



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 78 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PRINCE MULANDO.....1<sup>ST</sup> ACCUSED**

**FLORENCE NANGILA.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. *Mary Imminza Simiti* lay next to a footpath. She was dead. The body was about fifty metres from the house of the 2<sup>nd</sup> accused. The defence wounds pointed to a struggle with her assailants. The 2<sup>nd</sup> accused is the *third wife* of the 1<sup>st</sup> accused. The 1<sup>st</sup> accused and the deceased were lovers. The 1<sup>st</sup> accused testified that the deceased was, in fact, his *fourth wife*. The 1<sup>st</sup> accused was the last person seen with the deceased on the night she was murdered.

2. On the night of 8<sup>th</sup> December 2010, the 2<sup>nd</sup> accused was seen at the house of the deceased. She threw a tantrum. She banged the door and threw stones onto the roof of the house. The children of the deceased screamed attracting neighbours to the scene. The 2<sup>nd</sup> accused told a witness that the deceased and the 1<sup>st</sup> accused would not spend the night together; and, that one of them would die. After the discovery of the body, the police found some incriminating evidence.

3. The state brought information to the High Court charging the two accused persons with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that on 8<sup>th</sup> December 2010 at Vilaha Village, Makuyu Sub-Location, Mautuma Location, Lugari District within Western Province, they jointly murdered *Mary Imminza Simiti*.

4. They both pleaded *not guilty*. The prosecution called *eleven* witnesses. The evidence of the first *eight* witnesses was taken by Mshila J. The trial resumed on 24<sup>th</sup> July 2014. On the latter date, I explained to the accused their rights under section 200 (3) of the Criminal procedure Code. They both elected to proceed from where my predecessor had left the matter. At the close of the evidence, I found that the Republic had established a *prima facie* case. The accused elected to give sworn testimony. They did not call any witnesses.

5. The first state witness was a minor, Vivian Kageha. She is a daughter of the deceased. After a brief *voire dire* examination, she was affirmed. She testified that on 8<sup>th</sup> December 2010 at about 6:00 p.m., she was at home with the deceased. Two other children were present: her sister, Sharon; and, a niece, Dottie. The 1<sup>st</sup> accused called her mother at about 4:00 p.m. He asked her to go and collect money for grinding maize flour. Her mother told her she was going to Prince's (1<sup>st</sup> accused's) house, a walking distance. She

left them Kshs 20. She never returned.

6. PW1 testified that later that night someone knocked at their door. The children screamed. The person threw stones onto the roof of the house. Neighbours responded to the screams; the stranger retreated. On cross-examination, she said she did not see the person who knocked at their door. The next day Prince came and gave them Kshs 50 for breakfast. He asked her to retrieve his shoes from her mother's room. On further cross-examination, PW1 said she knew the 1<sup>st</sup> accused well; and, that he would leave some of his belongings in their house. She said the 1<sup>st</sup> accused and her mother were lovers. He would visit her mother. He would also give them money to run the house. PW1 later learnt from *Mama Benti* (PW2) that her mother had died.

7. One of the neighbours who responded to the screams was Jennifer Naliaka (PW2). She is also known as *Mama Benti*. She spoke to PW1. She made arrangements for her children to keep PW1 company. She then locked the house with a padlock. The following morning at 6:00 a.m., she unlocked the door. PW1 told her that the 1<sup>st</sup> accused passed by; and, gave her money to buy milk. On cross examination, PW2 said that she had known the 1<sup>st</sup> accused for three years. She confirmed that he used to visit the deceased. She did not see the 1<sup>st</sup> accused or the 2<sup>nd</sup> accused on the material night.

8. PW3 was Florence Lichuma. She and Ruth Nerima (PW5) also responded to the distress call by PW1. She said that later, the 2<sup>nd</sup> accused, to whom she referred to as *Susy*, had been detained. She said the 2<sup>nd</sup> accused was wearing a grey skirt suit. *Susy* said she was looking for Prince (the 1<sup>st</sup> accused) and Mary (the deceased); and, that one of them must die. *Susy* was with someone called *Oliech*. She testified that Ruth tried to call Prince or Mary but none picked up her call. The next day, they found the body of the deceased in *Susy's shamba*.

