



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE 43 OF 2004

REPUBLIC PROSECUTOR

VERSUS

DAVID TUITOEKACCUSED

JUDGEMENT

The Accused **DAVID TUITOEK** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 8th August, 2004 at Kapchepsir Village in Baringo District Rift Valley Province, murdered **JANE CHEPKERIO**.

The Prosecution called thirteen (13) witnesses. PW 1 was the husband of the deceased. He is called Stephen Sirma and works for the Office of the President at Kabarnet. He said that his wife was away from home on 8th August, 2004. He waited for her until 11 p.m. She had left in the morning saying that she was going to the Trading Centre. The next day he was told by his aunt that his wife had died and the body was at Kituro Primary School. PW 1 went to school and found his wife's body at the gate. She had injuries on the head and was bleeding. He went to the Chief and then to the Police to inform them of the death of his wife.

PW 1 testified that his wife used to go to bars to drink. He said that the deceased's clothes were found at a hotel in Kituro.

PW 2 was Mathew Walter Cherutich, a graduate of Egerton University. He said that on 8.8.04 he was helping his father to sell drinks at Kituro bar. That at around 9 p.m. the Accused arrived and bought alcohol. The deceased then joined him. They sat together. They drank for one hour. PW 2 said that the deceased then left and went to a hotel next door called Kinangei Hotel. The Accused remained behind. He heard her ask why he had employed her son. The owner asked her to leave the hotel. PW 2 said that he saw the owner push the deceased slightly. That the Accused came out of the bar and he spoke to the deceased after which they left together towards Kituro Primary School. PW 2 continued with his work until 10.55 p.m. when he closed the bar. He said that the next day he heard that the deceased had been killed. He was told by the Chief whom he gave his cell phone to call the police.

Upon cross-examination, PW 2 said that the Accused and deceased did not quarrel at the bar. PW 2 said he did not know if the deceased was beaten outside the hotel. He said that her clothes were found at the hotel. That there were many people at the bar.

PW 3 was Patrick Kirui. He said that he was a watchman at Kituro Primary School. He had worked there for six (6) years. He said that on the material night at about 10 p.m. he heard a woman's voice. She was screaming saying woi! Woi! The screams were at the school gate. He said he went there with his torch.

PW 3 said that he saw a man standing at the gate and a woman lying down at the gate. He said that he was about six (6) metres away. The woman was Jane Jepkorio while the man was David Tuitoek, the Accused. He said that the Accused was kicking the woman. That he asked him why he was beating the woman and the Accused told him to move away otherwise he would beat him too. The gate was closed. PW 3 was inside the school compound. That the Accused pulled her but she was not able to move. PW 3 said that he left to continue with his work. That he heard the woman scream.

PW 3 said that at 6 p.m. he went to the gate and found the deceased who was about 12 metres from the gate. He recognized her as Jane Jepkorio. He said that he went to report the matter to the Assistant Chief. He came back with him and found the deceased dead. He said that the Assistant Chief arrested the Accused and reported the matter to the Police.

Upon cross-examination he said that he had a rungu and a knife. That the Accused was not carrying any weapon when he was kicking the deceased. He said that he had a whistle but did not use it. That there were houses nearby about 20 metres from the road. PW 3 said that the deceased was naked when he saw her. He said that he was afraid that the deceased would hurt him and that he was not allowed to leave the compound.

PW 4 was an Administration Policeman. He said that he assisted the Assistant Chief on 9th August, 2004 to arrest the Accused and took him to the Police Station at Kabarnet. PW 5 was one Francis Kimuge Rotich. He said that on 8th August, 2004 he was inside his hotel called Kinaigei Hotel. He had a shout and someone knocking his door at 10 p.m. That a woman came in through the back-door. She told him that she did not want her child to work at his hotel. He said he recognized the woman and that she was unruly and drank. That she left through the front door. He went to sleep after putting off the light. That the next morning the Assistant Chief of the Area, Stephen Chemjor came to him with three (3) police officers. That he asked him what the noise was about the previous night. That he told the Assistant Chief that a woman came to ask about her child. He said he did not know what child she was talking about. PW 5 denied touching or beating the woman. That she was not beaten at his hotel. He said he did not know anything about the lady's clothes.

PW 6 was a brother of the deceased. He identified the body of the deceased Jane Chepkerio. He said that while Jane was a married woman she had a boyfriend who was the Accused. He said that her husband had complained to the family about her relationship with the Accused.

PW 7 testified that he was at the trading centre on the night of 8th August, 2004. He did not see the deceased or the Accused.

