



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Criminal Case 45 of 2003

REPUBLIC:.....PROSECUTOR

VERSUIS

ERNEST KEMBOI KIPLAGAT:.....ACCUSED

JUDGMENT

ERNEST KEMBOI KIPLAGAT is charged with murder contrary to section 203 as read with section 204 of the Penal Code, chapter 63 of the Laws of Kenya. The particulars are that on the 21st day of June 2003 at Kapsubere farm Moiben in Uasin Gishu District of the Rift Valley Province he murdered **GLADYS CHEBET**.

Seven (7) prosecution witnesses gave evidence. PW1 was Kipkemboi Sor Koilege who is a farmer living in Moiben. He is the father of the accused. He told the court that on 21/06/2003 he was weeding in his shamba when his son the accused herein who had gone for casual jobs passed by the shamba on his way home. Shortly thereafter the witness heard his wife shouting and he rushed to her at the accused's house which was about 800 meters from where he was weeding the shamba. The witness found the deceased outside their house. The deceased was not talking. She had many cuts all over her body. He added that the accused was standing there holding a panga. The accused then took a bicycle on which he rode saying he was going to the police station. He dropped the panga at the scene. The witness said that the deceased died at the scene. He sent his younger son to report the incident to the police. The police came later in the day and collected the body of the deceased.

The following day the witness, his wife and younger son went to the police station and found that the accused had been arrested. He said that on the 3rd day of July 2003 he went to the Moi Teaching and Referral Hospital mortuary where he identified the body of the deceased. He said further on cross-examination that the accused had greeted the witness when he had passed by the shamba where the witness was weeding. He did not know if the accused had taken any beer. He heard his wife screaming after about five (5) minutes after the accused had passed by the shamba. He reaffirmed that he found accused standing at the scene but that he left soon after on a bicycle over which he nearly fought

with his younger brother. The witness concluded his evidence that the accused and his wife had lived well and that he did not know if they had any differences. They had been married for eight (8) years. The witness said that he did not know why the accused killed his wife.

HELLEN KEMBOI was PW2 and she is a farmer from Moiben. She said that she was the mother of the accused. Her evidence was that on 21/06/2003 at about 2p.m she was at her house when she heard shouts from the deceased shouting from her house which was near hers. She called her husband and their other son and told them to go and help. She later went to the accused's house but did not find him. She found the deceased lying on the ground dead with cuts all over the body. By the time she arrived at the accused's house other people had already arrived. She said that she had not seen the accused that day as she was told he had gone looking for casual jobs. She added that they sent their son Timothy who went to report the incident to the police and on the following day she, her husband and their son Timothy went to the police and recorded her statement. They found the accused at the police station. The body of the deceased had been removed from the scene on 21/06/2003 by police. On cross examination she said that she saw her son the accused during the day at an hour she could not recall and that he was drunk and staggering. She had not spoken to the accused. She said that the accused and the deceased would quarrel sometimes. She did not witness the attack herself.

The third prosecution witness was **TIMOTHY KIMNGETICH KEMBOI** from Moiben. He is a farmer and the younger brother of the accused. He said that the deceased was the accused's wife. His evidence was that on 21/06/2003 he was at the shamba with his father weeding when the accused passed by and greeted them. Accused said he had come from doing some casual job. Soon after the witness heard his mother shouting that the accused was killing his wife. The witness then dashed to the accused's house and on the way he could see the accused beating his wife. He was about 100 meters way when he saw that. On getting to the scene the accused left and entered his house. He dropped the panga at the scene. The witness saw the lifeless body of the accused's wife which body had multiple cuts all over. The accused emerged from his house with a bicycle and when the witness asked the accused what was happening the accused told him to shut up. Accused said he was going to the police and the police would come. Other people also came to the scene. By now the deceased was dead. The accused went to Moiben Police Station to report but he did not find the accused there. Witness came back to the scene with policemen and the body was removed to the mortuary. The following day the witness with his father (PW1) and mother (PW2) went to the police station and recorded their statements. The witnesses identified the panga lying next to the deceased's body. It had blood stains.

On cross examination he maintained that he was the first to reach the scene and on his way there he could see the accused hitting his wife. He said that the accused told him he the witness did not know what problems the accused had at home when the witness asked the accused what was happening. The accused was drunk but the witness did not know whether the deceased was also drunk. He said that when he arrived at the scene the accused had gone into the house and so the witness took the panga and kept it aside as he was afraid that the accused might use it against him.

