



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 56 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

SALIM CHERUIYOT LABOSA alias KIMALEL.....1ST ACCUSED

JOSEPH KOSGEI KIBET alias SIGEI.....2ND ACCUSED

RONALD KIPKOECH MISOI alias MASAI.....3RD ACCUSED

JUDGMENT

The three accused person **SALIM CHERUIYOR LABOSO alias KIMALEL** (herein after referred to as the 1st accused) **JOSEPH KOSGEI KIBET alias SIGEI** (hereinafter referred to as 2nd accused), and **RONALD KIPKOECH MISOI alias MASAI** (hereinafter referred to as 3rd accused) are all jointly charge with three counts of murder.

The facts of the three counts indicate that

“On the 28th day of March, 2010 at Olunguruone township in Molo District, within the Rift Valley Province, the three accused persons jointly murdered BETTY RONO, ABIGAEEL CHEPKURUI and ANN CHELANGAT”.

All the three accuseds person pleaded ‘**Not Guilty**’ to the charge. Their trial commenced before **Hon. Lady Justice Hellen Omondi**. On 18/6/2014, the learned Judge recorded the evidence of the first two (2) witnesses after which she proceeded on study leave. I took over the matter on 12/10/2015 and heard the remaining five (5) witnesses. A total of seven (7) witnesses testified for the prosecution.

The brief facts of the case are as follows. The deceased ‘**Betty Rono**’ was the mother of the two other deceased children ‘**Abigael Chepkurui**’ and ‘**Ann Chelangat**’. **PW6 DAVIS KIPNGETICH** told the court that he was a worker employed in the home where the three accused persons lived. On 28/10/2010 **PW6** reported to work at 7.00am. He went to his quarters within the compound and found the padlock on his door had been broken. **PW6** then went to the kitchen of the main house and found the door open. He did not suspect that anything was amiss as he merely assumed that the family had woken up for the day. **PW6** then commenced his daily chores and milked the cows.

After milking the cows **PW6** decided to go to his employer ‘**Betty Rono**’ to report to her that the padlock on his door had been broken. He knocked on the door of the main house but received no response. **PW6**

then peeped through the window and noticed that all the door to the inner bedrooms were open. He saw the body of Betty Rono lying on the floor to her room. He then got alarmed and ran to call a neighbor one **'Chepkwony'**. The said **'Chepkwony'** came and called the police.

PW7 SUPT PETER NJOROGE was at the material time the OCS Olenguruone Police Station. He told the court that on 29/3/2010 at about 7.00am one **'Mr. Chepkwony'** called the police station to report a murder incident. **PW7** rushed to the scene. He found the door to the main house locked from inside. **PW7** peeped into the window and saw the bodies of **'Betty Rono'** and her two daughters lying dead inside their bedrooms. The police broke down the main door in order to gain access to the house. Upon entry the house was found in total disarray. The bodies of the three deceaseds were found with multiple cut wounds. Blood was splattered all over the house. As **PW7** put it **'The scene was awful'**. He then called the OCPD and the scenes of Crime Officer both of whom came to the scene. Photographs were taken and the bodies were later removed to Siloam Hospital Mortuary.

PW5 STEPHEN RONO was the husband to **Betty Rono** and father to **Abigael Chepkurui** and **Ann Chelangat**. **PW5** told the court that on 28/3/2010 he left his family home in Olenguruone and travelled to Eldoret on his way to Lodwar on duty. **PW5** told the court that he made two calls to his wife one at 3.00pm and again at 9.00pm. On both occasions he spoke to his wife and she assured him that the family was safe and well.

The next day on 29/10/2010 **PW5** received a phone call from a friend who informed him that his home had been robbed. He tried to raise his wife on her mobile phone to no avail. Later **PW5** managed to contact a neighbor called **'Hosea Chepkwony'** who informed him that the worst had happened.

PW5 cancelled his trip and drove to Siloam Hospital where he saw and identified the bodies of his wife and two daughters in the mortuary.

On 30/3/2010 **PW5** travelled to his home in Olengurone. He found that all the bedrooms had been ransacked and there was blood all over the house. Although the main doors to the house were both intact and locked from inside, all the inner bedroom doors had been broken down. **PW5** checked the house and noticed that some of his belongings were missing. These included his Sony Radio and clothes belonging to himself and his family. A TV which had been removed from the living room was later found at the gate.

