



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 65 OF 2014**

**REPUBLIC.....STATE**

**VERSUS**

**REBECCA JEPTUM KOIMA.....ACCUSED**

**JUDGMENT**

The accused **REBECCA JEPTUM KOIMA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

***“On the night of 31<sup>st</sup> day of March, 2014 at Kaptembwa Village in Koibatek District within Baringo County murdered NICHOLAS KIRWA CHUMBA”.***

The accused pleaded ‘**Not Guilty**’ to the charge and her trial commenced on 27/5/2017. The prosecution called seven (7) witnesses in support of their case.

**PW1 JULIUS KIPKEMOI KOIMA** told the court that on 31/3/2014 he was at his house. At 7.00pm the deceased ‘**Kirwa**’ came to the house of the witness. The deceased informed **PW1** that he had been cut by Rebecca (accused) on his leg. **PW1** shone his torch on the deceased and saw that indeed his leg had been cut.

The deceased attempted to enter the house of **PW1** but **PW1** declined to let him in as the deceased was bleeding heavily. Instead **PW1** made arrangements for a vehicle and the deceased was taken to Eldama Ravine District Hospital. On 18/5/2014 the deceased succumbed to his injury and died.

**PW3 SHADRACK CHUMBA** an uncle to the deceased told the court that on 31/3/2014 at 8.00 pm he received news about the injury to the deceased. On 1/4/2014 **PW3** went to Eldama Ravine Hospital to check on the deceased. While at the hospital **PW3** says he spoke to the deceased. The deceased informed **PW3** that he had disagreed with ‘**Rebecca**’ (the accused) over a Ksh 20/= debt for chang’aa which he had consumed. The deceased offered the accused his panga and jembe to keep as security for the debt.

Instead the accused took the panga and cut the deceased on the foot. Later on 18/5/2014 the deceased died.

Following the death of the deceased police launched investigations into the matter. The accused was arrested and charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto her defence. The accused gave a sworn defence in which she denied having unlawfully killed the deceased. The accused pleaded that she acted in self-defence as she feared that the accused was about to rape her.

Section 23 of the Penal Code 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”.***

In order to prove the charge of murder the prosecution must adduce evidence to prove beyond reasonable doubt the following ingredients of the offence of murder

- (i) Proof of the fact as well as the cause of death of the deceased
- (ii) Proof of an unlawful act or omission on the part of the accused leading to the death of the deceased.
- (iii) Proof that said unlawful act or omission was committed with malice aforethought.

The fact of the death of the deceased is not in any doubt. Both **PW1** and **PW2** confirm that the deceased had a serious injury on the leg. Both witnesses confirm that though the deceased was admitted into hospital he later succumbed to his injury and died.

**PW5 DOMINIC SANG** was a cousin to the deceased. **PW5** told the court that on 20/5/2014 he went to the mortuary where he identified the body of the deceased to the doctor. **PW5** confirms that he saw a cut on the right leg of the deceased.

**PW6 DR. TITUS NGULUNGU** was the consultant pathologist who conducted the autopsy on the body of the deceased. **PW6** told the court that he noted a healing incision wound on the right foot at the top of the toes. Upon an internal examination of the body **PW6** noted multiple thrombo-embolii in the lungs blocking the vascular channels of the lungs. **PW6** concluded from his examination that the cause of death was **‘pulmonary thrombo-embolic event due to healing metatarsal fracture on the right foot’**. The doctor filled and signed the post-mortem report which is produced in court as an exhibit **P. exb 1**.

At the face of it, it would appear that the cause of the deceased’s death was the cut to his right foot. However **PW6** under cross-examination stated clearly that the injury to the deceased’s foot was **not** the direct and proximate cause of his death. **PW6** states thus

*“The immediate cause of death was the pulmonary embolism. This embolism was a condition arising from the injury to the leg. The embolism was a complication of the injury. The injury itself to the foot would not cause death – it is the complication arising from the injury that led to death. If a patient is immobilized for a long time then an embolism may occur. A metatarsal fracture cannot immobilize a person”.*

Thus **PW6** makes it clear that the deceased died **not** due to the cut to this foot but due to his having been immobile for a long time after the injury leading to a pulmonary embolism. Thus the act attributed to the accused ie the cutting of the right foot was **not** the direct cause of the deceased’s death. The cause of death was the pulmonary embolism, which the accused had no role in causing. This was a medical complication which occurred during the course of treatment. It is highly debatable whether given these circumstances the accused can be said to have **caused** the death of the deceased.

Be that as it may despite the legal arguments the cause of death being pulmonary embolism is not in any doubt. **PW6** was a qualified pathologist of some standing gave his expert medical opinion evidence. This evidence was neither challenged nor controverted by the defence.

From the evidence of the doctor it would appear that the death of the deceased was caused by a pulmonary embolism and was **not** as a result of the assault. The doctor admitted that death arose from factors other than the assault by the accused. I therefore find that the death of the deceased was **not** caused by the cut to his foot.

The prosecution is required to adduce evidence to prove that it was the accused who committed the unlawful act being complained of. In other words it must be proved that it was the accused who cut the foot of the deceased.

