



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Case 31 of 2003

REPUBLIC.....PROSECUTOR

VERSUS

JAMIN OBOTE.....ACCUSED

JUDGMENT

The accused JAMIN OBOTE stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 14th day of May 2003 at Umoja Estate in Uasin Gishu District of the Rift Valley Province, jointly with another not before the court murdered Linet Nasimiyu Obote.

The prosecution called ten (10) witnesses in support of their case.

The evidence of PW1 METRINE NALIAKA was that she worked at Ken Knit Ltd. Eldoret. She was a niece of both the deceased and the accused. The deceased was her aunt. The accused was husband of the deceased. On 17/5/2003 at 1.00 p.m., she came from work and went to Mahindi Hotel in Eldoret to see the accused JAMIN OBOTE, as she had not seen the deceased for a long time. When she found the accused, he told her he was from the rural home and, on coming back he found that the deceased LINETE NASIMIYU had been unwell and had gone to her rural home. The accused further informed her that he wanted to go to the deceased's rural home to find out the position. NALIAKA then told the accused that she would go to Rupa Mills Ltd, where the deceased used to work, and try to find out more about the deceased.

On 18/5/2003, which was the next day, she went to her sister's house at West Estate. Her sister called MWATIA embraced her and told her to take courage as the deceased had been killed by OBOTE. She then went to the mortuary, but the mortuary attendants did not open for her as it was a Sunday.

On the Monday, which was the next day, she saw the accused OBOTE who informed her that the one who had killed the deceased, was a son of his (OBOTE'S) sister, who had disappeared to the rural area. They went together with the accused and the accused's two brothers to Mahindi hotel. At Mahindi Hotel the accused said that they should go and carry out a postmortem examination. She protested and said that postmortem should not be conducted until relatives from the rural home come.

She then proceeded to the police station, where she found relatives of the deceased from the rural home who had now come. She left them at the police station and went to Rupa Mills Ltd. where the deceased used to work. A clerk there informed her that the husband of the deceased (the accused) had gone there earlier and reported that the deceased was bleeding. They therefore paid him money on behalf of the deceased.

It was her evidence that the deceased was a sister of her mother. The deceased had, at one time, come to her gate and informed her that there was a domestic problem in that there was a loss of Kshs.10,000/= in the house, and the accused thought that she was the one who took the money. She was aware that the accused had married two wives. She advised the deceased to call people from her family to try to resolve the issue.

In cross-examination, she stated that she had recorded a statement on 19/5/2003. The statement was recorded by the police and read over to her before she signed the same. She knew the elder wife of the accused. She knew both the father and mother of the accused. She had not gone to the place where the accused used to live in Eldoret because she did not know the place. She went to that house on the Monday, after enquiries. It was at Umoja Estate down the valley. She was aware that the accused used to live with a son of his sister. On the Sunday, she had met one MR. KHATIA who neither went to the mortuary nor recorded a statement with the police. She stated that she went to Rupa Mills Ltd to find out how long the deceased had been missing. There, she talked to a clerk called ELLAM WAMWANDA. She also stated that the elder wife of the accused was staying in the rural home. She was aware that the young man who had disappeared was a son of MARY MASAI.

In re-examination, she stated that she was informed by the deceased that only three people lived in the accused's house at Eldoret.

The evidence of PW2 JACOB AMBATA LIKOBÉ was that he lived at Soy in Lugari and worked at Rupa Mills Ltd which was formerly known Raymonds Ltd. He knew the deceased as a co-worker. He could remember that on 14/5/2003, he deceased did not go to work. He enquired about that absence, as it was common for employees to lose their jobs merely for one day's absence. A co-worker called TIBERIAS WANJALA, who lived at Huruma was sent to find out. The said TIBERIAS came back and informed him that the husband of the deceased informed him that the deceased was sick. He therefore gave Kshs. 1000/= advance to TIBERIAS to give to the husband of the deceased. When he later tried to find out whether the deceased was getting better, some co-workers informed him that the husband of the deceased could be found at Honey Drops, near Mahindi hotel where he sold newspapers. He went there with other co-workers and found the husband of the deceased who identified himself. The husband of the deceased told them that he had gone on a journey, and, when he came back, he found blood stains in the house. He thought that his wife had miscarried and gone to Mautuma to see birth attendants, who could deal with her problem. The said husband (the accused) said that he had sent a young man there to check on the position. That was a Saturday and he went home.