9. The version of events was largely corroborated by Ruth (PW5). She testified that her house was about 10 meters from that of the deceased. She heard the screams from the children. She went there. She met a young man called *Oliech*. He told her that Florence (the 2<sup>nd</sup> accused) was looking for her husband (the 1<sup>st</sup> accused). She saw *Susy* (2<sup>nd</sup> accused) emerge from the direction of PW5's house. She was wearing a dark grey suit. *Susy* asked if Prince and Mary were in the deceased's house. She answered in the negative. She (*Susy*) said that neither of them would sleep. *Susy* then left with *Oliech*. The next day, she got information from a teacher called Edwin that the body of the deceased had been found on *Susy's* land. She went there. The body had visible injuries. She accompanied the police to *Susy's* house. They found a blouse outside the house. She identified in court other clothes recovered by the police inside the house.

10. PW4, David Nabibia, is a village elder. The 2<sup>nd</sup> accused called him at 6:00 a.m. on 11<sup>th</sup> December 2010. She told him there was a body on her *shamba*. She took him there. She said the body was that of "Prince's friend". PW4 called out Mary's name thrice. There was no response. He could not confirm if the person was dead. There were two phones on either side of the body [exhibits 1 (a) and (b)]. He enquired from Joyce Nanjala whether she had seen Prince or Mary. She said she had seen the two the previous night looking for change.

11. PW4 notified the Assistant Chief who advised him to get the police. In the meantime, he escorted the 2<sup>nd</sup> accused to the Administration Police Camp. He returned to the scene with Administration Police. He found the Chief there. Regular police later came to the scene and collected the body. They also collected some clothes from the house of the 2<sup>nd</sup> accused.

12. PW7 was Police Constable Simon Kaikai. He went to the scene with other police officers. He found Administration Police officers there. They were controlling the agitated crowd. The two accused were present. The body lay about 50 meters from the house of the 2<sup>nd</sup> accused. The police recovered a pouch or wallet at the scene. It contained the identity card of the 1<sup>st</sup> accused. He said a child of one of the accused persons gave him two mobile phones [exhibits 1 (a) and (b)] which were found next to the body. As I shall detail later, that part of evidence contradicted the evidence of the village elder (PW4) and Sergeant Henry Kipkemboi (PW9). The witness testified that the 1<sup>st</sup> accused told him that exhibit 1 (b) belonged to

him. In his defence, the 1<sup>st</sup> accused stated that he had given the deceased the phone to charge it for him.

13. P. C. Simon Kaikai (PW7) said that the 1<sup>st</sup> accused told him that he had quarreled with his wife (the 2<sup>nd</sup> accused) the previous night. They had been drinking *chang'aa*. The quarrel related to “the other wife” (the deceased). After the quarrel the 1<sup>st</sup> accused went to deceased's home at Makutano market. While at the scene, PW7 was informed that the 2<sup>nd</sup> accused had changed her clothes. He sought her permission to enter her house. He found a torn skirt which had blood on the edges. There was also a blouse with a piece of flesh on it. The clothes were in the bedroom; under the bed. They were wet. The 1<sup>st</sup> accused said that the 2<sup>nd</sup> accused had smashed windows of his house. PW7 went to the house of the 1<sup>st</sup> accused and confirmed it. The police arrested both accused and took the body of the deceased to Webuye District Hospital. He clarified that the accused persons were first escorted by Administration Police officers to Makutano AP Camp. They were later detained at Turbo Police Station.

14. The two mobile phones [exhibits 1(a) and (b)] were produced by Sergeant Henry Kipkemboi (PW9). Their makes were *Vodafone* and *Nokia* respectively. He also produced a pouch (exhibit 5) containing the identity card for Prince Ombita (1<sup>st</sup> accused). He said he found the items next to the body. Upon cross examination, he clarified that the local chief gave him the *vodafone* phone. When he asked him where he got it, he replied “just here.” The witness could not tell when the incident happened or how the mobile phones got there.

15. PW9 said he went to the scene with P. C. Simon Kaikai (PW7). It was around 7:30 a.m. on 9<sup>th</sup> December 2010. The body was next to a footpath near the house of the 2<sup>nd</sup> accused. They searched the house of Florence Nangila (2<sup>nd</sup> accused). They got a bloodstained blouse and a shirt. According to the public, the shirt belonged to the 1<sup>st</sup> accused while the blouse belonged to the 2<sup>nd</sup> accused. He handed over the blouse and shirt to Sergeant Kimango for onward transmission to the Government Chemist. He arrested the accused at the scene.

