



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CRIMINAL CASE NO. 89 OF 2009**

REPUBLIC.....PROSECUTOR

VERSUS

ISAIAH TARUS LAGAT ALIAS KITARIAN.....ACCUSED

**JUDGMENT**

Isaiah Tarus Lagat Alias Kitarian (herein, the accused) was arraigned in Court on the strength of the information filed herein dated 2<sup>nd</sup> September 2005. The information carried with it a charge of murder contrary to S. 203 as read with S. 204 of the Penal Code. It was alleged that on the 5<sup>th</sup> June 2005 at around 9.00 a.m. at Kaborgoge Village Bartolimo Sub Location, Kapteberwo Location in Baringo District Rift Valley Province, the accused murdered Paulina Kobilu Chongwo. After the accused pleaded not guilty to the charge, the trial commenced and progressed before three different Judges before it was finally taken over by this Court at the defence stage.

The Judgment is therefore a culmination of a protracted trial stretching for about six (6) years from the year 2005 to the year 2011 in which the prosecution called a total of eighteen (18) witnesses in support of its case which may be summarized as being that on the material 5<sup>th</sup> June 2005 at about 9.00 p.m., **SIMION KOECH (PW1)** and **JUSTINE KIPKOECH KIPROP (PW 2)** were at their home when they heard screams emanating from the homestead of the deceased Paulina Kobilu Chongwo who was their neighbour. The two ventured out of their house to enquire as to the cause of the screams. They moved towards the fence separating their home from that of the deceased. While a few metres away from the house of the deceased, they spotted a person leaving the house. With the aid of electric lights at the scene, they saw and recognized the person as being the accused, also their neighbour.

Both Simon (PW 1) and Justine (PW 2) noted that the accused was wearing a jersey with the inscription “**FUBU**” and that he left the house of the deceased while bending before returning therein after a few minutes. They (PW 1 and PW 2) were joined by other people who arrived and surrounded the scene. A stone thrown at the roof of the house scared the intruder into bolting therefrom and enter into an outside toilet before jumping over the fence and disappearing into a nearby bush.

**KENNETH KIPKOECH (PW 3)** was from a trading centre heading home when he heard the screams

emanating from the house of the deceased. He met Simion (PW 1) and Justine (PW 2) moving towards the deceased's house. He went home first and thereafter joined Simon and Justin. He saw a person wearing a jersey with the word "FUBU" enter the house of the deceased. He recognized the person as his neighbour, the accused. He (PW 3) then left the scene to summon the old man Ruto (PW4) and together they returned to the scene. On approaching the gate, he (PW 3) was alerted that the intruder was running away. He then saw the intruder enter a toilet and thereafter jump over the fence. He (PW 3) had a bow and arrows. He shot at the intruder but missed.

The old man **CHARLES KIBII RUTO (PW 4)** on arrival at the scene was informed that the intruder was inside the house of the deceased. He (PW 4) was armed with a bow and arrows and in possession of a whistle which he blew causing the intruder to emerge from inside the house and enter the outside toilet before jumping over the fence and disappearing. He (PW 4) later saw the accused appear at the scene with a torch. The accused told him that he had arrived there via a route at the lower side and found people looking for a thief. **DAVID KIPKOECH SONGOL (PW 5)** and **JOSEPH CHEPYEGON (PW 6)** were among those who arrived at the scene. They both spotted the intruder but were unable to identify him.

**EDWIN CHEROGONY CHEPCHIENG (PW 7)**, had been employed by the deceased as a herdsman. He was on his way home from Bartolimo trading centre at about 9.30 p.m. when he met and was informed by Kenneth (PW 3) that the deceased had been killed. He (PW 7) went to the house of the deceased on the following morning and on arrival found many people. Police officers arrived there later and carried away the body of the deceased.

**EZEKIEL CHEROP (PW 8)**, a businessman at Bartolimo trading centre was on the material date at about 8.00 p.m. in his shop when the accused arrived there. A football match scheduled to be shown on T.V was not shown. Therefore, the accused and others listened to the radio and left the scene at 8.30 p.m. when the shop was closed.