PW 8 was the Assistant Chief Stephen Chemjor. He said that on 9th August, 2004, the Accused David Tuitoek went to him and told him that he had been drinking the previous night at Kituro Centre and that a fight had taken place and Jane Chepkerio had died. PW 8 said that the Accused told him that they had been beaten. He said he suspected the Accused since he had blood on his clothes and mud all over his body and on the head. PW 8 said that he requested the Accused to accompany to the Police Station at Kabarnet.

Before that he went and collected an Administration Police Officer and then went to the scene. PW 8 said that they found the deceased's body about 800 metres from the centre, at the school. She was dead. He said that the school gate was metallic and the base had spikes. He testified that there was a clot of blood on the spikes. The ground was wet as it had rained. He said that the ground showed signs of a struggle. The body was about 3 metres from the gate. PW 8, said that the body was naked but had panties on. PW 8 said that his investigations did not reveal any fight at the bar. He had previously received reports that David fought women. PW 8 upon cross-examination stated that he believed that the

deceased had died at the gate.

PW 9 was Police Constable Livingstone Lihanda from the Scenes of Crime. In August, 2004 he was based at the Provincial C.I.D. Rift Valley – Scenes of Crime at Nakuru. He said that on 10th August, 2004 at around 5.10 p.m. in the company of Chief Inspector Kithitu who was a Divisional Commander CID Kabarnet proceeded to Kituro Primary School gate where he was shown a scene of crime. He took 3 photographs:-

1. One was showing the general view of the gate and the school buildings beyond.
2. The second showed a closer view of the spikes.
3. The third one showed a closer view of the spikes on the gate.

He said that the spikes on the gate had blood smears and stains. He produced the three photographs and his report in evidence. On cross-examination he said that from his experience he would have expected a pool of blood. However, in this case there was little blood. He thought that the blood may have been washed away by the rain.

PW 10 was a brother to Stephen Sirma the husband of the deceased. He said he was a police mechanic. On 9th August, 2004, he went to the two centre at Kituro and found his brother who told him that his wife had been killed. He went together with his brother to the Police.

He said that later he saw the Chief of Kituro with one Charles Rotich and David Tuitoek the Accused. That Tuitoek had mud on his head. His clothes had blood. He had a jacket on.

PW 10 said that he went with the Police to the scene at the school gate. He saw the deceased's body. He said that the body was 3 metres from the gate. It had injuries on the head and eyes.

PW 11 was Police Constable Joram Karanja. He testified that in August, 2004, he was based at Kabarnet Police Station. On 9th August, 2004 at about 9 a.m. he received a report of an alleged murder. He said that he went to the scene in the company of police driver, Corporal Kimulwo and P.C. Sitienei. The scene was at Kituro Primary School.

On arrival at the scene he saw the body of the deceased at the gate of the school. It had injuries. Blood was oozing from the head. That there were marks on the ground and the gate had blood stains. He was shown the photographs produced in Court. He said that the blood was along the spike on the right hand side. That there was blood where the deceased was lying. He said that there were skid marks on the ground. He said that there was a pool of blood under the deceased. That the blood on the gate had been swept away by rain but there were some stains.

PW 12 was Doctor John Tolo Boston Otieno. He was based at Kabarnet District Hospital. He produced the post-mortem report made by a Dr. Mwangangi in respect of the body of the deceased. Dr. Mwangangi carried out the autopsy on the body on 17.08.2004. PW 12 was familiar with the handwriting of Dr. Mwangangi and his signature.

He said the post-mortem showed that there was bleeding under the skin. There were three (3) wounds on the head. There was severe injury to the scalp vasculature and severe haemorrhage. There was a fracture at the occipital and frontal bones. He opined that the cause of death was the head injury.

PW 13 was one of the Investigating Officer P.C. Wesley Cheruiyot Kipkemei. He recalled that on 9th August, 2004, he was within the Station. He was instructed by the D.C.I.O. Inspector John Githitu to go to the scene at Kituro Centre. He went with Corporal Kimulwo. He found the body of the deceased at Kituro Primary School. He drew the sketch of the scene. He escorted the body to Kabarnet District Hospital. He said that the Chief had arrested the Accused. On 17.08.04 he identified the body at the

mortuary and post-mortem done. He produced the jacket worn by the Accused on the material night. He said blood analysis showed that the blood on the jacket matched the blood samples from the deceased. That the deceased blood was Group 'B' while the Accused was Group 'O'. He also testified that the deceased body was naked except for the underwear. That nobody identified the piece of cloth found at the Centre.

The prosecution closed their case. This Court upon consideration placed the Accused on his defence. He gave a sworn statement.

