



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KERICHO**  
**CRIMINAL CASE NO. 13 OF 2009**

REPUBLIC .....PROSECUTOR  
R

VERSUS

HASSAN WAFULA.....1<sup>ST</sup>  
ACCUSED

JAMES NGIRINE.....2<sup>ND</sup>  
ACCUSED

AARON MUTWIWA.....3<sup>RD</sup>  
ACCUSED

ROBERT MUTISO.....4<sup>TH</sup>  
ACCUSED

**JUDGMENT**

Messrs **Hassan Wafula, James Ngirine, Aaron Mutwiwa, and Robert Mutiso**, were jointly charged with murder contrary to **Section 203** as read with **Section 204 of the Penal Code** in March 2009. They all pleaded not guilty to the charge.

The particulars of the charge are that the four accused

***“on 25<sup>th</sup> day of February 2009 at around 6.00am at Mogogosiek Police Post situate in Bureti District of Rift Valley Province jointly murdered JANE CHEPKURUI KETER”.***

The deceased, **JANE CHEPKURUI KETER**, was held at Mogogosiek Police Post at Bureti at the behest of one Helen Chepkemoui Rono (PW2) on the latter’s allegation that the deceased had obtained from her money by false pretences.

The deceased was forced on 24/2/2009 by one Helen Chepkemai Rono (PW 2) to go to Mogogosiek Police Post. PW 2 described herself as a business woman from Konoin. She claimed in her evidence that she had advanced to the deceased on 14/1/2009 a friendly loan of Kshs. 4 000 which the deceased had under-taken to repay on 16/1/2009 but did not. PW 2 told the Court that she had been hoodwinked by the deceased to lend her the money when the deceased purported that she was expecting a cheque of Kshs. 470 000 from her SACCO being proceeds of a cheque she had deposited there. This, according to PW 2, turned out not to be true whereupon PW 2 forced the deceased to go to Mogogosiek Police Post on 24/2/2009 where the latter was locked up, notwithstanding that this appeared to be a civil matter.

On the night of 24<sup>th</sup>/25<sup>th</sup> February 2009, the deceased was taken to Mogogosiek dispensary but died there upon arrival. Her body was taken to Kapkatet District Hospital for preservation.

It was **ROSE CHENGENO LANGAT** (PW3) who testified that she was the nurse at Mogogosiek Dispensary and that Accused No.1 and Accused No.2 brought the deceased on 25/2/2009 at 8.00am. She told them the patient was dead after examining the deceased.

Acting Superintendent of Police (PW1) told the Court in evidence that he was the DCIO of Bureti and that on 25/2/2009 at 6.00pm the then OCPD, Charles Munyoti, informed him that the deceased had died at the police post where she was held as a prisoner and that members of the public were threatening to burn down the place. He set out on 26/2/2009 in Company of Sgt. Edward Elima, the Investigating Officer in this case and PW1's deputy, and one Inspector Mathew Bett. They went to Mogogosiek where they found about 6 000 people who had barricaded the place. PW 1 spoke to them and calmed them down. At the time, James Ngirine, the 2<sup>nd</sup> Accused was then the acting officer in charge. PW 1 told the Court that the 2<sup>nd</sup> Accused had been informed by Hassan Wafula, the 1<sup>st</sup> Accused, that the deceased had fallen sick at 3am on the night of 24<sup>th</sup>/25<sup>th</sup> February 2009 and that Sgt. James Ngirine (2<sup>nd</sup> accused) had called PC Robert Mutiso (Accused 4) to take the prisoner to Mogogosiek dispensary which was nearby. It was James Ngirine (Accused 2), said PW 1, who told him that the accused died on arrival at the said dispensary. PW 1 went back to the Police station at Litein and informed the OCPD of his findings and recorded statements under inquiry from each of the 4 accused persons.

The Prosecution called a total of 13 witnesses in support of the charge. When the prosecution closed its case, the four accused were put on their defence. Each one of them gave an unsworn statement. None of them called any witnesses.

