



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**Criminal Appeal 33 of 2004**

**REPUBLIC**

**VS-**

**1. SAMSON KENEI**

**2. DORCAS CHELIMO**

**3. WALA TEPA**

**JUDGEMENT**

The accused persons SAMSON KENEI, DORCAS CHELIMO and WALA TEPA stand charged with the offence of murder contrary to section 203 as read with section 2004 of the Penal Code. The particulars of the offence are that between 16<sup>th</sup> May 2003 and 18<sup>th</sup> May 2003 at Churo sub location, Baringo District in Rift Valley Province jointly murdered MARGARET NYAWIRA KENEI.

The prosecution called 9 witnesses in support of their case. CHEPTUI KIMEI (PW1) testified that she resided at Churo. She was the mother of Samson Kenei and mother in law of the Margaret Nyawira Kenei. She knew that Margaret Nyawira Kenei (Margaret) had disappeared. According to her evidence, she saw Margaret for the last time on 16/5/2003.

On that 16/5/2003 Margaret went to the witness's farm and gave her some posho meal. Margaret was with a son of the witness called Luka (PW2). Luka later proceeded to the farm. Afterwards Margaret left to go to her home Samson Kenei (Samson) and Wala Tepa accompanied her. This was before noon. The three of them left together and they were not quarreling. From that day, she had not seen Margaret again. That last day on which she saw Margaret was a Friday.

She testified that Samson was her first born son. On the next day (Saturday), she asked Samson where Margaret was, as she expected her to go to the market but had not seen her. Samson replied that he did not know where Margaret was.

On Sunday she went to church and heard people say that Margaret had disappeared from Friday. According to her evidence Samson did not enquire about the whereabouts of Margaret. That interview, was because Samson knew that she was no more. When Samson was asked by her and other people about the whereabouts of Margaret, he said that he would sell one cow and go to look for Margaret. He looked worried. He was not able to sell the cow however, before he got arrested. She testified that she was initially among those who were arrested.

She could recollect that Samson and Margaret were married for more than two years and were peaceful. Samson used to live in Nairobi. He recently married Dorcas Chelimo (Dorcas). Wala Tepa was her step-son, that is a son of her co-wife.

In cross-examination Margaret stated that on the day that Margaret disappeared, Margaret came into her house but did not go to the farm. She talked with Margaret in the house. Samson, Dorcas (2<sup>nd</sup> accused) and Wala Tapa (3<sup>rd</sup> accused) were all around. However, Dorcas remained in the farm. She stated that it was Samson who called Wala Tapa to escort Margaret. Margaret used to live some distance away. There were bushes and a river on the way between her home and where Margaret used to live. The day was wet as there was a lot of rain. There was no bridge across the river. She did not know whether Margaret had relatives, and whether she could be somewhere with her relatives else.

The evidence of LUKA KIMEI (PW2) was that on 14/5/2003 which was a Wednesday, at about 2 pm, he went to Churo Trading Centre. On that day he heard that Samson who was his brother, had come from Nairobi. The next morning he went to Samson's home where Dorcas resided. He found Samson and Dorcas who were going to pick a child Dorcas who had been brought of by Wala Tapa. Later, in the evening he found Samson, Dorcas, Wala Tapa and the child called SILALE aged 10 years, together in the house of Samson.

Samson told him that he wanted him to go somewhere the next morning. Then Samson told him to go and call Margaret on 16/5/2003.

On the 16/5/2003, he went and found Margaret at Maram, where she had a kiosk. Margaret closed the business and they went together to Churo. Margaret took maize meal and tobacco for his mother (PW1). At Churo, they found Dorcas, Samson and Wala Tapa. Margaret and Samson (1<sup>st</sup> accused) went and talked in his mother's (PWI's) house.

It was raining that day, but he went to his farm. He was at his farm up to 4 p.m. When he came back home he met Samson and Wala Tapa. It had rained on them. Dorcas was also present. Somson and Wala Tapa had already changed clothes, when he arrived. Dorcas was washing the clothe of Samson and Wala Tapa. He noticed that the pair of trousers that had been won earlier in the day by Wala Tapa was torn. That pair of trousers was not torn when he saw Wala Tapa wearing it earlier the same day. The clothes of Samson and Wala Tapa, which were being washed by Dorcas, were stained with what he initially through was mud. However, he later found that it was blood stains.

On 17/5/2003, he woke up early and wanted to go to Margaret's place. However, he did not go there because Samson told him to go to his farm. In the meantime, Samson said that he was going alone to help Margaret. In the evening Samson came back and said that Margaret had gone to her parents home at Kerugoya. On 18/5/2003 Samson told him that he was going to ask people at Maram if there was anybody who had seen Margaret. Samson also told him to go and sleep at Margaret's kiosk. He testified that Margaret and Dorcas had quarreled earlier because of Samson. However, Samson and Margaret had not quarreled.

