



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. 28 OF 2011

REPUBLIC PROSECUTOR

V E R S U S

SUSAN KHAMATE KAVAI 1ST ACCUSED

CICILY MWENDE NJIRU 2ND ACCUSED

LILIAN KHAUSI 3RD ACCUSED

J U D G M E N T

The three accused persons are 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 8.5.2011 at Buyenga village, Ilesi location, Shinyalu division, Kakamega East district within Western Province jointly murdered PETER KUVAI MUNALI*.

PW1 ADLAIDE NOAH MWIMALI testified that on the 8.5.2011 she heard noise from her brother in law's house at about 6.30 p.m. She went there and saw the accused beating their father. The accused were shouting "*leo utaona*" – you will see today. The deceased told PW1 that she should help him as the children would kill him. It is her evidence that it was a Sunday and the accused had rungu which they were using to beat the deceased. The accused were complaining that the deceased used to sell their items and had sold their banana. The deceased had his clothes on. The 3rd accused had a big rungu and she struggled with her to take the rungu. The other two accused had sticks. The 2nd accused had a wound on her head and she was bleeding. The accused claimed that it was the deceased who had assaulted the 2nd accused. She did not see the deceased attacking any of the accused. She took the deceased to his room and he told her to close his door so that the children could not beat him again. The deceased had taken alcohol. She confirmed that it was true that the deceased had sold a banana as she saw the plant from which it had been cut.

PW2 NOAH IMBUKA KABUYEFU is a younger brother to the deceased and a husband to PW1. On the material day they reached home at about 7.00 p.m. and PW1 informed him that the deceased was assaulted by his children. The 1st and 3rd accused are the deceased's daughters while the 2nd accused is married to the deceased's son. They went to the deceased's home with his other brother called Samuel who informed him that the deceased was in bad shape. On reaching the deceased's house they found that he had already died. They reported the matter to the police and the accused were arrested.

PW3 PC SAMSON BOR was based at the Kakamega police station. The report was made to the

Officer Commanding the Station and he was instructed to visit the scene. He went to the deceased's house and saw the body in the sitting room. They found two ladies who had been arrested by members of the public and were told they were children of the deceased. The deceased had injuries on the ribs and buttocks. It was the 1st and 2nd accused who had been arrested by members of the public and they re-arrested them. The 3rd accused was arrested the following day at Mukhonje. Investigations were done and the accused were charged with the offence. **PW4 DR. DICKSON MCHANA** produced the post mortem report done by Dr. Michael Oduor at the Kakamega Provincial General Hospital on the 11.5.2011. PW2 identified the body for post mortem purposes. The deceased had swelling of the groin, bruises on the front upper chest, lacerations on the right leg and fractures of the 3rd and 4th right ribs with bleeding into the chest. The doctor opined that the cause of death was bleeding into the chest due to blunt chest trauma.

The accused were put on their defence. The 1st accused **SUSAN KHAMETA KUBAI** in her sworn evidence testified that she is 28 years old and married with one child. The deceased was her father. The 2nd accused is her sister in-law while the 3rd accused is her elder sister. Their mother is deceased. On the 8.5.2011 she left home with the 2nd accused's child aged 2 years old and went to Khayega. She returned at about 3.00 p.m. and on the way she heard that her father had fought with the 2nd accused. She went home and found the 2nd accused fighting with the deceased. Both were armed with stones. The 2nd accused was bleeding on the head. She tried to intervene but her father started fighting her. She got a stick and hit her father so that they could separate. She hit her father twice on the legs. Her father told her that he heard her request to stop fighting and he sat down. PW1 came and took the deceased. The deceased was drunk at that time. The 2nd accused's T-shirt was soaked in blood. The 3rd accused was not present. She testified that it is true that she hit her father out of anger as to her it was shameful according to her customs for a father to fight a daughter in-law.

The 2nd accused **CICILIA MWENDE NJERU** gave sworn evidence. She is 22 years old and has one child who is now 5 years old. She was a housewife and her husband works in Nairobi. The deceased was her father in-law. On 8.5.2011 which was a Sunday at about 3.00 p.m. she went to the kitchen and started cooking. The deceased came home shouting while drunk. He held her and told her that he wanted to sleep with her. The deceased tried to remove his clothes and she screamed. There were stones and she hit the deceased on the head. The deceased also hit her with a stone on the head. The 1st accused who had gone out with the 2nd accused's child came to the house and found them fighting. The 1st accused hit the deceased with a stick. The fight ended and PW1 took the deceased. She went to her house and at about 8.00 p.m. the deceased's brother called her. She found that the deceased had died. It was not her intention to kill the deceased. She had no rungu but just used the stones. The 3rd accused was taking a bath. She finished and put on her clothes and then left.

