



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA
AT KITALE.

CRIMINAL CASE NO. 35 OF 2008.

REPUBLIC ::: PROSECUTOR.

VERSUS

JEREMIAH AMEI ESINYEN ::: ACCUSED.

J U D G M E N T .

1. The accused person **JEREMIAH EMEI ESINYEN** was charged with three counts of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the 1st count states that on the night of 12th and 13th October, 2008, at Loyor Manyatta Napal sub location, Kakuma Division, Turkana North District within Rift Valley, the accused person with others not before court murdered **Christine Achuo Etukon**. The particulars of the 2nd count stated that on the night of 12th and 13th October, 2008; at Loyor Manyatta Napal sub location, Kakuma Division, Turkana North District within Rift Valley, the accused person with others not before court murdered **Lokiru Itukon**.

2. The particulars of the 3rd charge stated that night of 12th and 13th October, 2008; at Loyor Manyatta Napal sub location, Kakuma Division, Turkana North District within Rift Valley, the accused person with others not before court murdered **Adapal Esinyen**. The prosecution called a total of 13 witnesses who gave evidence in support of the charges against the accused person. The accused person was put on his defence; he gave a sworn statement of defence and did not call any witnesses.

3. Briefly summarized, it was the prosecution's case that **Christine Achuo Etukon**, the 1st deceased person (hereinafter referred to as Christine) was married to the accused person but as the material time when this incident occurred, they had separated. Christine was living with her mother at Nadapal sub location. She had two children with the accused person. Christine and the accused person were embroiled in a domestic dispute over the maintenance of the two children. That dispute was arbitrated before **Erick Wanyonyi, PW5** who at the time of this incident was the D.O. of Kakuma. PW5 testified that he arbitrated over a dispute between the accused person and Christine regarding child support. The accused person was not ready to offer child support thus PW5 referred the couple to the local chief.

4. **Nakaya Esumbu, PW4**, the chief of Kakuma location told the court that he arbitrated over the dispute between the accused person and Christine regarding child support. However, the accused person was not willing to pay a sum of Ksh. 1,500/= which Christine was demanding for support of the two children. PW4 referred the matter to the children's officer. The accused person and Christine appeared before **Douglas Wawire, PW9** after the chief had written a letter dated 17th September, 2008 referring Christine's dispute to the Children's Department Office at Lodwar. PW9 summoned the accused person, who was supposed to attend the children's Officer on 8th October, 2008. However, the accused person did not turn up at the appointed time although Christine waited for him the whole day.

5. In the evening of the same date, PW9 testified that he was accosted by the accused person at about 8.00 p.m. at a place called White House within Kakuma Town. The accused person said that he had a problem in Children's Office but PW9 advised him to see him in the office the following day as it was not appropriate for a public officer to be seen at night over office matters. The following day Christine and the two children and the accused person met and discussed the welfare of the children. The accused person was willing to support the 1st child but he was claiming the second child **Adapal Esinyen (3rd deceased)** was not his child. PW9 said he adjourned the discussion to 16th October, 2008 to give the accused person time to

think about the welfare of the children. At the time the accused person was furious. He was agitated and threatened Christine saying in Kiswahili “*Tutaona*” meaning “we shall see”. It is on the 15th October, 2008 when PW9 learnt that Christine was murdered with one of the child and also her brother.

6. **Longoran Longore PW1**, the mother of Christine and the 2nd deceased person testified that on 12th October, 2008 at about 4.00 p.m. while returning home from church she met with the accused person who was riding a motor cycle with a passenger but the accused person did not talk to her. At that time, Christine and her children were inside the manyatta. The accused person cycled around the manyatta and went away and he did not talk to PW1.. On the same night at about 1.00 a.m., PW1 was sleeping in the same manyatta with Christine, her children including the third deceased child. PW1 heard somebody trying to enter the manyatta by force. Within no time there were gunshots and Christine started crying, PW1 said she heard somebody say “**Kill this one**”. The accused person shown a torch on Christine and Christine uttered the following words “**Why are you killing me Esinyen and Holoto**”. Esinyen is the accused person but Horoto is not known to PW1. PW1 managed to escape from the manyatta with the surviving child (3rd deceased who was also injured). PW1 reported the incident to Kakuma police station. She took the child to Kakuma Mission hospital but unfortunately the child who is the 3rd deceased person succumbed to the injuries.

7. **Agnes Anope, PW2**, testified that on 12th October, 2008, she too saw the accused person riding a motor bike cycling along the manyatta where Christine used to live with her mother, PW1. That same night she heard gunshots and when she went to PW1’s manyatta, she found Christine had been shot and PW1 had rushed a child to hospital. **Agnes Naook, PW3**, also narrated how she used to live with PW1 and Christine after she separated from the accused person. After they had taken supper on 12th October, 2008 Christine and the two children slept in the manyatta with PW1. PW3 slept outside with the 2nd deceased person. The 2nd deceased person was sleeping nearer the entrance of the manyatta.

