



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KERICHO**  
**Criminal Case 07 of 2009**

REPUBLIC ..... PROSECUTOR  
VERSUS  
D. K. C..... SUBJECT  
**JUDGMENT**

**I: Charge**

1. Murder contrary to **section 203** as read with **section 204** of the Penal Code.

**Particulars**

*That on the 18<sup>th</sup> January, 2009 D. K. C at Sotik town, Sotik District of the Rift Valley Province did murder Robert Rutto.*

2. D.K.C, the subject herein pleaded guilty in the first instance to the charge. He later changed his plea to that of not guilty stating he did not deliberately intend to kill and or murder

**II: Procedure**

3. An error occurred in the taking of the hearing dates. This was mentioned as 25<sup>th</sup> December, 2009 instead of 23<sup>rd</sup> March, 2010 and or 23<sup>rd</sup> March, 2009. The Deputy Registrar mentioning the case continued to give further mention dates in future regardless. New dates of 14<sup>th</sup> July, 2009 were taken. The advocate was not available as he was before the Court of Appeal at Eldoret. Further delay of this matter necessitated a new advocate being requested by court to take up the conduct of this matter.

**III: Background facts**

4. At the Sotik town there exists a business of selling food for consumption at the same premises. The witnesses herein described this place as a “hotel”. Its name, “seven star” Hotel. PW4 Richard K. Bii claimed to be the owner of the said business. He employed seven workers at any given time but in the evening he retains only three workers.
5. On the material evening of 18<sup>th</sup> January, 2009, he left the food hotel at around 10.00 or 11.00pm having done all the days calculation of the taking. He had been with PW5 Hillary Kipkemoi. They left behind PW1 Wesley Ngetich whose duty was to lock up completely the premises after hours.

6. PW2 and PW3 incredibly described themselves as girls who roast maize to earn an income. They had been doing this business, they claim, since they were nine (9) years old. At the time they appeared to Court, PW2 claimed to be a minor but really may have been 18 years old, whilst PW3 stated she was aged 19 years old. Both were hungry that night. They went to the “*seven star hotel*” to eat before returning to their abode where the two share the same premises.
7. At the “*seven star hotel*” they discovered that there was no more food. They ordered soft soda drinks. They consumed this drink when the subject D.K.C ordered they leave at the policy was not to sell drinks without a meal. The two got up to leave but as PW2 went through the door D.K.C then slapped her. PW2 then went straight to be abode. PW3 remained behind and witness a fight that broke out between the subject and Robert Rutto, the deceased. She ran to PW2 and informed her of the incident and how Robert was killed.
8. More clearly in evidence was PW1, who heard cries at the time from Robert Rutto who shouted, “*I have been stabbed with a knife by D*”. Pw1 proceeded to where Robert was and found that he had fallen down near the kitchen door. He was unable to respond to PW1. PW1 then rang PW4 and PW5 the owners of the food hotel who had earlier left him to physically close the premises.
9. A taxi was called. It took long to respond. They carried Robert to the nearby Caltex station where they got a vehicle to take him to hospital. Unfortunately the deceased succumbed to his injuries.
10. The said subject D.K.C surrender to the police and was arrested and charged with the offence.
11. The doctor PW8 filled out a post mortem report. The PW6’s witness being, the deceased father, gave evidence that he confirmed his son had died and he paid the medical doctor 5,000/= which sums was for conducting a post mortem.
12. The PW7 was an uncle of the deceased also present during the alleged post mortem.

#### **IV: Defence**

13. In his defence, the subject alleged that he was tasked to clean the “*hotel*” on the material night of 18<sup>th</sup> January, 2009. It was after closing hours on 11.00p.m. That the “*children*” who were there acted and behaved in a rude manner. The “*children*” are normally described as a reference to women. As a result of their bad and rude behavior, he slapped one of them. His fellow worker came and attacked him for doing so and knocked him to the ground where they struggled. He had a kitchen knife used to cut vegetables. His colleagues ran out through the kitchen door. He closed the doors and ran away home. He appears not to have informed anyone of the incident and went to sleep. At one point, he then went thereafter to his grandmother but met a school friend who notified him he was being looked for. He went home and found the police were looking him. His father requested that he proceeds to give himself up which he did.
14. The subject confirmed to this court he was aged 15 years old having been born in 1994. He began working at the hotel as he was from a poor family whose family lived in rented quarters.

