

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO 35 OF 2006

REPUBLIC PROSECUTOR

VERSUS

JOHN MWANZIA MUTUA ACCUSED

R U L I N G

JOHN MWANZIA MUTUA faces a charge of murder contrary to the provisions of section 203 as read with those of 204 of the Penal Code as per the information dated August 29th 2006. The particulars of the offence are that on the 4th February, 2006 at Kasoi Forest within Kasoi Village at Ewalel Location in Baringo District of the Rift Valley Province, he murdered LINAH CHEMOSOP. To prove the charge against the accused person the prosecution called nine (9) witnesses whose evidence is as hereunder state. JOSEPH KIPKALUM CHERUTICH gave evidence that he was telephoned while in Kitale that one of his brother's daughter had been killed. When he got home on 6/2/2006 he found that the accused had been arrested by the police. He said that he, the police and the accused went to the accused's house from where the police retrieved a blood stained grey T shirt. Other policemen went into the bushes and recovered a blood stained panga. His further evidence was that the accused told PC Koech there in the hearing of the witness that he did not know what devil got to him to cheat him to kill the deceased.

The evidence of PW2 – SILAS ROTICH was that the deceased was his elder sister. On 4/2/2006 at about 2p.m. he went to the accused's work place and found him having lunch with his employer after they had come from working in the shamba. The witness played football with the accused until they both went to draw water from the river and brought it back. At about 4 p.m. the deceased called the witness and instructed him to go to the posho mill to mill some floar and the deceased went to look for firewood but she never came back. The witness together with his brother Michael decided to go and ask the accused whether he may have seen the deceased while he herded cattle that evening. They did not find the accused in his house but found him at the house of the accused's employer's father with other men. It was then decided that the deceased be sought and the accused went to his employer and got a torch. They all ventured into the forest to look for the deceased. The accused was in the search team with the witness until late into the night but deceased was not found. The witness left the search team at about 10 p.m. and left the accused with other people still going on with the search. Witness added that the search for the deceased was resumed the next morning and accused joined the search team. That when the body of the deceased was found the accused said, in the hearing of the witness and many other people including PC Koech, that the devil made him kill the deceased. He added that the accused never ran away from the area.

The mother of the deceased gave evidence that she was not home when her daughter the deceased went to look for firewood but that the next day when the body was recovered she heard the accused tell PC Koech that it was the devil who made him killed the deceased. And PW4 said that she believed that it was the accused who killed the deceased because he was found with a blood stained Tshirt. PW5 HEBSIBAH was the employer of the deceased at the material time. She gave evidence that on 4/2/2006 she and the accused worked in her shamba upto lunch time when they went for lunch. At 3 p.m. the accused went to draw water from the river. At 5 p.m. he milked the cows and they had dinner at 7 p.m. Next she heard the accused was at 9 p.m. When he came looking for a torch to go help search for the

deceased. She said that she knew the accused as a very good person. She added that the accused never ran away and in fact it was him and Isaiah (PW6) who upon discovering the body of the deceased went to Kabarnet and reported the matter to the police. She finalized that for the six years the accused worked for her she never saw him with the deceased.

PW6 ISIAH KIPRUTO CHEROGON was in the search team for the deceased on 4/2/2006 and 5/2/2006 and that it was him and the accused who discovered the body of the deceased in a cliff at the place where she had gone to look for firewood. His further evidence was that he and the accused went together to Kabarnet to report the matter to the police and that it was the accused who carried the stretcher from the police motor vehicle to where the deceased's body lay in the cliff. He later heard that the accused had been arrested but he did not know for what reason. He said that the place where the deceased went to look for firewood was someone's ten (10) acres of land and there were through paths in that land where anyone passed.

PW7 was No. 71126 Police Constable JOHN KOECH. He was the investigating officer. On 5/2/2006 at around 1345 hours he visited the scene and drew a sketch plan and collected the body of the deceased. Later that evening the accused was brought to the police station by members of the public. He returned to the scene of crime with the accused on 6/2/2006 and the accused showed him the murder weapon – a panga which was about five meters away from where the body lay. They then went to accused's house and recovered blood stained clothes. He said that he suspected the accused to have committed the offence and he was also advised by the state counsel to have the accused charged. His investigations revealed that the accused participated fully in the search of the deceased. He said that the panga he recovered did not have any blood stains but that the accused later confessed to the witness after 3 days in custody when he was being interrogated that he had killed the deceased.

PW3 was the wife of PW6 and she gave evidence that she asked the accused whether he had killed the deceased when she found him with the police and he said yes, he had cut her bit by bit until she died. Upon saying that many people wanted to kill him but the police rescued him. Present were PW1 and, PW7. She did not know of any affair between the deceased and the accused and she knew that the accused was a very religious person who went to church every Sunday with his employer's and the witness's own children. She called him a staunch Christian.