Dr. Ben Kiplangat Korir who gave evidence as the 12<sup>th</sup> prosecution witness examined the body of the deceased. In his evidence in-chief, he testified that after examining the body of the deceased, he formed the opinion that the deceased had died due to strangulation which, in his opinion, could not have been self-inflicted. Rape, he said, was also probable. The body of the deceased was identified to him by Inspector Muthoka, who testified as the 11<sup>th</sup> prosecution witness, and Elijah Kimutai Keter and Richard Kipkirui Langat, the deceased's relatives.

Dr. Ben Kiplangat Korir (PW12) opined that the deceased's cause of death was respiratory failure caused by strangulation. He emphasized that after examining the injuries, his opinion was that the deceased died due to respiratory failure. He observed marks on the deceased's neck and that is why, he said, he came to that conclusion. He also observed laceration on the vagina and concluded that perhaps the deceased had been raped. He was quick to add that rape was not the only possible cause of the laceration on the vagina. He produced as Ext No. 8 the Postmortem report on the body of the deceased which was dated 27/2/2009.

The blood samples of each of the accused and the blood sample and vaginal swab of the deceased were examined by the Government Analyst, **STEPHEN MUTINDA**, who gave evidence as PW13. The latter testified that he had worked as a Government Analyst for eleven (11) years and that he held a Bachelor of Science degree in Chemistry from Moi University from where he graduated in 1998. He produced as exhibit No.3 an Exhibit Memo which he had received on 18/3/2009 from PC Lawrence Musembi of CID Bureti relating to the said samples.

PW 13 was required to do blood groupings and ascertain whether the under- pant (biker) marked as item E belonging to the accused and vaginal swab from the deceased (item F) had semen or blood and also do the grouping of the same and ascertain if there was relationship. In his evidence, PW 13 told the Court that his findings were that the blood sample of James Ngirine (accused 2) which was marked as item A and the blood sample of the deceased which was marked as item G belonged to blood group A. PW 13 also found that blood sample of Robert Mutiso and Hassan Wafula, accused Nos. 4 and 1 respectively, belonged to blood group B.

As regards blood samples of Aaron Mutiwa, the 3<sup>rd</sup> Accused, which was marked as item C, PW 13 found that it belonged to blood group AB. The under pant of the deceased had no seminal stains or spermatozoa, and the vaginal swab had no semen or spermatozoa either. These findings were put by PW 13 in a report produced by him as exhibit No. 7.

In cross examination, PW 13 testified that blood group A is not rare or unique. He told the Court that about 26% of any population normally has blood group A. He testified that the underwear of the deceased, which in this case was a biker, had blood stains which he found to be of blood group A. He opined that both James Ngirine, Accused No.2, and the deceased had blood group A and that the blood stains on the biker could have been from the blood of the deceased who wore it. This examination by PW 13 was intended to establish whether or not the deceased had been raped. PW 13 told the Court that his findings could not be conclusive because if a condom was used in rape, no semen traces would be discernible. But no evidence was led regarding use of condom.

It was the evidence of PW12 also that the body of the deceased had marks which could have been caused by a rope or cloth or strangulation. He could not tell the age of the marks. He told the court that he was not under pressure to find that the deceased had been raped or strangled. He conceded in his evidence that the deceased's family doctor was Dr. Sitonik. He told the Court that Dr. Sitonik did not perform the postmortem and that he, PW 12, received Kshs. 6 000 from Elijah Kimutai Keter (PW5) before he did the postmortem. The latter was taken to PW 12 by a police officer, he said in evidence. PW 12 admitted that he was not a pathologist and that a pathologist would have been better qualified or better placed to examine the body of the deceased.