On Monday, at the gate to Rupa Mills Ltd, some women told him that Linet (the deceased) had died.

In cross-examination, he stated that he did not know whether his statement to the police was not dated. He stated that he knew the deceased for 20 years. He reiterated that the deceased was not at work on 13/5/2003, and that was the date on which he sent TIBERIAS to find out. On 14/5/2003 he sent TIBERIAS again and then TIBERIAS reported at 2 pm, but did not bring a medical report. He knew that METRINE NALIKA had come to enquire about the deceased. However, that was before 14/5/2003. When he later talked to the accused he confirmed that he received the money and used it to send a young man to see the deceased. He testified that METRINE NALIKA went to Rupa Ltd twice. On the first occasion, she asked whether the deceased LINETE came for duty, and the second time she came and asked whether money for LINETE had been paid out.

PW3 was TIBERIAS WANJALA. His evidence was that he knew LINETE NASIMIYU, the deceased as a co-worker.

On 15/5/2003 a clerk at the place of work (Rupa Ltd) asked him if anybody knew where LINETE lived. He told him that he knew where her husband OBOTE used to work.

He was paid the deceased's advance payment of Kshs. 1000/= to take to LINETE's husband (OBOTE). At about 5.00 p.m. he went to Honey Drops where OBOTE used to sell newspapers but did not find him. The next day on 16th May 2003, he went to Honey Drops at 7.30 am and found OBOTE. He asked him

where LINETE was. OBOTE responded that he had traveled and when he came back he saw bloodstains in the house and thought that LINETE had a miscarriage and had gone home. He then gave OBOTE the Kshs.1000/= advance payment for LINETE. He had known OBOTE (the accused) before for about one year. He did not see the deceased any time thereafter. He learnt later that she was found dead in her house. He recorded a statement with the police.

In cross-examination, he stated that he did not know where the accused lived. He stated that JACOB LIKOBÉ was a clerk in his place of work. He denied that on 13th and 14th May 2003 he told LIKOBÉ that LINETE was sick. He however, talked to LIKOBÉ on 15/5/2003. The said LIKOBÉ was willing to take the money for the deceased. He did not tell LIKOBÉ that LINETE was sick. LIKOBÉ produced the money from his pocket to show that he had actually received the money for the deceased. He could remember that he recorded a statement with the police in May 2003, but he could not remember the exact date. He confirmed that his police statement, which was shown to him, did not have a date. He insisted that he did not tell JACOB LIKOBÉ that LINETE was sick.

ELLAM OKUMU WAMWANDA testified as PW4. His evidence was that he worked for RUPA LTD as an accountant. On 15/5/2003, while he was paying staff advances, an employee called JACOB AMBANYA informed him that another employee called LINETE NASIMIYU was sick. He paid JACOB AMBANYA (LIKOBÉ) the money for the treatment of the sick employee.

In cross-examination, he stated that 15/5/2003 was the day for paying staff advances. The advance was payable to every employee, including LINETE. He stated that JACOB said that the husband of LINETE had sent the message of sickness of LINETE. There was no medical document to prove the illness. He also stated that there was no general rule that an employee who was absent for a day would be dismissed.

PW5 was ZACHARIA SIMIYU MUNYIKANA. His evidence was that he was employed by OBOTE (the accused) to sell newspapers. On the 16.5.2003 at 2.00 p.m., while at Honey Drops hotel counting money for the sale of the newspapers, the accused told him that he had seen blood stains in his house, and that he thought that it was his wife, as she used to experience excessive bleeding during her monthly periods. He also told him that his wife and nephew were not at home and that he suspected that she had gone to the rural home. The accused then gave him Kshs. 700/= of which he was to use Kshs.200/= for fare, and take Kshs.500/= to his wife at his rural home.

He proceeded to Webuye where the accused had bought a farm. He met a girl who informed him that the wife of the accused had not been seen at WEBUYE. He slept at Webuye. On the next day, he came back and saw the accused and his sister at Honey Drops hotel. He informed them that he had not seen the wife of the accused at Webuye.

