



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Criminal Case 56 of 2001

REPUBLIC PROSECUTOR

VERSUS

PHILIP C. CHIRCHIR 1ST ACCUSED

JOSEPH KEMBOI LAKTANO 2ND ACCUSED

JUDGEMENT

The Accused was charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars of the charge were that on 13th day of March, 2001 at Chepkoropon Village, Ngetmoi Location in Baringo District of the Rift Valley Province murdered NANCY CHESANG.

The prosecution called eleven (11) witnesses. PW 1 was called Chebiwot Kandie, a 19 year old when she testified. She is a daughter to the deceased, Nancy Chesang. She testified that on 13th March, 2001 at around 5 p.m. she left school and went home to her parents' house. She found people drinking alcohol in their house. It was busaa. She identified the people drinking as:-

Philip Chirchir,

Joseph Laktano,

Mary Cherop,

Emily James,

Esther Chesang and

Nancy Chesang.

She said that she changed into home clothes and then did some house chores until 6 p.m. She then asked the group to go away since it was getting late. However, she said that they took time to leave. She stated that Joseph Laktano and Philip Chirchir then left and were followed by the rest. The deceased remained behind.

PW 1 stated that as she was outside the house, her mother came out and locked the house door with a padlock. PW 1 asked her why she was locking the house but she did not respond. She said that her mother was drunk. The mother then gave her the key and went away. PW 1 said that she went back to

the house.

She then heard people talking by the path. She said that the path was 30 metres away. One of the voices belonged to her mother. PW 1 said that she went outside after locking up the house and then towards where the voices were coming from. She then saw and recognized her mother, Joseph Laktano and Philip Chirchir.

PW 1 said that the three (3) were ten (10) meters from where she was. She then went to her grandfather's house where she stayed for ten (10) minutes and then left for her uncle's house one, Joseph Yator.

As she was going to her uncle's house, she heard someone scream. It was her mother. She heard people speaking as the screams went on. It was for about one minute.

She said that she was shocked by the incident but she did not say anything to anyone. She slept at her uncle's though he was not there. There was a maid and other children.

PW 1 said that the next morning she went to her home prepared herself and went to school. Her mother was not there. She said that she stayed until 9 a.m. at school but became uncomfortable. She then went back to the house. She found an uncle of hers, one Kibet who asked her why she had returned early. The uncle told her to go with him and as they went he told her that her mother had died. He consoled her that that was the way the world was. He did not say how she had died or where she was.

PW 1 identified the accused in Court as Joseph Laktano and Philip Chirchir. She said that she knew them for many years as they used to go to her home and also do casual work.

PW 1 said that the two were not very drunk when they left her home. They carried a container of busaa.

PW 1 said that there was moonlight on the material night which enabled her to see the accused. That there were no other houses nearby and she saw no one else when she left her grandfather's house.

Upon being cross-examined, PW 1 stated that she was about 30 metres from where the voices were coming from. She added that she could not see the persons talking but she could hear them. She said that she did not have a watch but she heard the voices at about 6.20 p.m. and the screams around 7 p.m. She said that darkness had not set in. She went towards the people who were moving. She said she went to check on who was talking with her mother. They were people she knew.

PW 2 was Esther Chesang, a sister to the deceased. She said that at about 7 p.m. on the 13th March, 2001, she decided to go and visit her sister Nancy Chesang. She said that her sister was selling alcohol – busaa. She found about ten (10) people drinking in the house. She joined them.

PW 2 said that after a little while she left. She said that at the drinking place both the two accused were present i.e. Philip Chirchir and Joseph Laktano. She identified them in Court.

PW 2 said that, the two accused left before her. It was about 7 p.m. and was getting dark. She said that she left ten (10) minutes after the two had left the house. On the way she found them sitting down. They were about 200 metres from Nancy's home. She said that they were not very drunk.

PW 2 said that she went to her house which was 300 metres away from Nancy's house. After a while she heard the two accused talking and pass by her house. There was a path about ten (10) metres from her house. She said that she knew the voices. They were not quarrelling and talked normally.

The next day she was told by her brother one Wesley that Nancy's body had been found at River Chepkoropon. On cross-examination PW 2 stated that she did not hear any other noise or scream. She

said that the accused were not violent people and they had no grudges with the deceased. That none of them had an affair or relationship with the deceased.

