



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE 26 OF 2005

REPUBLIC PROSECUTOR

VERSUS

THOMAS KIBIWOTT CHEBII ACCUSED

JUDGEMENT

The Accused was charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars of the charge were that on the 4th February, 2005 at Kapchekoima Village in Keiyo District of the Rift Valley Province murdered **REBECCA JERUTO CHEMASE**.

The Prosecution called fifteen (15) witnesses. The deceased was a wife to the Accused. PW 1, a daughter of the Accused and deceased aged 13 years old told the Court that she was a Standard seven (7) pupil in a Primary School. On 4th February, 2005, she and four (4) others, Hilda, Gladys, Sharon and Naomi were asleep at their home. Hilda, Naomi and Sharon were her younger sisters while Gladys was their house help. She said that she heard her mother scream. She was wailing as if she was being beaten. She was in her bedroom together with her husband, the accused. PW 1 said that she woke up Gladys and asked her to listen to the wailing. Naomi, Gladys and PW 1 then ran to their neighbour's house.

PW 1 said that they had tried to open the bedroom door but it was locked. The father was asking the deceased to shut up. He was shouting at their mother. PW 1 said that they ran to their neighbour's house, one Helen to ask for help. Helen returned with them but she stood at the gate. PW 1 said that her father had stopped beating their mother. Helen went back to her house. The girls slept.

PW 1 testified that in the morning she saw her mother. Her right ear was perforated. It was red but no blood was oozing. Her head was swollen at the back but there was no bleeding. PW 1 said one Dr. Leo of Iten came to the house and treated their mother. She said that on 6.2.2005 their mother went to see Dr. Leo at his Clinic. When her mother came she told her that she had been given some medicine and an injection. She took little food and went back to bed. On 7/02/2005 PW 1 came from school when her mother told her that she had gone to her place of work to report sick. She complained of headaches.

PW 1 said that on 11.2.05 her mother went to work. She complained of severe headaches. She could not walk without being aided. She said that on 13.2.2005 at 3 p.m. her mother's brothers went to the house. They were found accompanied by two (2) ladies. They took her mother to Eldoret for treatment at the Moi Teaching and Referral Hospital.

PW 1 said that her mother did not come back. She went to her Uncle's house one Jackson. Her mother

later died 12 days after she left home. PW 1 said that it was her father who sent Dr. Leo to the house to attend to the mother. On cross-examination she said that her mother did not fall. She believed her father killed her mother.

PW 2 who was the house help to the accused and deceased. She stated that on 4.2.2005, she was at home when the accused came with Dr. Leo and one Chesire, a Headmaster at Nyawa School. They took Muratina brew. She said that the accused used to make local brews. The deceased arrived later but did not join them.

PW 2 said that other men arrived at house who took the brew. The girls and the deceased went to sleep. At about 1 a.m. PW 1 woke her up. She heard wails coming from the accused bedroom. She said that the accused was making noise demanding explanations from the deceased. That he beat up the deceased who asked for forgiveness.

The next morning she took tea to the deceased who did not take it. PW 2 said that she had sustained injuries on the head. She noticed that her right ear was perforated and she was bleeding. She had a swelling on the back of the head. She complained of headaches. At 8 a.m. Dr. Leo came to treat her. That it was at the accused's request.

Later in the evening the deceased told her that Dr. Leo had given her pain killers. She complained of headaches and that she had been beaten for no reason. PW 2 said that the deceased went to work on Monday 7/2/2005 to report that she was sick.

That on 13th February, 2005 visitors came to the house. Their names were Jackson, William, Isaac, Maureen and Ruth. The deceased was unable to wake up. The accused told them that she was suffering from Typhoid. The deceased was then taken to Moi Teaching and Referral Hospital. She testified that accused used to beat Rebecca frequently. PW 2 stated that there was a time that the deceased had fallen down and he became unconscious. She went to the doctor the next day. This was prior to the incident of beating.

