



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 51 OF 2011

LESIT, J

REPUBLIC.....PROSECUTOR

-VERSUS -

STANLEY KURGAT.....ACCUSED

JUDGMENT

1. The accused **STANLEY KURGAT** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are:

“On the 12th day of June, 2011 at OngataRongai in Ngong District within Kajiado County, murdered CATHERINE CHEPKEMOI.”

2. The prosecution called a total of 16 witnesses. The trial was begun by Hon. Mwilu, J, as she then was who heard the first eight witnesses. The case was taken over by Hon. Muchemi, J who heard PW9 to PW15. I took over from there and heard the evidence of PW16, PW6 who was recalled and the defence case.
3. The summary of the prosecution case was that the deceased, Catherine Chepkemoi and her mother, PW5 got the accused from their rural home and was employed by Catherine, hereinafter the deceased, in 2009. Initially his work was to take care of broiler chicken. Eventually the deceased and her husband, PW1 bought cows and the accused work extended to feeding and milking the cows too.
4. PW1 informed the court that he was a long distance lorry driver. On 8th June 2011, he travelled to Kampala. His wife had complained to him that their shamba employee, the accused, had changed and was lax and no longer cleaned the compound nor did his chores well. She wanted to sack him but he cautioned her not to do so until she got a replacement.
5. It is PW1’s evidence that he spoke with the deceased the whole day on 13th June 2011. On that day the deceased, who was 7 ½ months pregnant, and their son, who was 4 years old were both unwell and went to see a doctor.
6. PW1 testified that the deceased wanted to slaughter chicken on the evening of 13th June and so he sent her about KShs.10,000/= for the job. PW1 said he last spoke with the deceased at 9.10 p.m., on the 13th and at that time, he heard chicken sounds in the background. The deceased told him that she was in the chicken pen weighing chicken but that the accused was not cooperating. PW1 advised her to leave the accused alone. Thereafter, PW1 was unable to reach the deceased as her phone was off.

7. PW5, deceased mother had run some errands for the deceased on 13th June 2011. She queued on her behalf at Nairobi Hospital so that she could bring her son for treatment, after seeing a doctor herself. PW5 also banked a cheque for her in the bank. On the same day, the deceased complained to her mother that the accused was disconnecting her calls whenever she called him and it bothered her. PW5 witnessed the deceased call her house maid in order to talk to the accused. She instructed him about taking the whole amount of milk he got from the cows to sell. PW5 also saw the deceased withdraw 30,000/= which she said was to be paid to the accused the following day as he was leaving employment.
8. PW5 stated that she parted with the deceased at 2.30 p.m. and at around 4.50 p.m. the deceased called her to say that the accused and her house maid were shocked to see her home. She also told her that she had gone home with Nyar Kisumu (PW15) to help her with the chicken. PW5 did not hear from the deceased again.
9. PW11 was the deceased house-help. She slept in the main house with PW1, the deceased and their 4 year old son. Her evidence was that on 12th June 2011 the accused called her to open the main gate for the deceased which she did. The deceased went away with her son to take him to hospital as he was not well. She did not return home until the following day. PW11 testified that the deceased called her on the 13th June 2011 and asked her what the accused was doing. PW11 informed the deceased that he was milking the cows. PW11 informed the deceased later that the accused had taken milk to sell but had left 7 litres at home saying the milk was too much. That the deceased informed her that the accused must sell all the milk.
10. PW11 testified that the deceased, who had returned in the afternoon of 13th June 2011, left the house at 7 p.m. saying that she was going to the chicken pen to check whether the people who were to slaughter the chicken that evening had arrived. PW11 did not see the deceased again. At 9 p.m., PW11 opened the door to the main house to find the accused sweating. The accused entered the house and went to the deceased bedroom saying that the deceased had sent him to collect money. The accused returned with deceased purse and left in a hurry.
11. PW11 asked the accused where the deceased was and he told her that if she wanted to see her, she should follow him. PW11 testified that she was afraid to follow the accused and decided to return to the house to wait for the deceased. That before she retired to sleep, PW11 peeped through the window and saw the accused leaving the gate with a suit case. PW11 stated that she asked the accused where the deceased was and he replied that he would call the deceased at the chicken pen and tell her to go back to the house.
12. PW11 said that later she called the deceased and her phone was off. She also called the accused and his phone was off. Before she slept, she heard a knock at the gate and she went to check. There were two people who said they had come to slaughter chicken. PW11 said that she told the men that she had no keys for the gate. PW11 stated she slept with the deceased child that night. At 5 a.m. she called deceased mother to tell her that the deceased had not gone home that night. At 7 a.m. police arrived home and so did PW5 and other relatives. The deceased body was found in a septic tank at 3 p.m. that day.
13. The accused was traced by PW13 and other police officers in Tinet Forest, Kuresoi, at his grandfather's place on 18th June 2011 at 7.30 p.m. PW13 and his colleagues had been trying to get the accused from 16th June 2011.
14. The post mortem on the body of the deceased revealed several laceration wounds on frontal head, base of skull and left cheek; abrasions wounds on the left cheek, inner side of the left eye and left toe. There was also a depression on frontal head to the base of the skull with haemorrhage in the brain. There were also two abrasions on the female organ caused by a forced penetration using either fingers or penis. The cause of death was massive blunt injury to the head.
15. The prosecution produced a statement of inquiry under caution taken by PW6 from the accused on the 24th June 2011. In the statement, the accused explained that deceased employed him in 2008 and never paid him any salary upto 2011. That on June 2011, he told deceased he wanted to go home. That on the day he was ready to go, the deceased told him he would go the next day. That on the next day, the deceased paid him KShs.20,000/= and told him he would get the balance when he returned from home.
16. The accused stated that he went home for one week then he returned. That the deceased mother picked him in Westlands and returned him to deceased home. That the deceased demanded sexual

