



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

Criminal Case 40 of 2005

REPUBLIC PROSECUTOR

VERSUS

CHRISTOPHER KIPKORIR KIMAIYO ACCUSED

JUDGMENT

In the morning of 25/3/2005 Christopher Kipkorir Kimaiyo and his wife Dinah attended a pre-wedding ceremony at the home of one Chebet where busaa and changaa was served in plenty. Kimaiyo's parents, brother and other relatives were present too. Dinah left for her home in the company of her mother in law at around 6.00p.m. Kimaiyo and his brother who left the venue an hour thereafter, went to the latter's home where they consumed more changaa, during which time Kimaiyo sent his brother to go and call Dinah from his home which his brother did, but after waking her up to give her the message she had walked out of the house, he left after a short wait and went back to inform Kimaiyo that he had delivered his message. The two brothers disagreed and confronted one another after Kimaiyo stopped further brewing of the changaa. Kimaiyo then left and went to his home, which he found vacant; he had his dinner and went to bed. Dinah who was not at home when Kimaiyo arrived, came in later and went straight to bed and slept. He discovered that she was dead later that night when he tried to wake her up.

Christopher Kipkorir Kimaiyo was arrested on 26/3/2005 and 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 night of 26/3/2005 at Koitugum Village in Marakwet District within the Rift Valley Province, he murdered his wife Dinah Korir.

The prosecution led evidence through thirteen witnesses, while the accused chose to make an unsworn statement of defence. He did not call any witnesses.

None of the thirteen, who led evidence for the prosecution, witnessed the incident which led to Dinah's death. The most incriminating evidence was that of Kimaiyo's mother (PW4), whom he had woken up at about midnight on the material date, and as he stood by the door to her house, he told her that he was leaving and that they would find him if they searched for him, and on being asked about his wife, he had requested his mother to look for milk and to take it to her, without any further explanation, after which he left. She tried to trace Kimaiyo but in vain. His mother alerted her sons after which she went to check on Dinah. She found the door locked from the outside with a latch but without a padlock. She entered the house, where she discovered Dinah's covered body on a bed. Kimaiyo was arrested later that morning in

Cherangany Division of the Trans Nzoia District.

The accused who chose to give an unsworn statement, confirmed having attended the aforementioned ceremony, with his wife Dinah. He also confirmed that they had all consumed busaa, after which he consumed more changaa at his brother's home, that he later went to his house where he found the door ajar; Dinah who was not at home then who came back drunk at 11.00p.m, and went straight to bed. He realized that she was dead when he tried to wake her up early next morning. He left immediately and went to his parents' home and as he was very shocked, he decided to go and inform his brother in Trans Nzoia, from where he was arrested by a police reservist. He denied having caused Dinah's death.

According to the doctor who performed the postmortem, Dinah's body had marked injuries of varying size and shapes; it had a wound of 3-5 cm on left leg; the left hand was swollen; the compals were fractured, and the right nostril had dry blood. There was intra scalp bleeding at the back of the head, and a fracture at base of the neck. The brain had suffered injury. The cause of death was brain damage due to fracture of base of the skull with multiple injuries. The probable weapon was however not defined.

It is clear that none of those who gave evidence saw the accused inflict the fatal injuries on the deceased. The issue that therefore arises is whether there was sufficient circumstantial evidence to link the accused with the death of Dinah.

The Assessors have returned a verdict of 'not guilty'. I am however of the view that had they taken time to consider my summing up seriously, they would have found that his behaviour during that fateful night was incriminating, and they would have reached a different verdict.

It is clear from the evidence on record that Dinah was well albeit drunk when she left Chebet's home earlier that evening. There is sufficient evidence to show that she actually made it to her home where Kimaiyo's brother later found her asleep when he went to invite her to join them in his home. She was also alive and well but still drunk by the time when she arrived back in her home at 11.00 p.m. on that fateful night. It is therefore clear that the death occurred while she was in their home and that Kimaiyo was the last person to see her alive. He was also the last person to inter-act with her, and that all fingers would point at him. This would tend to be supported by his behaviour soon after he realised that she was dead.

The legal position is that in order to found a conviction on a case which is based on circumstantial evidence, *"it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution"* (Kariuki Karanja v. Republic [1986] KLR 190).

His mother told of how he woke her up at about midnight, with a request for milk for Dinah, and at which time he also told her that he was leaving his home to an undisclosed destination, where they would find him if they searched for him. That, coupled with the fact that he left his home District that very hour went as far as Cheranganyi in Trans Nzoia would tend to show that he was the one who had committed the offence, and that he was trying to run away from the scene, otherwise he would have stayed behind to help unravel the issues surrounding Dinah's death. In my view his actions were suspicious and tend to incriminate him.

Do his actions amount to murder?

The main ingredients in a charge of murder are that the accused must have formed the criminal intention and have had a motive to cause death or bodily harm prior to killing the deceased and that the death must have been as a result of an unlawful act or omission on the part of the accused, while the first two ingredients would be lacking in the charge of manslaughter.

I have taken his statement into account and noted the fact that he had consumed busaa and changaa during

the material day and night. The fact that he had even engaged in a fracas with his own brother earlier that evening when both were armed with bows and arrows would convince me that he was in a state of intoxication which in my view was a condition graver and more extreme than just being merely drunk, or under the influence of drink. Such is a condition which exists “*when as a result of his consumption of intoxicating liquor [a man’s] physical or mental faculties, or his judgment, are appreciably and materially impaired in the conduct of the ordinary affairs or acts of daily life*” (per Fair, J., in R. v. Ormsby, [1945] N.Z.L.R. 109.

Based on the above, I find that the elements of malice aforethought and intention are lacking. Having found that the circumstances tend to incriminate him, I do however find that the accused would qualify for a defence of intoxication, and in such case then I find him guilty of the lesser charge of manslaughter.

Dated and delivered at Eldoret this 6th day of July 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Miss Oundo for the State

Mr. Nyambegera for the accused