PW 2 was a daughter of the deceased called Hilda. She was 12 years old. She testified that she went home after school on 4.2.2005. She found her father and Dr. Leo and Chesire at the house. They were taking muratina. They were joined later by other men. At about 2–3 a.m. she heard her mother wailing. She was being beaten by her father. She said that they tried to open the door but it was locked from inside.

PW 3 said she saw her mother in the morning. She complained of headache. Her head was swollen at the back. She said Dr. Leo came to the house to treat her mother. That on 13.2.2005 three of her maternal uncles came to the house. Their mother was very sick. The visitors realised that she was unable to speak. Then they took her to Moi Teaching and Referral Hospital. Their mother never came back. She learnt later that their mother had died. PW 3 stated that the accused frequently beat the deceased.

PW 4 a Clerical Officer at the District Commissioner's office, stated that she worked with the deceased. She testified that on Monday, 7.2.2005, the deceased arrived at the office and told her that her husband had beaten her on Friday night at about 1 a.m. She complained of headache. She said that the deceased had told her that the accused used fists until she fainted. The deceased told her that she had decided to seek separation from her husband. On 10.2.2005, PW 4 saw the deceased. She looked very sick. PW 4 said that she had known the deceased for 14 years. She did not know of other instances when she had sustained injuries to her head.

PW 5 a friend of the deceased testified about marital problems between the accused and deceased. She saw the deceased on 7.2.2005 when she complained of headaches. She was shocked to learn of her death.

PW 6 and PW 7 talked about previous quarrels between the deceased and the accused.

PW 8, was Jackson Kipsang Masai, a brother to the deceased. He testified that on 7.2.2005 he received a telephone call from his sister the deceased. She told him that the accused had beaten her on 4.2.2005. She told him that she had sustained injuries and requested for a meeting on 13.2.2005 to resolve the issue.

On 10.2.2005, the deceased called PW 8 and told him that the accused had postponed the meeting to a later date. PW 8 told her that they would still go to the house since he had made arrangements for them to visit the home. On 13.2.2005, PW 8 accompanied by his two brothers William Chemase and Isaac Chemase and his wife and William's wife went to the deceased house. They found the deceased lying on a settee. She could not lift her head. They sent for some pain killers for her – "panadol" from the local chemist. They were given pain killers with a different name ('Nice') which the deceased took. Her condition deteriorated and they took her to Moi Teaching & Referral Hospital. PW 8 said that that the deceased was treated and given a prescription. They bought medicine from the Pharmacy.

PW 8 said that the accused told him that he could take the deceased to his house (Jackson's) at Chepkoilel. Jackson then took the deceased to his house. PW 8 said on the 14.2.05 he saw the deceased in the morning and had a talk. The deceased told him that she was a little better. On 15.2.2005, the deceased woke up early and complained of severe headache. She requested to be massaged on the neck. Jackson's wife massaged her neck. The deceased went to sleep. In the course of the day the deceased's condition deteriorated further and he decided to take the deceased back to Hospital. She was taken to Moi Teaching & Referral Hospital where again she was given a different prescription. PW 8 and other family members bought the medicine. His mother decided to take the deceased to her house in Nyaru. PW 8 and two of his brothers spent the night at Nyaru.

At midnight, PW 8 stated that his mother woke them up. The deceased's situation had become worse. They decided to take her to hospital. However, she died on the way. On 17.2.2005, PW 8 reported the matter to the Police Station. PW 9 – one Isaac Chemase was a brother to the deceased. He is the one who identified the body of the deceased at the mortuary on 23.2.2005. PW 10 testified but his testimony had nothing to do with the incident on 4.2.2005. He was a friend of the accused and deceased.

PW 11 was Leo Kiprop Chebiego. He was a Clinical Officer and not a doctor. He had a Clinic called Kerio Medical Clinic. He testified that he was at the accused's house on 4.2.2005. He said that he had Muratina with the accused the said evening at the house but he left later. He stated that on 10.2.2005 the deceased went to him. She complained of headaches, general pains, fever and tiredness. He took her blood sample and discovered that she had typhoid brucellosis which is transmitted from animals to human beings through milk or meat. He treated her and she left. He testified that he had treated the deceased in the past on several occasions.