- relations with him which he declined saying he was sick. He said that he gave in once but had no interest. That when the deceased demanded for more, he refused.
17. The accused stated that the deceased then slapped him and called him useless. She also got a knife. That is when he took an axe and hit the deceased. He said he ran away and on returning later he found her dead. That he decided to hide her body in a hole used as a sewer then he took 1000/= which were the proceeds of the milk sales and ran away to his home. He said he had no intention of killing her. The statement was P.Exh.12.
18. The accused was placed on his defence. He gave an unsworn statement. He called no witnesses. In his defence, the accused narrated the events of the 12th and 13th June 2011. He stated that on the Friday before Sunday 12th, the deceased went to see her mother and did not return until Monday 13th. The accused stated that he was employed in January 2008 as a shamba boy. That on Friday (10th June), he agreed with the deceased that he would go home the following day. The accused narrated that on Sunday the 12th, the deceased called him and told him that he must deliver the 17 liters of milk he had milked that day to the customers. The accused stated that he told the deceased that 17 liters was too much and he would carry it in two batches. He said he held that conversation with the deceased through the telephone of one of their customers. He said on returning to the house he found that the deceased had already called the maid on phone and was quarrelling asking why he had not carried all the milk to sell. He said he took the remaining 7 liters and went and delivered it.
19. The accused stated that on 13th, the deceased called to find out how they were and also to tell him to deliver the milk where they usually took it. The accused said that when he reminded the deceased that he was supposed to go home that day, she did not answer him. He said that the deceased came back at 1.30 p.m. and the maid opened the gate for her because the deceased had taken away the gate keys from him. The accused stated that the deceased did not talk to him but went straight into the house. She later delivered the milk where the accused was supposed to take it and then returned home at 6.30 p.m.
20. The accused said that he saw the deceased next at 7.30 p.m. when she went to the chicken pen and the cowshed. He said that the chicken were supposed to be slaughtered that day. He said that the deceased first asked him why he had not delivered the milk as required for the last two days. She then asked the accused whether the chicken were old enough to be slaughtered. The accused said that they counted the chicken together and then he reminded her that he was supposed to go home that day. The accused stated that the deceased did not answer him but proceeded to the cow shed where she confirmed that the cows were okay.
21. The accused person said that after that, the deceased started approaching him to have sex with her, and that he first declined but she forced him and they ended up agreeing. He said that she took him to his room. Five minutes later, her husband called her and that gave him an opportunity to hide. He said that the deceased came looking for him but he refused to return to his room. That at that point, the deceased started abusing him calling him a useless man after which he came from his hiding and slapped the deceased. That the deceased reacted by going for a knife in the room they used to slaughter the kitchen and that she tried to stab him with it. He said that he pushed her away and then he picked an axe which was on the ground and he hit her with it and then she fell down. He said that he first went back to his room and stayed for five minutes. That on returning, he found that the deceased was not breathing. He then put her in the septic tank. The accused stated that he went away to his grandfather's place and that three days later he was arrested.
22. The accused person was charged with murder contrary to **section 203** of the **Penal Code**. **Section 203** provides as follows:

