



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CRIMINAL CASE NO. 11 OF 2009.**

**REPUBLIC.....PROSECUTOR.**

**VERSUS**

**STEPHEN WAMBUA NGUVA.....ACCUSED.**

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

1. The accused person was charged with the offence of murder contrary to the provisions of section 203 as read with section 204 of the Penal Code. The particulars of the offence stated that on the 19<sup>th</sup> day of March, 2008, at Kakuma Township, Kakuma Division of Turkana North District, Rift Valley province, the accused person murdered **Victoria NdendeMutua**. The prosecution called a total of 7 witnesses in their bid to prove the charge of murder against the accused person. The accused person was put on his defence; he gave unsworn statement of defence but did not call any witness. The accused person was cohabiting with the deceased as husband and wife for about one year prior to this incident. They were living in one house in the same plot with PW3 and PW4, PW1 and PW2 were living in the neighboring plot.

2. According to **Nicholas Mwema Kimanzi, PW1**, who was an uncle to the deceased (*the deceased was PW1's sister's daughter*) He testified that on 18<sup>th</sup> march, 2008, at about 8.30 a.m. the deceased passed by PW1's house and informed him that she wanted to discuss something between herself and the accused in his presence the following day. On 19<sup>th</sup> March, 2009, at about 10.00 a.m. he received a call from his daughter who was crying. His daughter informed him there was a problem at home. When he arrived at the scene, he found blood flowing under the door of the house that was occupied by the accused person and the deceased. The door was locked from inside. PW1 went to Kakuma police station and in the company of the police; they broke the door of the house. When they entered the one room house, they found the deceased lying on the floor. She had two cuts on the forehead and one on the hand. The hand was completely severed, she was dead. The accused person was also lying on the floor. He had cuts in the stomach; the accused person was taken to the hospital while the body of the deceased was taken to Lodwar District Hospital.

3. On 21<sup>st</sup> March, 2009 a post mortem examination was carried out by **Gilcrest Lokoel PW6**. The body of the deceased was identified to the doctor by PW1. On the external appearance, the doctor found large cuts on the head measuring 3 cm x 2cm and the brain tissue was oozing out. The left hand was severed from the body, at the wrist. There was a cut measuring 7 cm x 4 cm. He formed the opinion that the cause of death was cardiopulmonary arrest secondary to severe head injury and skull fracture which led to

oozing of brain tissue. The P3 form regarding the mental status of the accused person was completed by **Dr. Aromo**. However, **Dr. Aromo** could not attend court without unreasonable delay and the P3 form was produced by **Dr. Musa Mohammed** who used to work with **Dr. Aromo** and was familiar with his handwriting. According to the P3 form the accused was found mentally fit to plead to a charge of murder.

**4. Margaret Munai Mutua PW2**, a sister of the deceased testified that on the 19<sup>th</sup> May 2009, after she had escorted her children to school, she met with the deceased and both went to fetch water at the plot where PW2 used to reside. On the way to the deceased house, the deceased confided with PW2 that the accused person had kept a panga and a knife under the bed and it was for that reason the deceased wanted to discuss her fears with PW1. When they reached the house of the deceased person, they found the accused person in the house. According to PW2, the accused person appeared annoyed, he sent PW2 with ksh 40/= to go to the market and buy English potatoes. On the way from the market PW2 met with a neighbor who told her to hurry up as there was trouble in the sister's house.

5. When PW2 reached the house she saw blood flowing through the door of the deceased house. PW2 checked through the window and saw two bodies of her sister and the accused person lying on the ground. The police arrived immediately broke into the house. PW2, testified that the deceased was in a "*come stay relationship*" with the deceased. However their stay together was not happy, sometimes in December preceding this incident the accused person had threatened the deceased that their house would burn. The accused person also used to assault the deceased which forced the deceased to sleep outside of the house. Four days before this incident the deceased used to sleep outside and PW2 used to cook for the deceased family.

**6. James Kinuthia Mbugua PW3** testified that on the 19<sup>th</sup> March 2009 at about 8.00 am he met with PW1 and the deceased who were carrying water. PW3 was a neighbor of the deceased; he was going to take his mobile telephone, on his way back he saw people running away from the plot, when he reached the compound he heard people fighting inside the house of the accused person. He then saw blood flowing under the door, PW3 went to look for PW1 and they went to report the matter before the Kakuma police station. The police broke the door, the deceased had deep panga cuts and the accused person had bruises.

7. That incident was also witnessed by **Khadija Abdallahi Abdi PW4** who was a neighbor to the deceased and the accused person. PW4 testified that on the material day that is on the 19<sup>th</sup> March 2009, at about 9.00am she saw the deceased person with PW2 carrying water to the deceased house, at the time the accused person was standing outside the house. PW4 saw PW2 walk away and she entered into a house, she heard a cry of a woman coming from the accused person's house, when she went out to check she found blood flowing under the door, the house was locked.

**8.** This matter was investigated by **CPL Isaya Ochieng PW5** who was based at the Kakuma Police Station at the material time. When the report was made to the police station by PW1 and PW2, together with other police officers, they visited the scene. They found the house locked from inside, and blood was flowing through the door. The police broke into the house and found the body of the deceased. The accused person was lying on the floor he was still breathing and he had cuts in the stomach and was also bleeding profusely. The deceased had deep cuts and her hand which had been severed completely from the wrist. PW5 testified that the house where they found the bodies was a single room, it had one door and two windows, the front window was closed but the back window was half open but the space was not enough for a human being to gain entry to the house; PW5 also collected a panga and a knife that he produced as exhibits.

