



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL CASE NO. 5 OF 2007**

REPUBLIC .....PROSECUTOR

VERSUS

JACOB JUMA KIRONGET

FRIDAH CHEPKERIO

NANCY CHEPKEMOI .....ACCUSED PERSONS

**JUDGMENT**

1. The three accused persons **Jacob Juma Kironget**, **Fridah Chepkerio** and **Nancy Chepkemoi** are faced with the charge of murder contrary to section 203 as read with 204 of the Penal code. The particulars are that on the 4<sup>th</sup> day of February, 2007 at about 4.00 a.m. at Kamuneru village, kamuneru sub location, Kamuneru location in Mt. Elgon within Bungoma they jointly murder **Elizabeth Chemosop**.

2. The accused persons pleaded not guilty to the charge and the prosecution called a total of 7 witnesses. At the close of the prosecution case the court found the accused persons had a case to answer and they were placed on their defence.

3. The brief facts of the prosecution case is that the three accused persons had the previous day been seen with the deceased while drinking alcohol at the house of the 1<sup>st</sup> accused. Later at night loud talks were heard coming from the 1<sup>st</sup> accused home by the neighbors and later in the wee hours the 1<sup>st</sup> accused was heard saying the deceased was lying dead in his shamba. Footsteps were seen and marks of dragging of a heavy object from the house of the 1<sup>st</sup> accused to the place where the body of the deceased was found.

4. Evidence of the prosecution witness may be summarized as follows;

**PW1 Dr. Alex Muyendo** – a medical officer stationed at Webuye District Hospital. He conducted a post mortem on the body of the deceased **Elizabeth Chemosop**. On examination he found the following;

**Externally:** two bruises on the left side of the head measuring 3.5 cm and on the front part of the neck cutting across and measuring 5x1cm and the neck was loose.

**Internally:** the spine and vertebrae were fractured; there was injury of the spinal cord.

He gave cause of death as spinal shock at the level of the neck.

5. **PW2 – Emily Nasenya** – recalled that in the night of 4<sup>th</sup> February, 2007 at around 3.00 a.m. she heard people talking in the compound of the 1<sup>st</sup> accused who was a neighbor. She went to the home and found the 1<sup>st</sup> accused with his wife and one Carol. She was informed by the 1<sup>st</sup> accused that the deceased had taken changa'a and it was disturbing her and the deceased was sleeping in the 1<sup>st</sup> accused farm. Later she had the 1<sup>st</sup> accused shouting saying he did not know what to do. She also heard them say the deceased had died. At 7.00 a.m. she went to the scene and found deceased dead. In cross examination she said the deceased was at the 1<sup>st</sup> accused have the previous day drinking with the 2<sup>nd</sup> accused and one Osundwa.

6. **PW3 Robert Sikuku Kapchang** – he recalled that while sleeping on the 4.2.2007 at about 3.00 a.m. his neighbor the 1<sup>st</sup> accused woke him up while in the company of the 2<sup>nd</sup> accused and one Osundwa and told him the deceased was too drunk and they needed help as she was unable to walk. He told them to go and light a fire where she was. Later at 5.00 a.m. He heard the 1<sup>st</sup> accused call for help. He proceeded to the house of the 1<sup>st</sup> accused and found the deceased in the shamba of the 1<sup>st</sup> accused naked with only a lesa on the shoulder and the body full of mud. He knew the deceased. She used to drink but was never unable to walk. In the morning he saw the 3<sup>rd</sup> accused at the scene.

7. **PW4 Hezron Oketo** – the deceased had gone to visit him when this incident occurred. She died on the night of 3<sup>rd</sup>/4<sup>th</sup> February 2007. She had left to buy tobacco at Kapasayo market on 3.2.2007 at 1.00 and did not return.

The following morning he received information that she had been killed at the house of the 1<sup>st</sup> accused. He went to the scene and found the body of the deceased lying naked and muddy in the 1<sup>st</sup> accused shamba.

Police arrived and found clothes at a distance, some clothes were removed from a pit latrine of the 1<sup>st</sup> accused. They followed footsteps and found hair near the fence of 1<sup>st</sup> accused. There was evidence of struggle before the deceased died as her body was muddy all over. Her head showed her hair was uprooted.