16. The clothes were received by the Government Analyst, Moses Muhu (PW8), on 4<sup>th</sup> January 2011. From the memo (exhibit 3) the item marked *A1* was a blouse; exhibit *A2* a skirt; exhibit *B* a petticoat; and, exhibit *C* was the controlling sample. It was cotton wool stained with blood of the deceased. His findings were that the blood stains on items *A2* and *B* were human blood of group B. The deceased's blood on cotton wool item *C* was blood group B. Exhibit *A1* had no blood stains. He formed the opinion that the blood stains on items *A2* and *B* may have originated from the deceased following an injury. He said the clothes belonged to the deceased. Upon cross examination, he answered that no blood samples of either the accused were submitted for analysis. He produced in evidence the memo and the accompanying report (exhibits 2 and 3).

17. PW6, Edith Essendi, is a sister of the deceased. She identified the body of the deceased for post mortem purposes on 17<sup>th</sup> December 2010. The autopsy was carried out by Dr. Munyendo at Webuye County Hospital. It was also witnessed by Police Constable John Kulecho (PW11). The post mortem report was produced on his behalf by a colleague, Dr. Beatrix Atieno (PW10). Externally, there was a wound at the occipital aspect. There was a cut wound at the left supra orbital region extending to the front of the head; and, a fractured skull bone beneath it. There were bruises on both hands on the dorsal aspect; and, a dislocation of the right wrist joint. The witness said they were defence wounds; or, evidence of some struggle. In the final opinion, the cause of death was severe head injury from the linear skull fracture with intra-cerebral haemorrhage.

18. I will now turn to the defence. Like I stated, the accused elected to give sworn testimony. They did not call any witnesses. They protested their innocence. On his part, the 1<sup>st</sup> accused stated the following-

*“On 8.12.2010 at 6:00 in the morning, David Wekesa, a neighbor, called me and told me that Josphat Vudiji needed my services. I was in my late wife's house. I took my tools and went to Vudiji's house. I have 3 wives. At 3:00 p.m., I called the deceased (who was my 3<sup>rd</sup> wife) to come and collect some money for household use. She came at 6:00 p.m. I did not have change. We went*

to a kiosk. I gave the deceased 100/=. We parted ways at 6:45 p.m. I went to my 2<sup>nd</sup> wife's house (Florence, 2<sup>nd</sup> accused). I slept there the whole night.

*"The next morning I went to buy nails. On the way I passed by the deceased's house. The house was locked. I asked one of the children (PW1) where her mother was. She said her mother had not returned. I gave her Kshs 50 to buy sugar.....I asked her for my shoes.*

*"On my way back from the shops, I asked the children of 2<sup>nd</sup> accused where their mother was. They told me a body had been discovered. The body of the deceased had a cut on the head. I went to my neighbour Joyce Chema who told me she did not know what happened. I explained to the chief what happened when he came to the scene. David Wekesa, (village elder) and 2<sup>nd</sup> accused came shortly after. Police came. We went to Makutano A.P. Camp. The body of the deceased was in the farm of Florence (2<sup>nd</sup> accused). I did not kill the deceased. I had given my phone to my wife to charge it as her place had electricity. I do not know why or how the phone was found next to her body."*

19. Upon cross examination, the 1<sup>st</sup> accused disowned his statement to the police. In that statement he had said that he and the deceased went to take *chang'aa*. He claimed that the 2<sup>nd</sup> accused did not leave her house the whole night. He said he found the evidence of Jennifer (PW2) and Ruth (PW5) strange. He said the 2<sup>nd</sup> accused never told him she had found the body. He claimed that the deceased and 2<sup>nd</sup> accused had no disagreements. He said he was unaware of any complaint by the 2<sup>nd</sup> accused to the chief.