PW 3 was Wesley Kipruto Chesang a brother of the deceased. He said that on 13th March, 2001, he went to his sister's farm where he found her and Philip Chirchir digging the shamba. She gave him a hoe to dig and she went to get some busaa. She brought the busaa and they continued digging. They also drank the busaa.

PW 3 stated that some other people from his father's farm also came and joined in the drinking. They drank up 5.30 p.m.

He testified that on 14th March, 2001 at about 1 p.m. he went to look for water at the river. He then found the body of the deceased lying on the ground. He recognized the deceased. He saw that her "Lesso" had been tied to a tree. That the ground showed that there had been a struggle. He ran home to tell his father.

PW 3 said that there were injuries on the leg – scratches and bruises. Upon cross-examination he testified that when he left Nancy's house there were about seven (7) people including the two accused. He said that people were coming and going. That the "Lesso" was tied as a rope and but not tied to the tree.

PW 4 was Mr. Francis Chebet, the Assistant Chief for the area where the deceased lived. He said that on 14th March, 2001 at about 7 a.m. one Juma Kiprotich went to his house and told him that a body had been found near River Chepkiropon. He went to the scene and found the body of Nancy Chesang. He then called the police.

PW 5 was Mr. Wilson Kipsang another Assistant Chief of another sub-location. He said that on 14th March, 2001 he saw a police vehicle pass by towards Ngetmoi. He followed the vehicle and on the way he heard that a body had been found near the river. At the river he found police officers. He saw the body. He said that he was requested to look for Philip Chirchir and Joseph Laktano both of whom he knew.

PW 5 said that they divided into two groups to search for the accused persons. He said that as they looked he came upon Joseph Laktano taking a shower at the river. He was then arrested and taken to the police.

PW 6 a Prison Officer, David Kiptoon Chesang was the deceased brother. On the 14th March, 2001, he was on duty at the Prison at Kabarnet. The area Assistant Chief Mr. Francis Chebet went to him and told him that his sister Nancy Chesang had been found in the morning near River Chepkiropon. He asked for leave and went to the police. He then went to the scene. He saw the body of his sister on the ground with many foot prints. Her under pants had been removed from one leg. That she had injuries including scratches on the head and the buttocks. The private parts were scratched and bruised. He said that there was a "Lesso" which had been wrung into a rope.

The Police told the public to look for the suspects, Joseph Laktano and Philip Chirchir. PW 6 later traced Philip to Kapseret Trading Centre where he was arrested with the help of the public.

On the 17th March, 2001 PW 5 identified the body of his sister at the Mortuary at Kabarnet Hospital. The post-mortem was carried out by Dr. Bukose who stated that the cause of death was strangulation using a soft material.

PW 7 was one Mary Chelimo Michael. She stated that she remembered the 13th March, 2001. At about 10 p.m. she was sleeping at her home in Ngetmoi when someone outside called her. It was a person called Philip Chirchir. She said that she knew his voice. She knew him and knew his voice. They were neither related nor neighbours. He used to pass by her house and greet her. That Philip Chirchir asked

for a lamp. She told him that her lamp did not have any oil. He then asked for a torch. That she told him she did not have a torch.

PW 7 stated that she asked him why he wanted a torch and he told her that some people were making noise by the River Chepkiropon. He did not state who they were. PW 7 said she went back to sleep. It was the next day when she was told that someone had been killed at the river. PW 7 identified Philip Chirchir in Court.

PW 8 was called Mary Cherop. She said that on 13th March, 2001, she was at the house of Nancy Chesang at about 5 p.m. She said that those present were, Esther, Wesley, Emily and James. There was also William, Philip and Joseph Laktano. They were all drinking alcohol.

When she arrived, she stated that all left the house except Philip, Laktano and the deceased. That the daughter of the deceased called Jebiwot came from school. PW 8 said that she left at about 6.30 p.m. The next day Wesley came and told her that Nancy had been killed.

PW 9 was the Chief of Ngetmoi. He was called William Chirchir. He remembered the 14.03.01. He said that one Wesley came to him at 7.30 a.m. and told him that while at the river, he found the body of his sister, Nancy Chesang. PW 9 then called the police at Kabarnet Police Station. He went to the river and found the body. He said that around the scene were footmarks of what he thought were three (3) people. There were signs of a struggle. He said that her under pants were removed. It was still on one leg. He thought that she could possibly have been raped.

He said that the foot prints of one person went towards the hill. The followed it and found one slipper. A bit higher the hill, another slipper was found. Also found was a "Lesso" which had a knot. He identified the "Lesso and the slippers.

