



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 84 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ANDREW KIPCHUMBA.....ACCUSED**

**JUDGMENT**

The accused herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 21<sup>st</sup> day of November, 2011 at Kipsaiya Location in Marakwet District within Rift Valley Province murdered Susan Jepkemoi Yego.

**THE EVIDENCE**

The prosecution's case is that on the material date, on 20<sup>th</sup> November, 2011 the accused together with his brother (PW1) and the deceased who was the accused's wife, went to drink alcohol in the nearest Kapsaiya town. The accused had some money and found it prudent to invite the two to drink alcohol with him. They left home at about 3.00 p.m. and drunk alcohol until 9.00 p.m. in a bar in the town. The three of them were quite drunk by the time they left for home. Rain had also started falling. On their way home, PW1 paced ahead of the accused and the deceased. The deceased at some point was too drunk to walk herself home. She kept falling whereas the accused kept lifting her trying to carry her and finally dragged her to their house. PW1 reached his home earlier than the accused and the deceased. He testified that at about 3.00 a.m., the accused woke him up and borrowed a match box. Unfortunately he did not have one. Again, at about 6.00 a.m., he returned to the home of PW1 whereupon he informed him that he had killed the deceased but gave no reasons for doing so. He also informed PW1 that he would go to the police station to report the incident. PW1 was a brother to the accused. He went and informed the other brothers and together with other family members went to the deceased's home. They found the deceased in the bed lifeless. Her body was covered with blankets and had no clothes. Thereafter the police arrived at the scene and carried away the body to the mortuary. The body was found to have bruises on the hip, knees, legs and toes which were suggestive that the deceased had been dragged along the ground. PW6 who was the investigating Officer Corporal Sautei Jeremiah then working with CID Marakwet confirmed the injuries. In addition, he caused a post mortem to be done on the body which revealed that the deceased had been strangled. He formed an opinion that there existed human contributory factor in the death of the deceased. The accused having been the last person to be seen with the deceased and having informed his brother, PW1 that he is the one who had killed the deceased was charged accordingly.

**PW1, Philip Kipchumba** testified that it is true that he, the accused and the deceased had spent the larger part of the afternoon and evening of 20<sup>th</sup> November, 2011 drinking alcohol which was being bought by the accused. He confirmed that as at the time they left the bar at about 9.00 p.m. the accused and the deceased were drunk. He also confirmed that at 3.00 a.m. the accused went to his house to borrow a

match box. He testified that the accused returned again to his house at 6.00 a.m. when he told him that he had killed the deceased. He stated that the deceased and the accused lived as husband and wife respectively. Both did not have children. The accused was however married to another woman. He recalled that throughout the drinking spree the accused and the deceased were in a jovial mood and did not quarrel.

**PW2, Joshua Koech Cheboi** knew the accused and the deceased who were his neighbours. He recalled that on the 20<sup>th</sup> November, 2011 at about 11.00 p.m. while he was in his house he had voices of people quarreling. But in his own words testified that he recognized the voice of the accused Andrew telling the deceased Susan to get up and walk notwithstanding that she had drunk free beers. On the following morning he learnt that the deceased had been killed and the accused had reported the incident to the police. He also went to the accused's home where he found the body in bed without clothes. He noticed it had bruises on the back.

**PW3, Jane Jepng'eno** testified that the deceased was her aunt. She learnt of her death on 21<sup>st</sup> November, 2011. She viewed the same and saw bruises on the back. She was also present when the post mortem was being conducted.

**PW4, Ezekiel Yego** was a brother to the deceased. He also visited the site and on 22<sup>nd</sup> November, 2011 witnessed the post mortem being done.

**PW5, Doctor Wilfred Kimosop** from AIC Kapsowar Mission Hospital did the post mortem on 22<sup>nd</sup> November, 2011. Externally he observed that the body had several bruises on the left side of the body, the left knee and right foot. There was bleeding under the skin. Internally, the trachea was severed between the thyroid and the cricoid cartilages. The lungs were congested and were blueish in colour, an indication of lack of oxygen. The head had hemorrhage. The upper lip had a cut measuring 0.9cms. Its edges were ragged which was an indication that the object used to inflict the injury was blunt. He formed an opinion that the cause of the death was respiratory failure due to strangulation. He produced the post mortem form as an exhibit.

**PW6, Corporal Sautei Jeremiah** was the investigating officer. He summed up the evidence of the prosecution's witnesses. He also recorded the statements of the witnesses. In addition, he testified that Joshua Koech Cheboi was an administration police officer stationed at administration police office at Lorukudi. The said witness told PW6 that he was in the same bar that both the deceased and the accused were drinking on 20<sup>th</sup> November, 2011. The deceased and the accused left slightly earlier than himself. He however caught up with them on the road. He found the accused trying to assist the deceased walk home. He was doing so by lifting and pulling her. Since the witness had a torch he easily identified them. PW6 on summary of his investigations found the accused culpable and charged him accordingly.

