REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 78 OF 2005

REPUBLIC ……...…… PROSECUTOR
VERSUS

LEAH JESANG SEREM ……..…… ACCUSED

J U D G M E N T

The accused, **Leah Jesang Serem**, is charged with murder contrary to section 203 as read with section 204 of the penal code, in that on the 16th July 2005 at Koisagat Village Uasin Gishu District of the Rift Valley Province murdered **Tecla Cheptoo Serem.**

The trial commenced on the 19th October 2006 before the **Hon. Justice Ibrahim** with the aid of three assessors. One of the assessors later passed away and the trial continued with the two surviving assessors. However, in view of the amendment of the law pertaining to assessors, the assessors in this case were discharged on 22nd May 2008 when the trial resumed after several adjournments.Thereafter, the trial proceeded steadily before Ibrahim J. upto the closure of the case for the prosecution. The accused was placed on her defence on the 3rd August, 2007. The defence case started and concluded on the 21st January 2010 before the **Hon. Justice Osiemo** (as he then was) who took over the case after the transfer of Ibrahim J. to another Station.

The final submissions were presented before Osiemo J. on the 4th February, 2010 and thereafter the judgment was set for 25th February 2010 on which date it was deferred to 11th March 2010 but was never delivered for reason that Justice Osiemo retired from the judiciary and/or was transferred from Eldoret. This state of affairs contributed to the delay in having the judgment delivered. Eventually, the file was forwarded to the Principal Judge in Nairobi for directions.

The Principal Judge directed that the file be returned to the Eldoret High Court for the judgment to be written and be delivered to the accused by the **Hon. Lady Justice Mwilu.**

On 27th December 2010, Justice Mwilu noted that an anormally had to be corrected before the judgment could be written and since she was at the time on transfer to Nairobi she directed that the file be placed before the Resident Judge for action.

The anormally was that while two of the prosecution witnesses testified in the presence of assessors, the rest did not.

On 29th June 2011, the file was mentioned before this court and was moved to 7th July 2011 for directions

on the date of judgment.

On 7th July 2011, this court set the 14th July 2011 as the date for judgment.

This judgment is therefore being rendered without this court having had the benefit of seeing and hearing the witnesses.

Be that as it may, the case for the prosecution was that on the material 16th July 2005 at about 7.00 p.m., **Gladys Chebichi** (PW1), was milking a cow at the home of **Daniel Kiprop Serem (PW2),** the husband of the deceased Tecla Cheptoo Serem, when she (PW1) heard a noise sounding of something being hit. She looked behind and saw the accused hitting the deceased using an iron-bar. The deceased was hit on the head and hips. Gladys screamed and neighbours arrived at the scene while the accused ran away from the scene. The deceased was bleeding from the head and her clothes were blood soaked. She was taken to hospital and on the following day, Gladys learnt that the deceased had died.

Daniel (PW2) was on the morning of the material date arrested by the police following a complaint lodged by his brother. He was later released on bond. He went home and thereafter proceeded to a river three hundred meters away to bath. He left his wife (deceased) and Gladys (PW1) at home. After bathing, Daniel proceeded to a nearby shop and while there he heard screams emanating from his home. He rushed there and found a crowd. His wife was on the ground with a head injury. Her clothes were stained in blood. He was informed by Gladys that the accused had assaulted his wife using an iron-bar. The accused is his sister. He was told that she had escaped into a maize plantation. He fetched a vehicle and took his unconscious wife to hospital. At the hospital, he was told that his wife had passed away. He reported to the police and went looking for the accused but in vain.

Elizabeth Serem Kwambai (PW3) was at her home when she heard Gladys (PW1) screaming. She (PW3) was told that the deceased had been assaulted and injured by the accused, she was later informed that the deceased had passed away.

Gilbert Kiprop (PW4), was with the deceased in the kitchen on that material date. Later, the deceased went out to fetch firewood. It was then that the accused arrived at the scene looking for the deceased. Thereafter, he (PW4) saw the accused assaulting the deceased using an iron bar. The deceased was hit on the neck and waist. She fell down while the accused ran into a maize plantation. Gilbert (PW4) noted that the deceased was dead and bleeding from the head. He ran away to his aunt Kipserem.