**BENJAMIN MONIR (PW 9)**, was the Chief of Kapteberwo Location at the material time. He proceeded to the home of the deceased the morning after the murder and viewed the body of the deceased. He noted that the deceased had been severely stabbed. Blood stains inside the house suggested that the assailant had also injured himself. The stains extended into the outer toilet and continued towards a river which was about 100 metres away. The Chief (PW 9) also noted an empty knife sheath at the scene. Later, acting on information that a local butcher appeared sickly, the Chief went to the butchery where he found the butcher limping. The said butcher was the accused. He alleged that he fell down and twisted his knee-cap on the previous night while rushing to his home thinking that the screams heard by him were from there.

On seeing the accused's bandaged finger, the Chief became suspicious and alerted police officers who were nearby. The police officers arrested the accused for being a suspect in the murder of the deceased.

**TALAA KOMEN (PW 10)**, a business lady at Bartolimo trading centre was in her shop on the material date when the accused went there and asked for change. He looked fine. He left the shop after failing to secure the desired change. It was on the following day that she (PW 10) learnt that the deceased had been killed. She later on the same day met the accused but did not see him with any injuries. He was wearing a hat. He told her that he injured his leg after falling down. **PHILIP KIPTEKAT (PW 11)** is a son to the deceased. He was in his shop on the 6<sup>th</sup> June 2005 when he was informed that the deceased had been attacked. He proceeded to the deceased's home and found that the deceased was already dead. There was blood everywhere. He made telephone calls to other relatives and reported the matter at Kabarnet Police Station. Later, he identified the body of the deceased for post mortem purposes.

**SAMSON CHERUIYOT RUTTO (PW 12)**, was in church on the material date after which he went shopping and entered a hotel to take his lunch. He spotted the deceased taking lunch in the same hotel. Later, the deceased assisted him with Kshs. 1,200/- which he needed. Thereafter, they parted and he went home. On the following day, he went to the house of the deceased at 1.00 p.m. and found many people. He was informed that the deceased had been killed the previous night.

**ERICK KIPTEPKUT (PW 13)**, a step son of the deceased learnt of her death on 6<sup>th</sup> June 2005 at about 9.00 a.m. He proceeded to the scene and confirmed that the deceased was dead. Her body had injuries on the neck and face. There was blood in several rooms in the house. There were table clothes with blood stains. These extended to the outer toilet and to a nearby river. He (PW 13) confirmed that the accused was suspected and arrested. He (accused) was limping at the time and had bandaged his fingers with elastoplasts. His house was searched but nothing was found. His jersey had blood stains which he said were caused by blood from a goat. His trouser also had blood stains. Erick (PW 13) saw a knife sheath near the body of the deceased. He said that a blood stained knife was recovered on 10<sup>th</sup> June 2005.

**P.C JOSEPH OGOKI (PW 14)** was one of the police officers investigating the case. He received the murder report on 6<sup>th</sup> June 2005 but did not proceed to the scene with fellow officers. He visited the scene on the 7<sup>th</sup> June 2005 accompanied by officers from the Scenes of Crime Section. He saw blood stains and blood marks in the house. These were on electric switches, table clothes and cupboards. The blood stains extended outside the house and to a nearby river, 100 metres away. P.C Ogoki (PW 14) arrested the accused after he was pointed out by the area chief as a suspect. He (PW 14) noted that the accused had a mark on the forehead and a swollen knee which he attributed to falling down on the previous night while running in answer to a whistle blow which he thought was from his home.