The Accused said that he knew the deceased Jane Chepkerio. He denied he killed her. That she was his girlfriend for 1½ years. He admitted that he knew she was a married woman. He said that 8th August, 2004 was a Sunday. He drank busaa first in the morning. This was in the Village. They drank upto 2 p.m. He said that after that they drank Chang'aa. When it got finished they went to the Centre at 4.30 p.m. in the evening and entered a bar. He said that about 7 p.m. the deceased told him that they should leave as it was getting late. However, it was raining and they returned inside the bar.

He said that the deceased asked him for a pound to buy Samosa. That she left to go to the hotel. He remained behind. That after five (5) minutes he heard a scream from the hotel. That he got out. There were many people. He saw her outside. That she was lying on the ground. Part of her body was inside the hotel. That her skirt was at the door of the hotel. He said that the deceased had argued with the owner of the hotel about him employing her son at the hotel. That the boy had dropped out of school as a result.

Accused said that he tried to help as she was bleeding from the mouth. He said that he helped up and asked her to go with him. The Accused said that some people, men at the centre followed them. They threatened to take her away from him. That after three (3) metres the men started to beat her up and pulling her away but she resisted. The Accused said he and the deceased were drunk. That the men started beating them up. That he started screaming. That they beat the deceased but he did not recognize the assailants. He added that he sat on the ground as he was bleeding. His left eye could not see. He said that he went to the deceased who was lying on the ground. It was raining and their clothes became muddy.

The Accused said that the deceased told him that she was injured badly. He made her stand up but it was difficult to walk. He intended to take her to his house which was nearby. Accused said that he heard the sound of footsteps as if they were being followed. They were on the tarmac. He told the deceased that they hide. That they hid in a trench and those people passed but stopped at a junction. The Accused said that the deceased and him went to the entrance of Kituro Primary School. The road was slippery and they fell down since the deceased was heavy.

The Accused said that there was security light at the school gate. The deceased could not move and asked for water. He said that he took her to sit down at the fence in a good place and went to his house to get water. That he got some rain water in a container and went back to the deceased. However, she did not respond and upon touching her found that she was dead. That he was shocked. He tried to call for help but was unable. He decided to watch over the body since he was afraid that dogs could eat it. He waited from 10 p.m. upto 5 a.m. in the morning.

The Accused said that he went to the Chief in the morning and reported the incident. That the Chief sent him to the Assistant Chief whose home was one (1) Km away. The Accused said that he told the Assistant Chief what happened. The Assistant Chief drove him to the Trading Centre after calling his Administration policemen. That they then went to the Police Station at Kabarnet where he was arrested and placed in custody.

The Accused denied that he killed the deceased. That she was beaten up at the Centre.

I have carefully considered the testimonies of the prosecution witnesses and that of the Accused. I have also considered the submissions by Counsel. I have perused the proceedings and analyse the evidence.

I do hereby find that the Accused and the deceased were having an affair. The deceased despite being a married woman was having an open and illicit love affair with the Accused. On the 8th August, 2004, the two went on a drinking spree from early morning into the night. At about 9 p.m. they entered the Kituro Bar and had more alcohol upto about 10 p.m. The deceased left the bar and went to the Kinaigei Hotel, next door where she asked the owner why he had employed her son in his hotel. A quarrel ensued and the owner of the hotel ejected the deceased from the hotel. The Accused left the bar and talked to the deceased outside the hotel. The two then left, to go to the Accused's house which was near Kituro Primary School. The testimony of PW 3 the school watchman shows that the two ended up at the gate of the Kituro Primary School about 10 p.m. or shortly thereafter. PW 3 saw the Accused and the deceased at the gate. The deceased was on the ground while the Accused was standing. The deceased was screaming.

I do find that between the Kituro Bar and the school gate, the Accused and the deceased had a serious quarrel or disagreement. That as a result the Accused and deceased had a struggle near the school gate. It was raining and the ground muddy and slippery.

PW 3 said that he saw the Accused kick the deceased as she lay on the ground. PW 3 said that the Accused was not armed. He had no weapon in his hands.

The post-mortem report shows that the cause of death was severe head injury. The head had a fracture at the occipital and frontal bones. There were three (3) wounds on the head, two on the lateral points of the orbits penetrating deep into the scalp. There was stripping of the scalp and severe haemorrhage.

PW 8 described the gate to be metallic and its base had spikes. PW 9 was a police officer from the scenes of crime section. He took photographs of the gate. The photographs were produced in Court as evidence. The school gate was made of metal grills. At the base were shape spikes.

From the injuries sustained by the deceased as described in the post-mortem report and the evidence of PW 9, I do find that the deceased fell down at the school gate as she struggled with the Accused. He either pushed her or she slipped on the muddy ground. PW 9 said that the spikes or the metallic gate had blood smears and stains.