That on 13.2.2005 the accused called him and requested to come to attend the deceased. However, he declined since he was busy. He gave a prescription for pain killers and a muscle relaxer.

However, he later went to accused's house on 13.2.2005 evening. He found the brothers of the deceased present. He saw the deceased. She was in a lot of pain, sleepy and restless. She was disoriented. He took her blood sample and found no malaria. He asked them to go to his clinic so that he could give a referral letter to the Hospital. They did not go to his clinic. He learnt that they had taken the deceased to the Hospital. He did not see the deceased again.

PW 12 was the Assistant Chief of Kessup Sub-Location at the material time. He had not heard of any differences between the accused and the deceased. PW 14 was doctor Joseph Embenzi. The post mortem had been carried out by Prof. Koslova at Moi Teaching and Referral Hospital who had by now returned to her home country. Dr. Embenzi produced the post-mortem report under the provisions of 33 (b) of the Evidence Act. The doctor testified that the deceased passed away on 16.02.05. She had been attended at the hospital on 13.02.05 as a case of malaria and soft tissue injury. She was returned on 15.02.05. He testified that the cause of death was sub-dural haemotoma of the brain due to blunt injury on the head. He testified that she should have been admitted and a C-T scan carried out. He admitted that there was a degree of negligence on part of hospital. That any serious doctor should have at least have done an X-ray or C-T scan since there was trauma on the head. It is not known who had attended to her at the first

instance on 13.2.05 when she was mute and could not talk. She was brought back on 15.2.05. She died on 16/02/05 while on the way to Hospital.

PW 14 testified that the deceased died from injury on the head. He said that there was an old subdural haematoma which was three days to three weeks old. It was an old bleeding. This is an old clot. There was bleeding in a localised area. PW 15 was the Police Investigating Officer. He took over the investigations with effect from 4.03.05. The accused gave a sworn statement and was cross-examined.

I have carefully considered the testimonies on record of all the witnesses and the evidence on record.

I do find that the accused and deceased had been having domestic problems and difference for quite some time. There is a history of domestic violence. The accused used to or did beat his wife the deceased on several occasions. The reasons for the differences did come out clearly. None of the witnesses told the Court of the exact issues in dispute. What is clear and certain is that the deceased was an abused housewife who had been frequently assaulted and beaten up by the Accused. She silently persevered and did not report the matter to the police or authorities.

The evidence of PW 1, PW 2, PW 3 was consistent and collaborative of each other. On the night of 4.2.05 – 5-2-05 accused had drunk an alcohol brew called 'muratina' together with his friends. After 1 p.m., he picked a quarrel with his wife. Screams and shouts were heard from the bedroom. The deceased wailed and pleaded for forgiveness. In the morning, she was seen with injuries on her ear and the back of the head. An ear was red and perforated. The back of her head was swollen.

The accused did not take his wife to hospital. He went to work and sent his drinking friend, a clinical officer called Leo to attend to her. The said Clinical Officer attended to the deceased on the morning of 5-2-2005 and gave her an injection.

The deceased's health condition continued to grow worse and deteriorated between 5-2-2005 and 13-2-2005. The accused did not see the good sense or wisdom of taking her to hospital. He only continued to send his friend Leo to carry out treatment at the house. It is possible that accused was apprehensive that it would be discovered that his wife had sustained injuries due to beatings by him. The Clinical Officer did not advise him that the head injuries could be serious and should be referred to the Hospital.

It was only after the deceased brother, visited the house that the gravity of the situation was discovered and they took her to hospital. The deceased was attended to at Moi Teaching and Referral Hospital. However, the Hospital did not admit her as an in-patient. No X-ray or C-T Scan was carried out. If this had been done, the bleeding in the deceased's brain membrane could possibly have been discovered and preventive measures taken. She was prescribed some medicine and released to go back.