PW4 DANIEL CHERES a brother to **PW5** told the court that on 5/5/2010, he and **PW5** accompanied police to a house at Kiploki Centre where they recovered a shirt which **PW5** identified as his. The police later raided that house where they recovered a Sony Radio which **PW5** also identified as the one which had been stolen from his home on the day his wife and children were killed. Upon completion of police investigations the three accused persons were arraigned in court and charged with the offence of murder.

At the close of the prosecution case all three accused's were found to have a case to answer and were placed onto their defence. They each gave sworn statements in which each denied any involvement in the murders of the three deceased persons.

This court must now analyze the evidence on record to determine whether the three charges of murder have been proved beyond reasonable doubt.

Section 203 of the Penal Code Cap 63, Laws of Kenya defines the Offence of Murder in the following terms

"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder"

The prosecution must therefore tender evidence sufficient to prove all the following ingredients of the offence beyond reasonable doubt.

- i. Proof of the fact as well as the cause of death of the deceased person
- ii. Proof that the deceased's met their deaths due to an unlawful act or omission on the part of the accused's
- iii. Proof that said unlawful act or omission was committed with malice aforethought.

On the fact of death there can be no controversy. **PW3** and **PW7** were both police officers who visited the scene at Olenguruone immediately after the incident. Both confirm having found the dead bodies of a woman and two children lying inside the house. **PW5** 'Stephen Rono' was the owner of that home. He confirms that the deceased's were his wife and his two daughters. **PW5** saw and identified their bodies at the mortuary. He gave their names as

- Betty Rono
- Abigael Chepkurui
- Ann Chelangat

Once the fact of death has been established the prosecution is required in a murder trial to tender evidence of prove that the cause of the deceased's death. In other words it must be proved that the deceaseds died due to act of homicide and not due to any illness or other material causes. Ordinarily cause of death is deemed sufficiently proved when the doctor who performed the autopsy testifies as a witness and produces a duly filled and signed post-mortem report as an exhibit.

In **NDUNGU Vs REPUBLIC [1985] KLR 487** the Court held that

“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death as alleged by the prosecution”

In a case such as the present on where the prosecution alleges that a murder has occurred, the onus lies on the prosecution to prove that the deceaseds died due to act of homicide. The witnesses have stated that the bodies of the deceased had multiple cuts all over them. It cannot be assumed that it was these injuries that caused their deaths. The prosecution must establish by way of medical evidence the effect that these injuries had on the mortality of the three deceased's. In this case the court was informed that scenes of Crime Officers visited the scene and took photographs. The officer who took photographs at the scene was not called as a witness and no such photographs were produced as exhibits in the case. The court therefore was denied an opportunity to view for itself the nature and extent of the injuries on the bodies of the deceased's, to enable the court determine if such injuries were likely to lead to death.

No doctor was called to testify in this case. This is despite there being evidence that autopsies were conducted on all three bodies. No post-mortem report in respect of any of the deceased's was produced in court as an exhibit. In the **NDUNGU** case (Supra) the court held that

“Where a body is available and the body has been examined, a post mortem must be produced the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the medical officer who performs the post-mortem examination is cross-examined”

In **CHENGO NICKSON KALAMA Vs REPUBLIC [2015]eKLR**, the Court of Appeal sitting in Malindi held as follows

“The position then appears to be that save in very exceptional cases stated above, it is absolutely

necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular a post-mortem examination report of the deceased. To the extent that the same was not done in this case though available, death and its cause was therefore not proved beyond reasonable doubt....”

As stated earlier I have no doubt that autopsies were conducted on all three bodies in this case. Therefore post-mortem reports were available. However this evidence was not availed to the court.

It must be remembered that this case has been alive since the year 2010. The hearing proper commenced in June, 2014, three (3) years ago. This court takes judicial notice of the fact that doctors do regularly attend court in Nakuru to give evidence in murder trials. The prosecution did not indicate that they faced any particular difficulty in securing the attendance of the doctor to testify. The court allowed prosecution multiple adjournments to enable them secure witnesses to testify. It cannot have required three (3) years to bond a doctor to testify in this case. The failure to call medical evidence in this case was due purely to sheer laxity and lack of interest in fully prosecuting this case. This omission was inexcusable and in ultimately has proved fatal to the prosecution case. The cause of the death of the three deceaseds remains unproven. As such the charges of murder are doomed to fail.

Notwithstanding this failure by the prosecution to prove the cause of death, in the interest of completeness, I will proceed to analyze the evidence adduced against the three accused persons.