20. On her part, the 2<sup>nd</sup> accused testified as follows-

*"On the night of 8.12.2010 I was at home with my children. My husband (1<sup>st</sup> accused) returned at 8.00pm. I gave him supper and we slept. On 9.12.2010 he woke up to go and buy some nails at 5.00 a.m. At 6.00 a.m., I woke up to prepare breakfast. I went to the canteen to buy a match box. Along the path on the way I saw a body next to my farm. It was a lady. I called out. No response. I went to the village elder and notified him. I went back with him. The village elders said it was Prince's wife. I had not recognized her. We went to A.P. Camp Makutano. The village elder spoke to Joyce Wanjala and the chief. We went back with two APs to the scene....."*

*"I did not kill the deceased. I do not know who killed her. Florence (PW3) lied – I never woke up on 8.12.10 to go to deceased's house. I did not know her house. From my house to deceased's house was far. It would take 1<sup>1</sup>/<sub>2</sub> hours by foot. I do not know Rachael.*

*The clothes alleged to have been found in my place; it is an allegation; I have never seen them. I never saw them. I have no grudge with the deceased. I am a 3<sup>rd</sup> wife; there was no reason to kill her."*

21. Upon cross examination, she said the 1<sup>st</sup> accused had informed her of the marriage to the deceased. She was hard put to explain why she referred to the deceased as a *girlfriend* in her statement to the police. She denied knocking on the door of the house of the deceased on the material night. She said she did not know PW2, PW3 or PW5. She even denied the name of "Suzy."

22. I have considered all the evidence and the law. I have also paid heed to the written submissions by learned Prosecution Counsel dated 9<sup>th</sup> June 2016; and, those by learned defence counsel dated 12<sup>th</sup> September 2016 together with the list of precedents.

23. Section 203 of the Penal Code provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*.

24. Malice aforethought is the *mens rea* or the *intention* to kill another person. Section 206 of the Penal Code defines it as follows;

“206. 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;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

25. The death of the deceased is beyond question. On 9<sup>th</sup> December 2010, PW3, PW4, PW5, PW7 and PW9 all saw the lifeless body on a footpath next to the home of the 2<sup>nd</sup> accused. Furthermore, PW6, Edith Essendi, a sister of the deceased identified the body of the deceased for post mortem purposes on 17<sup>th</sup> December 2010. The autopsy was carried out by Dr. Munyendo at Webuye County Hospital. The cause of death is also known: it resulted from severe head injury. There was a linear skull fracture with intracerebral haemorrhage. From the defence wounds, there was a struggle between the deceased and her assailants. It was an *unlawful* homicide.

26. The key question then is whether the two accused persons or either of them perpetrated this heinous act. I am alive that the legal burden of proof lay throughout with the prosecution. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).

27. There was no eye witness to the homicide. But there are a number of facts that *link* the accused to the crime. To start with, the 1<sup>st</sup> accused was the last person to be seen with the deceased. This was a fact *especially within his knowledge*. PW1 testified that on 8<sup>th</sup> December 2010, at about 4:00 p.m., the 1<sup>st</sup> accused summoned her mother to collect some money from him. That fact was corroborated by none other than the 1<sup>st</sup> accused. In his sworn defence, he stated as follows-

“At 3:00 p.m., I called the deceased (who was my 3<sup>rd</sup> wife) to come and collect some money for household use. She came at 6:00 p.m. I did not have change. We went to a kiosk. I gave the deceased 100. We parted ways at 6:45 p.m. I went to my 2<sup>nd</sup> wife’s house (Florence, 2<sup>nd</sup> accused). I slept there the whole night”.

28. Secondly, it is *not* true that the 1<sup>st</sup> accused parted ways with the deceased at 6:45 p.m. On 9<sup>th</sup> December 2010, he told P. C. Simon Kaikai (PW7) that he had quarreled with his wife (the 2<sup>nd</sup> accused) the previous night. They had been drinking *chang’aa*. The quarrel related to “*the other wife*” (the deceased). After the quarrel the 1<sup>st</sup> accused went to the deceased's home at Makutano market.

29. I am fortified there by the evidence of Florence Lichuma (PW3). She and Ruth Nerima (PW5) responded to the distress call by PW1. PW1 testified that on the material night someone knocked at their door. The children screamed. The person threw stones onto the roof of the house. PW3 said that later, the 2<sup>nd</sup> accused, whom she referred to as *Susy* was detained. She said the 2<sup>nd</sup> accused was wearing a grey skirt suit. That evidence was corroborated by PW5. *Susy* said she was looking for Prince (the 1<sup>st</sup> accused)

and Mary (the deceased); and, that one of them must die. Therein lay the *motive* for the ensuing murder. I will revisit the matter of motive later.