Then the three of them went together to the house of the accused at BARINGO estate. They opened the door. At the sitting room, there was a basin with blood. He picked a piece of stick and, on stirring the blood, he saw in the blood a piece of cloth which belonged to the wife of the accused. He also saw a handkerchief that was soaked in blood. He identified the piece of cloth (shawl) in court. Then, he was called by the sister of the accused who had gone further inside the house, who showed him the body of the deceased which was dressed in an innerwear like a sleeping dress. He did not observe injuries on the body. Thereafter, the accused sent him to Mautuma to convey the information to the mother of the deceased. He went there and came back the next day with an elder brother of the deceased called DISMAS. They found that the body had already been taken to the mortuary.

In cross examination, he stated that he was employed by the accused and used to sell newspapers at Kidiwa. There was another employee of the accused who used to sell newspapers at Honey Drops. However, on the 13th and 14th May 2003 he sold newspapers at Honey Drops, as the accused had traveled to his parents home at Wekulo. The accused had told him that there was a quarrel between the deceased and a young man called STANLEY. Earlier, on 13.5.2003, they had a self-help meeting in the accused's house and the said STANLEY was present. He had known STANLEY for a month. After coming from Pan Paper Mills (Webuye) he did not see STANLEY. His evidence was that blood was on the left hand side in the house. As one enters the house, he could easily see the blood. He also stated that the mother

of STANLEY (sister of the accused) proceeded straight to the bedroom with OBOTE (the accused). Then she called him. He reiterated that the deceased had informed him that there was a quarrel between the deceased and STANLEY over material belonging to the deceased which went missing. STANLEY had said that the missing materials were taken by the elder wife of the accused. That was the reason why the accused traveled to the rural home to find out whether it was true that his elder wife had taken the materials.

PW6 was DISMAS WOMWANDU, who was an elder brother of the deceased. His home was at Mautuma location in Lugari.

He testified that on 17.5.2003 one Zacharia Simiyu and Kirongi Baraza went and informed him that his sister LINETE had disappeared at Eldoret. They said that they saw blood in the house.

The next day, he came to Kingongo Eldoret where his sister LINETE lived. He met his brother in law (the accused) and other people. When he enquired, they informed him that his sister was no more. He went and saw the body of LINETE at Moi Referral Hospital. He suspected that his brother in law killed his sister. The reason is firstly, because he delayed in sending the information on the death to the family. Secondly, he did not even inform neighbours about the death. Thirdly, he reported the incident to Langas police station instead of Central Police Station Eldoret.

In cross examination, he stated that he had visited the accused and deceased twice previously to solve domestic problems. When he came to Eldoret after the report of the disappearance of his sister, he did not meet MARY MASAI at the house of the accused. He met the accused and some men. He was aware that a nephew of the accused, who lived together with the accused and the deceased, had disappeared.

PW7 was JOSEPHINE NANYENI. Her evidence was that she was a sister of the deceased. On 18.5.2003 at 5.00 p.m. she was at a women's function at Makusi in Lugari, when she was informed that her sister LINET had been killed. On the next day, she went to Eldoret. At the house of the deceased, they found blood in a basin near the bed. After going to see the body in the mortuary, the police told them to pour out the blood as it was smelling. She witnessed the post mortem examination of the deceased.

In cross examination, she stated that she met DISMAS WOMWANDU at the police station, not in the accused's house. She did not know whether, the shirt that looked like a blouse, belonged to the deceased or to the young man who had disappeared. She stated that she was aware that there were disagreements between the deceased and the accused on the loss of Kshs.10,000/= as well as loss of materials.

PW8 was CHARLES LIRU. He was a police officer and a relative of the accused. In May 2003, he was stationed at Langas police station. On 19.5.2003 he received a report at Mahindi hotel that the wife of the accused had been killed on 14.5.2003. He was given the information by one ZACHARIA. Shortly thereafter, the accused appeared and narrated the story. The allegation was that the deceased was killed by STANLEY JINAI. He tried to assist in tracing the said STANLEY. He even went to Luanditi to try to find STANLEY. They even arrested MARY MASAI, the mother of STANLEY. However, the investigating officer Cpl. Monica Chumo and the OC Crime CI Seroney, arrested the accused and told him that if he knew the suspect he should go and arrest him.

