



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

**AT NAKURU**

**Criminal Case 105 of 2004**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES KIPYEGON KANOGO.....ACCUSED**

**JUDGMENT**

The accused, James Kipyegon Kanogo was charged with two counts of Murder contrary to Section 203 as read with Section 204 of the penal code. The particulars of the offence were that on the 26<sup>th</sup> October, 2004 at Kipsogon village Koibatek District, the accused murdered Sogome Chelimo and Beatrice Chepkemoi Chelimo (*hereinafter referred to as the deceased persons*). When the accused was arraigned before this court, he pleaded not guilty to the charge. The prosecution called six witnesses in its bid to establish the charge of murder against the accused person. When the accused was put on his defence, he admitted that he had killed the deceased persons but explained that he had done so because his wife, Beatrice Chepkemoi Chelimo (*one of the deceased persons*) was having an affair with another man. It was his testimony that he was provoked into the action. He further testified that at the time he committed the offence, he was drunk. This court heard the closing submissions of Mr. Nyaramba on behalf of the accused and by Mr. Mugambi, learned State counsel. This court shall revert back to the submissions made after setting out the facts of the case as narrated by the prosecution's witness and by the accused in his defence.

According to PW1 Chepkemoi Rono and PW2 Kiptarus Cheptim, Beatrice Chepkemoi Chelimo (one of the deceased persons) was the girlfriend to the accused. PW2 testified that the said Beatrice was once married to his son. His son is however deceased. Therefore at the material time the said Beatrice was a widow. Beatrice used to live with her mother Sogome Chelimo (*the other deceased person*). They had two huts in their homestead. One hut was the main house while the other hut was the kitchen. Both huts had grass thatched roofs. On the 26<sup>th</sup> October 2004, at 2.00 a.m. PW1 was relaxing on her bed. She recalled that at that time, she had just awoken up from her sleep. She was relaxing on her bed. It is then that she heard someone say in Kiswahili "*Nimefanya maajabu.*" The person talked as he was walking past her house. She recognised the voice to be that of the accused. PW1 testified that she knew the voice of the accused because the accused was her neighbour. She at the time thought that the accused was drunk. She confirmed that she did not see the accused but only heard his voice. After a while, she heard people screaming. She woke up and went outside to investigate the cause of the screams. It was then that she saw the grass thatched houses of the deceased persons on fire.

PW1 rushed to the scene. She found other neighbours including PW2 at the scene. She recalled that the neighbours tried to put out the fire, but the same was too fierce. The houses of the deceased persons were completely burnt down. PW1 testified that she went back home and slept. She did not see the

deceased persons. PW1 and PW2 recalled that on the following morning at about 7.00 a.m., they went back to the scene and saw the remains of the houses that belonged to the deceased. It was then that they saw the charred remains of the deceased persons. According to the said witnesses, the bodies of the deceased were burnt beyond recognition. PW1 testified that although there was a possibility that the houses of the deceased persons could have been set on fire by someone else, she was certain that it was the accused that burnt the house because of what he said a few moments before she heard the neighbours screaming that the houses of the deceased persons were on fire.

On the following morning at 7.00 a.m., PW2 went to Mogotio Police Station and made the report of the arson. The police arrived at the scene and took away the bodies of the deceased persons. Scene of crime officers took photographs of the scene. After the police had left the scene, as PW2 was walking around the compound of the deceased, he saw a panga hidden in the tall grass behind what used to be the houses of the deceased persons. The panga was blood stained. PW2 identified the panga to belong to the accused. Similarly PW3 Chelimo Chepchiem, the husband of Sogome and the father to Beatrice (*the deceased persons*) testified that when he went to the scene after the houses had been completely burnt down, he saw the charred remains of the deceased persons. When the panga was retrieved from the grass by PW2, PW3 was able to positively identify the said panga as belonging to the accused. He recalled that the said panga was blood stained. The said panga was produced in evidence as *prosecution's exhibit No.1*.