Accused No.1 Hassan Wafula was at the Mogogosiek Police Post when the deceased was taken there by PW2. PW2 left the deceased there and at 6.30pm the same day, in company of one Erick, PW2 found that the deceased had been placed in a cell. PW2 said that she spoke to the deceased who sought forgiveness and promised to pay. PW2 claimed in her evidence that she went away and returned on 25/2/2009. She told the Court that Accused No.2 made her record a statement after which she left to attend a meeting at Mogogosiek SACCO. It is while she was still in the meeting that Accused No. 1 went there and telephoned her on her mobile and told her to meet him at the gate. PW2 obliged. Accused No. 1 asked PW2 to sign the agreement she had recorded earlier. After the SACCO meeting, she was summoned to Mogogosiek Police Post where she went in company of one Cheranguti who was never called as a witness. At the post, Sgt. Elima told her that the deceased had died. She recorded her statement on 26/2/2009 after which she was put in a police cell for 3 days, and later released.

Walubengo Ngome (PW4) had been asked by Sergeant James Ngirine, Accused No. 2, to relieve Accused No.1 at the Mogogosiek Health Centre. He got there between 7.30am and 8.00am. When he got there, he found Accused 1, Accused 2, and Accused 3. He assumed the duty of guarding the deceased who was lying on the floor of the Health Centre in the waiting bay. PW4 tried to talk to the prisoner but to no avail. PW4 asked Accused No.2 to look for transport to take the deceased to hospital. When PW4 asked Hassan (Accused 1) if the deceased had been checked, Hassan answered in the affirmative but did not state who had checked the deceased. When the vehicle sought by Accused No.2 arrived, PW4 left. Inspector Alois Muthoka was in the vehicle when it came.

PW5, Elijah Mutai Kimutai Keter, testified that he was a brother of the late husband of the deceased. He attended the postmortem. He paid to the doctor Kshs. 6,000 for the postmortem exercise. He alluded to the fact that the deceased had financial problems and that that is why she had had to borrow.

David Kipchirchir Langat, PW6, was the Chief of Mogogosiek. He claimed he had advanced the deceased a friendly loan of Kshs. 9 000. He was called by Accused No. 1 to the Mogogosiek Police Post and given blank papers by the 1<sup>st</sup> accused and was asked to sign them in blank, which he did. Accused No.1 told PW5 that he would fill in his (PW5's) statement to the effect that the deceased owed him money. He learnt that the deceased had died when he was in a meeting in the DC's office on 25/2/2009. PW6 came to discover later that Accused No.1 had filled in the blank papers he had signed stating that the deceased owed him Kshs. 2 000.

It was **Kimutai Erick Koech** (PW3) who testified that he was at Mogogosiek on 24/2/2009 and that at 5.30pm PW2 requested him to accompany her to the Police station. He agreed. At Mogogosiek Police Post, PW3 found Accused No.4 whom he identified in Court as the person who guided them to where the deceased was held in the cell. PW8 testified that PW2 spoke to the deceased when PW2 and PW8 stood outside the cell. They then left after PW2 had told the deceased that she would not forgive her.

Sergeant Edward Elima, (PW 10), the Investigating Officer, gave evidence that the 2<sup>nd</sup> Accused told him that the deceased had fallen sick. He found that the deceased was the only female prisoner in her cell. He noted the marks on the neck of the deceased. He recorded the statement of PW2 who told him that she, PW2, had seen the deceased after the deceased had hanged herself in the cell with a tablecloth. But in her evidence in court, PW2 alluded to her having spoken to the deceased as she stood outside the cell and she

said she never saw the body of the deceased dangling from the roof! Nor was the tablecloth which PW2 alleged the deceased used to hang herself part of the evidence. That appeared to be false evidence intended for cover-up. Unfortunately the statement of the witness was never put in as an exhibit. He (PW 10) interrogated in his investigations eight officers four of whom were the accused. He arrived at the conclusion that the deceased had committed suicide and made a recommendation to that effect to the Attorney General. The Attorney General after perusing the evidence did not agree with that conclusion and the accused were charged.