Daniel Kosgei (PW5) a councilor at Meibeki Ward Moiben Division, arrived at his home on the 18th July 2005 at about 4.00 p.m. and was informed that the accused had committed murder and was hiding at a neighbour's farm. He (PW5) went there and found the accused in a maize farm. He apprehended and took her to Moiben Police Station.

P.C. Raphael Korir (PW6) of Moiben Police Station received the accused at the police station and formally arrested her.

P.C. Mohammed Shale (PW8), also of Moiben Police Station investigated the case and later charged the accused with the present offence.

Dr. Joseph Embenzi (PW7) of Moi Teaching and Referral Hospital examined the accused and confirmed that she was mentally stable. He also produced a post mortem report form signed by his colleague Professor Koslova who left for her native country Russia.

The post mortem report showed that the deceased died from head injury with compound fracture of the skull and left sided sub-dural haematoma, fracture of six ribs with contusion of both lungs and bilateral haemothorax rupture of spleen with haemopertoneum.

In her defence, the accused denied the charge and stated that on the material date of 7.00 p.m. she was at home when she proceeded to the house of her brother Daniel Kiprop (PW2) to find out if he had

been released by the police after his arrest. On arrival, she found the deceased outside the house and a quarrel ensued between them. The deceased blamed her for the arrest of her husband. The deceased entered the house and came out armed with an iron-bar. She went after the accused who made an attempt to flee. The two engaged in a struggle and in the process, the deceased fell down while the accused ran away. The accused contended that she did not know what caused the death of the deceased and opined that she may have been hit by the iron-bar when she fell down. The accused further contended that there was nobody at the scene when she and the deceased struggled.

It is apparent from the foregoing defence evidence and that adduced by the prosecution that the death of the deceased from injuries inflicted upon her on that material date is not disputed.

Indeed, the post mortem report (P.Ex.1) compiled by Prof. Koslova showed that the cause of death was head injury with compound fracture of the skull and left sided sub-dural haematoma, fracture of six ribs with contusion of both lungs and bilateral haemothorax and rupture of spleen with haemoperitoneum. These injuries indicated that the deceased met a violent death. It was concluded by the pathologist that the deceased was murdered.

A person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder (see, section 203 of the penal code).

The point for determination herein is whether the death of the deceased was caused by an unlawful act committed against her with malice afterthought by the accused. The accused denied any criminal responsibility leading to the death of the deceased. She did not however deny that on the material date and time there was a scuffle involving herself and the deceased moments after she went to the home of the deceased to enquire whether her brother (i.e the deceased's husband (PW.2)) had been released from police custody after his arrest earlier on the same day. The accused said that she was blamed by the deceased for the said arrest and that the unpleasant state of affairs which followed was instigated by the deceased when she entered the house and came out with an iron bar.

The accused went on to say that the deceased confronted her with the iron bar despite her attempt to flee from the scene. The two struggled before she (accused) ran away.

In contending that she did not assault the deceased, the accused said that she did not know what caused the death of the deceased and opined that it was probably caused by the deceased falling down and hitting herself with the iron-bar.

In sum, the accused indicated that the deceased was the author of her own misfortune in that her own iron-bar hit her when she fell down during the struggle.

Being aware that there was no obligation on the part of the accused to prove her innocence, this court nonetheless holds a strong opinion that the evidence by Gladys Chebichi (PW1) and Gilbert Kiprop (PW4) being eye-witnesses to the events that unfolded on that material date, disproved and rendered the accused statement of defence unworthy of credibility. Both witnesses (PW1 and PW4) are relatives of both the accused and the deceased. Contrary to what the accused stated, they were both at the scene during the saga. They both affirmed that it was the accused who confronted the deceased in her house and that she (accused) was in fact the aggressor.

Gladys heard a sound of something being hit and on looking back saw the accused hitting the deceased with an iron bar. She (PW1) saw the deceased being hit on the head and hips. She thereafter saw blood on the deceased's clothes and noted that the deceased was bleeding from the head. Gilbert (PW4) saw the accused hit the deceased once on the back of the neck and twice on the waist with the iron-bar. He thereafter saw the deceased bleeding from the head.