The alleged scene of the fall was visited by P.C Ogoki who formed an opinion that due to the rugged nature of the scene, the accused would have injured his hands. He (PW 14) examined the accused's hands and noted that his right ring finger and little finger were bandaged with elastoplasts. He (PW 14) removed the elastoplasts and noted that the accused had sustained deep cuts which could not have been caused by barbed wire. P.C Ogoki caused samples of dry blood stains to be taken by the scenes of crime personnel. He also caused the scene to be photographed. He collected several exhibits and arranged for blood samples to be taken from the accused. He forwarded some of the exhibits to the Government Chemist for analysis and after investigations of the case, charged the accused accordingly.

A Government Analyst, **JOHN KIMANI MUNGAI (PW 15)** carried out the necessary analysis and thereafter compiled a report which he produced in Court (P. Ex. 7) and which somehow implicated the accused.

**DR. PHILIP MBITHI (PW 16)** of Kabarnet District Hospital produced the post mortem report (P.Ex 8) compiled by his colleague Dr. Sephen Mwangangi after the post mortem examination of the body of the deceased. He (PW 16) also produced a medical examination report (P3 form) (P.Ex 9) which was compiled after the accused was examined to assess his mental capability.

**CPL. LUKA WAKO (PW 17)** of the Scenes of Crimes Section visited the scene and took photographs. He also took photographs of the dead body of the deceased lying at the Kabarnet mortuary. He later supervised the development of the photographs which he produced in Court (P. Ex 10). **P.C PATRICK KAHURA (PW 18)** assisted in the investigation of the case and also identified the body of the deceased for post mortem purposes.

In his defence, the accused made a sworn statement in which he denied the offence. His case is that he operates a butchery and that the deceased was his neighbour. On the material date, a Sunday, he left for church and thereafter went to his butchery. At about 6.00 p.m., he went to the local trading centre to watch a football match on Television. The match was between Manchester United and Liverpool. Manchester United lost 1-0 to Liverpool. After the match and on his way home, he met a person called Charles Barmasa who enquired from him whether he had met anybody else on the way. He replied in the negative and proceeded with his journey to his home. He had to cross a river and while doing so, slipped and fell down. He sprained his knees but managed to walk slowly to his house where his wife applied a vapour rub (Rob) on his knee. Thereafter, he went to bed. On the following morning, his knees had swollen. He used a walking stick and proceeded to a nearby market to purchase a goat for meat. He purchased two goats and since he could not slaughter them on the same day due to time factor, he locked the goats in a pen and went to his butchery where he remained upto 6.30 p.m. when he went to fetch his wife at her kiosk so that they could return home together. He found the kiosk closed and was informed that it had not been opened. He went home and his wife told him that she could not open her kiosk since something bad had happened in the area. She told him that their neighbour, the deceased, had been killed. She also told him that the area chief had alleged that an intruder had entered the house of the deceased and was shot twice with arrows as he escaped. She further told him that villagers had been told to be on the lookout for a person with fresh injuries. He slept that night and on the following day proceeded to his butchery and slaughtered his goats. It was then that the area chief arrived and enquired as to why he was walking with the aid of a walking stick. Thereafter, police officers arrived at his butchery and questioned him. He was taken to the Chief's office for further questioning. The police visited and examined the spot where he fell down. They searched his house and found nothing. He was taken to the home of the deceased where he found many people who answered affirmatively when the local Officer Commanding Station (OCS) asked them – "Is he the one?" After that, he was arrested and taken to the Police Station but on the way, there was mention of a suspect called Daudi who was arrested by Administration Police officers. However, the Chief who was in the same company, dissuaded the O.C.S from nabbing the said Daudi because he (Daudi) had a pregnant wife and small children. At the Kabarnet Police Station, it was alleged that he (accused) killed the deceased. He insisted that he did not kill anybody despite the beatings administered on him by the police so that he could admit the offence.

The foregoing summary of both the prosecution and defence case raises no dispute that the deceased was killed on the material night by an individual who gained entry into her house either with or without her consent. It was indicated by the investigating officer (PW 14) that the doors and windows to the deceased's house were not broken. The deceased and the assailant were certainly alone at the material time.