The 3rd accused **LILIAN KHAUSI** in her sworn testimony stated that she is 30 years old, married with two children. On the 8.5.2011 she had gone to her father's home and was in the bathroom when she heard screams. She finished bathing and went to the house and found the 2nd accused quarreling with the deceased. She put on her clothes and left for Ilesi where she is married. She did not witness the fight. She denied that she assaulted her father. The deceased was always noisy.

From the evidence on record it is established that the deceased died of injuries that inflicted during a fight with his children. The main issue for determination is whether the accused persons murdered the deceased. The only eye witness was PW1 and the incident occurred at about 6.30 p.m. according to her. PW1 knew all the accused persons. It is her evidence that she saw all the accused assaulting the deceased using rungu. It is her further evidence that the accused were complaining that the deceased had sold their items. The deceased was not assaulting the accused. DW1 admits that she hit the deceased with a stick but it was not her intention to kill her father. The 2nd accused testified that the deceased tried to have sex with her and was removing his clothes when she hit him with a stone. The deceased also hit her with a stone. Both the 1st and 2nd accused maintains that the 3rd accused was not there. According to PW1 it was the 1st accused who had a big rungu and she decided to struggle with her as the others had

small rungu.

Given the evidence on record I do find that it is the accused persons who assaulted the deceased. Although the 2nd accused sustained injuries during the struggle, I do find that she also participated in assaulting the deceased. I do find the evidence of PW1 to be reliable. There was no mentioning of the allegation that the deceased had tried to have sex with the 2nd accused when PW1 was there. According to PW1 she saw the 2nd accused bleeding from the head and the accused told her that it was the deceased who had assaulted her. The circumstances of the case do not point to a situation whereby the accused can claim to have been defending themselves. The deceased was drunk at the time and it is the evidence of PW1 that he had all his clothes on and was not responding to the assaults. I do find that even the 3rd accused participated in the beating and later decided to go to her matrimonial home.

The next issue is whether the accused had the malice aforethought to commit the offence. The defence evidence is to the effect that it was the deceased who started the whole situation. The 1st accused's evidence is that she came home and found the deceased fighting the 2nd accused. I do find that evidence to be reliable. There is however, the element of the accused complaining that the deceased had sold their banana and had a habit of selling their items. According to PW1 it was as if the accused wanted to teach their father a lesson so that he could not steal their items again. The 1st accused seemed to have reacted after seeing her father fighting with the 2nd accused. She acted out of anger and I do find that she was provoked into taking that decision. She had no intention to kill her father. The 2nd accused's position is that the deceased removed his clothes and wanted to sleep with her. No one was present that time. PW1 saw the 2nd accused bleeding from the head and it is the evidence of the 2nd accused that it was the deceased who hit her with a stone. From the evidence on record I do find that there was no intention on the part of the 2nd accused to kill the deceased. I will give her the benefit of doubt and conclude that it is possible that while the deceased was drunk he tried to sleep with the 2nd accused. The 2nd accused responded by hitting the deceased with a stone. I do find that the deceased provoked the 2nd accused. With regard to the 3rd accused it is established that she participated in assaulting the deceased. The evidence of the 1st and 2nd accused that the 3rd accused was not there is disproved by the evidence of PW1 who struggled to take away the big rungu from the 3rd accused. I do find that the deceased had stolen the accused's items and they were provoked by that action. There was no intention on the part of all the accused to kill the deceased. Indeed the accused assumed that the deceased had not suffered serious injuries and had gone to sleep. The 3rd accused simply went to her home thinking that all was well.

In the end I do find that the prosecution has not proved its case against all the accused on the offence of murder as charged. However, I do find the accused to be guilty of the lesser offence of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code and are hereby convicted of that offence.

Delivered, dated and signed at Kakamega this 18th day of September 2014

SAID J. CHITEMBWE

J U D G E