DR. JOSEPH EMBENZI was the fourth (4) prosecution witness. He produced the post mortem report on behalf of Professor Koslova who had performed the post mortem on the body of the deceased. The body and clothes were soaked in blood and there were many cuts and five chopping wounds on the right parietal region at occipital region and right parieto-temporal region and some defected wounds at the underlying thoracic vertebrae, at the pelvic bone, at the back of the left femur with linear fracture of the tibia and fibula bones, the cuts and wounds measured various sizes between 6x3cm and 6.3x 9cm.

The base of the skull was not fractured but there were cuts all over it. The right hand was almost completely separated from the arm. The conclusion was that there were multiple chopping wounds all over the body with cuts of underlying bones, skull, vertebral column, pelvic bone left femur, tibia linear fractures and intra cranial bleeding and massive external bleeding and these were the cause of death. On cross examination he said that the contents in the stomach were grey porridge like liquid which had no smell and added that if deceased was drunk then there would have been the smell of alcohol.

Police constable **No.61115 FRANCIS AUSTIN MWAI** was the fifth (5th) witness. He reported for duty on 21/06/2003 at 3p.m. At about 11:30p.m the accused came to the police station and gave his name as Ernest Kemboi. The accused said he had had a disagreement with his wife and that he had assaulted her. He was interrogated. The witness also found that a report had earlier in the day been booked stating that the accused had murdered his wife and then disappeared. The accused was then arrested and put in the cells. The witness said that he was at the station with P.C Kiprop when the accused came alone to the station at 11:25 pm. He said that he looked okay physically but he was drunk.

PHYLIS MAIYO from Cheburbur was the sixth prosecution witness. She was the deceased's niece. On 3rd July 2003 she identified the body of the deceased at Moi Teaching and Referral Hospital for the purposes of the doctor performing postmortem.

The final prosecution witness was Acting Inspector of Police No.48200 **ODHIAMBO MAKORI**. He was the investigating officer into the case. His evidence was as follows: He was at Moiben Police Station at 3p.m on 21/06/2003 when one Timothy Kemboi (PW3) came to the station and reported that his brother the accused herein had slashed his wife to death using a panga. He and PC Cheruiyot Joseph and Safari Cheya proceeded to the scene where they found the lifeless body of the deceased herein which had sharp cuts on the head, back, hands and legs. They took a sketch plan of the scene and he then interrogated members of the public at the scene and he identified the father, mother and brother of the deceased as his witnesses and summoned them to go to the police station the following day to record statements. He collected the body and escorted it to Moi Teaching and Referral hospital. Earlier at the scene he had been told that the accused had killed his wife and ran away on a bicycle saying he was going to the police. He recovered a panga at the scene. The accused went to the police station at 11:25pm where he reported to PC Kiprop and Francis

Mwai that he had killed his wife. The witness ordered that the accused be remanded in the cells and he later recorded witness' statements. He identified and produced the panga in evidence. He produced in evidence the sketch of the scene. He said that the accused told him that some spirits had told the accused to get rid of his wife. He said that when the accused was medically examined he was found to be mentally fit. He said that the panga was first found by Timothy Kemboi and the mother identified it as hers. The accused told the witness that he had taken not much alcohol on the date of the death of his wife.

The accused on his part gave unsworn evidence and called no witnesses in his defence after being found to have a case to answer. He said that he woke up in the morning on 21/06/2003 and left his wife at home where she was preparing changaa and he went to work at the shamba of his employer. He worked at the shamba planting until 2pm when he was paid five hundred Kenya shillings for his labour with which money he did shopping for the family. On the way home he drank "busaa", a local brew. On getting home his wife told him that she had spent the five thousand shilling he had given her to buy planting seed for their farm. He found the wife holding a panga with which she was cutting firewood. They started quarrelling and the deceased attempted to cut the accused with the panga but he blocked it with a stool and pushed her and she staggered backwards and fell on the panga which cut her on her head. His children screamed and his parents, brother and neighbours came. They all tried giving the deceased first aid. One of his brothers ran to the accused's employer to look for transport to help take the wife to hospital but by the time they came his wife had already died. He then went and reported the incident to Moiben police station where he was put in the cells and later charged with murder.