The only other person expected to be at the homestead was the deceased's employee (PW 7) but he said that he was not there at the material time having gone to the local Bartolimo trading centre. It was only later on the same night that he learnt from Kenneth (PW 3) that the deceased had been killed. It was apparent from the injuries on the body of the deceased and the blood stains found in the house that the deceased was killed by being stabbed and/or cut with a sharp weapon such as a knife. The murder weapon was however not recovered at the scene. Only an empty knife sheath (P.Ex.4) was found next to the body of the deceased.

The post mortem report (P.Ex.8) shows that the deceased died from severe hemorrhage due to multiple stab wounds.

The degree and intensity of the injuries suffered by the deceased which ultimately caused her death clearly indicated that the assailant intended to cause grievous harm and hence the death of the deceased.

Under S. 203 of the Penal Code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

And under S. 206 (a) of the Penal Code, malice aforethought shall be deemed to be established by evidence proving an intention to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not.

There being no dispute that the death of the deceased was caused by multiple stab wounds inflicted with a sharp weapon by a person who acted with malice aforethought, the basic issue for determination in this case is whether the accused herein was positively identified as the person responsible for the heinous crime.

The defence raised is a denial and an implication that the accused was incriminated without good cause mostly by the area chief (PW 9) who became suspicious of him on seeing that he was limping due to a knee injury.

The accused attributed the injury to his falling down while crossing a river on his way to his home on the material night after having watched a game of football on television at the local trading centre.

The accused said that due to the sprain on his knees, they became swollen on the following morning. He therefore had to walk with the aid of a walking stick and carry out his usual chores as a butcher. He went to a nearby goat market and purchased two goats. He could not slaughter the goats on the same day due to time factor. He later returned to his home and was informed by his wife that the deceased had been killed and that the area chief had told all the villagers to be on the lookout for a person with fresh injuries.

The accused said that he slept the night away and on the following day proceeded to his butchery where he slaughtered the goats purchased on the previous day. It was while he was at the butchery that the area chief arrived and questioned him about his knee injury. He gave his explanation but soon thereafter, police officers arrived and took him to the Chief's office where he was subjected to further questioning. He was in the process asked to remove his shirt but no other injury was seen on him. The accused went on to say that the police took him to the place that he had fallen down and examined it. They also took him to his home where they conducted a search. Thereafter, he was taken to the home of the deceased where he found a crowd of people including the area Officer Commanding Police Station (OCS). The OCS arrested him after the crowd answered affirmatively the question he had posed to them.

The accused contended that a suspect called Daudi was allegedly arrested and released by Administration Police officers at the instigation of the area chief who requested the OCS to leave Daudi alone as he had a pregnant wife and small children.

Essentially, it is the accused's contention that he was not involved in the killing of the deceased and if anything, the police at the instigation of the area chief got a wrong person and deliberately allowed a suspect called Daudi to walk free.

Basically, the law presumes the accused innocent unless proved guilty beyond any reasonable doubt. The burden to prove the accused's guilt therefore lies with the prosecution. There is no burden placed upon the accused to prove his innocence.

Herein, the evidence availed by the prosecution against the accused is both direct and indirect. The direct evidence was that adduced by the alleged eye witnesses (i.e. PW 1, PW 2 and PW 3). The indirect evidence was that adduced mostly by the investigating officer (PW 14) and the Government analyst (PW 15). This was intended to show that the accused was at the scene of the offence at the time it happened and was therefore most likely the person who killed the deceased. The indirect evidence was hinged on the blood samples obtained from the scene and from the deceased as well as the accused.

The direct evidence was hinged on the alleged visual identification of the accused at the scene of the offence as it happened or immediately after it happened.

With regard to the direct evidence, Simon (PW 1) stated that he heard screams from the home of the deceased and immediately rushed towards a fence separating their home from that of the deceased. From that position, he saw the accused briefly exiting and re-entering the house of the deceased while crawling or bending. He (PW 1) said that the accused was at the time wearing a jersey written "FUBU" and that he (accused) left the deceased's house after it was surrounded by a group of people.

