



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE NO. 35 OF 2010

REPUBLICPROSECUTOR

SUSAN NYAWIRA CHEGEACCUSED

JUDGMENT

BACKGROUND

1. The accused herein **Susan Nyawira Chege** is facing a charge of murder contrary to Section 203 as read with Section and 204 of the Penal Code.

The particulars of the offence are that on the night of 8th August and 9th August 2010 at Milimani Village, in Kiminini within Bungoma County she murdered **ISAAC CHEGE KIMANI**.

2. The accused pleaded not guilty to the charge and the matter proceeded to full trial. The prosecution called a total of 9 witnesses.

3. The evidence of the prosecution may be summarized as follows;

PW1 Gerishom Kimani Gitau

He is a farmer and stays at Tongaren, He knows the accused, she is the wife to his son ISAAC CHEGE KIMANI who is dead. On 9.8.2010 at 9.00 a.m. He was at Matunda preparing to travel to Nairobi when he received a call from one ISAAC who informed him that he had found a man lying dead in a trench and who looked like **his** son.

He abandoned the journey and went to the scene which was on the boundary of JAPHETH and another person in Milimani at Tongaren. He found his son lying there dead. He was not aware what caused his death. Police from Kapchonge were called and he recorded his statement that very day. The deceased and accused were initially living in harmony but later begun quarrelling over money. The deceased told him that he had given money to the accused for safe keeping and she kept it in the bank and when the deceased requested for it she refused to give it back. **PW1** was called to arbitrate in 2010. It was agreed that the accused should give back the money. The accused's father was present during the arbitration. **PW1** was not aware whether the money was given back as agreed. When he saw the deceased's body, it had clothes on but without shoes. It had rained the whole night but the deceased's legs and clothes were not muddy. There was no evidence of struggle at the scene. The body had no visible injuries but was bleeding from the nose.

During cross examination he stated that the deceased used to drink but that was long time ago. Deceased's body was about 200metres from his home. There was a path a few metres from the scene. He stayed at Amiti while the deceased stayed at Milimani.

4. **PW2 JOASH NDERITU NJOROG**

He is a farmer and stays at Soysambu scheme in Tongaren. On 4.8.2010 he was at home when Isaac Chege (deceased) called in. He usually advised and arbitrated when the deceased's family had issues.. He recalled that the deceased said he had given his wife Ksh. 100,000/= cash which he wanted to use to buy maize but she refused to give it back. The deceased wanted **PW2** to accompany him to his home to solve the dispute and help seek the money. He was informed that whenever the deceased asked for the money he would receive a beating from the accused and her children. The deceased had been asking for the money for two months and it was maize buying season. He informed the deceased that he would visit his home. He was then informed that the deceased had no populace at home and the accused was not giving him food. 4 days later and before **PW2** had visited the deceased's home he learnt of his death through his father in law- Gerishom Kimani (**PW1**) vide a call on 9.8.2010 at 11.30 a.m. and thereafter proceeded to Kimani's home and found Kimani had left for the scene. He proceeded to the scene but found the deceased's body had been taken to the mortuary. He then went to the deceased's home where he found several ladies including the accused.

In the home he noted the main door had broken glasses. When he inquired from the accused she responded the breakage was as a result of wind blowing. There were glass pieces on the floor which was freshly cleaned. He suspected the deceased was killed there and body taken to the scene. Bedroom had curtain but without door. He saw a pair of blue slippers and shoes in the bedroom and there were glass pieces there too.

Later, CID from Webuye visited the home. The CID talked to **PW2** then took the pair of slippers and pair of shoes with him. **PW2** found deceased's son-GITAU recording a statement.