Accused No.1 gave an unsworn statement in which he stated that he took over the report office and sentry duties on 24/2/2009 at 6.00pm. Later, while on duty, he had a bang in the main cells. Later still in the morning of 25<sup>th</sup> February 2009, he heard yet another bang in the *mabati* cells where the deceased was. He went there, he said. He found the deceased. The latter complained of being seriously sick. He informed the 2<sup>nd</sup> Accused who was the acting officer in charge. The 2<sup>nd</sup> Accused came. They took the deceased to Mogogosiek dispensary. Accused No.1 said that the nurse at the dispensary referred the deceased to Kapkatet district hospital. But this was not what the nurse said in her evidence. Rose Chepngeno Langat, PW3, the nurse, told the Court that the deceased had no sign of life and that she was dead.

Accused No.2 testified in his unsworn statement that he went to the report office at 10.30pm on 24/2/2009 and that he found Accused No.1 on duty. He later went to sleep on 25/2/2009 at 5.30am. He testified that Accused No. 1 went to his house and called him telling him that the deceased had fallen sick. He went with Accused No.1 to the cell and found the deceased lying on the floor. Accused No.3 was also there. Accused No.2 testified that he advised Accused Nos.1 and 3 to take the deceased to the nearest health centre. He said he joined them on their way to the dispensary. He stated that he learnt on 26<sup>th</sup> February 2009 that the deceased had died at Kapkatet hospital.

The 3<sup>rd</sup> Accused, told the Court in his unsworn statement that he was at the report office at Mogogosiek Police Post on 24/2/2009 and at 4.00pm he went to his house when Inspector Muthoka came to the report office. When he returned, he found Inspector Muthoka, the 1<sup>st</sup> accused and two ladies. Accused No.1 was instructed by Inspector Muthoka to book the deceased, Jane Keter, and that he, accused 3, placed her in the cell. Accused 3 worked up to 6.00pm when he handed report office duties to the 1<sup>st</sup> accused, he said. He was due back on duty at 6.00am on 25/2/2009. However, the 2<sup>nd</sup> Accused who was his superior called him earlier to assist in taking a sick prisoner to hospital. Accused No.3 was left with the prisoner at the dispensary while Accused 2 and Accused 1 looked for a nurse. He later recorded a statement and was charged.

In his unsworn statement, the 4<sup>th</sup> Accused stated that he was on road traffic duties with the 2<sup>nd</sup> accused and PC Ngirine on 24/2/2009 at 3.30pm and that at 5.00pm the 2<sup>nd</sup> accused instructed him and Inspector Ngirine to return to the Mogogosiek Police Post to collect a torch. He said that they performed their duties up to 10.45pm and passed through the said Police Post. On 25/2/2009, at 6.40am, Accused 4 woke up and at 7.00am went out to buy newspapers. He met Accused No.2 on his way back. He found Accused No.2 communicating with Inspector Muthoka. Later, Accused 2 told him, he said, that he was communicating with Inspector Muthoka about a sick prisoner who had been taken to Mogogosiek Health Centre. Later at 1.00am, Inspector Muthoka arrived from Litein with his party and went to Mogogosiek Health Centre via the Police Post. Accused 4 came to learn that the prisoner died at Kapkatet District Hospital. Accused 4 had not been assigned duties anywhere on the material day.

It is on the basis of this evidence that the accused were charged and tried. The issue before this Court is whether the prosecution adduced sufficient evidence to prove the guilt of the accused at the required standard of proof.

The burden of proving the guilt of the accused reposed on the prosecution throughout. At no time did it shift. The standard of proof is one beyond reasonable doubt.

The evidence adduced was circumstantial. The test to be applied before inferring guilt in a case based on circumstantial evidence was spelt out in the case of **SIMON MUSOKE VS. REPUBLIC (1958)** EA pg 715 particularly at pg 716 where the then Court of Appeal held, inter alia, that ***“in a case depending upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”*** Circumstantial evidence was said in the English case of **Republic Vs. Tylor Weaver & another (1928) 21 Cr. App. R 20** to be good and reliable evidence and that very often it is the best evidence as it is evidence of surrounding circumstances ***“which by intensified examination is capable of proving a proposition with the accuracy of mathematics.”***

I have carefully perused the evidence adduced in this case and the defenses put up by the accused persons. There were some discrepancies in the evidence adduced by the prosecution but these were minor and insignificant.