15. He was shocked to hear of the death of the deceased.

## **II: Submission**

16. The opinion of the defence advocate in his submission is that the evidence before court was contradicting. The charge against him was made as a result of a confession made of the offence before the police officer who was not permitted to act on such confession. The medical evidence on the post mortem was compromised at the medical practitioner one, Joyce Chebos who had been stationed in one district for over ten years failed to conduct a proper post mortem report. She was paid Kshs. 5,000/= which she pocketed instead of paying the Kenya Government whose normal charge is Kshs. 750/=. Further the incident took place at night and no proper identification was made. The subject being a minor should never have been employed.
17. In reply, the state said that there was a dying declaration. The subject in his defence confirmed the occurrence of these events.

## **IV: Opinion**

18. When the deceased was stabbed, he made a dying declaration stating *"I have been stabbed with a knife by Denis"*.
19. There is sufficient evidence given by the prosecution that the two had a confrontation, the cause being that the subject, Denis had slapped PW2. This caused the deceased to confront D resulting to the assault. If the assault was an accident, D would have remained behind and assisted the deceased to hospital. He instead ran away until his father convinced him along the line to give himself up.
20. The issue that the incident occurred at night and therefore no proper identification was made of the subject would not arise herein. The deceased, PW5, the owner of the business, PW6 his co partner and PW1 the worker in the kiosk side of the business all knew the subject and the deceased well. None wished to say the subject worked and was employed there because the subject was a minor and his being so hired contravened labour laws.
21. It seems that the subject was the one who admitted being employed there and as a result admitted having gotten into a fight with the deceased.
22. In this Kericho region, more so cases coming before the High Court, I do in deed have noted in several murder trial that medical doctors who are not pathologist perform post mortem. No explanation is given to this save perhaps there may be a shortage of medical practitioners. What is common is the charging of a fee to do post mortem reports. Dr. Joyce Chebose denied she ever received Kshs. 5,000/= for her services not paid to the government of Kenya. The correct fee is Kshs. 750/=. Her mode of post mortem was to put two fingers in the deceased stabbed wound and declared that the arteries had been severed. She did not open up the body as she concluded the wound was caused by the stab to the chest. The medical Director of Health requires to review this aspect of the evidence and accordingly take appropriate action to desist medical practitioner in a double enrichment by receiving a salary and inducement payment to perform postmortem procedures.

23. I have through evidence that the deceased did die. That the cause of death was a knife stabbed wound. The subject admitted this in his plea in the first instance, which this court was of a view it be safe for a full trial to be heard.
24. I accordingly find the subject guilty of under contrary to **Section 203** of the penal code.
25. **Section 204** states that if a person is found guilty of murder he must accordingly he sentenced to death. The subject allegedly being a minor is precluded from such sentence under **Section 190(i)** of the **Children's Act No. 8/01** that states "*no child shall be sentenced to death*"
26. The procedure of sentencing for minor are different from adult offenders. This had been what the High Court has always held as per the decision of Muli J (*as he then was*) in the infamous case of Joy Adamson deceased R V "E" (*a minor*) at Nyeri (*a minor is also never convicted*)
27. I according find the subject guilty as charged.

**DATED** this 3<sup>rd</sup> day of August, 2009 at **KERICHO**

**M.A. ANG'AWA**

**JUDGE**

**Advocates**

P. Kiprop State Counsel instructed by the Attorney General for the state – present

T.M.O. Nyaingiri advocate instructed by the firm of M/S Nyaingiri & Co. advocates for the subject – present

Subject - present

**SENTENCE.**

The report does not recommend a non custodial sentence due to the nature of the offence.

Under **Section 190(2)** of the **Children's Act Cap 8** of 2001, the LawStates

***"No child shall be sentenced to death"***

This Court in lieu of **Section 191(1) (j)** of the **Children's Act** hereby sentence the offender to Life imprisonment.

**DATED** this 17<sup>th</sup> day of September, 2009 at **KERICHO**

**M.A. ANG'AWA**

**JUDGE**