8. At about 1.00 a.m. they were attacked by two men one was armed with a firearm while the other one had a torch. There was full moonlight, and according to PW3, when one of the assailant shone a torch on her and spoke to the other gangster saying it is not that one. PW3 said she recognized the voice as that of the accused person who had been married to Christine. The same voice said in Kiswahili “*Ndio huyo*” meaning “it is this one”. That is when the other gangster shot Christine and the other two deceased persons were also shot. The accused person with the gangster disappeared on foot. PW3 said she did not see the accused person but only identified his voice. Christine was left bleeding and writhing in pain. Christine continued screaming that the accused person was the one who killed her. PW3 knew the accused person well because he had married Christine and the two were staying together for about a year until they separated.

9. The three bodies of the deceased person were identified by **Mark Ekuru Boyen, PW7** for purposes of post mortem examination which were carried out by **Dr. Gilchrist Lokoel, PW10**, a medical officer based at Lodwar District Hospital. He examined the body of Christine. On the external there was an entry wound on the sixth rib an exit wound on the 8th rib and back. There was an entry wound on the left arm. On external examination, both her lungs had lapsed. There was an entry wound on the lungs and the bullet had shattered the left ventricular vein. The doctor formed the opinion that the cause of death was cardiopulmonary arrest due to lung collapse and due to laceration of the great vessels. He produced the post mortem report.

10. PW10 also examined the body of the 2nd deceased person **Lokiru Itukon** who also had a bullet wound on the 4th and 5th rib which exited on the lower back, lumbar vertebrae No. 5. On internal examination he found the bullet had gone through the left and right verticals shattering the digestive systems. The cause of death was also cardiopulmonary arrest secondary to heart failure due to the injuries of lungs.

11. The post mortem in respect of the 3rd deceased person, a child of 1 ½ months was not carried out. According to **PW12, Simon Kirui**, who was the deputy OCS, Kakuma Police station at the time, the child was taken to Kakuma Mission Hospital. The child died while undergoing treatment and the body was released to PW1 before post mortem could be done because there was no mortuary at Kakuma hospital. PW1 buried the child immediately. PW12 tried to obtain the consent of PW1 to exhume the body for purposes of post mortem but PW1 refused to return to that particular Manyatta due to the trauma she had gone through after she witnessed the three deaths of her children and grand child. The medical treatment notes in respect of the 3rd deceased person were produced by **Dr. Mwea Macharia**, PW1, the Medical of Health based at Kakuima Hospital. He produced treatment file in respect of Edapal Esinyen, a child of about 2 months who was admitted in hospital on 13th October, 2008. The child had suffered a gun shot wound on the right forearm. The child passed away in the cause of treatment and the body was handed over to PW1.

12. The accused person was subjected to mental assessment by PW8 and was found fit to stand trial. The accused person was arrested on 18th October, 2008 by CPL Naftali Kweu at his manyatta called Mayamae. He was taken to Kakuma police station and charged with the present offence. The spent cartridges that were collected at the scene of murder by Simeon Kirui, PW12, were submitted for ballistic examination. They were tested by Mudidi Mwodomo, PW11 and he confirmed that they were ammunitions which were fired from the same gun type AK 47 assault rifle.

13. The accused person was put on his defence; he gave a sworn statement of defence and denied having anything to do with

the death of the deceased who was his girlfriend. He told the court they had lived together with Christine from December, 2004 when they got the first child in 2006. The second child was born in 2008 and they started having problems because he was not able to provide food for the children. The dispute was arbitrated before the chief and the accused person said that he was willing to pay a sum of Ksh. 1,000/= for maintenance of the two children. By that time Christine was still with her mother at Nadapal sub location while he was staying in Burungere sub location which is about 4 ½ km apart.

14. The accused person testified that on 12th October, 2008, he left his house at around 9.30 a.m. and proceeded to Kakuma town where he spent most of the day because he was not feeling very well. At about 6.00 p.m. he boarded a *boda boda* bicycle and took money to his wife and returned to Kakuma to watch the 7.00 O'Clock news. He returned to his home where he had a discussion with the secretary of welfare group up to 9.30pm when he retired to sleep with his wife and 4 children. He woke up the next day at 8.00 a.m. and was accosted by a battalion of police officers in the company of PW4. He was arrested and taken to Kakuma police station where he stayed for 16 days before he was charged in court on 4th November, 2008.

