



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU  
CRIMINAL CASE 74 OF 2008

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMUEL KIPNGETICH CHEPKWONY.....ACCUSED**

**JUDGMENT**

Samuel Kipngetich Chepkwony (*alias Samuel Kipchumba per PW1*), is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, (*Cap. 63, Laws of Kenya*).

The prosecution claimed that the accused on the 11<sup>th</sup> day of June 2008 at Ndonga Farm in Nakuru North District of the Rift Valley Province murdered SUSAN MUKINA.

The essential elements of the offence of murder is malice aforethought (*Section 203*), which is established if any of the circumstances set out in Section 206 of the Penal Code are present. These circumstances are four in number, and in this case, the fourth element, aiding a person who has committed or suspected to have committed a felony escape from lawful custody is absent. The three other elements applicable would either be -

- (1) 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; or
- (2) 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; or
- (3) intent to commit a felony.

The question or issue is whether the prosecution through the evidence of eight witnesses established any of the circumstances of malice aforethought.

In his submissions, Mr. Ombati learned counsel for the accused stated that no such case had been established by the prosecution's evidence against the accused. According to counsel, the only evidence connecting the accused with the killing of the deceased is that of PW1, that the accused hit the deceased. Counsel however observed that PW1 never sought any help particularly as the distance where they were drinking and where the body was found was a few metres away. In addition PW1 went direct to the home of the deceased about 3kms away and informed PW3 that the accused had attacked him and the

deceased. Counsel concluded that the evidence of a single witness may be credible, the evidence of PW1 was suspicious and not credible.

There was no evidence that PW1 and the deceased were boy and girl-friend and PW1 was last seen with the deceased. In the absence of any evidence connecting the deceased with the death of the deceased, the court should find the accused not guilty and acquit him of the offence of murder.

On her part Ms Idagwa learned State Counsel submitted that the State relied on the evidence on record.

### **ANALYSIS OF THE EVIDENCE**

According to the evidence of PW8, Dr. Frederick Kariuki who carried out a post-mortem of the body of the deceased, he found that the deceased had suffered a depressed skull fracture on the right temporal area and associated intracranial haemorrhage, and concluded that the cause of death was cardiopulmonary arrest due to severe head injury. The kind of injury suffered by the deceased is usually caused by blunt trauma applied with force.

The most telling evidence of this case is that of PW5 and PW6 both Police Officers and their evidence arises from their investigations as neither of them saw the accused apply any blunt trauma upon the head or body of the deceased.

PW5 accompanied PW6 who was the investigating officer to the scene of the crime where the body of the deceased was found at Ndanga Farm. PW5 testified that he and PW6 found the accused confined on the ground under a citizen's arrest, beaten and bruised on suspicion that he had killed the deceased.

Nearby he and PW6 found and recovered underpants, a slipper (*sandal*) and scarf near the body. He found the deceased had a deep cut on the forehead near the left ear. He took the suspect to Nyahururu District Hospital for treatment while the body of the deceased was removed to the same hospital mortuary.

PW5 also drew a sketch of the scene in relation to the salon where changaa was consumed by the deceased, the accused, and PW1. The sketch showed that the body was found about 100 metres away from the changaa salon and near bushes of tea trees, while the Police Station was 25km away from the scene.

PW6 who was the lead investigating officer established inter alia that the accused had earlier in the day sought from PW7, the whereabouts of the deceased, and had gone away after taking one glass of changaa and met both PW1 and the deceased who came in and had drinks for about 30 minutes and went away. The time was about 7.00 p.m. according to the evidence of PW2, when the deceased and PW1 left together to PW2 house.

PW6 also established that the accused and the deceased used to farm in Narok, and that the accused lived in a nearby farm called Ogilgia. The accused and the deceased therefore know each other, and explains the evidence of PW7 that the accused had earlier sought for and missed the deceased. This is despite the evidence of PW7 that so far as she was aware the deceased had a relationship with PW1 and not the accused. If the accused had had no relationship with the deceased why would he seek for her earlier in the day? The inevitable inference from that search is that the accused was obviously not amused to find a lady whom he regarded as his friend in the company of another man. So far as the accused was concerned the deceased was his friend, and did not approve of any interference by PW1.

So as soon as he had had his dose of changaa, he went away, and as PW1 and the deceased left the changaa salon, the deceased was so overcome by the drink that she kept falling, while PW1 kept on pulling her up until she was so overcome by the drink that she sought shelter by a neighbour's house. The neighbours however threw the deceased out and as PW1 was trying to pull the deceased up on their 3 km walk to the home of PW2, the accused suddenly appeared and hit PW1 on the arm, and when PW1 tried to assist the deceased further the accused pulled a knife, and at that stage PW1 ran away fearful for

his own life.

PW1 thereafter ran straight to the home of PW3, the brother of the deceased and he informed him of his ordeal in the hands of the accused, and that he had left the deceased with the accused, and that the accused was armed with a knife.

