



1. Criminal Law
2. Murder

Accused female adult married.

Court informed by the Attorney General on behalf of the Republic that the accused is charged with the offence of Murder contrary to Section 203 as read with section 204 of the Penal Code.

Particulars of offence

On 15th of October, 2008 at Kyongong village in Bomet District of Rift Valley Province murdered Geoffrey Kipkirui

3. **Facts**

- a) PW5 pregnant Sister to accused
- b) Accused request she takes her father in law aged 80 years to drink.
- c) Went to PW4 and drunk local brew changaa.
- d) Left and on way back old man attacked by deceased, Geoffrey Kipkirui.
- e) Winnie tried to intervene.
- f) Deceased beat her.
- g) He was drunk.
- h) Accused heard commotion came out.
- i) Returned to house produced knife and stabbed the deceased.
- j) Members of public wanted to lynch her
- k) PW8 rearrested her and took her to police station.
- l) Witnesses who saw stabbing of deceased by accused PW1, PW6, PW3 and PW6 and PW7.
- m) Post mortem performed by PW2 – a medical doctor.

4. **Defence**

Sworn in English/Swahili

- i) Saw fight
- ii) Went to slap deceased.
- iii) Deceased slapped her first.
- iv) Deceased produced a knife
- v) Two struggled, both fell but deceased fell on the knife – an accident.
- vi) advocate for accused alleges provocation.

5. **Held**

- i) Provocation – defence rejected
- ii) Guilty as charged

Section 203 Penal Code as read with **Section 204** of the Penal Code.

6. **Case Law**

- 6a) **Statute Law**
Section 146 Evidence Act Cap 80
Section 206,207 and 208 of the Penal Code Cap 63.

7. **Advocate**

- i) R.K. Koech Principal state counsel
- Later ii) P. Kiprop District State Counsel instructed by the Hon. Attorney General for the Republic
- iii) Later B.L. Kivihya for State
- iv) J.J. Onyango leading F.O. Koko instructed by Koko & Co. Advocate for the

accused.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL CASE 39 OF 2008
REPUBLIC
V
MERCY CHEMUTAI
JUDGMENT

I: Procedure

1. The court was informed by the Attorney General on behalf of the Republic, that the accused is charged with the offence of **Murder**

Contrary to Section 203 as read with Section 204 of the Penal Code.

2. The particulars of the offence being:-

On 15th of October, 2008 at Kyongong village in Bomet District of the Rift Valley Province, murdered Geoffrey Kipkirui

3. The accused Mercy Chemutai, a female adult was preferred the above information on the 4th November, 2008 and pleaded not guilty.
4. She was represented by F.O. Koko instructed by M/S Koko & Co. Advocates. He was later led during the trial by J.J. Onyango advocate.
5. The trial commenced for hearing on 4th June, 2009, 17th June, 2009, 20th July, 2009, 16th September, 2009, 6th October, 2009 and 8th October, 2009. Part of the delay in this matter was due to one witness (PW5) who was expectant and had gone to hospital to give birth. The other reasons was the defence who requested for time as they were awaiting the Provincial Principal State Counsel to give some form of instruction on this file. None was ever received and the hearing commenced to its conclusion. *(This information was given by the leading advocate for the defendant J.J. Onyango (17th September, 2009 inter alia) that the Provincial State Counsel wanted to look at this file).*

II: Background facts

6. The accused Mercy Chemutai has a sister called Winny Chepkirui Korir (PW5). This sister had gone out with an elderly man aged 80 years old (not called to give evidence due to his weakness to attend court).
7. The two had gone to the home of Gladys Chumo (PW4) where she had served them with the illicit brew of changaa. They drank and left.
8. As they were walking along the town centre of Kyongong village, the deceased Geoffrey Kipkirui began to fight the elderly man and Winny Chepkirui (PW5) came to separate them. She too was attacked.