On 11.8.2010 he accompanied GITAU to Kapchonge police station before proceeding to Kitale mortuary for post mortem. GITAU identified the body. **PW2** was present during post mortem. The Body had no shoes. The Feet were clean. the deceased had a pair of trouser and shirt. The body had no injuries. The doctor informed them that the cause of death was strangulation. He thereafter took the body for burial. He recognized the pair of blue slippers (**MFI-1**) and the broken pieces of glass (**MFI-2**). He recalled the deceased at one time called his parents and parents-in-law to arbitrate between him and the accused. **He** was present during the meeting.. The dispute was about money. The deceased complained of being beaten by the accused and her two children GITAU and WANJA whenever he asked for the money. **PW2** had not seen the deceased take beer or alcohol. The accused never complained deceased was drinking.

At cross-examination **PW2** stated that the deceased was his brother-in-law as **PW2** was married to his elder sister. He did not know that accused complained to her parents of being beaten by the deceased. The deceased never showed him injuries on his body resulting from the beating. It had rained during the night before the death. He suspected the door had been broken in the struggle. He noted deceased's bed was not made properly. He had not been to the bedroom before.

5. **PW3- JOSEPH GITAU KIMANI**

He is a teacher and stays at Ambich market in Tongaren. He knows the accused as she is the wife to his deceased brother.

On 9.8.2010 he was at home. He received a call from the market chairman and informed at 11.00 a.m. that the deceased was dead. He boarded a motorbike and went to the scene. He found police vehicle. He saw deceased's body being loaded into the vehicle.

It had injuries on both hands and was bleeding from the nose. He had a stripped navy blue shirt and trousers. Feet were clean and with no shoes. He accompanied the police and thereafter took body to Kitale District Hospital mortuary.

On 11.8.2010 he identified the body to Doctor Vincent Omondi who conducted the post mortem. He was with JOASH NDERITU. They were informed the cause of death was strangulation. They took the body

for burial.

The deceased and accused had a long standing dispute over money. The deceased kept complaining to **PW3**. It was money the accused had been given to keep but she had refused to give it back. It was Kshs. 200,000/= according to the deceased. The dispute had taken over one year. Their parents had tried to solve the dispute. **PW3** did not attend the arbitration.

When he saw the deceased's body at the scene, it had visible bruises on both hands. There were no shoes at the scene. Deceased was not initially mentally disturbed but stressed. He was a smoker though not a heavy smoker. He used to drink. He would go to bar. He did not know the cause of deceased's stress. The money complained of was raised from selling maize. He is not aware whether deceased was beating the accused. He did not know what killed the deceased.

6. PW4 P.C Martin Kinaza no. 89209

He is a CID officer currently stationed at Bungoma East on investigative duties.

In August 2010 he was attached to Kimilili police station. On 9.8.2010 he was at the police station when OCS C.I. Kagai called and informed him of a report of murder at Milimani. He accompanied P.C. Ochieng to the scene at Milimani village. They found the deceased's body lying within a maize farm. Relatives of the deceased were there. The body was clean and without shoes. There was a brown belt tied loosely around the neck. The body did not have physical injuries but blood was oozing from the nose and ears. He formed the opinion the deceased had been transferred to the scene because it had rained and the ground was wet but the deceased clothes were not wet and the body was not muddy. The scene was about 400metres from the deceased's house. He visited the home. In the house entrance the door was metal with glass panes. Some glasses were broken and scattered at the entrance to table room. In the bedroom the window pane was broken and glass scattered. He suspected there was struggle in the house. He took a pair of blue slippers and a pair of black shoes from the house. He called the crime scene personnel to photograph the body of the deceased before it was taken to Kitale district Hospital Mortuary.

He later went back to the mortuary during post-mortem. He was with two relatives of the deceased who had already given evidence. He identified the slippers (**MFI-1**) and broken glass (**MFI-2**) from the scene. The glass was from the bedroom. Table room had been swept. Curtain in the bedroom was partly drawn and the bedroom was disorganized. The bed had been moved and was not made. A belt and shoes were handed to the Investigating Officer. The Accused was sitting close to the body.