I do find that the deceased fell down and her head hit on to the metal spikes of the gate. She fell onto the metal spikes which entered her head causing the fracture at the occipital and frontal bones. The deceased bled profusely. There were blood smears and stains on the spikes and grills of the gate but most were washed away by the rain.

I do find that the Accused was not armed and did not by his hand cause any injury on the deceased. The two had drank the whole day and part of the night. They had drank busaa, changaa and beer. They were both very drunk.

I do find that in their drunken stupor they disagreed and were involved in some scuffle. The Accused appears to have become violent and forcing the deceased to go with him. In the struggle, the Accused stripped her of her clothes at some point. It is not clear whether it was before or after she had fallen onto the spikes.

The deceased and Accused were lovers and had not quarreled the whole day upto the time they left the bar. Any differences took place as they walked home. It was due to their drunken status. The Accused did not have any malice aforethought or motive to kill the deceased.

I do find that the death of the deceased was due to the fall on the metallic spikes of the gate. As they pulled and pushed each other, the deceased slipped on the muddy ground and fell on the metallic gate. The deceased head fell on the metallic spikes which severely injured her. She sustained a fracture of the head and severe haemorrhage. She died from there injuries at the school gate.

I find that the Accused panicked when he found that she was seriously injured or dead and he took her

clothes and dumped them near the hotel at the centre. Whether this was deliberate or not is not clear to the Court. It cannot be ruled out that he was so shaken by the incident that he wanted it to appear that the deceased had been injured at the trading centre hence dumping her clothes there.

I do find that the Accused did not with malice aforethought cause the death of the deceased by any unlawful act or omission. He is not guilty of murder.

However, it is certain to me that the Accused was forcing the deceased to go with him or she was resisting him. He was acting against her wish. He was seen by PW 3 to be kicking her on the ground. This conduct amounted to unlawful acts. It was due to the use of some force that she slipped and fell on the metal gate and spike. As a result of the fall on the spike she was severely injured and died.

The aforesaid facts and circumstances prove that the Accused ought to have been charged with the offence of manslaughter.

I therefore do hereby substitute the charge of murder with that of manslaughter. I do find that the Accused is guilty of the felony of manslaughter.

I do hereby convict the Accused of manslaughter.

M. K. IBRAHIM

JUDGE

23/07/09

I invite Counsel to mitigate.

Mr. Kipnyeikwei:

The Accused and deceased were friends and had an illicit relationship. They had drunk from morning to 10 p.m. When they left bar, they left peacefully. The Accused did not know he caused the death. He had no motive. He may have caused without his knowledge. He regrets his actions. He prays for leniency. We invite the Court to consider the number of years in custody – almost five (5) years. This is long. He has learnt his lesson. He be given lenient sentence. He will reform. Pray for leniency.

Mr. Chirchir:

He can be treated as a 1st Offender. A life was lost due to his conduct. The offence is serious. The maximum is life. He be sentenced in accordance with the law.

SENTENCE

I have considered the submissions, the evidence and all circumstances. The deceased died as a result of falling to the ground and her head hitting the metal spikes of the metal school gate. The fall was heavy as she was drunk and the ground slippery. However, there was evidence that the Accused had become violent and was forcing the deceased to go with him. The fact that her clothes were removed or came off shows that there was some force amounting to an unlawful act.

The Court notes that the Accused and deceased were friends and lovers. They had drunk the whole day and part of the night. They certainly did not know what they were doing to the extent that they went into the rain and began to act unbecomingly. The Accused's physical action which was aggressive and caused the deceased to fall. By leaving the tarmac road and going to the school gate is indicative of their movement. I accept PW 3's evidence that the Accused was violent and aggressive. However, it is possible that by then the deceased had already sustained her injuries as she had fallen and was on the ground. It appears that the screams were those of pain due to the injuries. However, the Accused due to

being drunk and the rain may not have immediately realized what had taken place.

From all circumstances I find that the death was not intentional. The Accused was not even armed. However, his conduct was unlawful when he turned violent leading to the deceased falling down.

I have taken into account that the Accused has been in custody from 9-05-04 i.e. for over five (5) years. I have considered that the case was partly heard by Justice Dulu and had to start de novo due to judicial transfer.

I believe the Accused has learnt his lessons and he has duly been punished by the incarceration resulting from being held in remand.

I do hereby sentence the Accused to three (3) day's imprisonment. Right of appeal fourteen (14) days.

DATED AND DELIVERED AT ELDORET ON THIS 23TH DAY OF JULY, 2009.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Kipnyekwei for the Accused

Mr. Chirchir holding brief for Mr. Omutelema for the State