In cross-examination he stated that he did not ask Dorcas whether the clothes that she was washing had blood stains. He admitted that he was also one of those initially arrested when Margaret was reported missing. He stated that when Margaret was reported missing. Samson and Wala Tapa appeared to be surprised.

In re-examination he stated that the river between his mother's house and where Margaret's used to live was a seasonal river. There was no bridge, but people used to walk on a tree trunk to cross the river. On the day that Margaret disappeared, the river was flooded.

Administration Police Constable No.87016555 KIPRUTO TANUI testified as PW3. His evidence was that on 19/5/2003 at Churo Administration Police Camp, Samson reported that his wife Margaret had disappeared. Later that evening, members of the public complained that Samson knew where his wife Margaret was. Later still, the Assistant Chief went and stated that there was information that Samson had killed his wife. They then went and arrested Samson, Wala Tapa, Samson's mother, Samson's wife and Luka. He handed over the arrested people to police from Loruk, as well as the exhibits.

After arresting the suspects, they combed the bush and found a basket (kiondo) and gum boots. Near a

river, they found a hole. They noticed flies around that hole. They dug the hole and got stones, sand, and tree branches, as well as clothes of the deceased. The clothes had blood stains and Samson confirmed that the clothes belonged to his wife. They were however not able to find the body of the deceased.

In cross examination, he stated that he was not present when the kiondo and gumboots were recovered. The gum boots were brought to him by a certain young man. He was however present, when the jacket (white in colour) was recovered from the hole. The hole was small and it appeared to have been dug by a wild animal. He stated that he did not record in his statement to the police that Samson said that the jacket belonged to his wife. He contended that the jacket was found with other clothes.

PW4 CHEPKERKER KENEI was a minor who was in standard 4 when she testified on 21/2/2005. She was affirmed before testifying. Her evidence, both in examination in chief and cross-examination, was that she was forced by the police through beatings to say that the accused killed Margaret. She was arrested and beaten, that is why she implicated the accused. She denied that she witnessed the accused kill Margaret.

PW5 was JOEL KIPTUR: He was the assistant chief of Churo. His evidence was that he received information on 19/5/2003 that Margaret Nyawira Kenei had disappeared. The husband (Samson) had already reported to the Administration Police (APs) about the disappearance. He was informed that Samson was involved in the disappearance of Margaret. Therefore he went with APs at night and arrested Samson and other members of his family.

On the next day they did a search in the area around. They found blood stained clothes of the deceased. They took the clothes to the AP camp.

In cross-examination he maintained that they did not force anybody to record a statement admitting the offence. He stated that there were wild animals in the area such as hyenas and leopards. The clothes recovered were a jacket and dress. He also maintained that the kiondo and gum boots were found near the hole. That they were not brought later by a young boy. He stated also that the incident occurred in the month of May which was the rain, season. However, on the material day, it had only rained slightly.

The evidence of PW6 SOLOMON LOKITEPUK was that on 20/5/2003 in the morning, he was told by the chief called Edward, that the wife of Samson had disappeared. He gathered about 40 people from Churo Centre. They went on a search. In the course of the search, some people found the clothes of Margaret the wife of Samson, in a hole. He did not discover the clothes himself. Samson was brought and he dug into the hole, but Margaret was not found. He knew Wala Tepa who came from Tangubei, which was about 20 kilometers from Churo. However Wala Tepa used to come to Churo to visit his half brother Samson.

PW7 was Administration Police Constable No. 89013577 REUBEN KIPTOO. His evidence was that on 19/5/2003 Samson went and reported at Churo AP camp, that his wife Margaret had disappeared. Later on the same day, an assistant chief went and reported that Samson had killed his wife. So they went and arrested Samson and two others. For three days from 20/5/2003, they tried to search for Margaret. They did not get Margaret, but they found clothes, a kiondo and mud boots belonging to Margaret.

PW9 was No. 72941 Police Constable GEORGE MWATARI. His evidence was that on 21/5/2003 at Loruk Police Station, they received a report of a murder at Churo. They went to Churo AP camp and arrested suspects.

On the next day (22/5/2003), they went to do a search for the alleged deceased. They did not get the dead body or anything else. On the next day (23/5/2003), they went again for a search. This time they were handed some items of clothing by the APs. He produced a jacket, T-shirt, scarf and kiondo as exhibits.

In cross-examination he stated that he was the investigating officer. He was informed by witnesses, especially Luka Kenei, that the clothes belonged to Margaret and that before the disappearance of

Margaret, she wore them on 16/5/2003. The gumboots were not brought to court. The information he had was that Samson discussed with Dorcas in the presence of Wala Tapa before Margaret disappeared. That was why he arrested them. He did not have proof that Margaret was dead. That was the prosecution case.

In their defences, all the three accused persons gave sworn testimony.

