



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BOMET
CRIMINAL CASE NO. 2 OF 2015

REPUBLIC.....PROSECUTOR.

VS.

GEOFFREY CHERUIYOT ALIAS ERIK KIPROTICH KIRUI...ACCUSED.

RULING.

1. The accused is charged with two counts of murder which are as follows:

COUNT I:

Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars being that on unknown date and time at Kamungei Village within Sotik District, Bomet County murdered **CAROLINE CHEPTANUI SINEI**.

COUNT II:

Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars being that on unknown date and time at Kamungei Village within Sotik District, Bomet County murdered **KIPTOO**.

2. The prosecution called a total of nine (9) witnesses. There is no one who witnessed the incident that led to the death of the deceased persons. In fact the date of incident is unknown. The evidence on record starts from the date of discovery of the bodies which is 12th October 2012.
3. What is before this Court is purely circumstantial evidence. Does this evidence link the accused to this offence? In the case of ***Mwangi & Another (2004) 2 KLR 32*** the Court of Appeal stated this of circumstantial evidence.

“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 reasonable hypotheses except the hypotheses that the accessed is guilty of the charge.”

It is stated by PW1 – PW3 that the deceased and accused were living together as husband and wife at the deceased's parents home.

PW1 & PW3 were their neighbors and also relatives. Infact PW3 stated in her evidence that:

- i. *The deceased in the 1st count used to visit her in her house daily.*
- ii. *The witness would occasionally visit her (deceased) when her parents were in Kuresoi.*
- iii. *The deceased passed her house to the canteen.*

1. The **Dr. Caleb (PW 6)** who conducted the postmortem stated that both bodies had decomposed, and had been partially eaten by dogs. It is obvious that the bodies had been in the holes/shallow graves for a few days before the discovery by the dogs and the witnesses.
2. If indeed PW1 & PW3 were good neighbours and relatives of the deceased, and in particular PW2 who said she was visited by the deceased daily, why was she not able to sense the absence of the deceased before the discovery of the body?.
3. There is no evidence that there was any report that the deceased persons were missing. PW3 was not even sure of when she had last seen the deceased before she went missing.
4. PW1 who was the deceased's uncle and immediate neighbour told the Court at page 29;

“I had seen the accused a long time before the incident”.

While PW3 who is an aunt to the deceased and lived on the same parcel of land with the deceased stated in cross examination at page 40;

“I can't recall when I last saw the accused before this day of the body”.

5. There was mention of blood having been found on the floor of the deceased's house. Also recovered near the trench were blood stained broken jembe handle and two jembes (EXB 5a-c).

The **Investigating Officer, P.C Fredrick Omondi (PW9)** did not apparently see the need of having these exhibits examined and/or the blood on the floor analyzed.

6. The accused was arrested. Its not clear how and from where he was arrested. I say so because one David Musonik who happened to have this information did not testify.

PW9 only co-ordinated for his arrest. He was alleged to have been arrested from Nyagacho estate of Kericho. No arresting officer or the owner the hiding place was called to testify.

7. The accused after arrest was taken to Sotik Health Center for treatment and examination.

A P3 form (Exhibit 4) was filled after treatment as evidenced by Exhibit 3. Exhibit 3 & Exhibit 4 bear different names but PW8 insisted that the person he treated and later examined is the accused hence the alias name in the Charge Sheet.

8. The history given in Exhibit 3 & 4 is that the accused was injured as he fought with his deceased wife eight (8) days prior.

Its not clear if its the police who were giving this history or the accused person. If it was the accused then the Court could have expected statement under inquiry or a confession to have been recorded to back it up. It was not.

9. I would wish to contrast the circumstances in this case and those in the case of **MKENDESHWO VS. REPUBLIC – (2002) 1 KLR 461** where the Court of Appellant held:

- i. *Although the appellant was not seen killing the deceased and he denied having done it, there was acceptable evidence that he had left with the deceased from her place of business and the deceased was not seen alive thereafter.*
- ii. *In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond any reasonable doubt and generally, the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.*
- iii. *The Evidence Act (Cap 80) Section 111 provides that in criminal cases, an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his knowledge. The Section is silent on what would happen if he fails to do so but Section 119 entitles a Court to raise a rebuttable presumption of fact from the circumstances of the case.*
- iv. *In the circumstances of this case, a rebuttable presumption of fact arose to the effect that the appellant knew how the deceased had died.*
- v. *The appellant's conduct from the date the deceased disappeared until he was arrested provided reason why his denial of having left with the deceased from her place of business could not be believed. He never made any effort to look for the deceased for several days.*
- vi. *It was never suggested that the deceased sometimes in the past failed to return home for several days. That the appellant was not disturbed by her disappearance for such a long time raised a rebuttable presumption that he knew where she was.*
- vii. *The appellant bought a panga sometime before his wife disappeared; she was found dead early the next day with several cut wounds; the interval between the time she was last seen alive and the time her dead body was discovered was quite short; the appellant having not explained where he parted company with her, a rebuttable presumption arose that he, or some other person he knew, was responsible for her death.*

1. In this present case besides the accused and deceased being husband & wife there is no evidence to show the following:-

- i. *When the two were last seen together.*
- ii. *The last time the deceased was seen alive before the discovery of the body.*
- iii. *The last time the accused was seen at the deceased's home.*

1. Further the prosecution has failed to confirm how the accused was arrested and for how long he had been in hiding, as well as the following:

- i. *Who gave the history narrated in Exhibit 3 & 4. If it was the accused why was a statement under inquiry and/or a confession recorded from him to support that history.?*
- ii. *Why the blood on the floor of the deceased's house and on the jembes and handles (Exhibit 5a-c) was not taken for analysis.*

1. The circumstances in the **Mkendeshwo case (Supra)** linked up so well. In the said case Mkendeshwo was asked to explain what happened to his wife as he was the last person to be seen with her. He had even bought a new panga before the disappearance of his wife.

In the present case there are no facts to enable this Court ask the accused to tell his story.

2. Yes, there are the cuts and bite marks. How are they linked to the death?. Yes the suspicion is there but again in **SAWE VS. REPUBLIC 2003 KLR 364** the Court of Appeal stated:

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

3. In this case, if the accused elected to remain silent, as is his right, would I be able to convict on the evidence before me? My answer would be NO.
4. I therefore find the prosecution not to have established a prima facie case to enable me place the accused on his defence.

For my part I find him not guilty and acquit him under ***Section 306(2) Criminal Procedure Code.***

Dated, Signed and Delivered in open Court this 28th day of September 2015.

H.I. ONG'UDI

JUDGE.