9. Winny Chepkirui was pregnant at the time. According to PW1 Gideon Kipsang Kirui, it was at around 6.00p.m of the 15th October, 2008 when he was waiting for a vehicle he saw Winny PW5 walk ahead of Geoffrey (*the deceased*). He held her by the collar. A commotion ensued. Mercy Chemutai came out of her resident and stated “*you do not want to add more problems to me*”. She returned to her house and came back and placed her hand in her trouser where she had tucked a knife. She took the knife and stabbed the deceased to his chest.
10. PW3 Robert Kirui also witnessed the incident. She saw that Winny PW5 fight with the deceased. Mercy, the accused came to ask why they were fighting. She went back and returned with a kitchen knife which she used to strike the deceased.
11. Gladys Chumo (*PW4*) was not there when the fight broke out but she did confirm that Winny (*PW5*) and the old man had gone to her place to drink. The old man was Mercy’s father in law. When she heard the commotion she was just in time to hold Geoffrey’s hand. Mercy stabbed him and he fell down. She screamed for help.
12. The prosecution’s case was therefore, the quarrel between the deceased and another. Then, PW5 intervened but was assaulted. The accused went to them asking why they quarreled, then returned to the house and came back with a knife that she used to stab the deceased with.
13. Winny PW5 was pregnant at the time. By the time she came to court she had given birth to a baby. In her evidence she admitted the deceased was quarrelling the old man but did not wish to state anything further in her statement in chief. In cross-examination by the advocate for the defence, she admitted that the deceased beat her up.
14. The incident occurred in a public place. The deceased fell down when he was stabbed on the chest. He was rushed to the hospital but died soon after. He waited fifteen (15) minutes in the casualty hospital then when taken in, he passed away whilst undergoing treatment.
15. The police received information of the incident PW8 No. 88050 P.C Charles Ongaga attached to the Criminal Investigating Department Bureti. He went to the scene where a crowd had gathered on that material day. The crowd wanted to beat the accused. He rescued her and took her to the police station. He had made enquires as to where the Kitchen knife was as he had been informed she had stabbed someone. This was not found nor recovered.
16. He then proceeded to the hospital and found the deceased had died whilst undergoing treatment. At the scene he had been informed “*Mercy stabbed Geoffrey*”. He found that this was due to the conflict between the deceased, another and the accused.
17. The prosecution called PW2 Dr. James Amisi Akiruga attached to the Tenwek Mission Hospital. He held qualification of Bachelors of Medicine and Bachelor of Surgery. It was he who undertook a post mortem examination in the presence of two relatives and police.

18. The post mortem report revealed that the deceased was an African male aged twenty one years old of good nutrition 169cm. The body was approximately over 24 hours old on the 17th October, 2008.
19. Injuries found to the chest was of
- i) Anterior left Suprasternal laceration measuring 4X3 cm.**
 - ii) Left mid Axillary region.**
 - iii) Incised wound.**
 - iv) Transverse 3cm.**
 - v) The respiratory system left chest Cavity haemothorax contained approximately 2 litres of blood mediastural clot.**
 - vi) The left lung collapsed. The right chest cavity /lung normal.**
20. The cause of death was shock secondary to massive left chest cavity, haemothorax secondary to a stab wound.
21. Having confirmed that the deceased sustained fatal injuries that caused his death.

III: Submission

22. The advocate submitted that there was no case made out to put the accused on her defence:
- i) There was no proper identification of the body as this was done by a minor (PW7 ?).**
 - ii) The deceased beat up Winny, beat up the old man and exchanged insults.**
 - iii) Provocation is therefore is the defence and she, the accused, acted in self defence.**
23. The prosecution in reply stated that a case had been established.

IV: Defence

24. The accused was placed on her defence. She elected to give a sworn statement. In her evidence she said her father in law had come to visit her. The reasons for his visit was that her husband had been arrested for the offence of cattle stealing. Her husband was in Bomet. That day they awoke early and went to see the husband at Bomet Police Station.
25. On her return home, the father in law asked that they go out for a drink. She refused because she did not drink. Her sister Mercy though drank alcohol and would probably know the best place to take him. Her sister had come to the house and she requested her to take him out as she knew the bars.
26. The two went out to the neighbours house. She confirmed to court it was to the house of Gladys Chumo (PW4). They were to return at around 5.00p.m to 6.00p.m. In the meantime she was to prepare the evening meal.

She then heard screams which were persistent. She went to investigate. She heard her sister scream. She asked the deceased what he was doing. The deceased began to abuse her and mentioned her husband. That she was not able to look after her husband. That there was nothing I could do to him.

