



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL CASE NO. 93 OF 2009**

**REPUBLIC**.....

.....**PROSECUTOR**  
**VERSUS**

**TABITHA NAISIA**.....

.....**ACCUSED**

**JUDGMENT**

The Accused, a housewife and a peasant farmer was charged with the offence of murder but this was later reduced to the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code (*Cap 63, Laws of Kenya*).

The particulars were that on 26<sup>th</sup> October 2009 at Olpukoti Village in Narok South District within the Rift Valley Province the accused, Tabitha Naisia, unlawfully killed Joseph Kipruto Membe, (*the deceased*).

The accused readily pleaded guilty, and following the procedure laid down in the case of **ADAN vs. REPUBLIC [1973] E.A. 445** where an accused pleaded guilty a plea of guilty was entered, followed by the reading of facts by the prosecution.

In brief the facts were these. The accused is the wife of the deceased. The events leading to the deceased's death are straightforward. The deceased had on the previous day sold some maize grain belonging to the accused without permission of the accused. When she sought an explanation from her dear husband on 26<sup>th</sup> October, 2009, the deceased picked a stick and started beating the accused until she threatened to leave him.

The deceased could not hear of it, and started beating the deceased again using the same stick. The accused could not bear the beating any more, she struggled with, and managed to wrest the stick from the deceased, and used the same stick and struck the deceased once on the head.

Such fights are accompanied by wailing on the side of the wife or woman, and usually attract immediate attention from members of the public who rushed to the home of the accused and found the deceased lying on the ground bleeding from the head. They administered first aid, but it did not stop the bleeding. The deceased was rushed by members of the public to Tenwek Mission Hospital where the deceased passed away while undergoing treatment.

In the meantime, and on the same day, Police from Melelo Police Station arrested the accused while on the her way to report the incident to the same Police Station.

A post-mortem was carried upon the deceased on 28<sup>th</sup> October, 2009 by Dr. Abakwala. The doctor established that the deceased died due to severe haemorrhage due to trauma to the head.

When these facts were read and explained to the accused, she confirmed them as correct, and a plea of guilty was confirmed.

Mr. Nyakundi learned State Counsel told the court that the accused was a first offender and had no previous record.

Mongeri, learned counsel for the accused, told the court in mitigation that the accused and the deceased were married in 1995. The marriage was blessed with 6 children all of whom were still minors, or below the age of 18 years, and are in school. The accused was provoked. She took herself to the Police, she has admitted the offence and thereby saved the court's time. She is currently the sole bread winner for the children. He prayed for mercy and a non-custodial sentence. She is a first offender.

Under Section 207 of the Penal Code, a person who unlawfully kills another under circumstances which but for the provisions of this section, would constitute murder, does the act, which causes death in the heat of passion caused by sudden provocation and before there is time for his passion to cool, is guilty of manslaughter only.

In Section 208 of the Penal Code "**provocation**" means and includes -

**".... any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the act which the person charged committed upon the person by whom the act or insult is done or offered.**

**(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in such relation as aforesaid, the former is said to give the latter provocation for an assault."**

The circumstances of this case fit the definition of provocation under Section 208(1) and (2) of the Penal Code. In keeping with the community's patriarchal society and male dominance, the deceased took and sold the family maize grain without reference to his wife, the accused. Upon inquiry by her, the response was cruel and painful assault upon the accused by beating or thrashing the accused with a stick. In pain, when the accused pleads, Sir, if you continue beating me this way, I will leave you, the plea becomes, an invitation to more beatings. Filled and galled with pain, the accused, wrested the stick, the same weapon, and applied it on the deceased's head with one hit. The results were not only dramatic but fatal. The deceased fell to the ground, bleeding from the head, and no first-aid would stop the bleeding, and even at the Tenwek Mission Hospital, the doctors could not save the deceased's life. According to the post-mortem by Dr. Abakwala, the deceased died of severe haemorrhage due to trauma to the head.

The accused was clearly provoked. Whereas men of yore knew how to chastise their womenfolk so that any such beating would not include any injury upon delicate and weak parts of the body such as the head, and would not ordinarily cause life threatening injury, their womenfolk not considered warrior-like, when they got opportunity, like in the present case, went straight to an area of the body such as the head, which could immediately disable the attacker, husband or otherwise. In such circumstances the accused cannot be said to have had the intention or *mens rea*, to kill the deceased. She was so provoked that by the incessant beatings, that when she got the opportunity to stop the beatings, she hit the deceased before her anger could cool down.

The accused is a mother of six children, all minors, and in school. Without their father they miss parental care and love from the accused, their mother. For those reasons I sentence the accused to one year imprisonment since she has been in custody for over one year now (*from 28/10/2009*), I think that this is sufficient punishment for the offence, in the circumstances of this case.

I would therefore direct her release forthwith unless there are lawful reasons for continued

detention in custody.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 5<sup>th</sup> day of November 2010**

**M. J. ANYARA EMUKULE**  
**JUDGE**