



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 97 OF 2003

REPUBLIC::: PROSECUTOR

VERSUS

JOSEPH KIPATNUI CHEPKU::::::::::::::::::::::::::::: 1ST ACCUSED

ISAAC KIMELI ERIC::::::::::::::::::::::::::::: 2ND ACCUSED

RULING

The two accused persons, **JOSEPH KIPTANUI CHEPKURUI** and **ISAAC KIMELI ERIC** were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence, as set out on the Information, were that the 2 accused persons jointly murdered **MARY JERONO MULWO** on the nights of 17th-18th days of October, 2003, at the Korongoi Village, Kapngetuny Location in Uasin Gishu District.

The prosecution closed its case after calling four (4) witnesses.

PW1, GILBERT KIPCHIRCHIR KOSGEI, testified that he was a neighbour to the deceased, **MARY JERONO MULWO**.

PW1 was at home on 17th October, 2003 where he prepared some changaa for sale. He did so at 1:00p.m.

PW2, SHARON CHEMUAI, is the wife of PW1. She confirmed having assisted her husband to prepare the changaa.

PW1 and PW2 sold the changaa to a number of customers, including the deceased, the 2 accused persons and **Andrew Mulwo, Jeremiah Kibos, Lawrence Mulwo** and **Selina Mulwo**.

According to PW1, the deceased first drunk changaa worth Kshs. 10/-. She left after 30 minutes.

Later, at about 4:00p.m the deceased returned with her brother-in-law Lawrence Mulwo. The deceased purchased changaa worth Kshs. 60/-.

According to PW1, the customers left one by one, leaving behind the deceased and the accused, at about 6:00p.m.

But they returned to the home of PW1. At 8:00p.m, the 1st accused purchased more changaa valued at Kshs. 60/-.

Eventually, when the 2 accused persons left, the 2nd accused escorted the deceased and the 1st accused. That was because it was dark, and the 2nd accused refused to give his torch to the 1st accused or to the deceased.

After the accused persons and the deceased went away, PW1 retired to sleep. He was with his wife, Sharon (PW2).

On the next day, at about 3p.m. PW1 learnt that the body of the deceased had been found near the road. He went to the scene and viewed the body, which had nail marks on the neck.

During cross-examination, PW1 said that he could get drunk on 1½ glasses of changaa.

As for the deceased, PW1 said that on the material day, she may have taken 2 glasses of changaa.

PW1 had no idea about what happened after the deceased had left his home, in the company of the 2 accused persons. But PW1 had not witnessed any quarrel between them.

After the body of the deceased was recovered, PW1 was one of the people who were arrested. He stayed in custody for one-and-a-half weeks. However, he insisted that he was only arrested in connection with the making of changaa.

PW1 also told the court that a person name Charles, who was allegedly a friend of the deceased, was also arrested.

PW2 corroborated the evidence of PW1. She said that the deceased left the place where they were drinking changaa, on the night of 17th October, 2003.

Although PW2 was unable to tell how much changaa the deceased had consumed, she testified that the deceased and the 1st accused did not appear drunk when they left the home where PW1 and PW2 sold changaa to them.

PW3, MILKA KIPLAGAT, is the Chief of Kapng'euny Location.

Her testimony was that when she left church, on 17th October, 2003, a man named **Patrick Kimutai**, told him that the body of the deceased had been found at the boundary of the land belonging to **Mzee Mulwo** and **Mzee Lelei Too**.

PW3 visited the scene where the body was found.

Later, the body was removed by the police. They then continued conducting their investigations. However, PW3 never got to know how the accused persons were involved in the murder. As far as he was concerned, the 2 accused persons were merely suspects.

PW4, STEPHEN KOECH KIPLAGAT, is the father of the deceased. It is he who identified the body of his daughter, for the purposes of the post-mortem which was conducted at the Moi Teaching and Referral Hospital, Eldoret.

After PW4 testified, the prosecution closed its case. In effect, the prosecution did not produce the post-mortem report nor did the doctor who conducted the said post-mortem testify. As a result, there is no proof, before the court, of the cause of death.

Secondly, the circumstantial evidence produced does not point exclusively to the accused persons, as those who caused the death of the deceased, **MARY JERONO MULWO**.

The 1st accused was escorting the deceased home, after they had been drinking changaa. The 2nd accused, who had joined those 2 much later, went along with them, as he provided lighting from his torch.

It is not known when or where the 2 accused persons parted ways with each other or with the deceased.

It is possible that the 2 accused or either of them never parted ways with the deceased. But the converse is equally possible: that either of the accused or both of them parted ways with the deceased before she met her unfortunate demise.

The accused persons were suspects because they were seen leaving from the home of Gilbert and Sharon together. That fact alone cannot form the basis for any conviction.

Therefore, I have come to the conclusion that the prosecution failed to put forward sufficient evidence to warrant the accused persons being put to their defence. I so hold because if the accused persons made a choice to remain silent, in the face of the evidence already adduced, the court could not convict them. Therefore, they cannot be called upon to either offer an explanation or to give an answer to something which does not, even on a prima facie basis, lead to the conclusion that they were involved in the acts or omissions which led to the death of the victim.

Accordingly, the accused persons have nothing to answer to. The charge against them is dismissed; and both accused persons are duly acquitted. I direct that they both be set at liberty forthwith unless they are, or either of them is otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET

THIS 30TH DAY OF APRIL, 2014

FRED A. OCHIENG

JUDGE