

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Case 66 of 2003

REPUBLIC.....PROSECUTOR

VERSUS

KIPSARMAT KIPNGETICH.....ACCUSED

JUDGMENT

The accused, Kipsarmat Kipngetich was charged with **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that on the 14th January 2003 at Molo Sirwa village in Koibatek District the accused murdered Tungo Kipsarmat (*hereinafter referred to as the deceased*). When accused was arraigned before this court, he pleaded not guilty to the charge. His trial did not immediately commence before this court because soon after being placed in remand custody, he developed mental illness. It is only after three years that the accused was assessed to be mentally fit to stand trial. The prosecution called seven witnesses in its bid to establish the charge of murder against the accused. When the accused was put on his defence, he gave an unsworn statement. He stated that the death of the deceased was accidental as it had occurred when he was drunk. The prosecution and the defence gave closing submissions. This court shall give reasons for its decision after setting out the facts of this case as narrated by the prosecution witnesses.

The accused married the deceased in 1975. The couple were blessed with children. Among their children are PW2 Sammy Kipsarmat and PW3 Samson Cheruiyot. The accused and the deceased resided together at their farm at Molo Sirwa. They lived in a grass thatched house. Their two sons lived within the neighbourhood. At the time of the incident, the accused and the deceased lived together alone in their house. However they used to be visited virtually everyday by their sons (*i.e. PW2 and PW3*). On the 14th January 2003 at about 7.00 p.m. PW2 visited his parents. When he reached their home, he found them quarrelling. According to PW2, both the accused and the deceased were drunk. The accused complained that the deceased had not cooked food for him. PW2 testified that the accused and the deceased used to quarrel especially when they were drunk. Sometimes the quarrel degenerated into fights. PW3 however contradicted PW2 when he stated that the accused and the deceased did not quarrel that often. PW2 recalled that on that evening he did not take supper at home but left the accused and the deceased while they were quarrelling. He went to his house and slept.

On the following morning at about 7.00 a.m., the accused went to the houses of PW2 and PW3 and informed them that he had done something bad. He immediately left the scene and disappeared. PW2 and PW3 went to their parent's home and were shocked to find the deceased lying dead outside her house. According to the prosecution witnesses who visited the scene, the body of the deceased was lying about 2 metres from the door to her house. PW2 and PW3 saw that the neck of the deceased had been cut with a sharp object. The neck of the deceased had nearly been severed from her body. There was a lot of blood at the scene. PW2 and PW3 saw a panga placed on the roof of their parent's house. The panga was blood stained. PW2 and PW3 to informed their relatives of what had transpired. Among the relatives who were informed was PW4 Wilson Kipkartich, the brother of the deceased. He arrived at the scene and was present at the scene when the police arrived.

Meanwhile, after the accused had informed PW2 and PW3 that he had done something bad, he walked to Emining Police Post and made a report to the police that he had killed his wife. The accused

was detained at the said Eming Police Post. The OCS Mogotio Police Station under whose jurisdiction Eming Police Post fell, was duly informed and immediately went to Eming Police Post. The OCS was PW1 CIP Mary Gakuo. She interrogated the accused who offered to escort her to the scene of crime. PW1 was accompanied by PW5 PC Hellen Mdwai. When they arrived at the scene at Molo Sirwa, they saw the body of the deceased. PW5 testified that the body of the deceased was lying about one metre from the door and had been covered with leaves. The neck of the deceased had been cut. PW5 recalled that there was a blood trail from the place where the deceased was found to the fire place inside the house. There was a lot of blood near the fire place in the house. PW5 assisted by PC Kanzika and PC Kemboi collected the body of the deceased from the scene. The body of the deceased was taken to Nakuru Municipal mortuary for the post-mortem to be performed. The accused was taken to Mogotio Police Station where he was detained pending the conclusion of the investigations.

While at the scene, the accused told PW1 that he had killed the deceased because the deceased had refused to serve him food. PW1 recalled that when she saw the accused, the accused appeared drunk. PW1 testified that she recovered the blood stained panga at the scene. The said panga was positively identified to belong to the accused by PW2 and PW3. The said panga was produced in court by PW1 as *prosecutions exhibit No.1*. PW7 Dr. Athanasius Kasera Ochieng performed the post-mortem on the body of the deceased on the 18th January 2003 at the Nakuru Municipal Mortuary. He observed that there was a cut on the neck of the deceased measuring about 20 cm, the trachea was severed as well as the oesophagus. The blood vessels in the neck were severed. He formed the opinion that the cause of death of the deceased was cardiopulmonary arrest due to severe haemorrhage as a result of the severed vessels in the neck. The post-mortem report was produced as *prosecutions exhibit No.2*. The accused was examined on 20th January 2003 by Dr. Kogutu who formed the opinion that the accused was mentally fit to stand trial. The P3 form filled by Dr. Kogutu was produced on his behalf by PW7 Dr. Ochieng and marked *prosecution's exhibit No.3*.

As stated earlier, when the accused was put on his defence he stated that the death of the deceased was accidental. He stated that he was drunk at the time the incident took place. Although he did not specifically admit that he had killed the deceased, the accused did not deny that he was with the deceased at the time she met her violent death.