203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

23. The prosecution has to adduce evidence to establish, first that it was the accused that attacked and inflicted injuries upon the deceased, secondly that the injuries inflicted by the accused was the cause of the deceased death, and thirdly that at the time the accused inflicted the injuries on the deceased, he had formed an intention to cause either death or grievous harm to the deceased.
24. The intention to cause death or grievous harm is malice aforethought. **Section 206** of the **Penal**

Code sets out the circumstances which constitute malice aforethought in the following terms:

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 accused was defended in this case by Mr. Mathenge, advocate. Mr. Mathenge submitted that the prosecution was relying on circumstantial evidence as there was no direct evidence linking the accused to the deceased death. Counsel urged that the defence was not disputing that the deceased died. Mr. Mathenge urged that the accused in his defence had shown that there was an exchange between him and the deceased and that following the same, the accused defended himself. Learned defence counsel urged that the accused in his defence confirmed the statement under inquiry he made. Counsel urged the court to find that the accused defence of provocation and self defence is available to him.

26. Ms. Onunga, learned Prosecution counsel prosecuted the last part of the prosecution case. In her submissions, the learned Prosecution Counsel urged that the prosecution had proved its case beyond any reasonable doubt. Counsel urged that the accused defence that the deceased wanted to have sex with him was an afterthought. Ms. Onunga submitted that PW11 saw the accused fleeing from the deceased home in a state of panic and therefore placed the accused at the scene. Counsel urged that the reason of leaving in that state was because he knew what he had done.

27. In regard to the issue of malice Ms. Onunga submitted that the accused used an axe, which is a heavy weapon that could cause a heavy injury if used on a person, and that taken together with the manner in which the injuries were inflicted shows that the accused had malice. Ms. Onunga urged that the behavior of the accused before the incident shows he was a very bitter person. Counsel urged that PW11's evidence was that the accused behavior had changed and he could no longer take instructions from the deceased as he was full of bitterness and hatred towards the deceased.

28. Ms. Onunga urged that the accused murdered the deceased who was 7 months pregnant and then entered her room and stole her handbag and disappeared with it. Counsel urged the court to find the accused guilty as charged.

29. I have carefully considered the evidence adduced in this case by both the prosecution and the defence. I have also considered the submissions by both counsels.

30. There is no dispute in regard to whether the deceased died and how she died. The accused has admitted in his defence and also in his statement under inquiry to PW6 that he hit the deceased on the head with an axe as a result of which she fell down and died. The cause of death and the person who caused it is not in dispute.

31. The issues in this case are:

a). First, whether the prosecution has proved malice aforethought?

b). Secondly, whether is the accused defence of provocation and self defence are available to him?

32. I will consider both issues together.

33. The accused has stated that the deceased had forced him to have sex with her on the material

evening and that he did it once. Then when she insisted on him doing it again, and when he declined and she abused him calling him useless, he slapped her. That on slapping, the deceased got a knife and tried to stab him with it and that was when he took an axe and hit her with it. He then hid her body in a sewer and ran away out of shock.

34. The circumstances surrounding the incident according to the accused are clear from his defence and statement under inquiry. There is no other evidence of how the incident occurred or what led to it. However, the prosecution case has a lot of information which, when analyzed and evaluated together with the defence and accused statement under inquiry, can create a clear picture to help determine whether the defences raised by the accused are applicable to the case.

35. The law on self defence is clear. In an English decision, the correct test for determining whether the choice of the use of force applied was reasonable or not was set. This is in the case of **R. v Nimrod Owino [1996] 2 Cr. App. R. 128** where the court held dismissing the appeal held:

“The test of the appropriate degree of force a person was entitled to use in self-defence was not any degree of force which he believed was reasonable, however well-founded the belief. A jury must decide whether a defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or threatened attack. A defendant must be judged in accordance with his honest belief, even though that belief may be mistaken. But the jury has then to decide whether the force used was reasonable in the circumstances as he believed them to be.”

36. In the case of **REPUBLIC v GACHANJA [2001] KLR 428** a definition of provocation was given as follows:

“Provocation includes any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

37. In the case of **AHMED MOHAMMED OMAR & OTHERS VERSUS REPUBLIC C.A. No. 414 of 2012**, the Court of Appeal emphasized that the proper test to apply where self defence is claimed is a subjective one not an objective test. The court cited from an English case **DPP v MORGAN [1975] 2 ALL ER 347** thus:

“If the appellant might have been laboring under a mistake as to the facts, he was to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness of the appellant’s belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”

38. The accused in both his statement under inquiry, hereinafter his statement and his defence raises the defence of provocation and self-defence. The accused stated that the deceased went to his room where he slept and demanded for sex from him.