In cross examination, he stated that the accused did not make any report to Langas police station. They arrested MARY MASAI because they thought that she knew the whereabouts of the suspect at large and the said MARY MASAI had even slaughtered a sheep for a ritual.

PW9 was MARY MASAI. She was the mother of STANLEY JINAI MASAI. It was her evidence that on 14.5.2003 her son Stanley, who lived with his uncle (OBOTE), went to her home at 9.00 a.m. He had a battery belonging to his uncle. He also had some clothes belonging to his uncle, which he was wearing. He slept there. On the next day he left for Eldoret. On the 16.5.2003 at 6 pm, she received a note written by her brother OBOTE (the accused) that he wanted the clothes and the battery. Next day she left in the afternoon and came to Eldoret with the battery, as she did not have the clothes.

When she met OBOTE, OBOTE said that her son had disappeared. She asked OBOTE about his wife. He told her that his wife had disappeared and could not be traced. Then, on further inquiry, he said that he had found blood stains in his house. They then went together to the house of OBOTE and found blood stains. OBOTE opened the door and they found blood in a basin. When she looked into the rooms, she saw the body of the deceased in one of the rooms near a door. The body had a cut wound on the neck. She told OBOTE to go and report the matter to the police. It was her evidence that she had not seen her son STANLEY since 15.5.2003.

In cross examination, she stated that her son STANLEY MASAI lived with the deceased and the accused. She was aware that the accused had another wife. She was not aware of a family member who had died at Malava at that time. She denied having conducted a ritual on 23.5.2003. She reiterated that she saw the body of the deceased on 17.5.2003. Simiyu was also present when she saw the body. She denied hiding her son (STANLEY) in the bush. She did not know whether or not the accused had killed LINETE. She denied that her son Peter said that STANLEY was in the bush.

PW10 was CPL. MONICA CHUMO. She was the investigating officer. It was her testimony that on 17.5.2003 she was at Eldoret police station as duty officer. She received a report from the suspect. The suspect reported that on 14.05.2003 he left his wife and a nephew and went to Kabras. When he came back on 15.05.2003, he did not find any of them in the house. That he stayed in the same house until 17.05.2003 in the morning. He looked for a basin to wash his face and found that the basin had blood soaked clothes. It was in the sitting room. He also stated that in the course of that day he was visited by his sister Mary Masai who was the mother of his nephew who had disappeared. The said sister searched in the house and found the body of the deceased under a sofa set.

She then visited the scene with other police officers and tried to enquire from neighbours. She saw the body with a cut wound on the neck below the ear. There were no blood stains in the house except where the body was lying. The clothes that the deceased was wearing had no blood stains. She was wearing a blouse and a skirt. The hair was cleaned and oiled. There were clothes which were soaked in blood in a basin. In the basin was a shoulder shawl, a shirt, a piece of cloth and a sisal string tied to a nail. She took possession of these items but they did not find any murder weapon. The scene was photographed and they removed the body to Moi University mortuary. She conducted further investigations and on 19.5.2003 she arrested the suspect.

She attended the postmortem examination conducted by Dr. Kazlova On 21.05.2003. The doctor who was now absent handed over the postmortem form to her. She produced the post mortem report under Section 77(1) of the Evidence Act (Cap. 80), as Mrs. Fundi for the defence did not have any objection. The postmortem report listed the injuries found and the cause of death.

She also produced the sisal string and nail, the shirt; the piece of cloth and shawl as exhibits. She also produced a net as an exhibit. These items were recovered from the accused's house.

In cross examination, she stated that it was the accused who made a report to the police station. She did not know whether a report had been made at Langas police station. The house of the accused was at Umoja Estate. She stated that they went to the accused's house on 17.5.2003 at about 7.00 p.m. when it was a bit dark. There was no electricity light in the house. It was a three roomed mud house. She stated that she knew PC Liru, who claimed to be a half brother of the accused. She did not refer the blood for expert examination, because they did not suspect poisoning. The blood was also mixed with water.