On cross-examination he stated that, they were not the first officers to arrive at the scene. The A.P. officers and the chief were at the scene. The body had no visible injuries and had clothes but without shoes. He was dressed in a trouser and shirt. He did not recall their colours. The body was about 1 metre from a path. He had not been to the deceased's house before. He did not know how the house was previously kept. glasses.

7. PW5- CPL Dan Kagambo no. 47424

He is attached to Nairobi CID area. Previously of Webuye up to 2012 April.

He recalled that on 9.8.2010 he was the officer on duty at the CID office when he was informed by the area OCPD David Mutai that the previous night one Isaac Chege Kimani had been found murdered. The case was for Kiminini police. He later learnt that the OCS had visited the scene in the company of the OCPD. He was later he was instructed to investigate the matter. The body had been taken to Kitale hospital mortuary after it was photographed by scenes of crime personnel. He visited the crime scene accompanied by P.C. Kimata.

He interrogated some witnesses and took their statement. He went to the deceased's house and met the deceased's wife. He questioned her, she took them to the bedroom where they noted the pieces of smashed glass and the broken window pane. He took some pieces of glass with him. He identified the

pieces of glass (MFI-1)

He continued with further investigations and later when the post-mortem was done by Dr. Omondi, he confirmed that the deceased was strangled. He formed the opinion that the deceased was killed in the house and body dumped at the scene 400 metres away from the house. The body had no injuries. He confirmed from officers who visited the scene earlier that there were no signs of struggle at the scene an indication that the body had been dumped.

He arrested the accused at her house on 2.10.2010 and he preferred the charge of murder against her.
PW7 RASTO WEPUKHULU

This witness recanted his statement to the police and perjured himself before this Honourable court. As a result and upon application by prosecution his witness statement to the police was admitted as part of the prosecution's evidence.

In that statement recorded on 13.8.2010 he stated that on 8.8.2010 he was at home when at around 10.00 p.m. he had screams from the deceased's house. He recognized that voice as belonging to ISAAC CHEGE KIMANI because they had been friends and neighbours for more than 30 years. At that time the accused and her children were in their house. He did not leave his house to ascertain what transpired because he has asthma and he was alone since his wife (Beatrice) had left to visit a sick person and his son had attended circumcision ceremony.

8. PW8 Dr. Emmanuel Majale Simiyu

He is a medical superintendent at Kitale Referral hospital. He has worked at Kitale County Referral Hospital for 1 year. He ascertained from the Hospital record that the post-mortem was done in 2010 by Dr. Vincent Omondi who was a medical superintendent then. He is unable to get the doctor who relocated.

There was no objection from defence.

The witness stated as follows;-

- **The post-mortem report relates to Isaac Chege Kimani who was identified by Joseph Gitau and Joash Nderitu. The time of death was estimated to be on 8.8.2010 at night. The post-mortem was done on 11.8.2010 at 10.00p.m.**

External examination

- **The body was of a male African adult estimated age at 49 years 5ft 4" height**
- **Rigor mortis had set in**
- **There were bruises on the left hand and right forehead**
- **There was blood coming from the right ear and nostrils**

Internal examination

- **The neck was hyper-mobile, could easily be moved**
- **There was obvious evidence of laceration on trachea rings**
- **There was much blood coming from the anterior neck compartment**
- **Reticule was obvious, this was at level of C5 and C6**
- **The heart was normal**
- **Digestive system normal**
- **Head normal**
- **Nervous system and spinal system normal**
- **Opinion formed:- cause of death was strangulation**

In Cross-examination he said that there was an indication that from the history given the deceased had mental illness since 2009.

9. PW9 Benjamin Wafula Isaac

He stays in Milimani area Tongaren, a watchman at Bishop Philip Anyolo Secondary School in Tongaren.

He recalled that on 9.8.2010 at around 7.30 a.m. he was at home when two men passed by his house and greeted him. They were all his neighbors and one of them was George Wanyama, he did not know the name of the other neighbor.