PW 10 was Shadrack Ikahu a Police Officer. He was instructed by his Superior the Deputy OCS Inspector Ngeno to go to Chepkiropon Village in Ngetmoi Location to look into the information that a body had been found. He went to the scene and found the body of the deceased at the scene. She had injuries on the face and neck. There were bruises on the neck. He saw footprints indicating that there was a struggle at the scene. He was present when the "Lesso" and slippers were recovered. The police then took away the body.

PW 11 was Dr. Philip Mbithi who is based at Kabarnet District Hospital. He had worked at the Hospital for 1½. He said that he had worked with Dr. Bukose for 1½ years. He said that he was conversant with Dr. Bukose's handwriting and signature. He was shown the Post mortem report relating to the deceased. He identified the handwriting and signature of Dr. Bukose. The State applied that Dr. Mbithi produces the post mortem report under the provisions of Section 33 (b) of the Evidence Act. Counsel for the Accused did not object and so it was produced.

Dr. Mbithi observed that the deceased Nancy Chesang's clothing was torn. Her pant was hanging from the right leg. There was riga mortis. There were some peeling of the skin. There were abrasions on the left buttock and left leg. That there scratch marks on the genita-urinary system. Dr. Mbithi stated the Report showed that the cervical vertebrae was mobile and therefore broken at C3 – C7.

There was nervous failure. That the spinal column was broken at cervical vertebrae. He stated that the cause of death was fracture of the cervical vertebrae leading to respiratory failure and multiple organ failure. He observed that there was no evidence of sexual intercourse but this could disappear depending on the length of time the body had been at the mortuary. He concluded that the injuries were caused by strangulation or blow with a heavy object. He said that there must have been a lot of force.

The Court subsequently ruled that there was sufficient prima facie evidence to place both accused on their defences. Accused 1, Philip Cheboiwo Chirchir testified as DW 1. He gave his evidence under oath. He said that on 13th March, 2001 he was employed by Nancy Chesang to till her land. He went to her house at 8 a.m. She instructed to till the shamba around her compound. That he and Nancy tilled

until 1 p.m. Since other workers had not arrived. Wesley had joined them.

At 1 p.m. Nancy removed some local brew – busaa and they drank. People started arriving including Joseph Laktano. He said that there were over 20 people. They drank until evening when the deceased's daughter told them to leave. He said that he took his jembe and left to his house. He said that he was very drunk. That it was about 5 p.m.

He said that in the morning he went to his own shamba. He tilled until 1 p.m. He was hungry and went to the shopping centre. He met the deceased brother, David Chesang on the way. He went into a hotel and ordered Chapati and tea. He then left for a butchery where he bought meat.

That outside the butchery, he found many people. They arrested him and tied him with a rope. He was then driven to the Police at Kabarnet. He was then accused of killing someone. He denied killing Nancy Chesang. He denied leaving the drinking place with Laktano. Joseph Laktano,

DW 2 who was the second Accused gave his evidence also under oath.

He said that on 13th March, 2001, he took his jembe and went to the deceased's father's land. He had a jembe and he tilled the land upto 1 p.m. The father paid him Shs. 60/=. He then went to Nancy Chesang's house to drink. He found many people there. He said that he drank until 5.30 p.m. and went home.

He said the next day he took his jembe and went to till the deceased's father's shamba. He worked on the said land until 1 p.m. He then went to the river to bath. At the river he was then accosted by 20 people who told him to put on his clothes. He was arrested and taken to the Police Station. He said that he left Nancy's house alone. That he left at 5.30 p.m.

I have carefully considered the testimonies on record of all witnesses and the evidence on record.

The accused persons are charged with the murder of one Nancy Chesang on 13th March, 2001. It is alleged that they committed the offence jointly.

PW 1 the daughter of the deceased who was 14 years at the material time and over 19 years when she testified before this Court, said that after her mother left her, she heard people talking. She said that she saw her mother with the 1st and 2nd accused persons. She said that she was 10 metres away.

PW 1 testified that DW 1 and DW 2 had left their home after drinking. The others followed. PW 1 knew the two accused persons.

She started going to her uncle's place, when she heard a scream. It was her mother's scream.

I am satisfied that the deceased left her house shortly after the 1st and 2nd Accused had left her house. I am of the opinion that the evidence of PW 1 is clear and reliable that she saw the 1st and 2nd Accused persons with her mother. She was about ten (10) metres away. While it was getting into night, there was moonlight to enable her see to that distance.