The 1st accused ‘**Salim Cheruiyot Laboso**’ was said to be a neighbor to the family home of the deceased persons in Olenguruone. However no witness has linked the 1st accused in any manner whatsoever to the unfortunate deaths of the three accused’s. The mere fact that he was a neighbor does not in any way cast suspicion on him. No witness saw the 1st accused anywhere near the home on the material day.

In his evidence **PW5** stated that

“I have nothing to show the involvement of accused 1 in these murders”

The alias name for the 1st accused is given as ‘**Kimalel**’. The 1st accused denied that he was known as Kimalel. **PW5** admitted that the name ‘**Kimalel**’ is used in Kalenjin language to refer to a light skinned person. There is no evidence that the 1st accused was the only person known by the nickname ‘**Kimalel**’ in that area. There is no proof that the 1st accused was the only light skinned person in that vicinity.

PW3 told the court that on 30/3/2010 he arrested five suspects who were handed over to him by irate members of public. Under cross – examination **PW3** confirms that the 1st accused was **not** one of the suspects whom he arrested that day. **PW7** the investigating officer similarly did not mention the 1st accused at all. There is not an iota of evidence to implicate the 1st accused in the murders. He is therefore acquitted of all 3 counts of murder.

With respect to the 2nd accused ‘**Joseph Kipkosket Kibet**’ there was no evidence which placed him at the scene of the crime. No witness saw him near or around the home of the deceaseds on the material date. Indeed the evidence was that the 2nd accused resided some kilometers away. The state sought to link the 2nd accused to these three murders by way of circumstantial evidence. The law regarding the reliance on circumstantial evidence is very clear. In the case of **JUDITH ACHIENG OCHIENG Vs REPUBLIC [2009]eKLR** the Court of Appeal sitting in Kisumu held as follows:-

“It is settled law that when a case rests entirely upon circumstantial evidence such evidence, must satisfy three tests

1. The circumstances from which the inference of a guilt is sought to be drawn must be cogently and firmly established.

2. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused

3. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”

The 2nd accused was being linked to the murders on the basis of a radio which was recovered at Kiplochi Trading Centre on 5/5/2010 and which radio **PW5** identified as one of the items stolen from his house during the murder incident. The said radio was never produced as an exhibit in court.

PW5 told the court that he was able to positively identify the radio due to some change he had made on it to enable his use the batteries. **PW5** told the court that although he had lost the original receipt for the purchase of the radio he was able to obtain a certified copy from the seller which copy he produces as an exhibit **P. exb 5**.

PW2 SITIENEI CHEROTICH told the court that on 15/4/2010 the 2nd accused came to his place of work and sold him the radio in question for Ksh 6,000/=. **PW2** stated that after purchasing the radio he went and kept it in the house of his sister where he was then residing. **PW2** produced as evidence of this sale a sale agreement he signed with the 2nd accused for the sale of the radio **P. exb 2**. Police later went to the house of **PW2** where they recovered the radio. The witness was arrested and was only released after he had recorded his statement.

In order for this radio to properly implicate the 2nd accused in his case it must be shown firstly that this radio did belong to **PW5** and secondly that it was the 2nd accused who sold this radio to **PW2**.

On the question of ownership **PW5** claimed that he was able to positively identify the radio as his property due to the modifications he had made on it and by the serial number which appears on the receipt which he identified in court **MFI 15**. This receipt was never produced as an exhibit. It was conceded by **PW5** that the original receipt was misplaced thus he availed a copy which was allegedly obtained from the sellers. **PW5** gave the name of this seller as ‘**Jega Electronics**’. No person from this shop/business was called to confirm having sold the radio to **PW5**.

Further although the copy produced in court is alleged to be certified the name and designation of the person who certified this receipt is not indicated. Ordinarily a person so certifying a document would have before him the original copy in order to confirm that the particulars on the copy are correct and correspond with the original copy. If the original receipt as was explained by **PW5** was lost, then what document did the person certifying the receipt use in order to confirm the correctness of the copy? This receipt has certain discrepancies which render it doubtful whether it can be taken as proof of purchase of that radio.

