



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CRIMINAL CASE NO. 60 OF 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**STEPHEN KIPKEMBOI ROTICH.....ACCUSED**

**JUDGMENT**

The accused person herein was charged with murder contrary to section 203 as read together with section 204 of the Penal Code. The particulars of the offence are that on the 1st day of November 2009 at a village within Nandi North District of Rift Valley Province murdered Mary Chelimo Rotich.

**EVIDENCE**

**PW1, Diana Chemutai** testified that the deceased was her mother and the accused is her father. She stated that on the 1/11/2009 a worker by the name Peter pw2, had wanted some payment in the form of maize after working for the deceased but the accused was opposed to the same and hence he became cruel and threatened to kill the deceased. It was her testimony that the accused also threatened to kill her and her elder brother Lamek. She testified that the accused rushed and picked the axe where peter was standing and suddenly cut the deceased on the neck with the said axe and the deceased fell down. She further testified that the accused also wanted to cut Nancy (pw7) who tried to stop him. She stated that they screamed and people gathered at the scene. The accused was later arrested by the public and PW3 took him to Turbo Police Station.

**PW2, Peter Nandu Kisenge**, testified that on the material date, he was a casual labourer in the said homestead. As he split the firewood with an axe the deceased went to fetch water. He stated that the accused came in and his daughters served him with food. It was his testimony that when the deceased returned from the river, the accused insulted her by calling her a prostitute. The deceased did not respond but accused continued to insult her. A quarrel ensued between the two and as he walked away the deceased called him back and wanted to give him maize for the payment in kind having worked for her. The accused on the other hand did not want the deceased to give him maize. He testified that the accused was not happy with the deceased's decision to give him maize and hence went for the axe that he was using to split firewood and aimed at the deceased. He stated that the accused fell down as he left.

**PW3, Misail Kipkoech**, testified that on the material date he was with one Rono, son of the accused who received a call to the effect that the deceased had been injured by her husband. He later rushed to the scene and found the deceased dead. He stated that when he arrived at the scene he found the accused being mobbed up by the public. It was his testimony that the accused was pushed into his car and took him to Turbo Police Station.

**PW4, John Kirwa**, Chief of Kapremul Location testified that on the material date he was at his home when he received a call at about 5 p.m which informed him that the accused had killed his wife. He later went to the accused's home and found the deceased had been cut on the neck. He stated that the accused had been arrested by the members of the public.

**PW5, Emmanuel Kirwa Rotich**, a Village Elder of Kapremul and brother to the deceased, testified that on 1st November, 2009, at about 5 pm, he was called by the wife of his brother Kemboi who told him that Mary had been killed by her husband. He stated that on going to the scene, he found that the deceased was dead. He testified further that the Chief called the police who took the deceased's body to Moi Teaching and Referral Hospital. He later attended the postmortem at the said hospital.

**PW6, Abraham Kipkemboi**, who was also a brother to the deceased testified that on the material date he was at home when he was informed by his cousin, Emmanuel of the death of the deceased. He was later accompanied by Emmanuel and Rotich and went to the scene. It was his testimony that the body had a cut wound below the ear. He testified further that the accused and the deceased had bad relationship and occasionally Mary, the deceased would run away from her matrimonial home. He stated further that in 2005, the deceased had run away from her home after being badly assaulted by the accused and therefore she was advised to seek refuge at Mombasa where she stayed with her sister.

**PW7, Nancy Cherop Massi**, testified that both the deceased and the accused are her parents. She stated that on the material date, the deceased had engaged pw2 to split firewood. She was with her sister Diana Massi, Berry Chepkorir, Mitchel and the worker, Peter, PW2. It was her testimony that PW2 was splitting firewood with an axe. The deceased had then gone to fetch water as she prepared meals for the accused. He stated further that PW2 wanted to be paid his wages but her mother the deceased did not have money. She thus opted to pay him in kind, that is with dry maize. It was her testimony that the deceased entered the house and fetched the maize and gave it to PW2. As the deceased gave PW2 the maize, the accused rose up and picked up the axe and aimed at the deceased and cut her with it on the neck. The deceased fell down and the accused fled. Before the accused fled, he also aimed the axe at her but she held the axe and the accused fell down.

**PW8 Dr. Macharia Benson** of Moi Teaching & Referral Hospital and pathologist did the postmortem on the deceased at Moi Teaching & Referral Hospital mortuary on 5th November, 2009. He formed an opinion that the deceased died from hypovolaemic shock due to excessive bleeding due to sharp force trauma to the neck.