George said he had sent his son- (Anthony) to get some books and when the boy returned he told him that he had seen Isaac lying in a ditch.

They went to the scene where they found children gathered.

He saw a belt tied tightly around the deceased's neck. The body had no shoes, The deceased was dressed in a checked blue and white shirt and dark blue pair of trousers. He was lying on his left hand and faced a maize plantation.

He recalled that it had rained the previous night but the body had not been rained on and was not covered in mud.

He called and informed the Chief about the incident then left for Milimani Centre on his return he heard screams and on arrival he saw the accused seated next to the deceased and the daughter (Dorcas Wanja) standing. The daughter then tried to loosen the belt on the deceased's neck.

The chief arrived and stopped Dorcas from loosening the belt. Two officers from D.O. Tongaren arrived and checked the body. The accused and Wanja were summoned and talked to the officers. The officers left, the chief called police officers from Kiminini police station who then took pictures and appeared to be investigating, they took the body to Kitale District Mortuary.

Upon cross-examination **PW9** stated that he did not know whether the accused used to drink, the deceased was sick and would talk on his own 1 year before but he had recovered.

10. PW10 Justus Mukonda Nyongesa

He stays at Milimani area Tongaren. On 8.8.2010 between 5.00p.m. and 7.00 p.m. he was with Isaac Chege playing draught. It started raining and they left for home. He left Isaac at his gate while he proceeded home.

The following morning at 6.00 a.m. he heard that Isaac had died. He visited the scene and realized the deceased had different clothes from the ones he had the previous day. He was dressed in a checked shirt, blue pair of trousers and no shoes. He was dressed in a dotted long sleeved shirt and black trousers the previous day.

The deceased was next to a ditch near the farm of Japheth Mukhebi. Later the police took the body. The scene was about 60-70 metres from deceased's home. Deceased was not wet or muddy despite raining the previous night. He did not know whether the deceased had an affair or was sick. He recalled that one month prior to his death the deceased had malaria; he never heard before that the deceased suffered mental illness. He and the deceased were close friends and the former knew the deceased's family since 1967 as they were neighbours.

The deceased used to drink but on 8.8.2010 he was not drunk.

11. At the close of the prosecution's case the court found that the accused had a case to answer and she

was placed on her defence. She gave a sworn statement and did not call any witnesses.

Her statement is summarized as follows;

DW1 SUSAN NYAWIRA CHEGE

She stays at Milimani in Bungoma County; Isaac Chege was her husband of 29 years. They had 6 children; she denied the offence of killing her husband.

She recalled that on 7.8.2010 her husband was home, she cooked and they ate. Later he left for the market to meet his friends and arrived home around 6.30-7.00 p.m. and found her seated outside the house. The deceased did not get in the house but left again saying that he was going to purchase cigarettes. She lived alone with the deceased. At 8.00 p.m. she took a torch and went searching for the deceased as he had not returned. She called the owner of the shop who said he had sold cigarettes to the deceased before he left for the place he used to drink. She went to the place and was informed by the owner that her husband had bought a drink and left. She followed the road she was told her husband pursued but did not see him. She returned home.

She stated that whenever the deceased failed to take his medication as he had mental illness he would be confused and they would have to look for him. That she went back to the market and the shop the next day but the deceased had not been seen. She also visited the place where alcohol is sold to no avail. On her way home she met Musa Sakina who informed her that she was being sought for. She followed him to the edge of her home. She spotted a crowd further, and decided to go see why there was a crowd.

She proceeded to the scene where she found her husband had fallen facing downwards. He was dead. The police later came for the body.

The body was found at Japheth's farm (neighbour). It had rained the previous night until almost morning.

On arriving at the scene and upon turning the deceased his front was not wet but his back was wet. As for the broken glass she contended that there was no broken glass in the house but there was a window that had cracked sometime back. He used to play draught and drink.