In re-examination, she stated that it was the accused who led them to his own house. The accused told them that the recovered shirt was his, but he had given it to his nephew. She reiterated that she did not take the blood for examination because a doctor had said that it would have no useful results, as it was mixed with water.

That was the prosecution case.

In his defence the accused gave sworn testimony. He also called one defence witness.

The accused testified as DW1. His evidence was that he was married to two wives JANE NALIKA and LINETE NASIMIYU. He was a businessman with newspaper business. He also operated a matatu. LINETE NASIMIYU was his second wife. They had lived together for five years and had one child, who had died.

On 14.5.2003 in the morning, he left the deceased and STANLEY MASAI, a son of a step sister, in the house. He went to Kabras in Kakamega District to see his first wife who was sick. There was also a funeral there. He came back on 16.5.2003 in the morning, arriving at 3.00 a.m. He found the house padlocked from outside. He had a key. He opened the house but did not find anybody inside. He slept up to 4.00 a.m. and woke up and wanted to wash his face. When he went for the basin, he found that it contained some blood and clothes. He was shocked.

He asked neighbours such as Wycliff Nyongesa Sanya, Ochieng and Okumu about what had happened. He then went to town to report to the police. He went to report to the police on 16.5.2003 and they asked him whether he had checked in hospitals. Then he sent his nephew Zacharia Simiyu to the home of LINETE. He also sent Sifuna Mangala to the home of STANLEY MASAI. He also went to hospital to find whether anybody was admitted.

On 17.5.2003, the mother of STANLEY MASAI came. She brought the battery. She told him to take her to his house. At that time, Zacharia had come back from the rural home and informed him that he had not found LINETE. The three of them went to his house. The mother of STANLEY started pulling the sofa set in the house. The body of the deceased was found behind the sofa set. It was about 4.00 p.m.

They screamed and neighbours came. He went and reported to the police station where he met Cpl. Monica Chumo. The police came and removed the body to the mortuary. There was no smell in the house. The death appeared to be a fresh death. He was arrested on 19.5.2003 when he was with the funeral committee. He was aware that somebody took the advance for LINETE. On 16.5.2003 he was told by an employee of Rupa Ltd that LINETE did not go for work on 15.5.2003.

In cross examination he stated that he could not confirm that the shawl belonged to the deceased. He sent Sifuna to STANLEY'S home not because of his own missing items but because he found blood stains in the house. He then changed his story and said that he sent Sifuna also to ask for the battery and other items. He did not report to the police that STANLEY had stolen his items. He denied hearing JOSEPHINE state in court that there was a loss of Kshs.10,000/= from the house. He denied that there was an issue of the loss of the money in his house. He stated that, when he saw the basin with blood, he thought that perhaps someone had died. He insisted that he looked around the house. He wanted the court to believe that he did not see the body of the deceased in the house.

He stated that he reported to the police and then sent Sifuna. He initially thought of arranging for a funeral for the deceased, because the family of the deceased did not want to cooperate.

In re-examination, he said that he examined the basin with the blood for 20 minutes.

The defence witness was STANLEY JINAI MASAI (DW2). He gave evidence that incriminated the accused and was stood down by the defence, but not declared a hostile witness. He was also not cross examined. His evidence was that he lived with the deceased and the accused at Eldoret.

According to him, on the night of 13th/14th May 2003 the accused and the deceased had a quarrel in the house. The reason of the quarrel was that the accused took the money of the deceased and did not return the same to the deceased. When he went to sleep he heard some screams. Shortly thereafter, the accused knocked at his door and asked him to go and help him. They went to the accused's bedroom, and found the deceased on the floor, bleeding. After trying to assist the deceased, he found that the deceased had died. The accused tried to clean the blood with a piece of cloth. The accused then warned him not to be involved in matters of his house. Accused gave him a battery to take to his rural home. The accused himself said that he would report the matter to his cousin at Langas Police Station and go home the next day. The accused told him that he would handle the issue himself.

At the close of the case learned counsel for the accused, Mrs. Fundi, and learned Principal State Counsel, Mr. Omutelema, made submissions.