PW2 told the court that he sold that radio to the 2nd accused. **PW2** identified a sale agreement, **MFI 2** but this sale agreement was never produced as an exhibit in the case. Be that as it may **PW2** told the court that this sale agreement was drawn up by one ‘**Robert Mutati**’. The said ‘**Robert Mutati**’ never testified in court to confirm having drawn up the sale agreement or having witnessed the sale. There is no proof that **PW2** paid the 2nd accused Ksh 6,000/= for the radio. Indeed under cross-examination **PW2** admits that

“This agreement does not bear any ones identification number just signatures. There is nothing to prove that I gave accused 2 Ksh 6,000/=”

Once again this document had several discrepancies. The maker was not called to testify. The document does not bear the identification number of the 2nd accused, which is the norm in most agreements of this kind. There remains a nagging suspicion that this sale agreement (which in any event was not produced as an exhibit during the trial) was just manufactured in order to bolster the evidence of **PW2**.

It is alleged that this radio was recovered in a house in Kaploki Trading Centre. **PW4** and **PW5** accompanied police to the scene where that radio was recovered. **PW4** in his evidence stated

“The radio was found in a house said to belong to one Lina. I do not know Lina”

The said ‘**Lina**’ was never called as a witness in this case. It is not clear what connection this ‘**Lina**’ had to the 2nd accused. **PW4** told the court that he did not know the 2nd accused at all.

Contrary to the testimony of **PW4** that the radio was recovered in the house of one ‘**Lina**’ **PW5** testified that the radio was recovered in the house of one ‘**Abraham Chelule**’ whom he claimed was the landlord of the 2nd accused. This ‘**Abraham Chelule**’ was never called as a witness in order to confirm if indeed the 2nd accused was his tenant. The 2nd accused was not found inside the premises where that radio was recovered. Indeed **PW4** and **PW5** confirmed that they found nobody inside that house. **PW5** told the court that the 2nd accused was later arrested from that same house but there is no evidence of this fact. **PW5** was not present when the 2nd accused was arrested and the officer who arrested the 2nd accused did not testify in court.

Finally on this point the officers whom **PW4** and **PW5** accompanied to the scene of recovery never testified in this case. There was evidence of recovery of other exhibits none of which were produced as exhibits in this case. On the whole the evidence against the 2nd accused is sketchy at best. This radio was recovered in May, 2010 roughly two (2) months after the murders occurred. A radio is a small item which can be quickly and easily disposed of. It is quite possible that the radio changed hands several times from March, 2010 to May 2010 when it was eventually recovered. It cannot be assumed that a person found in possession of that radio over 2 months after the incident was in any way involved in those murders.

PW3 and **PW7** both state that upon arrival they found a crowd at the scene. The very real possibility that one of the members of public who arrived at the scene after the murders could have stolen that radio has not been ruled out. Even on the basis of circumstantial evidence the involvement of the 2nd accused in the three murders has not been proved.

In respect of the 3rd accused ‘**Ronald Kipkoech Musoi**’, no evidence has been adduced placing him at the scene or in any way linking him to the three murders. **PW3** who arrested five suspects handed over to him by the public confirms that the 3rd accused is **not** one of the people he arrested. There exists not an iota of evidence to link the 3rd accused to these murders and he merits an acquittal.

This case involved a very sad and unfortunate incident where a woman and her two daughters were brutally murdered. The prosecution did not approach this case with the level of seriousness that it deserved. The trial dragged on for a full (4) years mainly due to the prosecution’s failure to avail their witnesses on the dates allocated for hearing. Crucial exhibits were not produced in court and key witnesses were not called to testify. The evidence presented was disjointed, half-hearted inconsistent and lacked cogency.

PW3 had informed the court that he arrested five suspects in connection with this incident and he gave the court the names of the five men he arrested. None of those 5 were charged in court. It appears that they were later released and the 3 accuseds were subsequently arrested as charged. The court was not told the reasons or the circumstances under which the five initial suspects were released. None of them were called as witnesses. **PW3** spoke of blood stained clothes which were taken to the government chemist for analysis. The government chemist was never called to testify in this case. The report on the blood stained clothes was not produced as an exhibit. The investigating officer who could have explained the gaps in the prosecution case was not called as a witness. One would be forgiven if one concluded that there was no real intention to bring the perpetrators of this heinous crime to book.

The law provides that the onus at all times lies on the prosecution to prove their case beyond reasonable doubt. They have failed dismally in this case. The evidence is not sufficient to implicate any of the three accuseds in this murder. I therefore enter a verdict of ‘**Not Guilty**’ and I acquit each accused of the three

counts of murder. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered in Nakuru this 24th day of April, 2017

Mr Maragia holding brief Ms Kerubo for accused 2

Ms Chemngetich holding brief for accused 3

Mr Obutu holding brief for Mr. Kanyi for accused 1.

Maureen A. Odero

Judge