**PW9, Jeremiah Kipkoech Yego**, Nursing officer at Nandi Hills District Hospital, and previously of Kapsabet Hospital testified that on 5th of November, 2009 she examined the mental status of the accused and found him to be of sound mind.

**PW10, No. 33243 P.C Ronald Mavindu** of Kabyet Police Station and formerly of Kipkaren Police post testified that on the material date at around 17.50 hrs he received a call from Joel Kirwa who reported that the accused Stephen Rotich had cut his wife on the left side of the head. He stated that he was later accompanied by one Mohamed and the driver and they went to the scene where they found the deceased dead and an axe was besides her. He stated that he drew the sketch plan of the scene locating the place where the deceased was lying. On the 2nd November, 2009 in company of the driver, went to Turbo Police station and collected the accused. He was wearing a coat that was blood stained which he kept as an exhibit. He produced as exhibit the axe that was the murder weapon. He said that the motive of the killing was because the deceased had paid PW2 his dues of splitting firewood with maize which the accused was unhappy with. He also stated that the two had a bad relationship.

## **DEFENCE**

The accused person gave a sworn defence that the deceased was his wife. He stated that on the material date he was at home at Kiplumul. He said he had two wives, the other one is called Pauline Chepkemboi Rotich. He stated that on the material date, her second wife had requested for some maize from the deceased's home. He thus requested PW2 to prepare the said dry maize. When the deceased arrived

home she did not want him to take the said maize to the second wife. Instead she wanted him to give the said maize to PW2. It was his evidence that he later noted that PW2 was wearing his clothes and ordered him out of his compound as he had started a love relationship with the deceased. He testified that he accosted PW2 who was splitting firewood with the axe and who wanted to cut him and that as he held the said axe in defence it cut the deceased who was standing behind him.

## **SUBMISSIONS**

On behalf of the accused, learned counsel Mr. Miyienda submitted that the accused does not deny killing the deceased with an axe and therefore agrees that the defence of the accused was in tenuous with the evidence of the prosecution witnesses. This being the case, it follows that the defence does not deny that it is the accused who killed the deceased. For record purposes, it is important to emphasize that PW1, 2 and 7 were present when the accused hacked the deceased to death. Their evidence was corroborated by that of PW8, the doctor who conducted the post mortem on the body of the deceased and concluded that the deceased died of excessive bleeding due to sharp force trauma to the neck.

From the foregoing, the court is only left with one issue for determination – whether the accused possessed malice aforethought when he killed the deceased.

Malice aforethought is defined under Section 206 of the Penal Code in the following words;

*“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. ”***

According to the accused, he became angry when he found PW2 wearing his clothes – a trouser, shirt and sweater which his wife (deceased) said were old. In the spur of the moment he confronted PW2 who in turn threatened to cut him with the axe. He stated that as he pulled the axe away from PW2 it cut the deceased who was standing behind him.

But the account of what transpired on the fateful day as told by the accused is in sharp contrast of what PW1, 2 and 7 saw. When the accused arrived at home he was unarmed. He began to insult the deceased by calling her a prostitute. He then got angry because the deceased used maize to pay PW2 for the work he had done whereas he too needed maize to take to his second wife. He did not take it kindly that the deceased had given the maize to PW2 against his wish. That is when he picked the axe and without iota of provocation by the deceased cut her neck with it. He did not therefore cut the deceased in an unfortunate circumstance of self-defence.

His further assertion that he got angry because PW2 was wearing his clothes and had a love relationship with the deceased is unsubstantiated. It was an afterthought defence which this court finds as lacking in merit.

The definition of what constitutes malice aforethought under paragraphs (a) and (b) of Section 206 of the Penal Code includes an act or omission by the person which he knows would cause either death or

grievous harm. In the present case, when the accused picked up the axe and so strongly struck the deceased, he was seized of the knowledge that an axe would either cause death or grievous harm. Besides, he aimed at the deceased's neck, a vital part of the body against which any serious injuries would cause death. There was also the evidence that both the deceased and the accused had had a bad relationship for a long time – prompting the deceased at one time to flee her matrimonial home to Mombasa. The accused could have then have seized the opportunity of the brief quarrel that had just ensued to get rid of their protracted domestic issues.

Be that as it may, this was clearly not a case of self defence. The accused aimed at the deceased with an axe knowing very well that the same was likely to kill her or cause grievous harm to her. I therefore find that he possessed malice aforethought. I dismiss his defence.

In the result, I find that the prosecution has proved its case beyond all reasonable doubts. The accused is guilty as charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and I convict him accordingly.

**DATED and DELIVERED at ELDORET this 18th day of November, 2014.**

**G. W. NGENYE - MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Miyianda for the Accused

Mr. Mulati for the State