

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 16 OF 2007

REPUBLIC PROSECUTOR

V E R S U S

KENNEDY KAIGA LUKA ACCUSED

R U L I N G

The accused is 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 the accused *on the night between 2nd and 3rd of March 2007 at Ideleri village, Ideleri sub-location in Vihiga District within Western Province murdered RONICA KABWAI LUKA.*

The prosecution called nine witnesses. The evidence of **PW1 SALEH ENDERE** is that on the 3.3.2007 he saw the deceased cows in her house at about midday. He decided to go and check and found her door closed. He pushed inside and saw the deceased lying on her bed covered with a blanket. He saw a lot of blood on the floor. He informed the village elder and people went to the scene. **PW2 MUSA KHANYENDA HAMISI** testified that the deceased was his step mother. On the 7.3.2007 he identified the body for post mortem. On the 28.2.2007 he had the accused assaulting the deceased. He went there and the deceased entered into her house. PW2 saw the deceased on the 2.3.2007 and she asked for maize meal. The accused and the deceased were leaving on the same compound. He later heard that the deceased had died on the 3.3.2007.

PW3 NEBERT ANYIENA KAHIGA testified that on the 7.3.2007 he identified the body to the doctor at Mbale district hospital for post mortem purposes. **SHADRACK ONGAYI** testified as PW4. He is the assistant chief of Ideleli sub-location. On the 3.3.2007 he heard people saying that a woman had died in her house. He went to the scene and found the deceased who was bleeding from the mouth and nose. While at the scene the accused went there and he was arrested. PW4 had been informed that it was the accused who had assaulted the deceased. **PW5 FEVAH YEDA** testified that on the 1.3.2007 the deceased informed her that she had been assaulted by her young son because she had passed through his shamba. She asked for some maize flour, vegetables and cooking oil. PW5 gave her. The deceased then left. On the 3.3.2007 she heard that the deceased had died.

CAROLINE MONDANI was **PW6**. She is the deceased's daughter. On the 1.3.2007 the deceased sent a boda boda cyclist to call her. She went home and the deceased told her that she had been assaulted by the accused on the 28.2.2007. The accused is her step brother. The deceased had injuries on her back but could walk. PW6 saw the accused at home as he lives in the same compound. PW6 later returned to her place and was informed that her mother had died. The deceased and the accused used to quarrel over farm items. **PW7 DR. NG'ENO GEOFFREY** produced the post mortem report on behalf of Dr. Oyoko. The post mortem was conducted on the 7.3.2007. The deceased had bruises on the neck and was bleeding on the mouth and ears. She had a fracture on the cervical spine. The doctor opined that the cause of death was cardio pulmonary arrest due to injuries and trauma.

PW9 PC PHILIP CHIVOLI was based at the Vihiga police station. On the 3.3.2007 a report was made by the area assistant chief. He went to the scene with other officers and took the body. The accused was living with the deceased in the same compound. The deceased used to live in her house alone and used to keep cows. The accused was arrested and charged with the offence.

The main issue is whether the prosecution has established a prima facie case to warrant placing the

accused on his defence. The evidence on record shows that no one saw the accused killing the deceased. It is established that the accused assaulted the deceased on the 28.2.2007. It is not clear whether the deceased died of those injuries. No report was made to the police or village elder about the assault. The deceased was seen walking around after 28.2.2007. It is the evidence of PW5 that the deceased went to her home on the 1.3.2007 at about 3.00 p.m. Her home is about 2 kilometers from the deceased's home. PW6 saw her mother on the 1.3.2007. The evidence against the accused is purely circumstantial. It is the prosecution case that the accused and the deceased used to live in the same compound and the accused assaulted the deceased causing fatal injuries. The postmortem report shows that the deceased had a fractured cervical spine. That would mean that the deceased could not have walked after the injury was inflicted. It is clear to me that the deceased was assaulted and suffered subsequent injuries other than those alleged to have been inflicted by the accused on the 28.2.2007. According to the post mortem the deceased was bleeding from the mouth and ears. No one saw the accused assaulting the deceased subsequently. Given the evidence on record I do find that it will not be possible to convict the accused on the evidence adduced should the accused decide to keep quiet. Putting him on his defence would simply call for him to explain his part of the story and may not add up to the prosecution case. The prosecution evidence has to stand on its own and I do find that it is not sufficient to lead to a conviction.

In the end, I do find that the prosecution has not established a prima facie case capable of putting the accused on his defence. The accused is hereby acquitted of the charge of murder under section 306 of the Criminal Procedure Code. The accused shall be at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 19th day of June 2014

SAID J. CHITEMBWE

J U D G E