Some two days later on 13/06/2008, following the encounter between PW7, PW1 the deceased and the accused, the deceased's dead body was found some 100 metres away from the changaa salon operated by PW7. According to the evidence of PW6, the scene next to where the body of the deceased was recovered, was disturbed indicating evidence of either some struggle or sexual assault as the deceased's underpants were found near her legs.

The question really becomes who between the accused and PW1 that the last opportunity to commit the offence against the deceased?

There is no direct evidence against the accused. The evidence against the accused is purely circumstantial. It is the evidence of one witness PW1. No specific number of witnesses is required to prove a fact (S. 143 of the Evidence Act, Cap. 80, Laws of Kenya). To convict an accused on the basis of circumstantial evidence, that evidence must meet specific criteria that -

(1) In order to justify an inference of guilt from circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of this inference is always on the prosecution which is required to establish its case beyond reasonable doubt.

(2) it is necessary before drawing the inference of the accused's guilt from circumstantial evidence, to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

See the case of **WAMBUA & 3 OTHERS VS. REPUBLIC [2008] KLR 142.**

The evidence against the accused comes primarily from one witness, PW1. He was in the company of the deceased. They had had their fill of the doses of changaa and were staggering on their home to PW3's house. PW3 was sister to the deceased. The time was between 6.30 - 7.00 p.m. It could not have been dark. So PW1 could see clearly. His companion the deceased was overcome by the drink. She was falling on the way. At one such fall, she admitted that she was too drunk to walk 3 km to her brother's house. She went by a neighbour's house, to seek shelter. She was not welcomed, she was pushed out.

It is unclear from the evidence of PW5 and his sketch which of the three huts was the neighbour's house where the deceased sought shelter. But whichever it was, she was denied access, and she staggered out and fell, and in the companionship of most drunken companions, one tries to encourage the other. PW1 tried to pull the deceased up. He did not succeed for out of the blue, the accused appeared on the scene, he hit PW1 with a rungu, and when PW1 tried to resist, the accused pulled out a knife, and seeing a knife, PW1 took to his heels and made a report to PW3 that he could not be sleeping while his sister was in the hands of the accused who was armed.

In the event neither PW1 nor PW3 took any action that night of 11.06.2008 to look for the deceased. It is on the next day, 12.06.2008, according to the evidence of PW7, Susan Gathumbi Mwololo, the changaa brewer and seller, that children herding goats led by one child - "**Nyambura Karimi**" told her that they found "**auntie sleeping - lying somewhere**".

This "find" was not reported to the Police, some 25 kms away from the scene until the morning of 13.06.2008. PW5 and PW6 testified that they found the accused under citizen's arrest and badly bruised as being the person who killed the deceased. None of those citizens volunteered information as to who saw the accused hit and kill the deceased. Those citizens may have had their reasons for suspecting the accused, but they did not tell the Police, or the Investigating Officer's failed to follow vital leads as to who may have assaulted and then bludgeoned deceased to death.

However, and despite the accused's sworn testimony, and denial that he never met either PW1 and the deceased on the fateful evening of 11.06.2008, there is evidence of PW7 corroborated unwittingly by the accused himself that he too had a glass of changaa at PW7's salon, and paid either shs 20/= and was refunded shs 80/= or shs 30/= and was refunded shs 70/=, and that he thereafter went to his brother-in-law Daniel's home and lay there until 13.06.2008 morning when he says he was attacked by the residents of that area.

Applying the above tests, the inculpatory facts are inconsistent with the accused's innocence, and there are no other co-existing facts which would weaken or destroy the inference of guilt on the part of the accused. He was the last person seen with the deceased. PW1 reported that fact to PW3 the brother of the deceased. The accused himself admitted in his evidence that he knew the deceased. They both used to farm in Narok-"Maasaini" from where he had come with Ksh 4,000/= and only used Kshs 20 or Ksh 30/= for a glass of changaa. He had sought for the deceased earlier in the day, and having failed to see her, he was disappointed to find her, in a drunken stupor with another man. The jealous instinct was to deal with the intruder or competitor, PW1, and having scared him off, with a well-aimed hit on the arm, he was left to deal with the helpless drunken woman.

The inevitable inference is that he dragged her 100 meters away from the changaa salon, sexually assaulted her, and being unhappy with the deceased's liaison with another man, he bludgeoned her to death with heavy blows on the head which caused fracture of the skull, intracranial bleeding and death.

In the circumstances, I find that the prosecution has proved its case beyond reasonable doubt, and I find the accused guilty of the offence of murder contrary to Section 203 of the Penal Code, (*Cap. 63, Laws of Kenya*), and I convict him accordingly in terms of Section 322(2) of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*).

I therefore call upon the counsel for the accused to address me why the accused should not be sentenced to death as prescribed by Section 204 of the Penal Code.

It is ordered, and directed.

**Dated, signed and delivered in Nakuru this 30<sup>th</sup> day of March, 2012**

**M. J. ANYARA EMUKULE**  
**JUDGE**