At the close of the prosecution's case, the court ruled that the accused had a case to answer and put him on his defence. He testified as DW1. In principle the accused did not deny having killed the deceased. He stated that the death of the deceased was most unfortunate. He conceded that he, PW1 and the deceased on 20<sup>th</sup> November, 2011 between 3.00 and 9.00 p.m. were drinking in a bar at Kapsaiya shopping center. The deceased was too drunk to carry herself home. He was forced to assist her. He recalled that it was raining and the deceased kept falling down due to drunkenness. He kept assisting her by lifting and occasionally dragged her. Finally, on arrival home, he took her to her bedroom which was separate from his. According to the accused, the deceased used to sleep in one room with the children. At that time, only his daughter, Hellen was at home. At about 5.00 a.m. on 21<sup>st</sup> November, 2011 he went to wake up the deceased but she did not respond. Hellen was also at home and she also tried to wake the deceased up in vain. Hellen got shocked and she screamed as a result of which their neighbours and the area chief arrived at the scene. They confirmed that the deceased had died. The chief advised him to report the incident to the police. He accordingly reported to Kapsowar Police Station.

The accused went on to testify that he did not strangle his deceased wife. He had lived with her peacefully for the last thirty years preceding her death. His case was that the deceased sustained the fatal injuries

owing to the falls she occasioned due to her drunkenness.

In cross examination, the accused stated that he and the deceased slept in one room. That both of them used one bed in which the deceased was found dead. He stated that although he informed PW1 of the death of the deceased, he did not tell him that he is the one who had killed her.

### **SUBMISSIONS**

Learned counsel for the accused Mr. Miyienda submitted that the accused did not intend the death of the deceased; that it was clear that the deceased must have sustained the injuries from the falls and the pulling as the accused tried to take her home. He urged the court to take into consideration that both the accused and the deceased were too drunk when they left the bar. In those circumstances, the accused could not recall exactly how he handled the deceased. Even if the postmortem revealed that the death was as a result of strangulation, this may have occurred due to the manner in which he handled the deceased. The accused regretted the circumstances under which the deceased died which was as a result of heavy drinking. Mr. Miyienda urged the court to find the accused guilty of manslaughter and not murder.

Learned state counsel Miss. Mokuia submitted that the prosecution had proved their case beyond all reasonable doubt. In particular, she urged the court to take into consideration the fact that the accused voluntarily indulged in heavy drinking and must take responsibility of the commission or omission of any action he did due to drunkenness.

### **EVALUATION OF EVIDENCE.**

It is trite to note that none of the prosecution witnesses saw the accused killing the deceased or do any act that was likely to cause the death or do grievous harm to the deceased. The accused was charged purely on circumstantial evidence available. The same is to the effect that the accused was the last person to be seen with the deceased alive. According to his own defence, he took the deceased to bed when she was alive only to find her dead on the following morning. It is important to note that the post mortem report points to a human contributory factor in the death of the deceased. The other available evidence was that of PW2 who testified that at about 11.00 p.m. on 20<sup>th</sup> November, 2011 he recognized the voices of the accused and the deceased quarreling. From the testimony of PW6, PW2 had found both accused and the deceased on the road. At that time the accused was trying to help the deceased get home as she was too drunk to walk by herself.

In those circumstances, which are circumstantial in nature, for the charge of murder to be sustained the prosecution must demonstrate that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused. See the case of **Republic -vs- Kipkering Arap Koske & Kimure Arap Matatu [1949] 16 E.A., 135**. The then East African Court of Appeal said;

**“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt, and the burden of proving facts which justify the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to accused.”**

Again in **Abanga alias Onyango-vs-Republic Criminal Appeal No. 32 of 1990** as cited in **Solomon Kiriimi M’rukaria -vs- Republic Criminal Appeal No. 46 of 2011**, the Court of Appeal outlined the principles which should be applied in testing the strength of circumstantial evidence. The court delivered itself as follows;

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests (i) the circumstances from which an inference of guilt is sought to be drawn, must cogently and firmly established, (ii) those circumstances should be of a definitive tendency unerringly pointing towards guilt of the accused (iii) 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.”**

There is no doubt that the last person to be seen with the deceased alive was the accused. He does not also deny that he was throughout the period in question with the deceased. All that he says is that at the time she went to bed, she was alive and could not therefore explain how she died. From the facts of this case, it is clear that notwithstanding that the death of the deceased was as a result of strangulation, the manner in which the accused handled the deceased in an attempt to take her home could have contributed to her death. Undoubtedly, the deceased died in the hands of the accused or as a result of the way he handled her. Bearing in mind then that it is not certain on what exactly caused the strangulation, I am in doubt to find that it is the accused who intentionally strangled her. I say so because there lies a possibility that the deceased could have died either on the road or on arrival at home. Further, no one testified that the two had quarreled prior to the deceased's death. What PW2 initially said was a quarrel between the two turned out to be that the accused was pleading with the deceased to agree to walk home. Hence, no *mens rea* or the intention to cause the death is established.

I shall resolve the doubt I have cast in my mind in favour of the accused. That is to say that although the deceased died in the hands of the accused, it was not ascertained that he was possessed of malice aforethought as defined under Section 206 [a] and (b) of the Penal Code as follows:

**Malice aforethought shall be deemed to be established by 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.**

As a result, I am inclined to believe the account of events as narrated by the accused in his defence. I find that the prosecution did not discharge its burden in proving a case of murder. Instead, the prosecution proved beyond all reasonable doubt that the accused committed the offence of manslaughter contrary to Section 202 of the Penal Code and I convict him accordingly.

**DATED and DELIVERED at ELDORET this 21<sup>st</sup> day of April, 2016.**

**G. W. NGENYE- MACHARIA**

**JUDGE**

**In the presence of:-**

**1. Mr. Omwega for the State.**

**2. Mr. Kigamwa holding brief for Mr. Miyienda for the Accused.**