



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 18 OF 2013**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**MATHEW KIPKEMBOI TARUS .....ACCUSED**

**JUDGMENT**

The accused 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 night of 19<sup>th</sup> May 2013 at Lessos Estate Kitale within Trans Nzoia County, unlawfully murdered **Rael Chepchoge**. The prosecution called a total of 5 witnesses whose evidence can be summarised as follows:

**PW1 Abrahan Kipruto Songok** the deceased brother was told of the incident on the said date. He stays at Ziwa within Uasin Gishu county. He went to the scene but found the body having been taken to the mortuary. He identified the body for the postmortem exercise.

**PW2 James Kibitok Moiben** a brother to the deceased and an athlete was heading to Europe when he was notified of the incident. He came back and went to the deceased home. He found the body had been taken to the mortuary. He went and identified the same.

Both PW1 and PW2 on cross-examination confirmed that they did not witness the offence being committed.

**Dr Obala PW3** produced the postmortem report which concluded that the cause of death was cardiorespiratory arrest secondary to head injury with subdural hematoma.

**PW4 Murcella Chuma** told the court that on 18<sup>th</sup> May 2013 the accused did some farm work for him. Later he sent his son to collect Kshs 200 for him which she gave him. Later in the evening she was told by her daughter in law that she had found the deceased lying down on the public path and had been taken away by the accused. The following morning the accused went to her home and informed her that the deceased had died. She went to the scene and saw the body which had a physical injury on the arm. She said that on the material day the deceased was drunk.

**PW5 A K** was aged 13 years and the step son to the deceased. He testified that on the material day at around 4 pm he was informed that the deceased had left the child on a small path and was very drunk. He called the accused his father who went to bring her. They had dinner and thereafter all went to sleep. At night he was awakened by some noise from his fathers bedroom. The noise was of chairs being

knocked down. In the morning he was told to prepare porridge for his young siblings by the father who went away and locked the bedroom. He said that he saw many people come who broke the door to the bedroom and found the deceased body. He said that both the accused and the deceased quarrel after drinking. On cross-examination he said that the deceased fell down on a stone while alighting from the motorbike. He said also that he did not see them fight that day.

The accused when put on his defence gave unsworn evidence denying the charge. He testified that on the material day he was told that the deceased was lying on a public path and was with their young child. He went and picked her using a motorbike. While they alighted at home and while he was getting some change from the motorist, the deceased fell down and hit herself on a stone. He then assisted her to the house. The deceased did not take supper as she said that she was going to vomit. They slept but in the cause of the night she asked for water. Although the accused insisted on giving her milk she wanted water. In the morning she was awoken by the cry of the child. On checking he found that she had died. He went and informed PW4 the village elder and later the police. He denied the charge.

### **Analysis and Determination**

I have read the written submissions by the defence counsel. From the evidence as presented by the prosecution it is apparently clear that there was no eye witness to the incident. There is a general conclusion from all the prosecution witnesses that the deceased was alcoholic and that on the material day the accused although he also drinks was not drunk.

Further it emerges from the evidence that the deceased was taken from a public path where she was lying and drunk using a motorcycle. Both PW5 and the accused who were present at the scene agree that the deceased fell down after alighting and was hit by a stone. This was consistent with what the postmortem report indicated.

The only variation of events is what PW5 heard that night. He testified that he heard some noises while asleep of chairs being knocked down but went back to sleep. There was no clarification by the said witness whether the chairs were being used by his parents who were fighting or not. Further he did not clearly indicate how long the noise took and whether he heard any human noise for example screams and the like. From his evidence he clearly stated that both the accused and the deceased would fight when they are drunk. I do not think therefore it would have been difficult to state whether they fought that night.

For the offence of Murder to be established the state ought to establish mens rea on the part of the accused. The entire evidence by the prosecution does not in any way implicate the accused either directly or circumstantially. The injuries as concluded by the post mortem report were consistent with blunt trauma which suggest that the deceased was cut or she hit herself on a blunt object. Both the accused and PW5 confirmed that the deceased fell on a stone. This was not controverted.

Further it appears that the deceased was totally drunk to the extent of her being found on a footpath lying down with a small child. It appears therefore that she was not in a position to control herself let alone take care of the small child.

I do find that the prosecution did not prove this case beyond a shadow of doubt. There was no direct or circumstantial evidence to link the accused with the death of the deceased his wife.

I therefore set him free unless lawfully held pursuant to the provisions of section 215 of the Criminal Procedure Code.

Delivered this 15<sup>th</sup> day of December 2016.

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**H.K. CHEMITEI**

**JUDGE**

**In the presence of ;**

**Kakoi for state**

**Bororio for accused**

**Court Assistant - Kirong**

**Judgment read in open court.**