In criminal cases, it is the duty of the prosecution to establish the guilt of an accused person to the required standard of proof beyond reasonable doubt. An accused person is under no obligation to prove his innocence. His duty is only restricted to raising reasonable doubt on the prosecution's case. The onus of proving a criminal case against an accused person is always on the prosecution and does not shift to an accused person. This court is required to evaluate the evidence that was adduced by the prosecution witnesses and the defence offered by the accused so as to reach its own determination whether or not the prosecution has established the guilt of the accused person.

In the present case, no one saw the accused kill the deceased. There is no direct evidence adduced by the prosecution witnesses which linked the accused with the death of the deceased. However the prosecution adduced circumstantial evidence to establish that it was indeed the accused that killed the deceased. The accused did not deny that he had killed the deceased. In fact the accused told PW2 and PW3, (*his sons*), that he had done something bad. Upon investigating, PW2 and PW3 discovered the body of their deceased mother lying outside their parent's house. The accused went to Eming Police Station and told the police that he had killed his wife. When PW1 accompanied the accused to the scene, the accused told her that he had killed the deceased because she had refused to serve him food. PW1 recalled that at the time, the accused appeared drunk. The blood stained panga which was found in the roof of the house of the accused was positively identified by his sons to belong to the accused. The said panga was produced by the prosecution as *prosecution's exhibit No.1*.

The circumstantial evidence which the prosecution adduced was to the effect that the accused was the last person to be seen with the deceased on the evening of the 14th January 2003. The accused was seen with the deceased by PW2. At that time, the accused and the deceased were drunk. PW2 recalled that the accused and the deceased were quarrelling at the time. The accused complained that the deceased had not prepared any food for him. PW2 testified that it was not unusual for the accused and the deceased to

quarrel. The quarrels sometimes degenerated into fights. The prosecution therefore placed the accused with to the deceased on the night the deceased met her death. On the following morning at about 7.00 a.m., the accused went to the houses of PW2 and PW3 and told them that he had done something bad. He then walked to Emiling Police Post where he made a report to the police that he had killed his wife. He later told PW1 that he had killed his wife because she had refused to serve him food.

The issue for determination therefore is whether the prosecution has established that it is the accused who killed the deceased. The other issue for determination is whether, if the accused killed the deceased, he did so intentionally or with malice aforethought. Evidence was adduced of how the accused and the deceased had formed a habit of quarrelling each time they got drunk. They even sometimes fought. On the material evening, the accused and the deceased was both drunk. When PW1 saw the accused the following day in the morning, the accused still appeared drunk. The accused told the police that he had killed his wife. In fact he surrendered himself into police custody. When he was put on his defence, he told the court that the death of the deceased was accidental and had occurred when he was drunk.

I have carefully evaluated the evidence that was adduced in this murder trial. As stated earlier in the judgment, the prosecution established to the required standard of proof beyond reasonable doubt that it is the accused that killed the deceased. The deceased admitted as much in his defence. The prosecution was able to establish that at the time of her death, the only person who was with the deceased was the accused. PW2, the son of the accused and the deceased, saw the accused and the deceased on the evening of 14th January 2003 when they were at their house. PW2 recalled that he left the accused quarrelling with the deceased. The accused complained that the deceased had not cooked dinner for him. At that time, the accused and the deceased were both drunk.

On the following morning, the accused woke up early in the morning and went to the houses of his two sons and informed them that he had done something bad. He then disappeared from his home. When PW2 and PW3 went to the house of the accused and the deceased, they found the deceased lying dead near the door to her house. They saw a blood stained panga placed on the roof of the house. They identified the said panga to be the one that belonged to the accused. After the accused had informed his sons that he had done something bad, he surrendered himself to the police. He told the police that he had killed his wife. He escorted the police back to his house where the body of the deceased was retrieved by the police and taken to Nakuru Municipal Mortuary. Post-mortem was later conducted by PW7 Dr. Ochieng who established that the cause of death of the deceased to be cardiopulmonary arrest due to severe haemorrhage as a result of the severed vessels in the neck.

The issue for determination by this court is whether the accused killed the deceased when he was in such a state of mind as to make a rational decision. PW2 confirmed that the accused was drunk on the evening when he last saw him with the deceased. PW1 testified that the accused appeared drunk the following morning when he escorted the police to the scene of crime. In his defence, the accused regretted the death of the deceased and stated that the death of the deceased was accidental. Taking into account all the facts of this case, it is clear that the accused lacked malice aforethought when he killed the deceased. He unintentionally killed the deceased. I therefore hold that the prosecution has established the lesser but cognate charge of manslaughter contrary to **Section 202 as read with Section 205 of the Penal Code**. The assessors who assisted this court during the hearing of this murder trial were all in agreement that the accused had killed the deceased without malice aforethought. They all entered a verdict that the accused was guilty of the lesser charge of manslaughter. I have no reasons to disagree with their finding. The accused is thus convicted of the proven charge of manslaughter.

It is so ordered.

DATED at NAKURU this 15th June, 2007

L. KIMARU

JUDGE