30. Thirdly, there was incriminating evidence. The first relates to bloodstained clothes recovered from the house of the 2<sup>nd</sup> accused. While at the scene, P.C. Kaikai (PW7) was informed that the 2<sup>nd</sup> accused had changed her clothes. He sought her permission to enter her house. He found a torn skirt which had blood on the edges. There was also a blouse or shirt with a piece of flesh on it. The clothes were in the bedroom; under the bed. They were wet. According to the persons he interviewed at the scene, the shirt belonged to the 1<sup>st</sup> accused while the blouse belonged to the 2<sup>nd</sup> accused. He handed over the clothes to Sergeant Kimango for onward transmission to the Government Chemist. Granted the evidence, I do not believe the 2<sup>nd</sup> accused when she says that no such items were recovered from her house.

31. The Government Analyst, Moses Muhu (PW8) examined the clothes. He formed the opinion that the blood stains on items A2 and B (a skirt and petticoat) matched the blood group of the deceased; and, may have originated from deceased following an injury. I remain alive that *no* blood samples of either the accused were submitted for analysis. The Government Analyst testified that the clothes belonged to the *deceased*. But the fact that the bloodstained clothes were hidden under a bed in the house of the 2<sup>nd</sup> accused points strongly and *compellingly* to her guilt.

32. The other smoking gun related to implicating items found adjacent to the body of the deceased. There were two mobile phones [exhibits 1(a) and (b)]. Their makes were *Vodafone* and *Nokia* respectively. The 1<sup>st</sup> accused in his defence admitted he owned one of the mobile phones. He could not explain how it reached the scene. But he ventured to add that he had given the phone to the deceased to charge it at Makutano market. But there was also a pouch or wallet (exhibit 5) containing the identity card for Prince Ombita (1<sup>st</sup> accused). I have reached the *inescapable* conclusion that both accused persons were at the *locus in quo*; and, had a hand in the murder of the deceased.

33. As I stated, the 2<sup>nd</sup> accused had a clear motive to kill the deceased. The body was found about 50 meters from the house of the 2<sup>nd</sup> accused. It was in the *shamba* of the 2<sup>nd</sup> accused. It is a suspicious coincidence that the 2<sup>nd</sup> accused “*discovered*” the body at 6:00 a.m. the following morning. When she reported the matter to the village elder (PW4) she claimed she did not recognize the victim. Yet, she admitted that the 1<sup>st</sup> accused had informed her of his marriage to the deceased. It is also telling that in her original statement to the police, she referred to the deceased as a *girlfriend* of the 1<sup>st</sup> accused. She had *never* truly accepted the relationship. It explains the tantrum she threw outside the deceased’s house on the material night scaring the young children; and, why she smashed the windows of the house of the 1<sup>st</sup> accused the same night. I also find it cunning that the 1<sup>st</sup> accused passed by the deceased’s house the following morning to retrieve his shoes; and, to leave the poor children Kshs 50 for breakfast.

34. When I juxtapose the defence put forth against the prosecution evidence, the defence crumbles. It is a red herring. It is a pitiable attempt to mask the complicity of the accused in the murder. I have reached the conclusion that the entire corpus of *circumstantial* evidence points *irresistibly* and *exclusively* to the guilt of the accused. See *R v Kipkering arap Koske & another* 16 EACA 135 (1949), *Sawe v Republic* [2003] KLR 364.

35. The chain of events is *complete*; and, I find *no* hypothesis that exonerates the accused. The homicide was *premeditated*. I also find that the 2<sup>nd</sup> accused had a clear *motive* to kill the deceased to terminate the relationship with the 1<sup>st</sup> accused. The accused acted in concert to execute the plot. I did not believe their defence at all. On the totality of the evidence of the *eleven* witnesses called by the Republic, I find that the charge was *proved beyond reasonable doubt*.

36. The upshot is that both accused, *of malice aforethought, caused the death of Mary Imminza Simiti by an unlawful act*. It must follow as a corollary, that the accused are culpable of murder. I accordingly enter a finding of *guilty*. Both accused are hereby convicted.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 24<sup>th</sup> day of November 2016.**

**GEORGE KANYI KIMONDO**

**JUDGE**

***Judgment read in open court in the presence of-***

Accused.

Mr. Esikuri for the accused.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.