Dr. Rotich performed the postmortem on the body of the deceased. He found multiple cut wounds and the spinal cord was completely severed at the neck. There was a deep cut on the left breast and the deceased was about twenty (20) weeks pregnant. He formed the opinion that the cause of death was severe haemorrhage and spinal injury secondary to assault with a sharp object. He said that he took high vaginal swab to check for sexual assault nail chippings to check for any defence signs and blood samples for DNA. He never received the results of those and so he was unable to make any specific conclusions.

This is the place at which point the court must determine if, after assessing the availed evidence, a prima facie case has been made up against the accused for the court to require him to offer his defence. This the court must do bearing in mind that the standard of proof required is that of "beyond reasonable doubt."

PW1's evidence of a blood stained grey Tshirt was not mentioned by any other witness. What came close was reference by PW4 and PW7 to the fact that some blood stained clothes were found with the accused or recovered from his house. No such blood stained clothes were produced in evidence before court and reference to them is of no relevance, it cannot avail the prosecution any assistance. PW1's account of how a blood stained panga was recovered by some policemen differs from that of PW7 who said that it was him who was led to the discovery of the panga, which was not blood stained, by the accused. PW1 had earlier said that when the blood stained panga was recovered, the accused was left standing with PW1 and PW7. PW1 and all the other prosecution witnesses who were related to the accused said that they all heard the accused tell PC Koech at the scene or nearby that it was the devil that had made him kill the deceased. That does not agree with what the said PC Koech gave in evidence. He said that the deceased confessed to this murder three days after he had been in custody. That can only show that the prosecution evidence by the family members was fabricated and made up and not coordinated with what the policeman said. These are material and weighty contradictions which create a doubt in the mind of the

court as to whether the accused ever admitted to having killed the deceased. That doubt, once created, must be exercised to the accused's benefit.

All the prosecution witnesses save for the doctor agreed that the accused person participated fully in the search of the deceased. His whole day of 4/2/2006 was accounted for by his employer PW5 and partly by PW2 the deceased's younger brother. No one gave evidence that the accused was on 4/2/2006 herding any cattle at the place where the deceased went to look for firewood or in deed any where else on that date. Available evidence was that he was with his employer at the shamba upto 1 p.m. and watered the cows at 3 p.m. and milked them at 5 p.m. earlier played football with the accused's small brother (PW2) and in the night was an active participant in the search for the deceased. That is not the behaviour of a guilty person and his very actions were absolutely inconsistent with guilt. The accused could have escaped if he was guilty. He had the opportunity to escape yet he fully participated in the search for the deceased. I do not find any direct evidence connecting the accused to this crime with which he is charged. There is not even a trace of circumstantial evidence connecting him to the commission of the offence. There is no eye witness account of what could have happened to the deceased. All there appears to be is pure speculation and fabricated accounts for reasons known only to those who made them. And such is not evidence that would empower this court to place the accused on his defence.

Mid the hearing of this criminal case the accused person took out a Preliminary Objection that his constitutional rights had been violated for his having been held in police custody for a period in excess of seven months. I upheld that Preliminary Objection but refused an acquittal/discharge of the accused at that stage. I now want to revisit those Preliminary Objection proceedings. P.C. Koech, now (PW7) swore in the affidavit in opposition to the Preliminary Objection that after his investigations he found no eye witnesses and when he passed over the file to the Attorney General's Office the state counsel there advised him that there was no evidence upon which the accused could be charged with murder and that the police needed to await the outcome of the Government Analyst examination to see if there was evidence there. Those Government Analyst results were never availed and so the accused was unconstitutionally kept in police custody for over seven months. I found then, as a I find now, that it is extremely wrong for the police to hold one for such long custody period while they fish around for some incriminating evidence. That is conduct most unacceptable. I do not know what motivated P.C. John Koech and his team to have the accused charged with murder even when the state counsel had advised that there was no evidence.

Section 306(I) of the Criminal Procedure Code Cap. 75 of the Laws of Kenya provides that;

"When the evidence of the witnesses for the prosecution has been conducted the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or defence may desire to submit, record a finding of not guilty."

In this case I am satisfied that there is no evidence that the accused committed the offence which he now faces charges for and I find him not guilty. He has no case to answer. I set him at liberty forthwith unless he is for any lawful reason held. Orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 23RD DAY OF DECEMBER, 2010.

**P.M.
JUDGE**

MWILU

In	the	presence	of;
Mr. Okara	-	Advocate	for
Present	-	Accused	person
Mr. Chirchir	-	State	Counsel
Grace	-	Court	Clerk

**P.M.
JUDGE**

MWILU