After the bodies of the deceased persons had been taken to the Nakuru Municipal Mortuary, PW4 PC Joseph Toroitich of Mogotio Police Station received information on the same day (i.e. on 26<sup>th</sup> October 2004) at about 3.00 p.m., that the accused had been sighted at a particular place. The accused had disappeared from his home after the arson incident. PW4 accompanied by PW5 PC Silvanus Madegwa went to the place which was about 5 kms from the station and managed to arrest the accused. PW4 recalled that the accused was carrying a bag and was waiting to board a motor vehicle. PW4 took the accused to Mogotio Police Station where he was detained and later charged.

PW5 was the investigating officer in this case. He recalled that after the incident was reported to the police station, he was assigned to investigate the case. He visited the scene with IP Ambani. He saw the charred remains of the houses that had been set on fire. He also saw the charred remains of the deceased persons. He instructed photographs of the scene of crime to be taken. He then commenced investigations at the scene. He established that the accused was the boyfriend to one of the deceased persons called Beatrice. He also established that the accused had been heard by PW1 saying in the dead of the night that he had done something of wonder. PW5 then escorted the bodies of the deceased persons to Nakuru Municipal Mortuary for post-mortem to be performed. He later recorded statements from the witnesses. He also received the blood stained panga from PW2 which was recovered near the burnt houses of the deceased persons. He testified that his investigations established that it is the accused person who killed the deceased persons. He therefore made the decision to charge him with the present offences.

The bodies of the deceased persons were examined by Dr. Ochieng at the Nakuru Municipal Mortuary. In respect of the body of Beatrice, he observed that there were deep cut wounds on the frontal skull, neck and the front of the chest. The flesh was scalded. There were no carbon particles in the respiratory system. This established that the said deceased was dead before she was set ablaze. He formed the opinion that the cause of the deceased was haemorrhagic shock from the multiple cut wounds. The post-mortem report was produced as *prosecution exhibit No.3*.

In respect of the body of Sogome, Dr. Ochieng observed that the deceased had sustained a deep cut wound on the right arm. There was also a cut wound through the upper sternum and the trachea. The whole body was scalded. The trachea was cut on the lower aspect of the neck. There was blood on the trachea and airways. The cause of death was determined to be asphyxia secondary to bleeding into the airways following the panga cut. The post-mortem report was produced as *prosecution exhibit No.4*. The accused was taken to Eldama-Ravine district Hospital on the 28<sup>th</sup> October 2004 where he was examined by Dr. Bogonko who formed the opinion that the accused was mentally fit to stand trial. The P3 form was produced as *prosecution's exhibit No.2*. The post-mortem reports were produced on behalf of Dr. Ochieng by PW6 Dr. Collins Masolo

As stated earlier at the beginning of this judgment, when the accused was put on his defence, he admitted that he had killed the deceased persons due to the fact that he was provoked when he learnt that Beatrice was having a love affair with a Veterinary officer within the area. He testified that he was drunk when he cut the deceased persons with a panga and set their house on fire.

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, the accused has admitted that he killed the deceased persons. He testified that he was drunk at the time he committed the offence. He further justified his action by stating that he was provoked because Beatrice, one of the deceased persons, (*whom he considered as his wife*) was having an affair with another man. The prosecution established that the accused person had the motive to kill the deceased persons. The accused was heard by PW1 saying that he had done something of wonder moments before PW1 heard screams by the neighbours and upon investigations saw the grass thatched houses of the deceased persons on fire.

Although it was initially thought that the deceased persons had met their deaths due to the arson attack, upon post-mortem being performed, it was established that the deceased persons had sustained several cut injuries which caused their deaths. The deceased persons were dead before their houses were set on fire. The blood stained panga which was used to cut the deceased persons was found within the vicinity of their burnt houses and was produced as an exhibit by the prosecution. The said panga was positively identified by PW2 and PW3 as belonging to the accused. The accused in his defence did not deny that he had cut the deceased persons with the panga, although he claimed it is Sogome who first cut Beatrice with the panga before he intervened and cut both of them with the said panga thus causing their deaths.