She denied receiving Ksh. 100,000/= from her husband. She also denied that they had quarreled over money. She also stated that at the scene the deceased was found in clothes he had worn on 8.10.2010, a striped shirt and a blue trouser.

12. Both the prosecution and the defence filed written submissions on 15.11.2016 and 21.11.2016 respectively.

13. Having considered all the evidence tendered before the court, it is not in dispute that Isaac Chege Kamau was found dead on the morning of 8.10.2010 in a trench 400m away from his home.

The issues for determination by this court are; **whether the evidence tendered by the prosecution link the accused to the death of the deceased? If that is answered in the affirmative was there malice aforethought?**

14. Having set the issues as above it is worth noting that the onus of proving the case against the accused in a criminal case lies squarely on the prosecution. This is derived from the celebrated case of **Woolmington Vs. Director of Public Prosecution [1935]A C 462 where Lord Sankey Stafford** stated;

“Throughout the web of the English Law one Golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject to any statutory exceptions.....no matter what the charge or where the trial the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be

entertained.”

15. Having laid down the above principle I now turn to section 203 and 204 of the Penal Code to establish if the ingredients of murder have been established.

16. No witness testified to having seen the accused kill the deceased on the material day. The prosecution has relied solely on circumstantial evidence and urges that the circumstantial evidence before court points to the accused as being the perpetrator of the murder.

17. 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.”

18. Being guided by the above cases I examine each evidence closely and separately, I find that the prosecution has proved that there was indeed a dispute over money through the testimonies of **PW1, 2, and 3**. though the sums stated were at variance, the genesis of the dispute as stated by the witnesses was consistent. There is evidence that whenever there was a disagreement between the deceased and the accused and whenever the deceased asked for the money the accused and her two children Wanja and Gitau would beat the deceased.

19. PW4 and 5 stated that there was no evidence of struggle at the scene of crime and they opined that the deceased was dumped there after being murdered at a different location. This is in tandem with the evidence of **PW1, 2, 3, 9 and 10** that the deceased was neither wet nor muddy despite it having rained previous night.

20. PW5 stated that there was broken glass at the deceased's house in the bedroom and the main entrance and that as a result he formed the opinion that the breakage of the bedroom window pane and the glass at the main door was as a result of a scuffle. In his statement to the police PW2 stated that as a neighbor he heard the deceased scream from his house the night before he was discovered dead in the morning. He further stated that at the time the accused and her children were at home.

21. It is crucial to note that when the deceased was discovered he was neither wet nor muddy although it had rained the previous night. It clearly means that the deceased was killed elsewhere and dumped at the scene in the morning after it had stopped raining. **PW10** told this court that he parted ways with the deceased at his gate that evening and that the deceased had different attire and was not drunk.

22. PW8 produced a post mortem report by Doctor Vincent Omondi who upon examination concluded that the cause of death was strangulation. Circumstantial evidence shows that there was a scuffle in the home of the deceased and the accused. There is also evidence that there was a disagreement between the deceased and the accused over money issues. The deceased was left at his gate by **PW10** and was dressed in other clothes not what he was dressed in when discovered dead. As stated by the accused only two people lived in their house yet there is evidence that a struggle had ensued in that home, where broken glass were spread all over the bed room that was shared by the deceased and accused also showed signs of people having struggled.

The deceased is found strangled, dressed in clean clothes; dumped in a ditch early morning, his clothes, not wet, not muddy, having been murdered elsewhere; further there is evidence that the deceased screams were heard the previous night. It is my considered view that the only inference to be drawn from the above is that the deceased had a scuffle with the accused on the night of 8th August, 2010, either the accused was alone or with others, where the deceased was murdered by way of strangulation and in the wee hours of the morning his body dumped where the neighbours found it in a ditch.

23. In the circumstances of the case therefore I find that the prosecution has proved its case against the

accused person and accordingly convict her of the offence of Murder..

DATED and DELIVERED at BUNGOMA this 20TH OF DECEMBER 2016

ALI-ARONI

JUDGE.