



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 59 of 2007

REPUBLICPROSECUTOR

VERSUS

PENINAH NDUKU MUTUNE.....ACCUSED

R U L I N G

The accused has been charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code.

It is the prosecution case that the accused murdered her husband, **PATRICK KALOLO MUTAVA**, on the night of 29th July 2007. The incident is said to have taken place at Matopeni Village, Kayole Division, Nairobi.

By the time the prosecution closed its case, they had called five witnesses.

PW 1, TERESIA MWIKALI, was a neighbour to the deceased, at Matopeni Village. She said that on 29th July 2007, at about 1.00 a.m the accused went to her (**PW1's**) house.

PW 1 noticed that the accused was bleeding from a cut on her hand. When **PW 1** inquired about the cause of the injury, the accused told her that it was caused by a knife with which her husband wanted to kill her. The accused told **PW 1** that she had been injured when she used her hand to ward-off the attack by her husband.

PW 1 administered first-aid on the accused, by using a leso to tie the wound, so as to stem the bleeding. Thereafter, **PW 1** decided to take the accused to hospital. As they were on their way to hospital, **PW 1** and the accused passed by the deceased's house, where they found him lying down, outside his house.

PW 1 called out to the deceased but he did not respond. As the accused said that the deceased was drunk, **PW 1** did not take much more interest on him. The accused and **PW 1** then went via the police station, where the accused reported about the assault by the deceased.

When they got to the hospital, the accused was attended to. She was given 3 stitches on the injured hand.

Thereafter, **PW 1** and the accused went by the deceased's house, where they found him on the same spot as they had left him earlier. Again, **PW 1** called out to the deceased but he did not respond. However, **PW 1** told herself that the deceased was simply sleeping as he was drunk.

The accused declined to sleep in her own house. They went with **PW 1** to her house.

In the morning, **PW 1** opened her shop, as usual. But soon thereafter, some two women told her to go over to the house of the deceased, as the said deceased was calling her. **PW 1** went there, but found that the deceased had passed away.

When asked about the relationship between the accused and the deceased, **PW 1** said that it was peaceful.

PW 1 also said that the accused did tell her that there had been a fight between her and the deceased; and that someone had intervened. However, **PW 1** did not get to know the identity of the person who had intervened.

Finally, **PW 1** said that the accused was not the kind of person who could have liked to kill her husband. Also, **PW 1** said she believed that if the accused had killed her husband, then the accused would not have decided to go to the police station to make a report. As far as **PW 1** was concerned, had the accused been the person who killed the deceased, she would have escaped.

In my assessment of the views expressed by **PW 1**, they appear to be very plausible because the accused was ordinarily resident at her rural home. Indeed, the accused had only just arrived in Nairobi on the night when the incident occurred. It is therefore easy to appreciate why **PW 1** held the view that the accused could easily have escaped.

PW 2, Inspector **DAVID K. TERER**, was the O.C.S Kayole Police Station, at the material time.

On 29th July 2007, at about 7.45 a.m he received a call from his Duty Officer, Corporal Mutiso, who informed him about a homicide at Matopeni.

PW 2 rushed to the scene, where he found the body of the deceased. The body was lying down, facing upwards. A kitchen knife, which was bloody, was lying near the head. And the ground surface near the body had many footprints, which, in the opinion of **PW 2**, suggested that there had been a fight or a struggle.

Upon observing the body, **PW 2** noticed a stab wound to the chest.

When **PW 2** interviewed neighbours, he learnt that the deceased had fought with the accused.

PW 2 also confirmed that the accused did go to the police station to report about the fight. According to **PW 2**, when the accused made the report, she did not know that her husband was dead.

PW 3, **FRANCIS MUTISYA**, is a brother to the deceased. He was resident at Yatta. He identified the body of his late brother to the doctor who then carried out a post mortem examination.

PW 4, **NDOLO MUTUKU**, was also a resident of Yatta. On 3rd August 2007, he received information that the deceased had been attacked and killed by robbers.

Later, **PW 4** also helped in the identification of the body of the deceased, for purposes of post mortem examination.

PW 4 was a nephew to the deceased.

Although both **PW 3** and **PW 4** knew the accused, neither of them talked to her about what may have

happened to the deceased. They however knew that the accused had been arrested in relation to the death of the deceased.

PW5, PC JOHN ROTICH, was a police officer attached to the Criminal Investigation Department (C.I.D), Kayole.

On 2nd August, he was instructed by the DCIO Kayole, to investigate the killing of the deceased herein. By that date, the accused was already in custody.

PW 5 took the accused for mental assessment by the police surgeon. He also accompanied the relatives of the deceased to the mortuary, for the post mortem examination on the body of the deceased.

PW 5 confirmed that the accused had a cut wound on her palm. When **PW 5** inquired from the accused how she got the cut wound, the accused explained that she was injured in the course of a fight with the deceased.

When answering questions raised by the trial court **PW 5** said that the deceased was drunk at the time he fought with the accused. **PW 5** also said that the accused only managed to escape when the deceased fell down.

Indeed, **PW 5** said that the accused was defending herself.

That marked the conclusion of the prosecution case. The question I have to address now is whether or not the accused should be placed on her defence.

The first thing that strikes me is that although **PW 2** was stood down before he concluded his evidence, the prosecution never had him recalled. Therefore, his evidence remains incomplete.

Secondly, the doctor who performed the post mortem did not give evidence. Furthermore, the post mortem report was not adduced in evidence.

Consequently, the prosecution did not prove the cause of death. That failure is fatal to the prosecution case.

Thirdly, the evidence adduced is wholly circumstantial. There were no eye-witnesses to the incident which may have led to the death of the deceased.

And right from the outset, the accused had alluded to the intervention of a third person. Notwithstanding that position, the prosecution did not give any evidence about the investigations, if any, that were conducted on that aspect of the matter. In the result, it is not possible to say, with certainty, that even if the accused had something to do with the incident, that the facts pointed only to her, as the person who killed the deceased.

Fourthly, the prosecution have not led any evidence to establish that the accused had malice aforethought.

Finally, the Investigating Officer (**PW5**) said that the accused was defending herself from an attack by the deceased. If that be the position, self defence would be a complete defence to the charge of murder.

For all those reasons, I find that the prosecution has not established a prima facie case which would require me to put the accused on her defence. Accordingly, the case against the accused is dismissed.

I now order that the accused be acquitted forthwith, and that she be set at liberty forthwith, unless she is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 21st day of July, 2009.

FRED A. OCHIENG

JUDGE