



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL CASE NO. 2 OF 2008**

**REPUBLIC ..... PROSECUTOR**

**V E R S U S**

**SHABAN CHASIA KASSIM ..... ACCUSED**

**J U D G M E N T**

The accused person 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 *on the nights of 18<sup>th</sup>/19<sup>th</sup> of July 2005 at Matidira village, Shirakalu sub-location in South Kakamega district within Western Province, murdered WYCLIFFE MALANG'O.*

Ten witnesses testified for the prosecution. **JACKLINE OMBIMA** was **PW1**. Her evidence is that the accused had been employed by one **PAUL** to take care of his farm. The deceased was also an employee of Paul and they used to live together in one house. PW1 was at her home on 18.7.2005 when the deceased and the accused went there. The deceased informed the accused that their employer had told the accused to go to Maragoli and the accused responded that he would not go. The accused said that he would go and cook his ugali and thereafter go to sleep. The two went back to Paul's home. It was about 3.00 p.m. PW1's home is about 100 meters from Paul's home. On the 19.7.2005 at about 1.00 p.m. PW1 was at home with Peter (PW3) when Peter asked for container to carry water. PW1 had no container and Peter went to Paul's house for a container. Peter came back saying that he had seen a dead person inside Paul's house. Peter went to notify the village elder and the police went to the scene. It is her evidence that it is only the deceased and the accused who used to live in the house. The accused had been employed long before the deceased.

**PW2, PETER ONGALE ASASIRI** testified that he knows the accused as his house is about ½ a kilometer from that of Paul. It is his evidence that the deceased was a new employee of Paul. On 19.7.2005 at about 6.00 a.m. he was in his farm when he saw the accused passing by. The accused did not have any milk with him as would be the normal case. The accused was heading to his employer's home. PW2 did not talk to him. PW2 continued with his work until 12.00 noon when he saw the police going to the scene. PW2 went to the scene and saw the deceased body. The deceased had an injury on the left side of the head and was lying on the floor. According to PW2 things had been disturbed in the room and there were signs of a scuffle. The accused had lived in that home for about 2 months and the deceased had been there for about one week. The accused was wearing a green T shirt with white strips at the neck on that day.

**PW3, PETER ABUKUSU** went to Paul's house on the 19.7.2005 at about 12 noon to borrow a drum as they were helping a church member to put up a wall on his house. He didn't find any body at Paul's house but the door was ajar. He peeped inside and saw the deceased body lying down. He went to inform PW1 and later notified the village elder (PW4). Police went to the scene and removed the body. According to him there were chairs in the house which appeared to have been arranged normally. **PW4 WYCLIFFE NDOMBI KHASATSILI** was the village elder and was notified about the incident by PW3. He knew Paul as he bought the land from PW4's father. He knew that Paul had brought in his father **HERMAN KHALWALE** to take care of the farm. He knew the accused as Paul's employee but he had been sacked. The accused was a new employee. The deceased was staying together with the accused. PW4 informed the assistant chief and the police went to the scene. The deceased had an injury on the left side of the head. Police went to the scene and took the body. The deceased had gone to replace the accused and had just worked for two days.

**ALEX MUTENDE OREMO** was **PW5**. He is the area assistant chief. He was notified about the incident by **PW4** and went to the scene. He found the body lying at the sitting room. The body had an injury on the left side of the head. He notified the police who went to collect the body. The accused was not at home. He later got information from the police that the accused had been arrested. According to him the accused had been relieved of his duties. **PW6 ROSEMARY ALUMALI** was with **PW1** assisting her to build a wall when **PW3** went to borrow a drum at Paul's home. **PW3** returned and informed them that he had seen a dead person in Paul's home.

**PW7** was **HERMAN KHALWALE**. He is Paul's father. He knew the deceased as his son's employee. On the 19.7.2005 at about 3.00 p.m. he had gone to the farm to see the deceased only to find that the deceased had been killed. He saw the deceased had an injury on the side of the head. Police went to the scene and collected the body. **PW7** was present when the postmortem was conducted on 22.7.2005. It is his evidence that the accused used to work for Paul for two months. **PW7** employed the accused on 20.4.2005 but wanted to leave and on 1.7.2005 he went away and **PW7** employed the deceased. It is his further evidence that there was no sign of struggle in the house and no weapon was recovered. **PW9 DR. DICKSON MCHANA** produced the postmortem report prepared by Dr. Musimbi. According to the report the deceased had a deep cut on the head. Depressed fracture of the left temporal bone of the skull. The doctor formed the opinion that the cause of death was head injury due to fracture of the skull.