**9.** Moreover, if anybody had passed through the back window, PW5 testified that the person would have

left marks of blood as the whole room had blood. There was also a fence made of thorns thus if somebody passed through the window that person would only have exited through the main gate. There was no one seen going through the main entrance and there was no sign of an intruder. PW5 also drew the sketch plan of the scene. He took the accused person to Kakuma Mission hospital. At the time the accused person was unconscious but the following day he regained consciousness. PW5 interrogated the accused person but he did not explain to him what had happened thus he charged him with the offence of murder.

**10.** Placed on his defence, the accused person gave unsworn statement of defence and did not call any witness. He gave a long narrative of how he was unwell and bedridden with Malaria and the deceased who was his wife was looking after him. On 18<sup>th</sup> March, 2009, the deceased woke up as usual and went to work and the children went to school. The accused person spent the whole day at home sleeping. When the children came from school, they cooked dinner and ate. The deceased came home at about 7.00 a.m. the following day, prepared the children to go to school. The accused person said he gave his wife money to go and pay rent. The accused person said that the deceased was also treating him with a bitter medicine. At the material time, he testified that after he had taken the bitter medicine, he noticed somebody cutting him on the stomach. When he looked up he saw it was the deceased who was cutting him. By that time he was bleeding profusely and his face was covered with blood. He lost consciousness and when he woke he found himself in the hospital. He denied that he committed the offence of murder and contested that he had no problems with the deceased and the children.

**11.** According to the accused person somebody may have entered through the window and caused him and his wife the injuries. Counsel for the accused person submitted that the prosecution failed to prove the case against the accused to the required standards. There is a possibility that somebody entered the house through the window and committed the offence. The accused person was sick with malaria and had just taken medicine administered by the deceased. However, PW7 who produced the P3 form failed to produce the treatment records of the accused person which would have shown the type of medicine that caused him to lose consciousness.

**12.** On the part of the state, **Mr. Onderi**, learned counsel for the State, submitted the evidence against the accused person was overwhelming. Counsel referred to the evidence on record of a ranging domestic discord between the accused person and the deceased for which the deceased had reported to PW1, her uncle. The deceased also confided to PW2 and as the time the incident occurred, the deceased was in the house alone with the accused person who had sharpened a panga and kept under the bed. It is the accused person and non other had the opportunity kill the deceased. Both the panga and the knife were recovered from the accused person's house and these were the same weapons which were used to inflict the injuries on the deceased. The State urged the Court to disregard the defence because when the police found the accused person injured, they treated him in a humanitarian manner and took him to the hospital. The police were not aware that the accused person was suffering from malaria thus they were not under any obligation to ask for his medical records.

**13.** It is clear from the prosecution's evidence that there was no eye witness who saw the accused person inflict the fatal injuries on the deceased person. This case is based on circumstantial evidence that on the material day that is on 19<sup>th</sup> March, 2008, the accused person and the deceased person were together in the house where they used to live together as husband and wife. They were seen by PW2 who left them together a short while and she went to the market to buy potatoes. The two were also seen by PW4 who was a neighbor. Immediately she entered her house, she heard a cry of a woman. When she came out, the house was locked from inside and she saw blood oozing through the door. It is also on record that the deceased and accused person were experiencing problems and the deceased person had confided with PW2 that the accused person was keeping in the house under the bed a panga and a knife. These are the same weapons which were recovered by the police from the scene of murder and were the items that were used to inflict the fatal injuries on the deceased.

14. Under the law, for the prosecution to succeed in a case based on circumstantial evidence the facts of the case must be incompatible with the accused person's innocence and incapable of any other explanation or other hypothesis than that, it is the accused person and no other person was responsible for the death of the deceased. See the case **Simon Musoke vs. Republic [1958] EA 715** where the Court of Appeal held:-

***“In a case depending exclusively 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.”***

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***“In order to justify, the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”***

15. The defence by the accused person alludes to the fact that it is the deceased who attacked him and cut him on the stomach. That is my understanding of his defence that the deceased had administered on him a bitter medicine which made him lose consciousness. Further the accused person testified in his defence that he suddenly saw his wife cutting him, on the stomach, he fell down and was covered by the blood on his face so that he could not see what was happening. Although the accused person was under no obligation to give defence evidence his defence evidence taken with the prosecution's evidence lacks credibility and completely defeats common sense. It is not possible that the deceased who was heard crying and was immediately found with deep cuts on the head and a hand which was completely severed could have inflicted injuries on the accused person. The prosecution's evidence clearly shows that at the material time, it was only the deceased and the accused person who were in the house. Although there was a rear window which had a small opening, PW5 testified that it was not big enough for an intruder to enter through, and further PW5 examined the scene and there was no evidence of an intruder. PW5 also checked around and did not see any signs of an intruder who could have gained entry into the house thus it was the accused person and the deceased who were in the house alone.

16. Going by the evidence on record, I am satisfied that the prosecution have been able to prove that it is the accused person and non other who had an opportunity to inflict fatal injuries on the deceased. It is also on record that there were domestic problems between the deceased and the accused person and the deceased person had confided in PW2. I find the accused is the one who inflicted the injuries on the deceased which was the cause of her death. This was either a deliberate act of omission or commission for which the accused must bear the consequences.

17. I find the prosecution has proved the case against the accused person to the required standards. I therefore convict the accused person with the offence of murder contrary to section 203 and 204 of the Penal Code.

**Judgment read and signed on 8<sup>th</sup> day of June, 2011.**

**MARTHA KOOME.**

**JUDGE.**