Simon further testified that on leaving the house of the deceased, the accused entered a toilet. Since he (PW 1) had a torch, he shone it at the accused thereby forcing him to jump over a fence and disappear into a bush.

Simon contended that he was able to see and identify the accused by recognition. The accused was a neighbour and previously known to him. He (PW 1) indicated that the presence of electric light at the scene of the offence enabled him to see and recognize the accused. He (PW 1) did not mention torch light as having also assisted him in identifying the accused.

Of interest is the statement by Simon (PW 1) that earlier on the material evening he was together with the accused watching a game of football.

In cross-examination, Simon (PW 1) said that he saw the crawling man from the back and that he had a knife, torch and was wearing a heavy long sleeved jumper. Simon also said that the crawling man at the scene of the offence was limping.

In the company of Simon at the time was Justine (PW 2) who stated that while at the fence they saw someone whom they identified as the accused exiting the deceased's house and run behind it before re-entering it.

Justine also said that the accused was wearing a jumper with the word "FUBU" and that he escaped when the homestead of the deceased was surrounded by people. He (PW 2) indicated that he was able to see and identify the accused due to the presence of electric light at the scene.

In cross-examination, Justine (PW 2) confirmed that in his statement to the police he talked of a man exiting the house of the deceased with his head covered. Kenneth (PW 3) was also at the scene at about the same time with Simon and Justine. He said that the accused was the person he saw entering the house of the deceased while wearing a jersey with the word "FUBU". Thereafter, he (PW 3) briefly left the scene to go and call Mzee Rutto (PW 4). Upon his return to the scene, he was informed that the suspect intruder was running away and had entered a toilet before jumping over the fence. He (PW 3) said that he shot at the intruder with arrows but missed. On being cross-examined, Kenneth (PW 3) disclosed that he recorded two statements at the Police Station and that in one of the statement he stated that he saw the

intruder through a window but could not identify him. He (PW 3) mentioned that he recorded a second statement as the first statement was not proper. In his second statement, he said that the intruder had covered his face.

The offence occurred in the hours of darkness. This meant that conditions favourable for identification were non-existent. However, the three identifying witnesses (PW 1, 2 and 3) alluded to the presence of electric light at the scene. This would, of course, provide favourable conditions for identification depending on the intensity of the lights and their position vis-a-viz the suspect.

For a Court to convict on the basis of evidence of identification, the same must be watertight and free from the possibility of error or mistaken identification. Even in cases of identification by recognition, the evidence must be cogent and credible.

From what was stated by Simon (PW 1) and Justine (PW 2) there were electric lights at the scene. The two did not however indicate the intensity of the lights and their position or distance from the suspect. Kenneth (PW 3) was with both Simon and Justine when they allegedly saw and recognized the accused but he did not mention or say anything about the presence of electricity at the scene. He implied that the place was in total darkness by stating that the intruder ran into the darkness.

The trio of Simon (PW 1), Justine (PW 2) and Kenneth (PW 3) said that the accused was wearing a jersey with the word "FUBU". However, they offered no evidence to show that the jersey was unique to the accused and that no other person in that area had or could have such a jersey.

Although Simon (PW 1) said that he identified the accused due to the presence of lights at the scene, he also said that the person he saw exiting the house of the deceased was doing so while crawling backwards such that he only saw him from the back.

Significantly, Simon (PW 1) stated that he was with the accused watching a game of football earlier on the material date. In effect, Simon suggested that the person he saw at the scene might not have been the accused or that he mistook the person for the accused.

In his defence, the accused contended that he was watching football on T.V on the material night. The evidence by Simon (PW 1) confirmed as much and so did the evidence by Cherop (PW 8), the owner of the shop where the T.V was situated. However, Cherop (PW 8) said that the football match was not shown on T.V and instead the accused and others listened to a radio and then left at about 8.30 p.m. when the shop was closed.

