



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CRIMINAL CASE NO. 29 OF 2007**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**PAUL KOSGEI KIBET ..... ACCUSED**

**JUDGMENT**

The charge facing the accused is that of murder contrary to S. 203 read with S. 204 of the Penal Code. It is alleged that on the night of 23<sup>rd</sup>/24<sup>th</sup> March 2007 he murdered Emmy Jemutai.

After pleading not guilty to the charge, the accused's trial commenced on the 6<sup>th</sup> March 2008 before the late **JUSTICE KABURU BAUNI** who took the evidence of the first three prosecution witnesses. The evidence of the remainder of the prosecution witnesses numbering eleven was taken by **LADY JUSTICE MWILU** who took over the case from where it was left by the late Justice Bauni.

After the closure of the case for the prosecution, Lady Justice Mwilu placed the accused on his defence but was transferred prior to the completion of the case. This Court took over the matter and heard the accused in his defence. This judgment is therefore a result of a full hearing of the case, hitherto by different Judges.

The prosecution case is that on the material date at about 2.00 a.m., a form four student **LUCY SIGEI SANG (PW.1)** was asleep at the house of the accused who was married to her aunt. Emmy Jemutai (herein, the deceased). She (PW.1) slept in a room shared with a house maid called Nelly Chelimo in a house among others within the accused's compound. The house was adjacent to that in which the accused and the deceased slept. While asleep, Lucy was awakened by an unusual noise from the house in which the accused and deceased slept. She heard the deceased shouting "**Segei come and help me for I am being killed**". She (Lucy) ventured out of her room and found that the accused was standing outside his house while stepping on the deceased who lay on the floor at the door. Lucy made an attempt to rescue the deceased by pulling her away from the accused but all in vain. Instead, the accused pulled the deceased to a grazing area three metres away. The deceased begged Lucy not to leave her alone. Lucy made another attempt to pull away the deceased from the accused but again in vain. She however managed to pull the deceased up to a place where there was barbed wire fence. It was at that point that **CECILY KIPLEKEI KEINO (PW 2)** arrived at the scene.

Cecily was woken up by shouts from the accused's house, two hundred metres away. She went towards the house and before reaching there while she was 50 metres away, she saw the accused beating

the deceased. There was moonlight. The deceased called out her (Cecily's) name and asked for help. The accused then started pulling the deceased towards the kitchen. Cecily asked the accused not to beat the deceased but he told her that he was doing his own things. She told him that it was bad to kill and that he should not kill his wife. Against the background of the voices of the two girls who were shouting nearby she further told him that she was going back to her house but he should not kill. She left others at the scene and returned to her house but at about 6.00 a.m. more noises attracted her to the accused's home where she learnt that the accused had killed the deceased.

**GEOFFREY TERGAT (PW 3)** rushed to the scene after being woken up by his wife and hearing noises from the accused's home. On arrival there, he found Cecily (PW 2) and Emmanuel (PW 4). He also found the accused and the deceased fighting. The deceased was crying and asking for help but the accused warned those at the scene not to venture into his compound. Being scared, Geoffrey left the scene and ventured to his house but after a time saw the accused pass nearby holding a stick.

**EMMANUEL KIPCHIRCHIR BOIT (PW 4)**, a tractor driver by occupation, arrived at his home on the material date at about 3.00 a.m. from ploughing a farm and immediately thereafter, heard shouts from the accused's home. He went there and found the accused beating his deceased wife. Many other people had already arrived at the scene.

Emmanuel attempted to get hold of the accused but was beaten with a stick by the accused. He left the scene even as the accused continued to beat his wife but on the following day he received news of the death of the deceased. At about 4.30 a.m. on the material date, **DAVID SAWE (PW 5)** was asleep in his house when he was awakened by the accused who said that he had beaten his wife and injured her leg. The accused asked him (PW 5) to assist in taking the deceased to hospital.

David indicated that the accused was accompanied by his driver called Kipchirchir. He (David) accompanied them to the accused's house and on reaching there they attempted to re-start the accused's vehicle by pushing it but all in vain. They then proceeded to the house of the accused's father to fetch a tractor but it could also not start. They proceeded to the home of one Arap Kumba who assisted with his vehicle which took them to the accused's home where they found the deceased lying down near a Cyprus tree and covered with a cloth sheet. The deceased was taken to the hospital in Arap Kumba's vehicle after which David (PW 5) returned to his house. He later heard that the deceased passed away.

**ELIUD KETER BUSIENEI (PW 6)** is a farmer at Kaplonic and was at the Kaplonic junction on the material date at 10.00 a.m. when he saw the accused arrive in a car and alight from it. The accused joined him and they walked on foot to the accused's house nearby. On arrival, the accused informed him that he had fought with his wife and that she died on the way to hospital.

Eliud and others took the accused to his place of work at the Moi Military Barracks where he was referred to the military police by his duty officer. The accused reported to the military police that he fought with his wife and she died.