PW 2 was the deceased sister. She testified that the two accused persons had left her house before her. She left the house at 7 p.m. and it was getting dark. She left ten (10) minutes after the two accused persons. This corroborates the evidence of PW 1 that the two accused persons left Nancy's house together.

PW 2 said that after she left the house of Nancy, she found Philip Chirchir and Joseph Laktano sitting down near the path. They were 200 metres from Nancy's house. They were very drunk. PW 2 went to her house which is 300 metres from Nancy's house.

After a while she heard the two accused talking and pass her house. There was a path, ten (10) metres away from her house. She knew their voices.

PW 7 was Mary Chelimo Michael. She was not at Nancy's where the accused had been drinking. At about 10 p.m., the 1st Accused went to her house and asked for a lamp. When she told him she did not have oil, he asked for a torch. He said that some people were at the river making noise. PW 7 was not a neighbour of Nancy and the 1st accused. But she knew his voice as she knew him as he used to greet her.

This evidence to the Court is crucial. I believe the independent evidence of PW 7 that Philip went to her house on the same night asking for a lamp or torch at 10 p.m. I am convinced that Philip knew what had taken place at the river for him to need a lamp and torch.

Section 203 of the Penal Code provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

Under Section 206 malice aforethought provides for how it is to be established:-

“206 - Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances.

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person killed or not;**
- (b) knowledge that an act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused.**
- (c) an intent to commit a felony.**
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

From the evidence of most of the witnesses including

PW 1, PW 2 and PW 4 it was clear that Philip Chirchir and Joseph Laktano had no grudge or quarrel with the deceased. To the contrary, they got along and she hired them to cultivate her land. The accused were also her customers. They were friendly and bought her alcohol and drank in her house. The second Accused even used to get hired by the deceased's father. The two accused had no record or history of violence.

As a result, I find that they had no motive to kill Nancy Chesang. In any cause the prosecution did not prove any such motive. I find that there was no malice aforethought on their part.

Be that as it may, all circumstantial evidence of PW 1, PW 2 and PW 7 prove that the two accused left the deceased house and waited for her along the path near her house.

The deceased followed them and they engaged in some talk or discussion. Shortly, the deceased for some reason screamed.

The next day she was found dead in circumstances showing that she was involved in a struggle with one or more persons. There was evidence on the ground of footprints of several people. She was undressed and her panties removed. I find that this was a case of violent passion. The attackers appear to have either attempted to rape the deceased or did indeed rape her considering the injuries and bruises on her private parts.

The circumstantial evidence here is that while the three were drunk, they got into an argument. The two accused with intention to have sexual intercourse with her whether willfully or without her consent, jointly used such extreme force and violence that during the struggle or intercourse, the deceased's cervical vertebrae broke due to strangulation using the "Lesso".

The physique of the two accused person indicate that they were capable of exerting the kind of force which broke the deceased's spinal column.

In the case of **OMAR MZUNG CHIMERA –V- REPUBLIC MOMBASA CRIMINAL APP. NO. 56 OF 1998**, the Court of Appeal stated:-

"It is now settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-

- (i) the circumstances from which inference of guilt is sought to be drawn, must be cogently and firmly established,**
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.**
- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."**

It is my view that there is circumstantial evidence in the present case that meets the above test that truly the two accused person by unlawful acts caused the death of Nancy Chesang and are therefore guilty of manslaughter contrary to Section 202 of the Penal Code and not that of murder under Section 203 of the Penal Code.

I therefore do hereby convict the two of the offence manslaughter contrary to Section 202 of the Penal Code.

DATED AND DELIVERED AT ELDORET ON THIS 15TH DAY OF JANUARY, 2009.

M. K. IBRAHIM

JUDGE

SENTENCE OF THE COURT

I have considered the mitigation of the accused persons and the fact that they have been in custody for the last eight (8) years. I have also considered the circumstances in which the deceased died. The deceased was a mother too and a useful member of her family and community. The accused are two heavily built men who applied violence on a defenceless woman who had done them no wrong. It appears that the attack was actuated or motivated by sexual intentions.

The accused must face punishment for this wanton loss of life and for their reckless misadventures.

I have considered that the offence of manslaughter carries a maximum sentence of life imprisonment.

I do therefore sentence each of them to fifteen (15) years imprisonment.

Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 15TH DAY OF JANUARY, 2009.

M. K. IBRAHIM

JUDGE

In the presence of: