



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 13 OF 2004

**REPUBLIC:.....PROSECUTOR
VERSUS
JOHN KIPKURUI KURGOR:.....ACCUSED**

JUDGEMENT

John Kipkurui Kurgor, the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The allegation as set out in the information dated 19th March, 2004 is that on the 10th day of February, 2004 at an unknown time at Kimonton Village in Kapkelelwa Location in Baringo District of the Rift Valley Province, the accused murdered **Caroline Kurui**.

The accused was first brought before the court on 5th March, 2004 but his plea was taken before **Gacheche J**, on 8th March 2004. The accused pleaded “not guilty” to the charge. After the usual adjournments the trial commenced before **Dulu J**, on 27th June, 2005 with the aid of assessors. Two witnesses testified before him before he was transferred from Eldoret. When the trial was to resume on 1st February, 2006, before **Gacheche J**, the Learned Judge ordered a de-novo hearing but heard no witnesses. The hearing again commenced on 5th December, 2006 before **Ibrahim J**, as he then was. The Learned Judge heard six (6) witnesses with the aid of assessors but the 7th witness does not seem to have testified in the presence of assessors. The prosecution closed its case on 27th November, 2008 and Learned Judge on 29th January, 2009 ruled that the accused had a case to answer. **Ibrahim J**, was then transferred and the trial was taken over by **Osiemo J**. The Learned Judge heard the statement of the accused in his defence which statement was unsworn. The Learned Judge then retired before final submissions.

When the case was placed before me on 2nd November, 2011, counsel informed me that they did not wish to make any submissions. I explained to the accused his right under section 200 of the Criminal Procedure Code and he stated that he did not wish to recall any witness who had testified before. So, this judgment is based on the evidence taken before **Ibrahim J** and **Osiemo J**. I prepare the same without having observed the demeanour of the witnesses and with the knowledge that the 7th witness for the prosecution was heard in the absence of assessors.

The Evidence

PW1 **Nathan Korir**, testified that on 11th February, 2004 as he was preparing to go on duty, was told by **Samuel Chebii** (PW5) that the accused had informed him to look after his children. The accused, PW1 and PW5 are brothers. PW1 and PW5 proceeded to the home of the accused and found him sitting next to the body of the deceased in his land. They went to report to their chief. On their way

back they met the accused in the company of their village elder and the chief who was with Administration Police Officers directed the latter to take the accused away.

PW1, PW5 and the Chief proceeded to the scene and observed the body closely. PW1 and PW5 noted serious injuries on the body of the deceased. There were cuts on the face, neck and head. The chief called police officers from Kabarnet Police Station who arrived shortly. PW7 PC **Jacob Kisoo** was among them. The police officers recovered a panga which was near the scene. They then took the body to Kabarnet District Hospital Mortuary where **Dr. Eric Ngetich** (PW4) carried out a post-mortem on the body of the deceased. The body was identified by **Kims Maindi Koino** (PW3). The post-mortem form was produced by **Dr. Tolo Boston Otieno** (PW4) on behalf of his colleague **Dr. Eric Ngetich**.

Samuel Koima Cheburet (PW2) only received a report of the killing and advised that the police be informed and PW6 **PC Josephat Ongoki** accompanied PW3 when he identified the body of the deceased to the Doctor who performed the post mortem.

After the testimony of PW7, the prosecution closed its case. The accused gave an unsworn statement and called no other witness. He testified that on 9th January, 2004, he went to his farm with the deceased where they worked upto 1:00pm, when they returned home. They had lunch together and at 4:00pm he left the deceased at home as he went to claim payment for work he had done for someone. He was paid at about 7:30pm and when he returned home at about 10:00pm he did not find the deceased in the house. He started looking for her. At about midnight he went to the house of PW5 to inquire whether he had seen the deceased. He responded that he had indeed seen her during the day tying his livestock. He then asked PW5 to look after his children as they were alone. He looked for the deceased at the houses of his other brothers and neighbours without success. At 2:00am, he returned to his house and slept. However, at 5:00am on 10th November, 2004 the Chief, APs and his brother arrested him and took him to Kabarnet Police Station and charged him as already stated which charge he denied and still denies.

Analysis and Evaluation of the evidence on record.

As I analyze and evaluate the evidence, I am fully aware as to who bears the burden of proof. The onus is on the prosecution to prove beyond reasonable doubt that the accused person committed the murder of the deceased **Carolyn Kurui**. I am cognisant of the fact that the accused bears no legal responsibility in proving his innocence since he is presumed to be innocent until and unless the prosecution proves him to be guilty.

The prosecution case is that on 11th February, 2004, the accused went to the house of PW5 **Samuel** and told him to look after his children. PW5 did not know why the accused had made that request. He therefore informed his brothers including PW1 of his brother's request. The brothers went to the home of the accused the next morning and saw him next to the body of the deceased. They retreated and made a report to their Chief who arrested the accused. The Chief also called Kabarnet Police Officers who visited the scene, recovered a panga and took the body of the deceased to Kabarnet District Hospital Mortuary where **Dr. Eric Ngetich** performed a post-mortem which indicated the cause of death as severe haemorrhage due to facial artery injury caused by a sharp object.

On the evidence adduced by the prosecution, there is no doubt that the offence of murder was committed, given the injuries found on the body of the deceased. But was the offence committed by the accused? There was no eye witness to the commission of the offence. No one saw the accused kill the deceased or do grievous harm to her.

All that PW1 and PW5 stated was finding the accused next to the body of the deceased. The prosecution therefore relies on circumstantial evidence to demonstrate their case against the accused. The doctor who performed the post-mortem on the body of the deceased i.e **Dr. Eric Ngetich** did not testify at the trial. He did not indicate in the post mortem report when the deceased died. PW4, **Dr. John Tolo Boston Otieno**, did not also testify as to when the deceased could have met her death.

The accused stated that he parted with his wife on 9th February, 2004, at about 4:00pm when he

went to claim payment for work he had done for someone and when he returned he could not find the deceased in the house. He therefore informed his brother to look after his children as he continued with the search. He did not succeed and returned home to sleep only to be arrested the next morning at 5:00am.

There is therefore the period between 4:00pm of 9th February, 2004 and when the body of the deceased was discovered which has not been accounted for by the prosecution. The information which the accused gave to PW5 to look after his children could as well have been quite innocent. The statement of the accused to PW5 *parse* in my view does not inevitably lead to the inference that the accused person murdered his wife. For circumstantial evidence to lead to a conviction inference from the same must be inconsistent with the innocence of the accused. I cannot say that the prosecution indeed excluded other inferences. Murder is the ultimate crime and for a conviction to be achieved the evidence in support of the charge must be water-tight more so circumstantial evidence. I have doubt that the circumstantial evidence relied upon by the prosecution has proved the guilt of the accused person beyond reasonable doubt. I resolve the doubt in favour of the accused.

In the premises, I find that the prosecution has failed to prove the charge of murder or any other offence against the accused person beyond all reasonable doubt. In the event I find the accused not guilty. He is therefore acquitted. I order that he be set at liberty forthwith unless he is otherwise lawfully held.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET
THIS 7TH DAY OF DECEMBER, 2011**

F. AZANGALALA

JUDGE

Read in the presence of :-

Mr. Kabaka for the State and

Mr. Nyambegera for the accused person.

F. AZANGALALA

JUDGE

7TH DECEMBER, 2011.