Both Gladys and Gilbert overruled the allegation by the accused that she engaged in a struggle with the deceased. Their evidence clearly showed that it was the accused who confronted the deceased and unlawfully assaulted her with an iron-bar thereby inflicting fatal injuries upon her.

Indeed, the cause of death as found by the pathologist was very consistent with what Gladys (PW1) and Gilbert (PW4) stated. The evidence by these two witnesses proved beyond reasonable doubt that the deceased was assaulted and fatally injured by the accused.

The evidence by Elizabeth (PW3) confirmed that she heard Gladys (PW1) screaming and was thereafter informed that the accused had assaulted and injured the deceased. The deceased was her daughter in-law while the accused is her daughter.

Daniel Kiprop (PW2) the deceased's husband and a brother to the accused, heard screams while he was at a nearby shopping area. We rushed to his home and found a crowd. He also found the deceased on the ground with a head injury and blood stained clothes. He was told that the deceased had been hit with an iron-bar by the accused. He did not witness the incident but said that the deceased and the accused did not previously have any dispute between themselves although they were sucked into the dispute between him (PW2) and his brother which led to his arrest.

Daniel Kosgei (PW5) learnt of the presence of the accused in a neighbour's farm. He went there and found her hiding in a maize plantation and took her to Moiben Police Station where she was charged. His evidence is only relevant in showing that the accused was found hiding in a maize plantation after assaulting the deceased thereby imputing guilty consciousness on her part.

There being no doubt that the fatal injuries occasioned upon the deceased were inflicted by the accused, the next issue would be whether the accused acted with malice aforethought.

The evidence by Gladys (PW1) and Gilbert (PW4) coupled with that of the doctor (PW7) clearly and cogently demonstrated that in occasioning fatal injuries upon the deceased, the accused acted with malice aforethought. The evidence did not even slightly show that the accused may have been provoked into doing what she did. There was nothing to suggest that she acted in self defence. She went all out to assault the deceased without any justification and in the process snapped life out of her. The defence raised herein is completely unsustainable. The charge against her has fully been established and proved to the required standard. Accordingly, she is found guilty as charged and convicted.

In conclusion, it would be appropriate to consider the issue of assessors raised by the learned counsel for the accused in his final submissions.

Learned counsel submitted that during the trial assessors were on record but were discharged by the trial judge on the 26th May 2008 prior to the conclusion of the case. This therefore rendered the trial irregular. In response, the learned state counsel submitted that the issue of assessors was never raised when directions were taken and that the discharge of assessors would not lead to acquittal.

The view of this court is that although recent guidelines from the Court of Appeal indicate that if a trial was commenced with the aid of assessors then it ought to proceed and end in the same manner, the fact that this trial proceeded without assessors from the 22nd May 2008 does not render it irregular if no prejudice was occasioned to the accused. In any event, the accused did not raise any objection for the trial to proceed in the absence of the assessors and even if the trial had proceeded with the aid of assessors, their opinion would not have been binding on the court.

When the court discharged the assessors on the 22nd May 2005 it did so in keeping with the amendment in the law pertaining to trial by assessors.

Thus, section 262 and 263 of the Criminal Procedure Code and all provisions relating to assessors were repealed by Act No. 7 of 2007 such that trials by assessors no longer exist in law by dint of the repeal.

A second issue raised by the accused pertains to the right to a speedy trial as enshrined in the old constitution. It was contended that the accused has been in remand for over five (5) years. Indeed, that is a very long period for a person to be held in remand awaiting trial and/or conclusion thereof. However, the circumstances indicated herein above contributed to the delay for which neither the prosecution nor the

defence may be held responsible.

J. R. KARANJA
JUDGE

(Delivered and signed this 14th day of July 2011).

14/7/2011

Before J. R. Karanja J.

C.C. Andrew
Mr. Kabaka for prosecution
Accused present in person
Mr. Miyienda for accused absent
State Counsel – Accused may be treated as a first offender.
Mitigation;

I ask for leniency. I have been in custody for long. I am also sickly. It is my first offence.
Court; Accused is a first offender. Mitigation noted. Offence must be treated with seriousness deserved.
Sentence; To suffer death as by law prescribed.

J.R. KARANJA
JUDGE