39. He said he reluctantly agreed. However, when the deceased demanded for more, he declined and that was when the deceased abused him, calling him useless, whereupon he stabbed her. The deceased stated that the deceased armed herself with a knife with which she attempted to stab him. That is when he took an axe and hit her with it.

40. I have considered the forced sex theory of the accused. The prosecution adduced evidence to show that the deceased invited three people to her home that day to help her with the slaughtering of chicken that night.

41. PW15 testified that the deceased called her at 2.30 p.m. to her gate. She asked her to go and help per sort the chicken to be slaughtered that afternoon. PW15 stated that she went there that afternoon and sorted the chicken upto 6 p.m. when she left.

42. The other person called to help to do the actual slaughtering was PW3. PW3 testified that the

- deceased called him twice that day to remind him that he was to slaughter chicken at her place from 10 p.m. that day. The last call that the deceased made to him was at 8.30 p.m.
43. The other evidence the prosecution adduced was that the deceased was 7 ½ months pregnant. Indeed, Dr. Njeru who performed the post mortem even included photographs of the dead fetus in his report, P.Exh. 11.
 44. The other evidence was the same postmortem in the doctor's finding that there were abrasions on both sides of the vulva which the doctor concluded were forced penetration either by fingers or penis.
 45. The other findings also by the doctor were scratch marks on the left side of the neck and the back and below the umbilicus.
 46. I find that the deceased was very advanced in her pregnancy and I doubt that at 7 ½ months she could have had pleasure engaging in illicit sex.
 47. Furthermore she had several scratch marks on her neck, back and umbilicus and abrasions on her vulva all indicative of force having been applied on her and most likely in an attempt to rape her. The doctor even found the defence marks on both hands meaning she was trying to defend herself from an attack.
 48. I doubt that the deceased could have planned to solicit for sex from the accused after inviting people to go to her home at around the same time. There was the additional evidence from PW1, the deceased husband that he spoke with her at around 9 p.m. at which time she was complaining that the accused had become very disobedient and difficult.
 49. From the evidence of two neighbours who were working 50 meters from the deceased home, PW4 and 6 were outside a construction site making dinner when they heard screams of a woman twice. It is clear that they heard the screams of the deceased, and further, the screams were soon after the deceased spoke with her husband.
 50. Earlier that day (13th), the deceased had complained to her mother, PW5 and her aunty PW7 both who knew the accused that he had changed and become very spiteful of her, disconnecting her calls and refusing to do his work, including leaving milk to go bad instead of delivering it to customers. All this evidence, in my view, is proof beyond any reasonable doubt that the deceased was in no position to solicit for sex from the deceased on the night in question.
 51. The final evidence which throws out the accused sex theory was the finding of the Government Chemist; PW10 that the vaginal swab sent for analysis was negative of any presence of spermatozoa. That, according to the doctor and PW10, ruled out any possibility that the accused and the deceased had had sex that evening as the accused alleged.
 52. In regard to the self-defence theory, in addition to the scratch marks and defence injuries noted herein above, I noted that no knife was recovered at the scene of incident. On the other hand, the axe the accused used to hit the deceased, and with which he caused the fatal injuries was recovered at the scene.
 53. The axe was sent to the Government Chemist. PW10 testified that the axe tested positive for deceased blood.
 54. I considered that the deceased was 7 ½ months pregnant. She was physically inflexible and must have been having a protruding stomach. I do not see how a person of such a size, shape and inflexibility could have caused any threat to the deceased. The accused defence of defending himself was not only unreasonable in the circumstances but exaggerated. If accused says deceased went against him with a knife, in her state, the use of an axe was wholly an excessive and unreasonable force. Even if the deceased had a knife, which I found is untrue, the use of an axe was unreasonable and excessive.
 55. The nature of the injury caused on the deceased was a depressed skull on the frontal part of the head which affected the skull from the front to the base of the skull. It also caused massive haemorrhage in the brain and massive swelling. That was a tremendously heavy blow and I find that it was intended to cause death or grievous harm to the deceased.
 56. The same post mortem doctor, PW14, also examined the accused on same day of postmortem. The only injury he found on the accused was a scratch on the left face below the left eye which was 10 days old, commensurate to the date of incident. That is clearly indicative that the accused was not under any threat from the deceased and comparatively he caused very severe injuries on the deceased.
 57. I find that the deceased was in no ability to force the accused to have sex with her. I find he had