While counsel for the accused submitted that the prosecution had not proved the case against the accused beyond reasonable doubt the State Counsel submitted that the prosecution had proved the case against the accused beyond any reasonable doubt. After summing up to the assessors, they returned an opinion that the accused killed the deceased but that the offence committed was manslaughter, as there was a quarrel.

I should remind myself from the onset that this is a case based on circumstantial evidence. No one saw the accused kill the deceased. As was stated by the Court of Appeal in **KARIUKI KARANJA – vs – REPUBLIC [1986] KLR 190**, at page 193 –

“.....circumstantial evidence to sustain a conviction must point irresistibly to the accused. In order to justify, on circumstantial evidence, the inference of guilt the exculpatory facts must be incompatible with the innocent of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts. Rex – vs – Kipkering Arap Koske, 16 EACA 135”.

I have evaluated the evidence on record. This being a charge of murder, the ingredients to be proved by the prosecution are firstly, whether LINETE NASIMIYU OBOTE is dead. The second ingredient to be proved by the prosecution is whether the accused caused the death of the deceased. Thirdly, the prosecution has to prove whether, if the accused caused the death of LINETE NASIMIYU OBOTE, it was with malice aforethought. The standard of proof is beyond any reasonable doubt.

Now, is LINETE NASIMIYU OBOTE dead. The evidence both for the prosecution and the defence support this. Her body was found in the house of the accused on 17/5/2007. She was already dead. The accused was present together with MARY MASAI (PW9) and ZACHARIA SIMIYU MWINYIKANA (PW5). Postmortem examination was done on 21/05/2003 at Moi University mortuary by Prof Kozlova. The postmortem report was produced as an exhibit in the absence of the doctor. The defence did not object to its production under section 77 (1) of the Evidence Act (Cap. 80). The postmortem doctor found the cause of death to be a stab wound of the neck with cut of the jugular vein, haemorrhage into endocardium of left ventricle, and fracture of thyroid cartilage. There were also signs of mechanical asphyxia.

From the evidence on record, I am satisfied that indeed, the prosecution has proved beyond any reasonable doubt LINETE NASIMIYU OBOTE died. I also find that the cause of death was as found by the postmortem doctor.

Was the death caused by the accused? The accused was charged with causing the death of the deceased with another not before the court. The prosecution had the burden of proving, beyond any reasonable doubt, that the accused caused the death of the deceased. Even if he did so with another, he would still be a principal offender.

As I have observed earlier, this case is based on circumstantial evidence. Nobody witnessed the incident in which the deceased died. Nobody witnessed the accused kill the deceased. The evidence has to be looked at as a whole. It is not in dispute that the deceased was the wife of the accused. It is not in dispute that they lived together in the same house at Eldoret. It is not in dispute that the body of the deceased was found in the house used by the accused and the deceased on 17/5/2003. It is not in dispute that three people lived in that house, that is the deceased, the accused and one STANLEY MASAI. The prosecution case is that the accused killed the deceased. He used to live with the deceased.

The deceased did not go to work at Rupa from 14/5/2003. This is per the evidence of PW2 JACOB AMBANYA LIKOBÉ, a co-worker. The accused was given Kshs.1000/= advance payment for his wife the deceased in the morning of 16/5/2003. The money was given to him by TIBERIAS WANJALA

(PW3). At that time the accused told WANJALA that he saw bloodstains in the house, and thought that the deceased had miscarried and gone home. He also gave the same story of a miscarriage to PW5 ZACHARIA SIMIYU MUNYIKANA. He in fact gave money to the said PW5 to go to Webuye and look for the deceased. That was on the same 16/5/2003. On the same 16/5/2003, the accused informed PW2 JACOB AMBANYA LIKOBÉ that his wife the deceased had miscarried and gone to see some birth attendance, who could deal with the problem at Mautuma. It was the prosecution contention that the accused had to be persuaded by MARY MASAI to go to his house and find what had befallen the deceased. He went to his house on 17/3/2003 with MARY MASAI (PW9) and ZACHARIA SIMIYU PW5. He opened the house. The blood in the basin was easily visible as one enters the house. The body of the deceased was found under a sofa. It was MARY MASAI who did a simple search in a room and found the body.