She was taken to her brother's house where she stayed until 15-2-2005. During this time she was not given any medical attention. Her condition got worse and she was taken back to the Moi Teaching and Referral Hospital. Sadly again no X-ray was taken or C-T Scan carried out. Despite her continued complaints, pain and suffering, none of her brothers, or the accused insisted on admission into hospital. She was again taken away, this time to her mother's house in Nyaru which was said to be even further than Jackson's house at Chepkoilel.

The next day on 16-2-05 the deceased condition deteriorated. She was being rushed to hospital when she died.

I do find that the accused did use physical violence on his wife on the night of 4-2-05 – 5-2-05. She sustained serious injuries on the head. Between 5-2-05 and 13.2.05 a period of eight (8) days the accused suffered pain but she continued to try to go to work and move around. Her husband did not realise of the death-threatening injuries. Due to her injuries and pain she did not herself go to seek help elsewhere.

The accused while drunk used violence on his wife. It must have been excessive considering the injuries. He was in a drunken stupor when he went and woke his wife and assaulted her. The wife did not die

immediately. She died twelve (12) days later. In between she reported to her office, met with workmates and friends. She talked to them about her pain and intention to leave her husband. She was given pain killers and muscle relaxers by the Clinical Officer.

In his intended cover-up of the assault on his wife the accused avoided to take her to a fully fledged Hospital. He relied on his friend the so-called Dr. Leo who became part of the arrangement and conspiracy to keep the injuries under wraps. He wanted to assist his friend from possible prosecution. He did not give proper advice that the deceased be taken to hospital. He was so incompetent he did not realise that the deceased had sustained serious injuries. He only prescribed pain killers.

When the deceased family came into the picture they took immediate action and took the deceased to the hospital. Unfortunately the personnel who attended to the deceased were casual, and acted negligently. They did not carry out an X-ray or C-T scan on two occasions. They released her with pain killers only. I am certain that had the deceased received immediate proper and professional medical attention, she would not have died.

The doctor testified that the cause of death was blunt head injury with old subdural haematoma complicated by development of dystrophic changes of parenchymatous organs, oedema of brain and lungs. Dystrophy is wasting away of the organs like lungs etc. There was evidence of bleeding in a localized area. There was no fracture of the skull. The injury was on the membrane which bled. Clearly from the foregoing had the X-ray or C-T scan been carried out the life of the patient could have been saved. The bleeding could have been stopped.

What happened instead? For a period of 12 days the deceased went about without assistance and with the injuries becoming worse on a daily basis. She was put on pain killers first by the Clinical Officer and then the Hospital. Her initial injury became complicated as the bleeding affected other critical organs.

I do hold that while the deceased assaulted his wife and caused her grievous bodily harm that he did not premeditate and intend to kill her. The injuries she received were not the immediate cause of death. The injury to the subdura could have been arrested and the clot avoided. The blood clotted due to lack of immediate medical attention or medical attention within a reasonable time. The blood degenerated and turned to yellow-brownish colour since the bleeding was not evacuated.

I do hold that the deceased died from subsequent complications from the bleeding of the sub-dura. It was avoidable. She died as a result of neglect by her husband who did not take her to hospital immediately, medical negligence by the hospital who did not immediately carry out an X-ray or C-T Scan and lack of firmness by her family members who casually accepted the hospital's decision to allow her go back home from time to time.

This Court considered the alternative charge of manslaughter. However, I have been dissuaded from this by the nature of the injury and the degree thereof and the fact that the deceased could have been saved during the twelve days from the date of the injury.

In conclusion, I find that it is unsafe to find the accused guilty of murder in the circumstances. I do hereby hold that the case against the accused has not been proved beyond any reasonable doubt as required by law.

I therefore do hereby acquit the accused person of the offence of murder and I do hereby order that he is released from custody unless otherwise lawfully held.

DATED AND DELIVERED AT ELDORET ON THIS 21ST DAY OF NOVEMBER, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Chirchir for Mr. Omutelema for the State

Mr. Miyianda for the Accused

Accused