- no sex with her that day as he alleged. I find that from the facts and circumstances of this case the accused attacked the deceased that day, caused her severe injuries, lacerations and abrasions all over her body, including her private parts, before the fatal injury he inflicted on her with the axe. I am satisfied that the deceased did not attack the accused. I find that there was no provocation and no self defence and therefore the same are not available to the accused.
58. The accused conduct after the incident, of running away to Tinet Forest to live with his grandfather is conduct of a man with a guilty mind. He was definitely hiding and was only caught after a police manhunt carried out over a period of five days.
59. CIP Agutu, PW16 who took the charge and caution statement from the accused person stated that in his view, the accused had motive to commit the offence given the fact that he complained of poor pay, delay in being released to go on leave and the lack of care when he was unwell.
60. Even though this was not raised in defence, I considered whether the accused may have suffered momentary insanity. Could the accused have been suffering from momentary insanity as envisaged under **section 12** of the **Penal Code**?
61. The accused in his statement and his defence in court complained that the deceased did not care about his health because when he fell ill, she did not allow him to see a doctor immediately. The accused also complained that deceased did not use to pay him his salary but kept it for many months. I believe the accused that his salary may have been withheld for sometime given the evidence of PW5 that the deceased withdrew 30,000/= saying she owed the accused money. I also think that the accused may have been overworked as he took care of cows and chicken alone and was expected to milk the cows, deliver the milk and also keep the compound clean.
62. Can that be an excuse to cause someone's death? Definitely not. Could it have caused temporary insanity or affect accused mind as to cause him to lose his mind? The accused did not claim so in his defence. Furthermore an accused person is presumed to be sane unless it is proved otherwise. I see no evidence from the record of this case to even suggest that the accused may have been suffering from a disease of the mind.
63. Regarding malice aforethought, the evidence adduced by the prosecution shows that the accused threw the body of the deceased in a sewer, then stole her money before running away to Tinet Forest. PW11, the house maid to the deceased, saw the accused sweating and in a hurry. However, he was not appearing confused or shocked or remorseful. In fact, PW11 did not even suspect that anything bad could have happened to her employer until next day when her body was found.
64. I find that the accused had premeditated his actions. His actions of being rude, disobedient and spiteful to extent of not performing his duties, disobeying deceased orders and the spite of disconnecting her when she called him were all evidence of deep hatred, spite and malice. I am satisfied the prosecution proved that the accused had malice aforethought at the time he inflicted the injuries he did on the deceased.
65. There was another person who was investigated for possibly having been behind the deceased death. That was PW12, an immediate neighbor of the deceased. It was the evidence of PW12 that there was a complaint filed against him by the deceased in 2009 in regard to damage of deceased perimeter wall. PW12 testified that they resolved the dispute in 2009 before a police officer. I accepted the evidence of PW12 and from the evidence on record; I do not see how PW12 could have been involved in the deceased death.
66. I now turn to the issue of accused age. We have two Age Assessments. One by Dr. Maundu who examined the accused and filled a P3 Form P.exh. 7. He assessed accused to be 17 years old on 1st July 2011.
67. There was an order for Age Assessment by the plea court on 4th July 2011. The accused was taken to a Dental Specialist who examined him at Mbagathi District Hospital on 8th July 2011. The results of the exam are on face of the letter requesting age assessment. In the report signed by Dr. Kamundia, Dental Specialist the accused was assessed to be over 18 years of age. The court required to know method used to assess the age and to that the same doctor wrote:

“Method used

Intra oral examination.

All the 8ls fully erupted”

68. At the time the court ordered for the second Age Assessment, the prosecution submitted that the accused was over 18 years as he had an identity card. The defence did not oppose that fact which means that the same was admitted. Given the comprehensive examination to assess age by the Dental Specialist, and the fact that the accused had an identity card, I have no doubt that at the time the accused committed this offence, he was over 18 years of age.
69. **Having carefully considered the entire evidence adduced by the prosecution and the defence in this case, I am satisfied beyond any reasonable doubt that the prosecution has proved the charge of murder contrary to section 203 of the Penal Code against the accused. Under section 322 of the Criminal Procedure Code, I find the accused guilty of murder as charged and convict him accordingly.**

DATED AT NAIROBI THIS 12TH DAY OF NOVEMBER, 2015.

LESIT, J.

JUDGE