A step brother to the accused's late wife **NICHOLAS KIPLAGAT MUREI (PW 7)**, was at the material time an Assistant Chief. He was informed by one Daniel Kosgei that the deceased had been killed by her husband. He went to Kabiyeet Police post and found relatives recording statements. He went to the Kapsabet District Hospital on the 27<sup>th</sup> March 2007 where he identified the body of the deceased for post mortem purposes. He observed that the body had cut injuries all over.

**POLICE INSPECTOR JOSEPHAT CHAILI (PW 8)** of Kabiyeet Police Station was on duty at the material time when he received a report from the father of the accused at 12.46 p.m. to the effect that the accused had killed his wife on the material night and that her body was taken to the Kapsabet District Hospital.

After booking the report, IP Chaili and his colleagues proceeded to the scene where they found scattered beddings in the accused's bedroom. They noted bloodstains on the floor and outside the house and were shown a spot near a fence and told that it was where the deceased was fought. IP Chaili and his

team collected a blood stained stick from the place but on searching a latrine found no weapon. Thereafter, they returned to the police station and sought the assistance of Soy Police Station to have the accused arrested. The accused was arrested by the military police and headed to Soy Police Station from where he was transferred to Kapsabet Police Station and the matter taken over by the Criminal Investigation Department (C.I.D) Nandi North.

At about 8.30 a.m. on the 24<sup>th</sup> March 2007, **JOHN EKUTAN LOKOL (PW 9)**, a mortuary attendant at Kapsabet District Hospital was called from his house to attend to a case. He went to the mortuary and found a motor vehicle make Peugeot 505 at the gate. Two people and the body of a woman were inside the vehicle. The accused was one of the two people in the vehicle. John received and registered the body which was that of the accused's late wife. He was informed that there was a dispute at the accused's home and that the body had come from Kabiyeet. He noted that the body had bruises on the left leg. He reported to the police after becoming suspicious of the accused on learning from the local medical officer of health, a Doctor Kiprotich that a person had beaten his wife at home.

A post mortem examination of the body of the deceased was done by Professor Koslova then of the Moi Teaching Hospital who compiled a report which was produced on her behalf by **DR. PAUL KIPKORIR RONO (PW 10)** of the same hospital. The body had been transferred from the Kapsabet Hospital to the Moi Teaching and Referral Hospital by **CPL. FREDRICK LEMISO (PW 11)**. He also took the accused for mental assessment and obtained the suspected murder weapon (i.e. a stick) from the Kabiyeet Police Post. He was one of those who investigated this case and preferred charges against the accused.

**P.C JOHN KIPTOO MAINA (PW 12)** re-arrested the accused after he had been arrested by the military police. The accused's father, **PHILEMON ARAP KOROS (PW 13)**, indicated that the accused killed his wife after a disagreement that he (PW 13) did not know about. **P.C SIMON LIKONYI (PW 14)** of the Eldoret Scenes of Crime took photographs of the body of the deceased while it lay at the Moi Teaching and Referral Hospital. He noted that the body had deep cut wounds on the forehead, hips and multiple injuries all over and a broken right leg.

As for the accused, his defence is that on the 23<sup>rd</sup> March 2007 he was released from duty at 4.30 p.m. at the Moi Military Barracks Eldoret so that he could visit his family at Kabiyeet Location. He arrived at his home at 6.45 p.m. but did not find his wife (deceased). He found two children, a house maid and a farm hand. Firstly, he assisted in having their livestock kept in a shed and secondly, proceeded to the nearby trading centre to purchase paraffin while in the company of one child and the farm hand. Thereafter, he remained at the trading centre on his own. He was at the centre upto 9.00 p.m. when he returned home and found everybody asleep. He went to his bedroom to sleep. The deceased normally slept in a separate room. He woke up at about 3.00 a.m. so that he could smoke a cigarette and it was at that juncture that he heard movements and murmurs from his wife's bedroom. He went towards the said bedroom but along the corridor found his wife and another man. He attacked the man who managed to escape in the process.

By then, the accused was outside the house and scantily dressed. On the way back into the house, he met his wife near the kitchen and they engaged in a fight. The wife slipped from his grip and took off. In the process, she stumbled and fell into a ditch thereby injuring her leg. She asked for forgiveness and he decided to take her to hospital. His vehicle was broken down. It was fixed by someone and driven to Kaiboi for re-fuelling. Thereafter, the deceased was taken to a nearby missionary hospital where there was nobody. She was then taken to Kapsabet District Hospital where they all arrived at 7.30 a.m. The deceased was examined by a hospital nurse who confirmed that she had already passed away. The accused took the dead body of the deceased to the hospital mortuary and returned home where he found relatives and neighbours gathered. He relayed the said information to those gathered there thereby prompting a commotion between his family and that of his late wife. He went to his place of work and reported to his superiors who handed him over to the nearby police before being handed over to the police at Soy Police Station. He remained locked in the police cells for about forty days prior to being arraigned in a Kapsabet Court for manslaughter. He was released by the Court on bond but was later informed that the matter was referred to the High Court after manouevering of the office of the Attorney General by the

relatives of his late wife.

