



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

**AT ELDORET**

**Criminal Case 34 of 2000**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**ROBERT WEKESA WESONGA ..... ACCUSED**

**JUDGEMENT**

The Accused, Robert Wekesa Wesonga was charged with the offence of murder contrary to Section 203 and 204 of the Penal Code. The particulars of the offence were that the Accused between the 19<sup>th</sup> and 21<sup>st</sup> days of December, 1997 at Bugar Village in Keiyo District within the Rift Valley murdered DINA JEMUTAI CHEPKURUI.

The Prosecution called seven (7) witnesses. PW 1 was the Pathologist who produced the Post-mortem Report. He is the one who carried out the Post-mortem on the body in 1997. He concluded that the cause of death was cardio-pulmonary failure due to head injury with intracranial haemorrhage following assault with a sharp object. There was bleeding in the brain. He said a sharp object was used and the deceased sustained head injuries.

PW 2 was the grandfather of the deceased. He said he gave her a house to live in. It was a hut. It had one room. In the evening of 8.12.1997 he saw a man enter the house. He said the man was called John and was her friend. He said that they lived together for 11 days. On 19<sup>th</sup> December, 1997 he smelt some bad odour. He went to Dina's house and found it was locked from outside with a padlock. He pulled it open. He saw a body under the bed. He called his brother Sebastian. They found a body covered with a blanket. It was Dina's body. She was dead. He said he did not see John from 1997 until he was arrested on 24<sup>th</sup> May, 2000.

He saw a knife in the house. It was a small knife with a wooden handle. He said that he last saw John on 18.12.1997. He did not know whether John slept in the house on 18.12.97. He said he drank busaa with John on the said evening.

PW 3 was the grandmother of the deceased and wife of PW 1. She says on 8<sup>th</sup> December, 1997, Dina came home and asked for a place to live. Her husband gave her a hut for her to stay in. She moved in the next day. She came with a man. She said he was called John and was a Mgisu. That they lived together for 12 days. They disappeared one day. The house was locked. She did not see them for three days. On 19<sup>th</sup> December, 1997 she learnt that a body had been found the hurt. She recognized the accused in Court

as John. She says he had 6 toes.

PW 3 confirmed in Court that the Accused had six toes upon examining the foot. She did not witness the incident leading to the death of Dina. She says that in 1997 she could not see clearly. She was treated three years ago and could now see properly.

PW 4 was a brother to PW 1. He did not know with whom Dina stayed in the hut. He never saw John or the Accused. PW5 was the deceased brother. He is the one who identified the body at Iten Hospital Mortuary.

PW 6 was a brother in law to the deceased. He also identified the body at the mortuary. PW 7 was the investigating officer. He said the suspect had gone underground. He was apprehended on 25<sup>th</sup> May, 2000 by the Police at Chebyemit. His names were Robert Wekesa Wesonga.

The Accused was placed on his Defence. He confirmed that he is called Robert Wekesa Wesonga. He said he lived at Chebara with a Pastor Joel. He worked on the farm. He said between 19<sup>th</sup> and 21<sup>st</sup> December, 1997 he was in Uganda at a place called Bugiri. He said he did not know Dina Chepkurui. He was arrested at Chebara Market by three people. He says he did not know the three. He said he was called Robert and not John. He said his having six (6) toes was a matter by his Creator. He said he is a Ugandan but has no evidence to prove this.

I have carefully considered the testimonies of the witnesses and all the evidence. One aspect is certain – none of the witnesses saw the Accused killing the deceased.

I do find as a matter of fact that the so-called John is indeed the Accused. He was identified by both PW 2 and PW 3. PW 2 sat down with the said “John” and drank Busaa together. It was during the day and they were close enough. They spoke. PW 3 despite her poor eyesight saw the Accused. He sat near her to the extent she could remember he had six (6) toes, a unique physical feature. She was able to confirm in Court that he had six (6) toes.

I find that the Accused is indeed the so-called John, i.e. boyfriend of Dina. It is said in the Charge Sheet that Dina was killed between 19<sup>th</sup> and 21<sup>st</sup> December, 1997. PW 2 said that she must have died on 18<sup>th</sup> December, 1997 since they found her body on 19<sup>th</sup> December, 1997. He said that he saw John on 18.12.1997 at about 5 p.m. He drank alcohol with John. He said that he did not know whether John spent the night with Dina. This means that he did not know whether John went into the hut. PW 2 did not say whether she saw Dina enter the hut when going to sleep. PW 2 did not state who the owner of the knife found in the house was.

PW 3 said the Accused and the deceased lived together for 12 days before 19.12.97. She says the two had disappeared. This means she did not see the said John on 18<sup>th</sup> or 19<sup>th</sup> December, 1997. PW 3 did not tell the Court where she was when her husband was drinking with the accused in her house on 18<sup>th</sup> December, 1997. If she was at home on the said date, she should have seen the said John if he was there drinking with her husband.

PW 2 and PW 3 are the witnesses whose evidence could possibly connect the Accused with the incident. Their evidence is purely circumstantial.

It was held in the case of **R –V- KIPKERING KOSKE & OTHERS (1949) EACA, 135**, that:-

“In order to justify on circumstantial evidence, the evidence of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

In the present case, while the Accused is the natural suspect and had the opportunity to kill the deceased yet other reasonable hypothesis do exist e.g.

- that he did not spend the night with Dina on the material night.
- that another third person could have come to the hut and killed the deceased and ran away.

Another issue is that PW 2 and PW 3 claim that she may have died on 18<sup>th</sup> December, 1997. PW 2 claims this to be so since he found the body on 19.12.1997. However, this Court notes that PW 3 said that she had not seen the deceased and accused for at least 3 days. PW 2 said that there was a heavy smell/odour coming from the hut which attracted him to investigate. If the deceased died on the night of 18<sup>th</sup> – 19<sup>th</sup> December, 1997, it is unlikely that the body would have started to decompose at the said rate that such a strong smell would be emitted. I believe that PW 3 was more accurate that the two had disappeared for days before 19.12.1997. This suggests therefore that in fact the deceased may have died long before 18<sup>th</sup> – 19<sup>th</sup> December, 1997.

The police on their part are even more imprecise. The date of the offence in the Charge Sheet is indicated to be between 19<sup>th</sup> and 21<sup>st</sup> December, 1997.

I do hold that there was no eye witness to the murder in this case. The circumstantial evidence presented in this case is weak. The inculpatory facts are not incompatible with innocence of the accused. There is a lot of room for speculation and possibilities. There are many possible explanations. The said facts are inconsistent and disjointed.

The fact that the accused has lied to this Court about his knowledge of Dinah or that he disappeared until he was arrested is not sufficient to warrant conviction on the aforesaid circumstantial evidence.

As a result, I find that the prosecution have not proved their case beyond any reasonable doubt. I do hereby acquit the accused under Section 215 of the Criminal Procedure Code.

He is ordered to be released from custody forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT ELDORET ON THIS 19<sup>TH</sup> DAY OF JUNE, 2008.

**M. K. IBRAHIM**

**JUDGE**

**In the presence of:**

Mr. Miyienda for the Accused

Ms. Oundo for the State