15. Both counsel for the accused person and the state made extensive submissions in support of their respective positions. According to **Mr. Ondabu**, learned counsel for the accused person, there was no connection between the allegation that there was bad blood or a grudge between the accused person and Christine over child support. Moreover, the three murders took place at night and no one identified the accused person. PW1 said she heard Christine crying out asking the accused person why he had shot her. The other evidence was by voice identification by PW3. However, this has to be treated cautiously because no evidence was adduced to show the distance between where PW3 was and the accused person. PW3 testified that she was flashed with a torch which in essence makes it difficult for a witness to identify the attacker after being blinded by the flashlights.

16. On the part of the state, **Mr. Onderi** submitted that the prosecution proved its case to the required standard. As regards motive, the accused person was embroiled in a dispute over the maintenance of the 1st deceased and the 2 children. The accused person had threatened the deceased before the Children's officer. The deceased was seen the previous day going round the home of Christine while riding a motor cycle with a passenger. He did not speak to anybody and this was confirmed by PW1, PW2 & PW3. Furthermore the accused person was identified by his voice by PW3 and dying declaration by the deceased.

17. The accused person in this case is charged with the offence of murder. The prosecution has the onus to prove that it is the accused person who committed the triple murder of **Christine Achuok Ituken, Lokiru Ituken and Adapal Esinyen** as per the 3 counts that he is charged with. Going by the evidence on record, the prosecution relied on the evidence of PW1, the mother of the deceased, PW4, the chief of the area, PW5, the DO of the area and PW9, the Children's Officer to prove that the accused person was involved in a ranging dispute over the children's support with Christine. The accused person was being pushed by the children's officer, the D.O. and the chief to take parental responsibility over the child support of his 2 children. The accused person had not taken the matter of child support well and he had threatened Christine over the same in the presence of the children's officer. As at the time of this incident, Christine and the accused person were supposed to appear before the children's officer within 3 days but Christine was murdered on 13th October, 2008. According to these witnesses, the accused person had a motive for the death of Christine.

18. Further evidence was given by PW1, PW2 and PW3 that the previous day, the accused person was seen cycling around the manyatta where Christine was living with PW1. The accused person did not talk to anybody and his presence was associated with the murder that happened several hours later that the accused person was conducting a surveillance of the manyatta. The above is referred to in law as circumstantial evidence. For the prosecution to succeed with the charge of murder based on circumstantial evidence, the facts in support of the case must be incompatible with the accused person's innocence and incapable of any other explanation or hypothesis other than, it is the accused person, and no other, was responsible for the death of the deceased. See the case of **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.”

See also the case of **Republic vs. Kipkering Arap Koskei & Aother 16 E.A.C.A. 1325.**

“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.”

19. Apart from the circumstantial evidence, the other evidence was the voice recognition of the accused person by PW3 who had lived with the accused person and Christine for about a year. When the assailants struck, PW3 testified that she recognized the voice of the accused person when he instructed the other assailant who was armed with a gun after he had shot **Lokiru**, the 2nd deceased person that it was not that one, and pointed at Christine who was shot. This can be termed as recognition which is more reliable than identification by a stranger. In the case of; **Anjononi & Others vs. Republic [1980] KLR 59**, the Court of Appeal held that;

“Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

20. According to PW1, Christine was left writhing in pain and was crying out asking why **Esinyen**, who is the accused person and Horoto were killing her. Also PW2 and PW3 testified that the 1st deceased person kept on crying out and saying that the accused person had killed her. That in law is known as a *dying declaration* which is a statement made by a person who is conscious and knows that death is imminent arising out of the injury. A dying declaration can be introduced in evidence as an exception to hearsay rule. (See the provisions of section 33 (a) of the Evidence Act.) Which provides:-

“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

21. At the time Christine uttered the dying declaration, she was mortally injured. She was aware death was imminent and kept saying **Esinyen** caused her death. It took some hours before Christine died. By that time PW1 had rushed the 3rd deceased person to hospital and also reported the matter to Kakuma Police Station by the time the police led by PW12 arrived at the scene, the deceased had passed away.

22. The totality of the evidence, that is the circumstantial evidence on record that the accused person was seen and identified cycling around the home of Christine a few hours before the attack, the voice identification of the accused person and the dying declaration of Christine taken in the context that the accused person had threatened Christine for insisting that he should pay child support for the two children leads to the inescapable conclusion that it is the accused person who was responsible and ordered that the 3 deceased persons be shot. They were indeed shot and succumbed to death out of the injuries sustained from the gunshots.

23. Accordingly, I find the prosecution has established the charges preferred against the accused person to the required standard. The accused person is found guilty and convicted of the offences of murder as stated in count 1, 2 and 3 contrary to section 203 as read with section 204 of the Penal Code. The accused person is hereby convicted as charged.

Judgment read and signed this 6th day of June, 2011.

**MARTHA KOOME.
JUDGE.**