The accused in his defence stated that he had traveled to Webuye on 14/5/2003. When he came back to Eldoret he neither saw his second wife the deceased nor his nephew STANLEY MASAI whom he had left at home. He came back to Eldoret on 16/5/2003 at 3 am in the morning. When he looked for a dish to wash his face at 4 am he saw blood in the basin in his house. He stated that he reported the matter to the police but they told him to look around for the deceased.

The witnesses who saw him that 16/5/2003 did not state that he told them that he saw a basin of blood in his house. He did not inform any of them that he had reported the issue to the police. Though he told PW2 JACOB AMBANYA LIKOBÉ that his wife had gone to Mautuma, in fact he sent ZACHARIA SIMIYU MUNYIKANA to Webuye, to look for the deceased.

Though the accused stated in his defence that he reported to the police before the body of the deceased was found, no question was put in cross-examination to prosecution witnesses that such a report was made. Though the accused stated that he reported the discovery of blood in the basin to neighbours such as Wycliff Nyongesa Sanya and Ochieng and Okumu, no suggestion in cross examination was put to any of the prosecution witnesses, including Cpl. MONICA CHUMO (PW10), who was investigating officer. I find that the line of defence adopted by the accused was an after thought.

I believe the testimony of prosecution witnesses. The witnesses impressed me as truthful. I dismiss the accused's defences as an afterthought. The accused appears to suggest in his defence that it was his nephew STANLEY MASAI who killed the deceased. I was told that the said STANLEY MASAI is charged in another case in respect of the same incident. He gave evidence as a defence witness, but was stood down and the prosecution chose not to cross-examine him. I will give no weight to his testimony.

I believe the testimony of prosecution witnesses. The witnesses impressed me as truthful. I dismiss the accused's defence as an afterthought.

In my view, the totality of the evidence on record points irresistibly to the guilt of the accused. He either alone, or with another or others killed the deceased. I do not consider it normal for a person whose wife has disappeared, and who has seen a lot of blood in a basin in the house, to merely hold that the wife has a bleeding problem during menstruation, or that, she miscarried and leave the matter there. A miscarriage itself is such a serious matter, and I would not expect the deceased to miscarry and then immediately travel home on her own, as stated by the accused to witnesses. I do not find it normal that the accused did not make a formal report to the police about the circumstances of the disappearance of the deceased after seeing the blood in the basin. I do not find it normal for him to send someone (PW5) to his rural home at Webuye while maintaining that the deceased might have gone to Mautuma. He should, indeed, have sent someone to Mautuma. In my view the accused killed the deceased or participated in killing the deceased by stabbing and strangulation. The travels and conduct of the accused were merely meant to cover up the killing incident. The reason for the killing was the disagreement on lost money. He had the opportunity to kill the deceased because they were staying together. He also had the opportunity to dispose of the weapon, clean the blood from the floor or clothes and hide the body, to create an explanation as a defence.

I do not think that STANLEY MASAI would have, alone, killed the deceased without the involvement of

the accused. I find no other reasonable hypothesis than that the accused killed the deceased.

Was the death caused with malice aforethought? Malice aforethought is defined under section 206 of the Penal Code, which provides –

“206 malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) an intention to cause 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 will probably cause the death of or grievous harm to some 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”

I have considered the evidence on the circumstances of the death of the deceased. Everybody is presumed to intend the natural consequences of his or her acts. The deceased was stabbed once. There was also evidence of strangulation. Clearly, the attack on the deceased was vicious. However, there is evidence of a preexisting disagreement between the accused and the deceased, due to loss of money in the house. This appears to me to be a borderline case. It may well be premeditated killing. It may be a killing arising from a carry over of the disagreement. Only because of that doubt in my mind, I will give the benefit of the doubt to the accused. It is therefore my finding that the prosecution failed to prove beyond any reasonable doubt that the killing was premeditated. Malice aforethought was not proved. The prosecution proved beyond any reasonable doubt that the accused unlawfully caused the death of the deceased. I therefore find the accused guilty of the lesser offence of manslaughter contrary to section 202 of the Penal Code and convict him accordingly.

Dated and delivered at Eldoret this 25th day of May 2007.

George Dulu

Judge

In the presence of –