



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL CASE (MURDER) NUMBER 46 OF 2012**

**REPUBLIC .....DIRECTOR OF PUBLIC PROSECUTIONS**

**-VERSUS-**

**JOSEPH KIBET KIRUI.....ACCUSED**

**JUDGEMENT**

1. On the 21<sup>st</sup> June 2012 the accused Joseph Tuwei Kitur *alias* Joseph Kibet Kirui was charged with the offence of murder of his wife Jane Chepkemoi Kirui on the 14<sup>th</sup> June 2012 contrary to Section 203 as read with Section 204 of the Penal Code.

2. The prosecution called nine witnesses. It was its case that on the fateful morning about 6.30a.m the couples children who were preparing to go to school in the kitchen heard their mother calling them out for help shouting that the accused was killing her.

3. **PW1** Gabriel Kiplagat 16 years old son rushed to the main house where the parents were living and found the door closed kicked it and was joined by **PW2** and **PW3** his sister – (Lilian Chelagat) and cousin and two were screaming. It was their collective testimony that their father whom they pointed to the court then opened the door and placed their mother at the door of the house. They testified that their mother had cuts on the arms and neck that their mother and father lived alone in the main house and that there was nobody else in the house.

4. It was their further testimony that after placing their mother at the door their father run away but another man run after him and neighbours who answered their screams caught him and tied him with ropes near the door of the house.

5. Before testifying the children **PW1, PW2, PW3** aged 15, 14 and 12 respectively were taken through a *voire dire* examination and the court was satisfied that they were intelligent and understood the requirement and necessity of telling the truth. They were sworn.

In their totality of evidence they told the court that it was their father whom they called Mzee who killed their mother with two *pangas* by cutting her at the neck and arm.

6. **PW4** the chief of the area **John Kipkurui Kosgei** upon receiving the report informed the police and went to the accused home, found him tied with ropes from the hands and found the deceased lying dead with a cut at the neck and right hand at the door of their house. He also saw the murder weapons being two *pangas* with blood stains.

7. **PW2** Corporal David Kamuti King'ori from Subukia police station went to the scene of crime upon receiving a report of the murder. His testimony was that he found the accused tied with ropes at a tree and neighbours beating him, and the deceased body lying at the door of their house with a cut at the back of the neck. He was also given the two *pangas* with blood stains.

8. **PW6 Jane Chepkwei** was the sister in law to the accused. Her testimony is that upon hearing screams from the accused compound she rushed there, found house closed from inside heard neighbours fighting inside and sooner the door was opened and saw the deceased fall down and the accused cutting her with a *panga*. She testified that she then ran screaming and calling people for help who arrested the accused as he tried to run away. She identified the *panga* that she saw used to cut the deceased.

She confirmed that the couples children were at the scene screaming.

9. The Investigating officer **PC Sanda Tunje** testified as **PW7**. His testimony was that the scene of crime he found the deceased body at the door of the house, that it had cuts at the neck facing downwards in a pool of blood.

That inside the house he found blood. He was then given the two *pangas* stained with blood by **PW5** (police officer) who had arrived at the home earlier. He also found clothes with blood stains which he identified in court. He also identified the body together with relatives during the post mortem.

10. The postmortem was conducted by **Dr. A.O. Freda from Nyahururu hospital**. She concluded that the cause of death was cardiopulmonary arrest secondary to high spinal cord injury and severe head injury.

11. In his unsworn defence statement the accused stated that in the early hours of morning when he went home after work as a school watchman he found his wife in his matrimonial bed with another man then a scuffle ensued with the deceased trying to kill him using a *panga*. That in the process he cut her with the *panga* at the neck and she fell at the centre of the house door. He regretted his actions and sought for forgiveness.

12. The offence of Murder is defined under **Section 203 Penal Code** thus:

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

13. **Section 206** states

**“Malice aforethought shall be deemed to be established by evidence proving anyone or more the following circumstances**

**(a) an intention to cause death of or to do grievous harm to any person whether that person is the actually killed or not**

**(b) Knowledge that the act or omission causing death will probably cause the death or grievous harm----”**

14. **In Criminal case (Murder) No. 21 of 2010 Republic -vs- Mohamed Dodi Korane & 7 Others (2014) e KLR** – the four main ingredients of murder are stated as

**1) The fact of the death of the deceased**

**2) The cause of the death**

**3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused.**

**4) Proof that the said unlawful act or omission was committed with malice aforethought.**

15. In the present case the circumstances that led to the death of the deceased are quite clear. All prosecution witnesses collaborated each others evidence.

I am unable to accept as credible the accused evidence that he found his wife with a man in his matrimonial bed as no proof was tendered. Indeed all the prosecution witnesses including his children and who were present and saw their father the accused cut their mother with a *panga* has not been rebutted. I find no reason that the said children would frame their father.

16. **PW5** sister in law to the accused testified having seen the accused cut the deceased with *panga* and even attempted to cut her too. She did not talk of any man having been in the accused house.

17. I am satisfied that it is the accused who caused the death of the deceased by his unlawful actions. The post-mortem report too confirms that the cause of death was due to severe spinal cord injury at the cervical vertebrae.

18. There is no dispute as to what caused the said injury and death to the deceased.

There is no dispute as to what caused the said injury that led to the deceased death.

The accused confirmed having cut the deceased with a *panga* at the neck and arm on the fateful morning.

Thus the four ingredients are sufficiently proved

19. In **Dickson Mwangi Munene & Another -vs- Republic (2014) e KLR** where the Court of Appeal stated:

**“As stated, either of these acts, intentional or reckless, constitutes malice aforethought under Section 206 of the Penal Code which the Mensrea of the crime of murder.”**

20. The court continued to state that:

**“----the Mensrea of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthy on the part of the accused person and in the absence of malice aforethought the unlawful killing is termed as manslaughter.”**

21. The defence did not establish by submission or evidence lack of malice in the accused's unlawful actions that caused the death of the

deceased. The alluded to action at the hit of passion in my view is but a lame defence.

22. In the case **Republic -vs- Andrew Mueche Omwenga (2009) e KLR** and cited in **Criminal case No. 4 of 2014 Republic -vs- Stanley Muthike Tiire (2018) e KLR**, the court reducing the charge of murder to manslaughter stated

**“Adequate provocation, especially when coupled with self defence can reduce a murder charge to manslaughter.”**

This is stated in **Section 207 Penal Code**.

23. Having carefully considered all the evidence before me and the relevant legal provisions I come to the conclusion that the prosecution has proved the charge of murder against the accused beyond any reasonable doubt.

I find the accused guilty as charged.

**Dated, signed and delivered this 20<sup>th</sup> day of December 2018.**

**J.N. MULWA**

**JUDGE**