There was no witness who saw exactly how the deceased sustained the cut injury on his foot. **PW1** told the court that when the deceased came to his house he was bleeding heavily from a cut to his right foot. The deceased told **PW1** that it was **‘Rebecca’** (accused) who had cut his foot.

**PW3** told the court that he visited the deceased while the latter was admitted in hospital. The deceased told **PW3** that it was accused who had cut him on the foot following a disagreement over a debt of Ksh 20/= which the deceased owed for chang’aa which he had consumed.

These statements made by the deceased in which he identified his assailant, having been made shortly before the deceased died amounted to a **‘dying declaration’**.

In **DZOMBO CHAI Vs REPUBLIC Crim. Appeal No. 256 of 2006** the Court of Appeal held

*“A statement by a dead person as to the cause of his death or as to the circumstances of the transaction which resulted in his death in cases in which the cause of death of the person comes in question is admissible under Section 33(a) of the Evidence Act. Although the court can in law solely rely on such evidence there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction....”*

In this case the deceased named the accused **‘Rebecca’** as the one who had cut his foot. This statement was made a few days before the deceased met his death. It therefore amounts to a **‘dying declaration’**.

Aside from this declaration made by the deceased the accused in her defence readily concedes that indeed it was she who cut the deceased on the foot. In other words the accused does not deny the *actus reus* of the offence.

Similarly **PW8 CHIEF INSPECTOR VICTORIA MUTUKU** told the court that she recorded a confession from the accused person. The accused through her advocate **‘Mr. Magata’** did not object to the production of her said statement as an exhibit. The same was produced as

**P. exb 4.** In the statement the accused admitted that on the material day she was engaged in a scuffle with the deceased. Since the deceased was drunk, the accused managed to overpower him and she snatched the panga the deceased had and used it to cut him on the foot.

In the light of this clear admission by the accused I find as a fact that it was the accused who cut the deceased on the right foot thereby causing the injury to his foot.

The final ingredient for the offence of murder requiring proof is the mens rea. It must be shown that the accused committed the act unlawfully and with intent to kill or to cause grievous harm to the accused. Mens rea which is defined in law as '**malice aforethought**' is provided for by Section 206 of the Penal Code.

In her defence the accused told the court that on the material night she was in her kitchen cooking with her two young children. The accused who was drunk came to the house armed with a panga. The deceased felled the accused to the ground and lay on top of her. At the time the accused was pregnant. He began to demand for sex. He pulled up her skirt and slapped her. The accused feared that the deceased was about to rape her. They struggled and she wrested the panga from the deceased and cut him on the leg. After the incident the accused ran back to her house and informed her husband what had occurred.

**PW4 JOHN RUTO** was the local chief. He confirmed that when he questioned the accused about the incident, she told him that she cut the deceased because he was attempting to rape her.

The prosecution did declare **PW4** as a hostile witness and proceeded to cross-examine him. **PW4** conceded that he did not include in his statement to police what the accused had told him. However he stated that he omitted to include the fact that the deceased had tried to rape the accused because he assumed the accused had herself informed the police of this.

**PW8** who recorded the statement from the accused confirmed that the accused did tell her that she cut the deceased on the leg to prevent him from raping her. Thus the accused told the police exactly what she had told the court. Her defence cannot be said to be an afterthought.

I am satisfied that defence raised by the accused is persuasive and believable. The accused maintained the same defence throughout and even told the police the said thing. The accused told the court that at the time she was pregnant and the court noted that the accused during her court appearances had with her an infant.

The accused has pleaded that she was acting in self defence. Where a person commits an act causing death in defence on his/her person then the said act cannot strictly be deemed '**unlawful**'.

Section 17 of the Penal Code provides

***“17 subject to any express provisions in this code or any other law in operation in Kenya, Criminal Responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law”***

These principles of the English Common Law were well enunciated in the case of **REPUBLIC Vs MCINNES 55 Cr. App R 551** in which Lord Morris stated as follows

***“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances ..... some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert that danger by some instant action..... The defence of self defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected”.***

In this case the accused feared that she was about to be raped. She was pregnant at the time. The act of rape is an act of extreme violence and violation to any woman. The accused was well within her rights to act so as to prevent this violation of her womanhood and honour.

The accused told the court that the deceased who was armed with a panga had lain on top of her and was pulling her skirt up. She faced imminent danger and had to take immediate defensive action. This she did by wresting the panga from the deceased and cutting him on the leg. The action of accused in cutting the deceased on the leg was clearly aimed at immobilizing him to enable her escape. She did not aim at his head or chest.

From the circumstances I am satisfied that the accused acted in defence of herself. She faced an imminent danger and acted immediately to ward away the threat. The plea of self defence succeeds. The action of accused cannot be deemed unlawful as the *mens rea* was absent. I therefore enter a verdict of 'Not Guilty' and I acquit the accused of this charge of murder. The accused is to be set at liberty unless she is otherwise lawfully held.

**Dated and delivered in Nakuru this 30<sup>th</sup> day of October, 2017.**

Mr. Magata for accused

**Maureen A. Odero**

**Judge**