



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 50 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

PAUL KITUM KILIMO.....ACCUSED

J U D G M E N T

1. **Paul Kitum Kilimo**, (the accused) is charged with Murder, contrary to Section 204 read with Section 204 of the Penal Code, in that on the **1st September, 2011**, at Miti Moja Village Muswoli Farm Trans-Nzoia County, murdered **Joyce Chepkoech Yano**.

2. The case for the prosecution was that the accused and the deceased were involved in a marital relationship which was somehow not recognized by the father to the deceased, **Emmanuel Suter Yano (PW2)**. The two appeared to have been living together and had two children. The woman was a teacher by occupation while the man was a civil servant employed at the Ministry of Public Works, as a fire officer.

3. Their relationship appeared to have been dogged with problems as it was reported by the deceased to the accused's elder brother, **Barnabas Kipsiro Kilimo (PW3)**, that the accused had gone to the deceased's parents home and taken away one of her children. The two were at the time living separately but their children were at the home of the deceased's parents.

4. Barnabas (PW3), called for a family meeting which was attended by both the accused and the deceased. It was resolved in the meeting that their (accused and deceased) children would remain with their mother (the deceased). This was on the 31st August, 2011. The meeting ended well and all those who attended spent the night at the home of Barnabas.

5. On the following day 1st September, 2011, the accused and Barnabas were holding a conversation in the living room when the accused left the house and went outside where he found **Sharon Cherono (PW4)**, making the deceased's hair. He confronted the deceased and they engaged in a quarrel. He picked an axe in the process and used it to hit the deceased on the head before fleeing from the scene. Barnabas rushed outside the house after being attracted by the ensuing commotion. He found the deceased lying down in a pool of blood having seriously been injured.

6. The deceased was taken to hospital but passed away while undergoing treatment at Kitale District Hospital.

Dr. Blastus Kakundi (PW1), performed the necessary post mortem on the 7th September, 2011, and

compiled his report [P. Exhibit 1] indicating that the cause of death was cardiopulmonary failure secondary to severe head injury from penetrating injury (assault). The body of the deceased was identified to him by her uncle, **Josphat Kiplagat Bowen (PW5)**.

7. **Sgt. Smith Njeru (PW6)**, conducted the necessary investigations and in the process visited the scene of the incident and retrieved the axe allegedly used by the accused to fatally assault the deceased. He formally arrested the accused and caused him to be charged with the present offence.

8. The accused denied the offence and stated in his defence that he was living at Kimumu in Eldoret. The deceased was his wife and they had two (2) children. She worked as a teacher in the County of Elgeyo Marakwet. They lived peacefully until the month of July, 2011, when he visited her at her place of work and found that she had transferred their children to another school. He went to her parent's home on the following day to see the children. He was then advised by her parents to transfer the children to Eldoret where he lived. He heeded the advice and took away the children.

9. He was called for a family meeting by his brother (PW3) at Kachibora. He went there on 30th August, 2011, accompanied by his children and housemaid. The arrival of the deceased elated him such that he purchased meat for the entire family to eat. They later engaged in family discussions over his (accused) children schooling. He proposed that the children be left to stay with the deceased and not her parents. The proposal was rejected by the deceased but supported by the accused's brother (PW3) who ultimately convinced the deceased to accept it.

10. All ended well and the family went to bed. They woke up well on the following day (i.e. 1st September, 2011) and he (accused) held a conversation with his brother before proceeding for a call of nature outside the house where he found the deceased cutting wood using an axe. She turned on him and insisted that she would return their children to her parent's home. She chided him with regard to his standard of education and out of annoyance aimed the axe at him. A struggle ensued between them and in the process she was injured on the head. She let out a loud scream and he proceeded to Cherangany police station to seek for assistance since he did not commit any offence.

11. The accused indicated that he was arrested when he went to the police station and was charged in court after the deceased died while undergoing treatment. He contended that he did not intend to kill the deceased and that it was only later that he realized that he had hit and killed her. He indicated that he suffered from a mental illness which had earlier been treated. He produced a medical record (D. Exhibit 1) in that regard.

12. Under Section 203 of the Penal Code, any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

Such a person shall on conviction be subjected to the death sentence (see S.204 penal code) From the evidence and the submissions presented herein by the learned counsel for the accused, **M/s. Arunga**, the fact that the deceased died from injury inflicted upon her by the accused was not at all or substantially disputed.

The basic issue for determination was whether the accused acted with necessary intention to kill the deceased.

13. The defence raised by the accused was that the deceased was cutting wood using the suspected murder weapon (an axe) and when she saw the accused outside the house she pointed the weapon at him and proceeded to berate his level of education. It was after that that they engaged in a struggle which led to the deceased suffering serious injury and ultimately her death from the injury.

14. The accused said that he only realized much later that he had assaulted and injured the deceased. He implied that his unlawful action could have been as a result of a mental illness for which he had previously undergone treatment. The medical records (D. Exhibit 1) from Kitale District Hospital indicated that the accused suffered from insomnia and visual hallucinations and was under treatment.

15. There was no report from the prosecution on the accused's mental state. Such a report is crucial in murder cases but was omitted in this case thereby implying that the accused was not examined to determine his mental status prior to being charged with murder. His evidence that he suffers from a mental illness remained undisputed by the prosecution. His explanation for his unlawful action appears to have been attributed to his mental illness rather than self-defence which did not apply in the circumstances as it appeared that the deceased and the accused engaged in a brawl which led to the deceased suffering fatal injury.

16. The accused uncle, **Patrick Chesir Kanda (DW2)** confirmed that the accused suffers from a mental illness which runs through their family. He said that the accused's father is his elder brother and that he (father to accused) may have inherited the illness from their mother who had a mental problem. He (DW2) opined that the accused's father may have “transferred” his mental problem to his two sons i.e. the accused and Barnabas (PW3). He indicated that at the time he (DW2) testified in court, Barnabas had recently been discharged from a mental patients ward at the Moi Teaching and Referral Hospital.

17. Another uncle of the accused, **Luka Cheboi Kanda (DW1)**, indicated that the marital problems experienced by the accused and the deceased revolved around their children and the fact that the deceased was a university graduate while the accused was a form four leaver. He (DW1) did not however, witness the brawl between the couple on the material date.

18. None of the prosecution and defence witnesses other than Sharon (PW4) witnessed the brawl as it happened. She confirmed that there was a quarrel between the accused and the deceased before the deceased was hit on the head with an axe by the accused. She indicated that the accused rather than the deceased was the aggressor. She also indicated that the accused was a person susceptible to anger and was very angry when the incident occurred. She did not know whether or not the accused had a mental problem.

19. It is clear from all the evidence that the accused may not have been in full control of his action which led to the death of the deceased. His inhibited anger and/or mental illness may have erupted on the material date after being triggered by the quarrel or brawl between him and the deceased over their children and probably his level of education compared to that of the deceased. It may therefore be safely stated that the death of the deceased was not premeditated or characterized by deliberate purpose on the part of the accused. His unlawful action was a “script” of his demented mind, so it seemed.

20. This court therefore absolves the accused from the charge of murder but finds him guilty of manslaughter, contrary to Section 202 (1) of the penal code and convicts him accordingly.

J.R. KARANJA

JUDGE

28/07/2015

[Delivery and signed this 28th day of July, 2015]