



REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL CASE NO. 37 OF 2014

REPUBLIC.....PROSECUTION

VRS

N C KACCUSED

JUDGMENT

1. **N C K** the accused herein stands charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars being that the accused on the 15th day of October 2014 at Kamas Village, Kaplelartet sub-location in Kericho West Sub-County within Kericho County, murdered David Koech Rono.
2. The prosecution case is premised on the evidence of ten (10) witnesses. A totality of the prosecution evidence is that the accused and deceased were brewers of alcohol. On the night of 15th October 2014, there was alcohol in the house of the couple and there are people who were there on account of that alcohol to consume it.
3. Some of these people were PW1, **Cosmas Kimutai Langat**, PW2, **Emily Langat**, and PW5, **P K R**. They left for their homes. It is the evidence of PW1 and PW2 that while in their house late that night, the accused came to borrow their torch for reasons unknown to them. They did not give it to her and she left.
4. PW5 claims that after he had gone to PW2's house for more alcohol, he heard screams from the deceased's home. He left the others and ran there. He found the door closed and pushed it open. He entered the house and found the deceased injured and the accused was present.
5. The deceased had a torch which PW5 took. The accused immediately set on him and cut him. He denied trying to rape the accused. He however, admitted that he was drunk on that night. He was injured on the head, neck and left hand.
6. PW7, **Josphat Kipkemoi**, a son to PW1 and PW2 testified that, on 16th October 2014 at 7.00 a.m, he went to the accused's kitchen to borrow a match box. He did not get one and went to the main house. He pushed the door open and on entering, he stumbled on two people lying on the floor. He identified them as the deceased and PW5. He ran back home and informed his parents. The two people had injuries on their bodies.
7. His mother (PW2) came and started screaming, attracting many people who also came. They found the deceased already dead but they were able to take PW5 to hospital and he was treated.

8. PW7 identified the blood stained panga he saw under the table (EXB1) plus two sufurias which had some blood in them (EXB 2a & b). The same were also identified by PW8, **P.C. Mwamule Msungu** and PW10, **Chief Inspector Robinson Mwangi**.

9. PW9, **Dr. Gilbert Langat** produced the post mortem report (EXB3) on behalf of Dr. Edwin Kosgei who conducted the post mortem. The deceased's body was found to have nine (9) cut wounds. The cause of death was asphyxia due to the cut to the trachea and the blocking blood.

10. The accused in her unsworn defence denied the charge. She explained that on the night of 15th October 2014, she had chang'aa in her house. PW1 and PW2 her neighbours also came there to brew their own chang'aa. They borrowed her torch but when they finished they left with it. She remained drinking her changaa with the deceased.

11. Later they went to PW1's home to collect the torch. PW2 requested to be left with the torch till morning. The couple went back to their house to sleep. While they slept she found her brother-in-law (PW5) who is infected with the AIDS virus on top of her wanting to rape her.

12. She struggled with him and the deceased started beating her. Both of them were against her and on seeing this, she went to the other room. While there, she started screaming.

13. PW5 and the deceased broke the door to get to her but they could not. She got hold of a panga in the room and attacked PW5 and deceased randomly. That is when she got a chance to escape with her children. She reported at the Administration Police's place. She later learnt that she had fatally injured her husband. She was arrested and charged.

14. Mr. Mutai for the accused submitted that PW1 and PW5 were unreliable witnesses. He further submitted that the offence of murder had not been proved as malice aforethought had not been established.

15. Section 203 of the Penal Code defines murder as follows:

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

For this offence to be established, the ingredients to be proved are:

- **The fact of death.**
- **The act of killing (*actus reus*)**
- **The intention/malice aforethought (*mens rea*).**

16. The fact of death is not disputed. The post mortem report produced by prosecution confirms that the deceased had nine (9) cut wounds and the cause of death was asphyxia due to the cut to the trachea and the blocking blood.

17. After the drinking of alcohol that night of 15th October 2014, the accused and deceased were left in their house. The next morning the deceased was found dead in his house. He had several cuts. There was blood on a panga and on sufurias under the table. The accused person who was his wife was visibly absent together with the children. She was the last person to be seen with the deceased alive.

18. The accused person in her defence has stated that she had locked herself in one of the rooms in their house. The reason being that the deceased and her brother-in-law (PW5) had ganged up against her. She got hold of a panga and cut both of them randomly just to be told the next morning that she had fatally wounded her husband (the deceased).