The accused contends that the fight between him and his late wife did not involve the use of any weapon despite being annoyed. He had never previously been involved in any confrontation with his late wife even though they slept in different bedrooms since 1997 and were blessed with four children. He maintained that he did not intentionally kill his wife.

From all the foregoing facts which form the basis of both the prosecution and defence cases, it is apparent that the death of the deceased from injuries inflicted upon her by the accused is not disputed. Indeed, the post mortem report (P.Ex. 20) compiled by Prof. Koslova, a forensic pathologist show that the cause of death was multiple injuries all over the body. There was head injury with left sided subdural, focal subarachnoid and intraventricular (IV ventricle) haemorrhages. Chest trauma with fracture of the sternum, multiple fractures of the ribs, laceration of lungs, haemothorax. Abdominal trauma with laceration of the liver and haemoperitoneum. Fracture dislocation of the right wrist joint. Right sided tibia/fibula fracture. Most injuries were caused by blow from the blunt objects. Defence injuries were on the hands, swollen dorsum of the right hand, lacerated wounds on the 2<sup>nd</sup>, 3<sup>rd</sup> left digits and 2<sup>nd</sup> right digital amputation of distal phalanx of left 4<sup>th</sup> finger.

In his defence, the accused concluded by stating that he did not kill the deceased intentionally. This was an acceptance of his responsibility for the injuries inflicted upon the deceased which proved fatal.

The evidence by PW 1 (Lucy), PW 2 (Cecily) and PW 4 (Emmanuel) dispelled the suggestion and defence by the accused that the injuries inflicted upon the deceased were occasioned by a fight between themselves. PW 1, PW 2 and PW 3 found the accused in the act of assaulting the deceased who was at the time helpless on the ground and begged for assistance from PW 1 and PW 2 which was not forthcoming due to the accused's aggressive nature. Even if the two had started off by fighting, the accused ought to have stopped on realizing that he had already overcome the deceased. He did not and instead persisted in assaulting the deceased and inflicting fatal injuries upon her. His action did not avail to him the defence of provocation assuming that there was a strange man in his wife's bedroom. He did not find the man and the wife in compromising position in the bedroom. In any event, he directed his anger at the wrong person i.e. his wife instead of the man. Most likely than not, there was no strange man in that house otherwise Lucy (PW 1) who was within the homestead would have seen the man as he escaped in the dark as alleged by the accused. Lucy left her room immediately on being attracted by noises and the first thing she saw was the accused standing outside his house stepping on the deceased who lay on the floor at the door.

The injuries inflicted upon the deceased were so severe and serious to have been caused by a mere fight and/or domestic brawl between a husband and wife. Such injuries would only be inflicted upon a person bent on inflicting grievous harm if not death on another person.

The report by the pathologist clearly indicated that the deceased was beaten to a pulp, so to speak. As it were, the accused battered his defenceless wife to death for reasons which were largely unknown. It is however, instructive to note that the relationship between the accused and his wife prior to the offence was far from good. The fact that they slept in separate bedrooms spoke volumes about that relationship and it is not far-fetched to opine that it provided enough fodder for commission of a criminal offence by the accused. His remarks heard by Lucy (PW 1) to the effect that he wanted to commit a taboo shows that he was intent on inflicting severe injuries upon the deceased. He went on with his unlawful intention despite the warning from Cecily (PW 2) not to kill his wife.

In the case of **BENSON WANJE MWANGANI MSA. CRIMINAL APEAL NO. 225 OF 2007**. The Court of Appeal examined S. 9 (3) of the Penal Code and stated that S. 203 of the Penal Code under which the accused herein is charged does not expressly declare that motive is a necessary element in a charge of murder.

Indeed, S. 9 (3) of the Penal Code provides that:-

**“Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act or to form an intention is immaterial so far as regards criminal responsibility.”**

But, on a charge of murder both the act causing death and the guilty mind have to be proved. The guilty mind is the so called malice aforethought which is defined under S. 206 of the Penal Code which provides that:-

**“Malice aforethought shall be deemed to be established by evidence proving any one or none of the following circumstances:-**

- (a) an intention to cause the death 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 was committed or attempted to commit a felony.”**

From the foregoing, it is very clear that adequate evidence was adduced by the prosecution to show that the accused intended to inflict grievous harm upon his wife and in the process caused her death. It must therefore be held that with malice aforethought he killed his wife.

The charge against him has been established and proved beyond reasonable doubt. He is found guilty as charged and convicted accordingly.

**J. R. KARANJA  
JUDGE**

**[Delivered and signed this 14<sup>th</sup> day of April 2011]**

**SENTENCE**

Accused will suffer death in the manner prescribed by the law.

**J. R. KARANJA  
JUDGE  
14/6/2011**

Right of Appeal.