What was stated by Simon (PW 1) and the accused contradicted what was stated by Cherop (PW 8) thereby implying that he (PW 8) was evasive and reluctant to give a true account of what went on in his shop on that material date and time.

Simon (PW 1) said that when he saw the accused at the scene of the offence, he was wearing the jersey written "FUBU". He (PW 1) said that the accused was wearing the same clothes he had been wearing when they earlier met to watch football on T.V. If that were so, Cherop (PW 8) and Talaa (PW 10) would have mentioned the jersey written "FUBU" but they did not despite the fact that they had met the accused earlier on the material date.

Other than Simon (PW 1), Justine (PW 2) and Kenneth (PW 3), there was at the scene people like Mzee Rutto (PW 4), Songol (PW 5) and Chepyegon (PW 6). They went to the scene after the presence of an intruder was communicated to them. None of them identified the intruder. They all indicated that there were no lights at the scene even though Songol (PW 5) and Chepyegon (PW 6) alluded to the presence of insufficient light in one of the rooms.

The two (PW 5) and (PW 6) implied that if there was any light at the scene, it was not sufficient for a positive and proper identification of the intruder. Interestingly, Mzee Rutto (PW 4) alluded to the presence of the accused at the scene while a group of young men were in hot pursuit of the intruder. Mzee Rutto thus implied that the accused was not the intruder being pursued by the young men after escaping from the house of the deceased.

Apart from Simon (PW 1), Justine (PW 2) and Kenneth (PW 3) none of the other prosecution witnesses said that they saw and identified the accused as the intruder who was suspected to have caused the death of the deceased. Despite their alleged identification of the accused, the evidence by Simon (PW 1), Justine (PW 2) and Kenneth (PW 3) was shaky and unbelievable. The evidence was contradictory, inconsistent and not cogent enough for this Court to hold that it was free from the possibility of error or mistaken identification. The three may have seen the intruder but without being able to identify him. So, they could not say with certainty that he was the accused and the accused only. Their evidence fell short of establishing beyond reasonable doubt that the accused was the person who attacked and killed the deceased in her house. The prosecution's direct evidence against the accused has thus been rendered insignificant.

With regard to indirect evidence, this was conceived by the suspicion cast upon the accused by the area Chief (PW 9) on the basis of the knee injury sustained by the accused. It was the opinion of the Chief and the police investigators led by P.C. Ogoki (PW 14) that the person who was at the house of the deceased at the time of the offence must have sustained injury since there were blood stains at various places inside the house and also outside the house towards a nearby river.

Consequently, blood samples were collected at the scene and near the scene for analysis by the Government Chemist (PW 15). The samples were to be comparatively analysed with samples collected from the deceased and the accused. This was done by the Government Chemist and a report (P.Ex 7) compiled.

The report placed the accused at the scene of the offence at the material time thereby incriminating him with the murder of the deceased.

However, the report cannot be relied upon because it was not known when, how and by whom blood samples were obtained from the accused. The investigating officer (PW 14) could not tell when and by whom blood samples were obtained from the accused. The Government Analyst (PW 15) was merely handed samples and informed that they were obtained from the accused.

If it was not known when, how and by whom blood samples were obtained from the accused, what could have prevented a sample of blood obtained from the accused on an unknown date and by an unknown person from being sprinkled at the scene of crime and environs in order to implicate the accused with the murder of the deceased? In the circumstances, the possibility of a frame up could not be overruled.

Suffice to say that the indirect evidence against the accused is suspect and cannot be relied upon to link him to the offence.

The suspicion cast upon the accused by the area Chief and the investigators was of no evidential value. No matter how strong, suspicion alone is not and cannot be evidence of conviction of a crime.

In the end result, this Court must and hereby finds that the case against the accused has not been proved beyond reasonable doubt. Consequently, the accused is declared not guilty as charged and is acquitted.

**J. R. KARANJA**  
**JUDGE**

**[Delivered and signed this 13<sup>th</sup> day of October 2011]**