It is not in dispute that the deceased was alive and well on 24/2/2009 when she was handed over to Accused No.1 at Mogogosiek Police Post by Helen Chepkemoi Rono PW2. The evidence shows that on 24/2/2009, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused were on duty while the 4<sup>th</sup> accused was on stand by. They were supposed to guard the prisoners. Accused No.2 telephoned PW11 (Alois Muthoka) on 25/2/2009 in the morning. According to the evidence of PW11, Accused 2 informed PW11 that the deceased had complained that she was suffering from stomach pain and headache. Accused No.2 requested for a motor vehicle to ferry the deceased to hospital. But Rose Chepngeno Langat (PW3), the nurse, testified that when she examined the deceased at 8.00am on 25/2/2009, the deceased had no sign of life. Indeed, when Accused asked PC Edward Walubengo Ngome (PW4) to relieve Accused No.1 at 7.00am, PW4 on getting to Mogogosiek Dispensary found that the deceased could not talk. He found at the Mogogosiek Dispensary Accused Nos.1, 2 and 3. He relieved Accused No.1. It seems that Accused No.2 called PW11 at the behest of PW4.

The cause of death of the deceased was respiratory failure caused by strangulation. There is no evidence that the accused hanged herself. If she had, no doubt the investigating officer would have collected the evidence relating thereto. If the deceased had committed suicide, the officers on duty would not have disturbed the scene of the crime. Indeed, the ***“rope”*** used in the alleged suicide would have been preserved as evidence and photographs would have been taken of the ***mabati*** cell to show where and how the suicide was committed including the facilities therein that facilitated the taking away of life. The investigating officer seemed intent on covering the tracks of the culprits by attempting to advance the suicide theory. But it rang hollow as there was not a shred of evidence to suggest its possibility. In his evidence, the investigating officer, Sgt. Edward Elima, made a poor attempt to exonerate the culprits who were his colleagues. But his duty was to tell the truth not to cover tracks. I observed him as he testified

and I formed the vivid impression that he was not a witness of truth. He seemed bent on distorting the evidence ostensibly to bail out the accused. The theory of suicide which he propagated does not hold good or true in the circumstances of this case. For starters, there were no facilities in the “*mabati*” cell to facilitate suicide by self-hanging. And there was no reason why the deceased would have chosen to hang herself in the police cell.

It is my finding in this case that the deceased was murdered while in Mogogosiek Police Post. It is my finding also that the deceased died of respiratory failure. On the basis of the evidence before this court, it is my further finding that the inculpatory facts are incompatible with the innocence of the accused Nos.1, 2, and 3 and are incapable of explanation upon any other reasonable hypothesis except that of their guilt. The court cannot but infer guilt on the part of accused Nos.1, 2, and 3. I accordingly, find accused Nos.1, 2 and 3 guilty of the offence of murder with which they are charged. There is not sufficient evidence on basis on which this court can infer guilt on the part of the 4<sup>th</sup> Accused. I acquit the 4<sup>th</sup> Accused of the offence of murder with which he is charged. Unless otherwise lawfully held, the 4<sup>th</sup> Accused shall be released and set free forthwith.

I convict the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused of the offence of murder. As death is the only sentence provided for this offence by **Section 204** of the **Penal Code**, I sentence each of them to death.

The deceased was the only prisoner in Mogogosiek Police Post on the night before she died. She was at the mercy of law enforcement officers who booked her and placed her in a cell for a complaint they had not investigated. They allowed one Helen Chepkemai Rono, ostensibly an usurious shyster, who gave evidence as PW2 to abuse the due process of the law and criminalize an otherwise civil matter. The deceased was helpless. She deserved protection of the law enforcement officers. She got none. Instead, they gave her death.

**DATED**at **KERICHO** this 1<sup>st</sup> day of FEBRUARY, 2011

**G.B.M. KARIUKI, SC**

**RESIDENT JUDGE**

**COUNSEL APPEARING**

Mr. Meroka, Advocate, for the Accused

Mr. P. Kiprop, State Counsel

Mr. R. Koech, Court clerk