The issue for determination therefore, is whether there are justifiable circumstances that would exonerate the accused from being convicted of the charge of murder. Was the accused justified in killing the deceased persons due to the fact that he was provoked by the act of Beatrice in having an affair with another man?

I have carefully evaluated the evidence that was adduced by the prosecution witnesses and the defence offered by the accused. As stated earlier in this judgment, the accused admitted before court that he killed the deceased persons. Even without his admission, the prosecution established beyond reasonable doubt that the accused was within the vicinity of the houses of the deceased persons moments before the said houses of the deceased persons was set on fire. PW1 recognised the voice of the accused when he uttered the words that he had done something of wonder at 2.00 a.m. in the morning moments before she heard people screaming that the house of the deceased had been set on fire.

The Court of Appeal in **Libambula vs Republic [2003] KLR 683** held that the evidence of voice identification is receivable and admissible in evidence and it can be, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, the court should take care to ensure that the person identifying the voice of the accused was familiar with the said voice of the accused. In the present case, PW1 had no doubt in her mind that she had heard and identified the voice of the accused. The accused was her neighbour. She was familiar with his voice and therefore she could be able to positively identify it. Having observed her demeanour when she testified before court, I am satisfied that PW1 recognised the voice of the accused.

Further evidence which was adduced by the prosecution was the evidence of the recovery of the panga at the scene of crime by PW2. PW2 testified that he recovered the said panga (*which he positively identified to belong to the accused*) behind the burnt houses of the deceased persons. The said panga was produced as an exhibit during trial. The said panga was blood stained. PW3, the husband and father of the two

deceased persons respectively identified the said panga to belong to the accused. There is no doubt therefore, that the prosecution proved, by circumstantial evidence, that it was the accused that killed the deceased persons.

There is therefore no doubt that it was the accused that killed the deceased persons. The issue for determination by this court is whether the prosecution established malice aforethought. Having carefully analysed the evidence, it is clear that the deceased had a motive for killing one of the deceased persons namely Beatrice. PW1 and PW2 testified that the accused was the boyfriend to Beatrice. However, it is apparent that at the time of the incident, the said Beatrice had ended her relationship with the accused. She had started another relationship with another man. The accused was unhappy by this turn of events. Although the accused claimed that the said Beatrice was his wife, it is clear from the testimony of the prosecution witnesses that the said Beatrice was just but a girlfriend to the accused.

Was the accused justified in the circumstances to kill the deceased? In his defence the accused claimed that he was provoked when Beatrice started a love affair with another man. In the circumstances of this case, it was not clear to this court how the accused could have been provoked when the deceased was with her mother at their home. Although the accused claimed that he was drunk at the time he committed the offence, it is evident that the accused drunk alcohol to gain Dutch courage so that he could have an excuse when he is charged for having killed the deceased persons.

Even if the accused was provoked as he claimed, there was no justification for the accused to kill the mother of Beatrice. From the nature of injuries described by the doctor who performed the post-mortem on the bodies of the deceased persons, it is clear that the said attack was brutal and vicious. The accused severally cut the deceased persons with a panga. It is evident that he intended to kill them and not to just injure them. The act by the accused in setting on fire the houses of the deceased persons was clearly an act of a person who was in full control of his mental faculties. A drunken person could not kill people and then burn their house in a crude attempt to conceal the crime.

Taking into totality the evidence adduced in this case, it is clear that the prosecution proved to the required standard of proof beyond reasonable doubt that it was the accused person who killed the deceased persons with malice aforethought. I therefore hold that the prosecution has established the charge of murder contrary to **Section 203 as read with Section 204 of the Penal Code** against the accused to the required standard of proof beyond any reasonable doubt. The two assessors who assisted this court during the hearing of this murder trial reached similar verdicts that the accused was guilty of murder. I have no reason to disagree with their verdicts. The accused is accordingly convicted as charged.

It is so ordered.

**DATED at NAKURU this 14<sup>th</sup> day of June, 2007**

**L. KIMARU**

**JUDGE**