



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE NO. 17 OF 2004

REPUBLIC PROSECUTOR

VERSUS

DAVID KIPKORIR BUSIENEI ACCUSED

JUDGMENT

The charge facing the accused is that of murder contrary to S. 203 as read with S. 204 of the Penal Code.

The particulars are that on the 20th February 2004 at Cherondo Sub-Location Nandi South District, the accused murdered Sarah Chepkoech Busienei.

The case for the prosecution is that the deceased was one of the accused's two wives and on the 21st February 2004 at about 9.00 a.m. it was reported to **PHILIP SONGOK (PW 2)**, a local businessman, that the deceased had been beaten to death by the accused. The information was relayed by two women named Margaret and Clara. The businessman was a neighbour to the accused. He proceeded to the accused's home and found many people outside. The accused was also there. He (PW 2) went into the accused's house and found the deceased lying down on the floor with her head on top of a pesticide container. He was told by the accused that the deceased became annoyed and took poison after he beat her up. The matter was reported to the area's assistant Chief, **PETER KIPTOO KEMBOI (PW3)**, who in turn reported to the police.

Accompanied by police officers, the assistant Chief went to the scene of the offence and found the body of the deceased inside the house. He noted that there was an injury on the head and leg and concluded that a stick had been used in beating the deceased.

AG. INSPECTOR JAVAZ ONZERE (PW 4) of Songhor Police Station was informed that the accused and the deceased were involved in a dispute whereupon the accused hit the deceased with either a walking stick or a "rungu" (club). The accused informed him (PW 4) that he fought with the deceased after which they went to sleep but in the morning he found the deceased dead. IP Onzere proceeded to the scene and found the body of the deceased on the floor. He recovered a broken walking stick (P.Ex.2) inside the house. He noted that the body had injuries on the head. He removed it to the Nandi Hills District Hospital for post mortem. **P.C MATHEW NJAGI WARUI (PW 5)** was with IP Onzere at the time the report was made. He said that the assistant Chief (PW 3) said that he was told by the accused that a quarrel had ensued between the accused and the deceased over eggs eaten by a dog and in the process the accused picked a rung and started beating the deceased.

P.C Warui confirmed that the body of the deceased had fresh multiple injuries and said that it was removed to the Nandi Hills District Hospital for post mortem conducted by Dr. Kalya. **DR. STEPHEN KALYA (PW 1)** performed the post mortem and compiled the necessary report (P.Ex.1). He formed the opinion that the deceased died from head injury with epidural haematoma.

With the closure of the prosecution case, the accused was placed on his defence. However, he exercised his right of remaining silent and called no witnesses. He was entitled to do so. The obligation to prove the charge against him lay with the prosecution. There is no burden placed upon him to prove his innocence.

From the evidence adduced by the prosecution, it is apparent that the deceased died from head injury.

The post mortem report (P.Ex.1) shows that the cause of death was head injury with epidural haematoma.

The circumstances of the death indicated that the head injury was inflicted upon the deceased. The basic issue for determination is whether the accused was responsible for inflicting the injury with a murderous intent.

None of the prosecution witnesses saw the accused inflicting the injury upon the deceased. The accused's neighbour (PW 2) was informed by two women that the accused had beaten his wife to death. None of those women was called to testify to confirm the information alluded to them. The Assistant Chief (PW 3) was also told that the accused had killed his wife.

According to the neighbour (PW 2), the accused told him that he had beaten his wife and that due to the resulting annoyance by herself she took poison.

However, there was no evidence from the doctor (PW 1) that the deceased died as a result of taking poison. Although the Assistant Chief (PW3) indicated that the accused had a history of domestic violence and was in fact a violent man, he (PW 3) could not say with certainty that he (accused) was responsible for inflicting the fatal injury upon the deceased.

IP Onzere (PW 4) was informed that on the 20th February 2004 the accused and the deceased were involved in a domestic scuffle in which the deceased was hit with a walking stick by the accused.

IP Onzere said that the accused told him that he fought with the deceased and on the following morning found her dead.

A walking stick (P.Ex.2) said to have been the assault weapon was recovered in the couple's house. P.C Warui (PW 5) said that the Assistant Chief told him that the accused arrived home drunk and met his two wives including the deceased. He requested the deceased to serve him eggs but the deceased said that the eggs were eaten by a dog. This prompted a quarrel which led to the accused beating the deceased. This information was relayed to P.C Warui in the presence of the accused who did not speak.

The accused's neighbour (PW 2), the Assistant Chief (PW 3) and the two police officers (PW 4 and PW 5) relied on information given to them by the accused and others to arrive at the conclusion that the accused was responsible for inflicting the fatal injury upon the deceased.

In effect, there was no direct evidence against the accused. However, the information he provided to some of the prosecution witnesses regarding the circumstances leading to the death of his wife strongly implied that this was a case of domestic violence gone awry.

Indeed, the injury of the deceased's head was most likely than not as a result of the violence in which a walking stick was used and if not a walking stick, then any other hard object.

Being a case of domestic violence, it is doubtful that there was pre-meditated intent on the part of the accused to kill his wife although the violence meted out against her was excessive. The facts show that the accused was the assailant. It may therefore be safely stated that the accused did not with malice aforethought kill the deceased. The charge established against him is not murder under S. 203 of the Penal Code but manslaughter under S. 202 of the Penal Code.

Consequently, the accused is hereby found guilty of manslaughter and convicted accordingly.

J. R. KARANJA
JUDGE

[Delivered and signed this 19th day of July 2011]

19/7/11

Before – J. R. Karanja – Judge

Court Clerk – Andrew

Mr. Kabaka for State

Mr. Chepkwony for accused

J. R. KARANJA
JUDGE

Court:

Judgment delivered to accused.

J. R. KARANJA
JUDGE

State Counsel:

Accused may be treated as a first offender.

J. R. KARANJA
JUDGE

Mr. Chepkwony in mitigation:

Accused is aged fifty (50) years old. He is married. He had two wives, one is the deceased. He has eleven (11) children. Eldest being twenty five (25) years old and the youngest nine (9) years old. They are all in school. Accused is the sole bread winner. His elderly mother depends on him. His father is deceased. He is remorseful for the offence. What happened was accidental. The accused has been in custody since 2004.

J. R. KARANJA
JUDGE

Court:

Accused is a first offender. Mitigation noted. Although there was no intention on the party of the accused to kill his wife he used excessive force on a defenceless woman. Incidents of domestic violence are on the increase and a way must be found to curb them. That way would be deterrent sentences.

However, it is herein noted that the accused has been in custody for about seven (7) years. That would be sufficient punishment considering the circumstances of the offence. However, for purposes of effective deterrence, the accused is sentenced to serve an additional three (3) years imprisonment.

J. R. KARANJA
JUDGE

Right of appeal.

J. R. KARANJA

JUDGE