19. Her defence confirms the evidence of the witnesses that the injuries suffered by the deceased were inflicted by the accused person. The injuries were fatal.

My finding is that it is the accused person who killed the deceased person.

20. The next issue for determination is whether the killing was premeditated. Section 206 of the Penal Code defines malice aforethought as follows:

“206. Malice aforethought shall be deemed to be established by Malice aforethought.

Evidence proving any one or more of the following circumstances -

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

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

21. The accused has explained in her defence that she is a brewer of alcohol and that, that night there was alcohol in her house. She also partook of the same with the deceased. What led to her attacking the deceased and PW5 was that PW5 who has AIDS came into their house and was on top of her with an intention of raping her. Later she stated that indeed she was raped by PW5 and had to be treated.

22. Further that her husband (the deceased) instead of supporting her, supported PW5. No one witnessed what happened between the accused, deceased and PW5. One thing that is clear is that the accused was not raped by PW5 as she has alleged in her defence. She did not produce any documents to confirm she was treated as alleged.

23. Secondly, her first allegation was that it was an attempted rape. This is even what PW5 was cross examined on by the defence counsel i.e attempted rape. It is therefore not clear when the attempted rape became rape. It is an exaggeration of what may have happened.

24. Concerning the occurrences of the 15th October 2014, I dismiss the evidence of PW1 as very unreliable. There was something he must have been hiding. He denied there being any alcohol in the accused's house. He denied that PW5 was in the accused's house that morning. He said PW5 assisted them carry the deceased to the vehicle. The evidence is clear that PW5 was injured and a motor vehicle had to be found to take him to hospital. How could he assist in carrying the deceased?

25. The evidence of PW5 is very suspicious. The truth of the matter is that these people had been drinking in the accused's house until late. What could PW5 have gone to do in the home of PW1 and PW2 after leaving the said home?

26. This couple has mentioned nowhere that PW5 was in their house late that night. He even admits having been drunk that night. Allegedly when he heard screams, he took off alone leaving everyone else behind and telling no one where he was going. Apparently, no one else heard the screams

27. My conclusion is that PW5 most likely in his drunken state, may have strayed into the accused's house and attempted to do what the accused claims. The accused and deceased were both drunk according to the evidence adduced before this court. This in itself did not justify the vicious manner in which the accused butchered the deceased who received nine (9) cuts.

28. Since it was the two of them with their children in the house it is not clear as to who the aggressor was. There was mention by PW8 of the accused having been arrested while running away. This was refuted by the Investigating Officer (PW10). He said the accused was arrested when she went to report the matter.

29. Upon considering the evidence on record and the circumstances surrounding the commission of this

offence, I am satisfied that the element of drunkenness by both the accused and deceased played a role in this incident. The likelihood of an amount of provocation has also lifted its head.

30. Finally, there was no evidence placed before this court to show exactly what may have occurred on this night between the accused and deceased. They were in their own house and that is where the deceased was found lying dead in a pool of blood.

31. In the Case of **Njoroge V R [2002] 2 KLR 200 the Court of Appeal** held as follows:

“1.This was a case in which the appellant and the deceased were involved in a drunkard's brawl and the deceased lost life at the hands of the appellant.

2. From the evidence it could not be said with certainty that the appellant was so drunk that he was incapable of forming any guilty intention.

3. Since the charge of murder was reduced to manslaughter it would not be appropriate to interfere with the trial judge's findings.

4. The appellant was convicted on clear evidence and in view of his own admission that he killed the deceased, there was no merit in the appeal against conviction.”

32. In this case there is evidence that the accused and deceased had been drinking with others in their house. They were left there may be still drinking as the accused was a brewer.

33. The accused admitted having cut the deceased and PW5. The cuts led to the deceased's death. There being no evidence to show exactly what transpired, I find the element of malice aforethought not proved by the prosecution.

34. I therefore find the offence of Murder not proved. What has been proved is the act of killing. The killing was unlawful. I reduce the charge from Murder to Manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict the accused accordingly.

Signed, dated and delivered this 23rd day of March, 2016.

.....

H. I. ONG'UDI

JUDGE

In the presence of:

1. M/s Keli for State.
2. Mr. Mutai Julius for accused – present.
3. Accused- present in person.
4. Hillary/Kenei – court assistant.