**PW10** was **CI ALEX OWARE**. He was based at the Kakamega police station at the time. **PW10** got information from **PW5** on the 19.7.2005 and went to the scene. He investigated the case and the accused was not at that place. According to him the accused had been relieved of his duties but was still waiting for his payment before he could leave. The accused was seen with the deceased and they used to live together. **PW10** was transferred and heard that the accused was arrested by the Administration police officers. No weapon was recovered. **PW10** left the station before the accused was arrested.

The accused was put on his defence. In his sworn testimony testified that on the 18.7.2005 he was in Kakamega at Eruko village. He used to work for Paul in the year 2005 but did not kill the deceased. He didn't know the deceased and the deceased was not Paul's employee. According to him he was the only employee of Paul and he worked for two months. He does not know **PW1** and **PW6**.

From the prosecution evidence, it is established that the deceased died on the night of 18<sup>th</sup> and 19<sup>th</sup> July 2005. The deceased's body was discovered by **PW3** when he had gone to borrow a drum. The only issue for determination is whether the accused is the one who killed the deceased. The prosecution evidence is circumstantial. Nobody saw the accused committing the offence. It is the evidence of **PW1** that the deceased and the accused went to her home on the 18.7.2005 at about 3 p.m. She knows the accused and she talked with them. The accused left with the deceased saying that he was going to prepare ugali and thereafter sleep. It is her evidence that it was only the accused and the deceased who used to live in Paul's house. **PW2** saw the accused the following morning at about 6.00 a.m. walking towards Paul's house. It is his evidence that the accused had lived in that house for two months. The deceased used to do most of the work and the accused used to pass by **PW2**'s farm carrying milk. **PW2** was certain that he saw the accused in the morning of 19.7.2005. He described the clothing the accused was wearing as a green T shirt with white strips.

The accused's defence is that he was not at the scene on that date. He was at Kakamega. Counsel for the accused submitted that the accused did not cause the death of the deceased neither did he escape as he was doing his business in Kakamega. Counsel further submitted that the prosecution evidence does not link the accused with the offence and there is no evidence that the accused was in bad terms with the deceased.

According to Herman Khalwale **PW7** the accused worked up to 1.7.2005 and wanted to go to Eldoret. **PW7** paid him. The accused went away and **PW7** employed the deceased. The prosecution evidence shows that, the accused went back to live at Paul's house and was seen by both **PW1** and **PW2** on 18<sup>th</sup> and 19<sup>th</sup> July 2005. Given the evidence on record, I do find that the circumstances under which the deceased met his death point to the accused's guilt. The accused was living in the same house with

the deceased. They were seen together at 3 p.m. PW2 saw the accused early the following morning. The accused was not carrying milk as usual. I do find that the accused had the opportunity to kill the deceased. The post mortem report shows that the deceased had stab wounds on the head. The cause of death was the head injury. The deceased had just stayed in that homestead for about two days and was living with the accused. I do note that the circumstances leading to the accused's arrest were not explained to the court as the investigating officer left the Kakamega police station before the accused was arrested. The court record shows that the accused was arraigned before court on the 9.1.2008. This was a period of almost 3 years. Despite the long period of arrest I do find that the accused is the one who killed the deceased. Although counsel for the accused contends that malice aforethought has not been proved, I do find that the accused was not happy that he had been relieved of his duties and the deceased had taken over his work. According to PW1 the accused was told to go to Maragoli but was not willing to do so.

Although the prosecution evidence is circumstantial, I am certain in mind that it is the accused who committed the offence. The prosecution evidence proves that the accused had the time and opportunity to commit the offence as he was with the deceased. The circumstances under which the deceased met his death cannot be explained in any other manner other than the fact that the accused caused his death. I find the accused is guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and he is hereby convicted of the offence of murder as charged.

*Delivered, dated and signed at Kakamega this 4<sup>th</sup> day of December 2013*

**SAID J. CHITEMBWE**

**J U D G E**