**PW5 Rodgers Maruti** – he recalled that on the night of the 3<sup>rd</sup> and 4<sup>th</sup> February, 2007 between 2.00 a.m. and 3.00 a.m. he heard people making noise in the house of Jacob the 1<sup>st</sup> accused, he heard 1<sup>st</sup> accused asking PW3 to help him light a fire for their aunty who was drunk and outside. After a few hours, he heard the first accused shout that the aunt had passed away. He went to the scene and 1<sup>st</sup> accused asked him to call the village elder. 2<sup>nd</sup> accused showed him the body. It was muddy all over and naked. He knew the deceased for many years. She used to drink local brew and would walk home without any problem. On 3<sup>rd</sup> February, 2007 during the day he saw the deceased at the home of 2<sup>nd</sup> accused which is next to the one of the 1<sup>st</sup> accused.

**PW6 Dr. Silas Ayinga** – he produced medical examination reports for 1<sup>st</sup> – 3<sup>rd</sup> accused confirming that they were fit to stand trial.

8. **PW7 P.C. Ngunye** - recalled that on the 4<sup>th</sup> of February, 2007 while stationed at Sabosho police patrol base in Mt. Elgon the area assistant chief reported to him at 6.00 a.m. about a murder at Kamuneru sub-division. In the company of P.C. Ang'ula led by the chief they visited the scene of crime. They found the body of one Elizabeth alias Mama Safi lying in the 1<sup>st</sup> accused shamba. He interviewed a few people who informed him that the deceased had been drinking in the house of the 1<sup>st</sup> accused the previous evening. The body was naked and he noticed signs of struggle at the scene. He saw signs of dragging of a heavy object which led them to the house of the 1<sup>st</sup> accused where they found pieces of cloth and hair at the door. He formed the conclusion that the deceased was dragged from the house of 1<sup>st</sup> accused to

the shamba. In a pit latrine without a wall 12ft deep they recovered the deceased clothes, a dress and a cardigan.

He recorded statements of witnesses some who identified the deceased clothes. He arrested 8 suspects but released some for lack of evidence. He charged the 3 before court. In cross examination he stated inter alia that he found the pieces of clothes on the rafter of the door frame of the 1<sup>st</sup> accused house, he also saw there were foot prints leading to the 1<sup>st</sup> accused house. He further stated that learnt that the 2<sup>nd</sup> and 3<sup>rd</sup> accused were at the house of the 1<sup>st</sup> accused with the deceased.

9. The three accused persons gave evidence and did not call witnesses. The first accused gave a sworn statement whereas the 2<sup>nd</sup> and 3<sup>rd</sup> gave unsworn evidence which evidence was as follows;

**DW1 Jacob Juma Kironget** – he did not murder the deceased. On 4.2.2007 he woke up and went to cultivate at about 7.30 a.m. when he saw some people in his shamba and upon enquiring he was told that there was a woman lying there. His house was 500 to 600m away from the place. On seeing the woman he went to report to the chief one Charles Materi who then went to the scene with AP Police. That investigations were carried out by the police and at 3 p.m he was summoned to the police station and later charged with the offence of murder. He denied having seen the prosecution witnesses the previous day or hearing anything unusual. He also testified that he had had a quarrel with **PW1** and **PW2** on land and they testified against him due to the disagreement.

**PW2 Fridah Chepkeno** – she recalled that a woman was found lying in her shamba that when she woke up on the material day she found people in the said shamba. She does not know what happened. She had not seen the deceased the previous day. She saw the body of the deceased that morning and returned to her house.

**DW3 Nancy Chepkemoi** – she recalled that at 4p.m a child told her that there were people at her grandmothers. She went there and on arrival she was told to sit, at about 10.00 p.m along with her brother, they were taken to Sombojo police station and later transferred to Kapsokwony police station where they stayed for 18 days and later charged with the offence.

Both sides filed submissions.

10. The issue before the court is whether or not the ingredients of the offence of murder have been proved against the 3 accused persons. The two ingredients are *actus reus* and *mens rea*. No doubt from the evidence of PW1 the deceased died from spinal shock as a result of strangulation and the big question is who may have murdered the deceased? There was no direct evidence of an eye witness to the incident and the prosecution have relied solely on circumstantial evidence. In the land mark house of Lords case of **Woolmington vs. DPP [ 1935] E.A at 462** the onus of proving the case against the accused persons squarely lies upon the prosecution.