Counsel for the accused persons relied on and reiterated his submissions at the stage of no case to answer to support the accused's case that the accused is an innocent man. Counsel had at that stage submitted that the ingredients of the offence of murder that there must be death, an act or omission causing that death and malice aforethought had not been met in this case. While he admitted that there was death counsel's view was that all else there was circumstantial evidence which is not enough to commit for murder in this case. He submitted that the accused was drunk when the offence was committed and none of the witnesses said that there were any differences between the accused and his deceased wife and hence the only offence that was established was perhaps manslaughter.

At that stage the learned state counsel for the state submitted that the evidence adduced had established a prima facie case for the accused to answer to charge of murder. He submitted that there was direct evidence connecting the accused to the offence.

I have thoroughly considered the available evidence. PW3 was the first to reach the scene of the crime. He found his brother holding a panga and standing outside of their house where the deceased lay dead. Earlier when the witness was running to the scene and while about 100 meters away he saw his brother the accused beating his wife. On asking the accused what was happening the witness was told by the accused to shut up as he did not know what problems the

accused had in his house. The witness said the body of the deceased had many cuts all over.

PW3 was an eye witness. PW1 was the second to arrive at the scene and he found his son the accused holding a panga which he dropped and took a bicycle and left saying he was going to report the matter to the police. That evidence tallies fully with that of PW3. PW2 the mother of the accused alerted PW1 and PW3 of the noise emanating from the accused's house. She got to the scene after PW3 and PW1 and found the deceased already dead with cuts all over the body. PW5 is the policeman whom the accused surrendered to at 11:30 p.m the same day of the offence saying that he had assaulted his wife. When the officer checked the OB he noticed that an earlier report was booked stating that the accused had actually killed his wife. He put him in cells. PW7 was the investigating officer and he recovered the murder weapon and added that the accused had told him that he killed his wife because certain spirits had told the accused to get rid of his wife. I find that the prosecution evidence points directly to the accused as the person who killed his wife and surrendered himself to the police. The deceased's body was identified to Professor Koslova by PW6 and the same was found to have many cuts all over varying in size with the smallest being 6x3 cm and the biggest being 10.5 x 9 cm. He found the cause of death to be massive haemorrhage due to multiple cuts and fractures of various bones and the skull. This is medical evidence which is not questioned. And this evidence completely destroys the defence evidence that the accused merely pushed his wife who staggered backwards and fell on the panga that cut her on the head killing her. If his tale were true, which I find it is not, how then would one explain the multiple panga cuts all over the body of the deceased? I find as a matter of evidence and fact that the accused brutally cut his wife on many parts of her body and killed her. He explained their quarrel as arising from the deceased's alleged squandering of 5,000/= meant for planting seeds. The accused has himself explained what led to the death of the deceased and he was the cause. The tale about administering first aid to the deceased is like water put in a sieve – it merely flows through effortlessly. None of his family members who were PW1, PW2 and PW3 talked of any first aid attempts. The accused is hereby found to have administered the cuts on his wife which led to her death.

I now must turn to the issue of whether or not the accused had malice aforethought. Malice aforethought is deemed to be established by evidence proving that the accused had knowledge that the act causing death will probably caused the death of or grievous harm to his wife and it matters not that that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or that there is a wish that it may not be caused. That is the law under section 206 of the Penal Code. In this case malice aforethought is clearly inferred from the vicious and brutal cutting and the resultant fractures on several parts of the body of the deceased by the accused. The postmortem report was evidence of the cuts and fractures of bones. The vicious and brutal attack and the multiple times it was repeated coupled with the force with which it was inflicted resulting in deep and wide cuts and broken bones can only have been intended by the accused to result in grievous harm, if not death. In this case it is safe to infer that the accused fully intended the consequences of his action and death of his wife was the direct result of the wounds, cuts and fractures that the accused

inflicted on his wife. It matters not if the accused was obeying his spirits to do away with his wife – he killed her and surrendered himself to the police. That death was intended by his action. He had the necessary malice aforethought. He committed a crime. I have no doubt whatsoever in my mind that murder has been proved beyond any reasonable doubt and accordingly I find the accused guilty as charged and accordingly I hereby convict him of murder contrary to the provisions of section 203 of the Penal Code.

DATED SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF MAY 2010

P.M.MWILU
JUDGE