



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL CASE NO.27 OF 2012**

**EVANTUS WANGILA KHISA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The accused herein **Evantus Wangila Khisa** is faced with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 29<sup>th</sup> of September, 2012 at Bukisa Village, Lukusi Location within Bungoma County he murdered Mary Nelima Walubengo.
2. The prosecution in a bid to prove its case against the accused called 8 witnesses. At the close of the Prosecution case, the accused who denied the charge was placed on his defence, he did not call any witness.
3. The prosecution case is that the accused and deceased had been married for about 6 months during which time their marriage was faced with problems and before her death the deceased had gone back to her parents and on the day she met her death the accused and PW5 went for her while her parents were away. Later her father PW4 was informed of her death, he alerted other members of family. The deceased siblings, her uncle and PW5 went to the accused home and found the deceased dead, naked and covered with a blanket. The accused was nowhere to be found, he was later arrested at Sanga in Kakamega district when one of his uncles who had learnt of the death tipped A.P police near him who arrested the accused.
4. **PW5 Sammy Wekulo Mahokolo** confirmed that on 29.9.2012 he escorted the accused to go pick the deceased at her parents' home; they missed her and traced her at PW2's house. He later dropped the two at their home at 12 noon. Later at about 1.58pm the accused called him saying his wife had collapsed. He headed to the accused home and found the girl dead. PW1, PW2 and PW3 also visited the scene of crime after hearing of the death and found the deceased lying naked covered, upon being informed of the deceased death by PW4. They did not see any visible injuries on the deceased.
5. **PW 4 Benson Walubengo** is the deceased father. On the material day he was in church in Chwele when at 2pm he received a call from PW5 informing him that his daughter had fallen and had not woken up and PW5 enquired whether she was epileptic. As he was away he relayed the information to his brother PW3 and asked him to check on his daughter. He confirmed that his daughter was married to the accused but had returned home as the accused had beaten her.
6. **PW 7** the investigating officer confirmed that at 9pm on 29.9.2012 they received information of the deceased death. They got to the scene of crime at mid night and found the body of the deceased naked and with no visible injuries and they moved it to Webuye Mortuary. Post mortem was carried out on

1/10/2012 by PW 8. He further confirmed that the accused was not home when they visited the scene. The accused was apprehended by A.P police in Kakamega.

**7. PW 8 Dr. Alex Muyendo** did a post mortem on the deceased 1<sup>st</sup> of October 2012 and reported as follows.

There were no external injuries or signs of struggle.

Internally, he noticed some semen like substance in the uterus, hemorrhages between spine C4 – C5, Contusion with petechial hemorrhages at level C5 of the spinal and he formed the opinion that cause of death was spinal shock due to twisting force on the neck with a resultant spinal cord contusion.

During cross-examination the witness said that it is possible that during intercourse there could have been an accidental twist of the neck depending on the position taken by the parties.

**8.** In his unsworn statement the accused confirmed the testimony of PW5 that he had gone with him to pick his estranged wife of 9 months and on reaching home as he had missed the wife they agreed to have sex. That the deceased did not show any sign of weakness, they had sex and after the first round she screamed and collapsed. He thought she had had a fit of epilepsy, he called her out, she did not answer, he opened the door and windows for fresh air to no avail he then called PW5 to ask if the girl was epileptic and sought his help to see if she was still alive, he then heard motorcycles and out of fear, he ran to his uncle and informed them of the incident, his uncle informed the village elder who alerted the A.P police who arrested him.

**9.** For the charge of murder to be sustained three ingredients must be proved, firstly, the fact of death, secondly that the act, or omission that caused the death must be linked to the accused and thirdly, the act or omission must be actuated by malice aforethought.

**10.** In this instance the fact of death was established. PW8 said there may have been an accidental twist of the deceased neck. The accused in the act of having sexual intercourse may have accidentally twisted the deceased neck and if so no malice aforethought can be attributed to the act. It therefore follows that in the circumstances of this case the charge of murder against the accused cannot be sustained.

**11.** Can the accused then be convicted of the lesser offence of manslaughter, under section 202 of the penal code? The section provides that any person who by an unlawful act or omission causes the death of another is guilty of manslaughter and an unlawful omission is defined as an omission amounting to culpable negligence to discharge a duty.

**12.** In my view the accused did not do any unlawful act or omission. Together with his deceased wife they engaged in consensual sex as no signs of struggle were detected and by twist of event without his knowledge the wife's neck twisted and her spinal cord injured. Such an unfortunate situation, it was an accident that the two love birds had not intended; the accused ought not to be blamed for the said accident. I read nor see any intention on his part to have wanted to harm leave alone kill his wife.

**13.** As if the loss of his dear wife was not enough the accused has languished in custody for 6 years awaiting for justice, he should wait no more. He is acquitted of the charge of murder for the reasons above. He is at liberty unless otherwise being lawfully held.

DATED and DELIVERED at BUNGOMA this 16<sup>th</sup> day of November, 2017.

**ALI-ARONI**

**JUDGE**