27. It was then that the deceased removed a knife from his pocket. The two of them struggled. She did not want to kill him.
28. She alleged that the crowd said she had a knife but this was not true. All the witnesses were related to the deceased.
29. In cross-examination she said that the deceased was beating her father in law who was in his 80's. It was an open Public place. She then said she slapped the deceased and the deceased slapped her but in re-examination she stated it was the deceased who slapped her first.
30. On further enquiry by the court **Section 146(6) Evidence Act Cap 80** the accused stated that her main intention was to stop a fight. The two of them began to fight and the deceased fell down with her and in the process the knife injured him.
31. She clarified further, through her advocate that they struggled with the knife. They fell and she was not able to know what occurred. She was angry.
32. In response to the state, the deceased had more strength than her.
33. In further submission the advocate for the defendant accused stated that the accused did not plan to take the deceased life. He relied on provocation.
34. The state relied on its evidence and said it had discharged its mandate and burden of proof in the case.

V: Opinion

35. “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 actually killed or not.**
 - b) **Knowledge that the act or omission causing death would probably cause the death of or grievous harm to someone. Person whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily 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” (Section 206 of the Penal Code) (emphasis supplied)”**
36. The prosecution has established a case whereby the accused herein had a knife which she stabbed the deceased

with in an open and public place. She stabbed him but stated her intention was not to kill him. Malice aforethought includes the act to do grievous harm to any person. Whether the person is actually killed or not she wished that the grievous harm may not have been caused.

37. The accused pleads provocation. This has been defined under section 208 of the Penal Code as follows:-

1) **“The term “provocation” means and includes except as herein stated, any wrongfully act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of any ordinary person to another person who is under his immediate care, or to whom he [she] stands in a conjugal, parental, filial or fraternal relation, or in relation of master or servant to deprive him [her] of the point of self-control and to induce him [her] to commit an assault of the kind which the person charge committed upon the person by whom the act or insult is done or offered”**

2) ...

3) ...

4) ...

5) ...”

38. **Section 207** of the Penal Code deals with *“when a person who unlawfully kills another under circumstances which but for the provocations for this section would constitute Murder, does the act which causes death in the heat of passion caused by sudden provocation as herein after defined and before there is time for his passion to cool is guilty of Manslaughter only”*.

39. To my opinion on hearing both the evidence of the prosecution state and of the accused, it is definitely proved that the deceased was afflicted with an injury due to a knife stab to his chest.

40. The prosecution/state’s case is that the accused went to where the deceased, who is alleged to have been drunk (PW4) and who was quarrelling PW5 and possibly beating an old man and inquired of the quarrel. She then left the scene and returned with a knife to stab the deceased. Did this amount to provocation, namely, did the act occur in the heat of passion to cause sudden provocation?

41. In her defence, the accused said she had no knife. She went to where the quarrel was. She struggled with the deceased who had a knife which stabbed him.

42. If this is the correct position, then the stabbing was a result of an accident and not provocation. The said *“passion at the heat of the moment” was not there*.

43. The struggle on the ground would have produced inflicting of injuries lower down the body around the abdomen region and not at the chest. A chest stab made whilst standing would reflect injuries sustained at a higher level of the body going down.

44. The relationship of the deceased to the accused was not established as provided for under **Section 208** of the Penal Code.

45. There was the allegation that the witnesses were all from one family. I noted from PW8’s evidences three of the witnesses were not, besides the doctor and himself.

46. I also noted that a minor is said to have witnessed the post mortem. According to the doctor there were two persons who witnessed the post mortem.
47. I find that there was not provocation established in this case.
48. I find that the charge of murder contrary to **Section 203** as read with **Section 204** of the Penal Code has been proved.
49. The accused is guilty as charged.

DATED this 15th day of October, 2009 at **KERICHO**

M.A. ANG'AWA
JUDGE

Advocate

- i) R.K. Koech Principal state counsel
Later ii) P. Kiprop District State Counsel instructed by the Hon. Attorney General for the Republic
iii) Later B.L. Kivihya for State
iv) J.J. Onyango leading F.O. Koko instructed by Koko & Co. advocate for the
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