11. The circumstantial evidence can be summarized thus **PW2** heard people speaking at 3.00 a.m. on the 4.2.2007 at the home of the 1<sup>st</sup> accused and she went outside to see what was happening, she found 1<sup>st</sup> accused and his wife. They told her the deceased was drunk, was affected by the same and was lying in the 1<sup>st</sup> accused shamba. Later she heard a conversation involving accused 1 where they said the deceased had died. The previous day the deceased was having changaa at 1<sup>st</sup> accused house with the 2<sup>nd</sup> accused and one Osundwa. **PW3** on the same day at the same time was woken up by accused 1 to help move the deceased to the house. At 5.00 a.m. he heard first accused call for help. He heeded the call, just to find the deceased naked and dead. She had seen the deceased the previous day drinking at the house of first accused.

**PW4** on the morning of 4.2.16 he received information of the deceased death. He went to the scene at the shamba of accused 1 he found a naked muddy body. The police arrived and found the deceased dress at a distance and some in a pit latrine. They followed footsteps and found a bunch of hair near a fence, the body was muddy showing signs of struggle

**PW5** he heard a conversation between accused 1 and **PW3**. After a few hours he heard accused shout that the deceased had died. He went to the scene this was about 4 p.m. The previous day he saw the deceased with 2<sup>nd</sup> accused.

During investigations PW6 found the body of the deceased near the house of the 1<sup>st</sup> accused. He also learnt that the deceased had been drinking both at day time and in the evening in the house of the 1<sup>st</sup> accused. They found pieces of hair and clothing on the door of accused and there were signs that some object had been dragged from the 1<sup>st</sup> accused home to where the body was lying. The body was naked and there were signs of struggle at the scene. He formed an opinion that the deceased was dragged from the house of the 1<sup>st</sup> accused to his shamba. Clothes of the deceased were recovered from a pit latrine within the shamba of accused 1.

12. In order to rely on circumstantial evidence the circumstances should be so conclusive such that all one and if pierced together should leave no other hypothesis but that of guilt.

In **Mohamed & 3 others vs. R 2 1 KLR** Osiemo J, stated

***“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable reference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.”***

In **Mwangi & another vs. Republic (2004) 2 KLR 32** the Court of Appeal held as follows,

***“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other hypothesis except the hypothesis that the accused is guilty of the charge.”***

13. The prosecution witnesses heard accused 1 in the night complaining about the deceased drunken state. He raised an alarm about her death about 4/5 a.m. in the morning of 4<sup>th</sup> February, 2007. The deceased was found naked and muddied. There were signs of an object having been dragged from the 1<sup>st</sup> accused house to where the deceased lay. Hair had been plugged from the deceased and hair and pieces of clothes were found at the door of the 1<sup>st</sup> accused house, clothes of the deceased were found in the pit latrine in the 1<sup>st</sup> accused shamba, the previous day and in the night the deceased had been seen in the house of the 1<sup>st</sup> accused.

In his evidence the 1<sup>st</sup> accused stated that he did not see the deceased the previous day nor did he see or hear anything unusual at night. His defence in my view was a mere denial. He did not dislodge the prosecution case.

14. It is my opinion based on the evidence above that the chain that form the prosecution evidence is so strong and complete and when pierced together one cannot arrive to any other hypothesis other than that the 1<sup>st</sup> accused either alone or in the company of others caused the death of the deceased.

I am however of the view that there is no evidence to link the 2<sup>nd</sup> and 3<sup>rd</sup> accused to the said murder for having simply been in the company of the deceased the previous day while drinking. Witnesses said that 1<sup>st</sup> accused while seeking help on the night of 4<sup>th</sup> February, 2007 was in the company of one Osundwa and his wife. Why they were not arraigned in court is not clear. That as it may I find and hold that the prosecution proved beyond all reasonable doubt that the 1<sup>st</sup> accused is guilty of the murder of the deceased and I convict him accordingly.

15. As there is no evidence to the required standard against the 2nd and 3<sup>rd</sup> accused persons I hereby acquit them. They are released unless otherwise lawfully charged.

**Dated at Bungoma this 19<sup>th</sup> day of May, 2016.**

**ALI-ARONI**

**JUDGE.**