The 1<sup>st</sup> accused SAMSON KENEI testified as DW1. He stated that he worked for Nairobi City Council. He had two wives Margaret and Dorcas. On 13/5/2003 he came from Nairobi to Maram Centre where Margaret used to live. They talked with Margaret and he left her and went to Churo at about 12.00 noon. At Churo, he met his other wife Dorcas and his children. The younger child had also testified in court as PW4. They stayed together on 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> May.

On 18/5/2003 he left on a bicycle and went for 18 miles to look for Margaret. However, he did not find her. He asked neighbours about her, but nobody told him where Margaret was. He went to look for her in her small farm but did not find her. He therefore went back to Churo. On Sunday, he went back to Maram Centre to look for Margaret. He did not find her. He found her house padlocked. He asked neighbours, about the whereabouts of Margaret, but none knew where Margaret was. He actually thought that she had gone to her home. He waited up to evening. In the evening, he called an old man and they opened the padlock with the key that he had. He noticed that some important clothes of Margaret were not there.

On Monday, he went and reported the matter to the chief's camp. After reporting, Wala Tapa came at about 10 a.m. He told Wala Tapa and (Solomon PW6) that the woman was gone. The three of them went to Maram. Then, at night, he was arrested at home with Wala Tapa and others, a total of 13 people.

He denied going to look for the deceased in the bush. He denied escorting the deceased with Wala Tapa. He denied that Dorcas washed the clothes that were brought to court. He contended that the deceased might not even have died.

In cross-examination he said that he had no disagreement with any of the witnesses who testified against him. He said that if his mother (PW1) testified that Wala Tapa came to Churo on 16<sup>th</sup> May 2003, that must have been due to threats by the police.

The 2<sup>nd</sup> accused DORCAS CHELIMO testified under oath as DW2. She testified that that Samson was her husband. She used to live at her own plot in Gilgil and only used to go to Churo to greet the relatives of her husband. She had lived with Samson since 1990. She did not know Margaret. She denied washing clothes that were blood stained. She denied that she met Margaret. She denied killing her.

In cross-examination she denied hearing Luka (PW2) testify that she had earlier on quarreled with Margaret. But if he said so then it was lies. She also stated that she did not hear Chepkerker Kenei (PW2) testified in court. Then later she reluctantly agreed that she heard her testify in court. She did not know or see Margaret. She stated that Wala Tapa came to Churo on 19/5/2003.

The sworn defence of WALA TEPA was that he lived at Keptuya. He was a step brother of Samson. He did not know Margaret very well, though Samson had told him that he had another wife.

On 19/5/2003 he came to Churo to buy beans. He found Samson with many people. It was in the evening. Samson told him that his wife had disappeared and asked him to accompany him to enquire. They went and enquired, but did not get any information.

His contention was that the mother of Samson (PW1) who testified in court and Luka (PW1) were liars. These were people who were also arrested and probably wanted to exonerate themselves. He denied killing Margaret or planning to kill her. He did not escort Margaret, nor did Dorcas wash his clothes as he did not carry extra clothes when he went to Churo.

In cross examination he started that he had no disagreement with PW1 and PW2. However, they were all initially arrested and must have been trying to pass blame to exonerate themselves.

At the end of the prosecution and defence cases, Mr. Obiero for the accused persons and the Principal State Counsel Mr. Omutelema made submissions. After summing up to the assessors, they gave a unanimous opinion that the three accused persons were not guilty of the offence of murder.

This is a case based on circumstantial evidence. Nobody saw any of the accused kill or assault the deceased. For a conviction to be sustained on the basis of circumstantial evidence, the evidence must be such that it points irresistibly to the guilt of the accused person and be incapable of being explained on any other hypothesis than that the accused is guilty – see *REPUBLIC –VS- KIPKERING ARAP KOSKE* (1949) 16 EACA 135.

The evidence for the prosecution herein is that Samson was the husband of the Margaret. That on 15/5/2003 Margaret came from where she had a shop at Maram to Churo where Samson, his mother CHEITU PW1, Dorcas and Wala Tapa Were. Margaret came to Churo together with (PW2) LUKA. Margaret brought posho meal for PW1 and tobacco to (PW1). Then Margaret and Samson went and went and had a talk in the hose of PW1. No one saw them quarrel or noticed any disagreement between them. On that day there was rain. At around 12.00 noon, Margaret was escorted by Samson and Wala Tapa toward Maram where she had come from. Thereafter Samson and Wala Tapa came back. The time when they came back was not indicated. However, Luka (PW2) stated that in the evening he saw Dorcas washing wet and blood stained clothes belonging to Samson and Wala Tapa.

According to him, the clothes which were earlier in the day worn by Wala Tapa were now torn. No evidence was tendered on whether these clothes were taken to the Government Analyst for examination.

It is the prosecution contention that from that day 16/5/2003 Margaret has not been seen again, and therefore she is dead. They also contend that she was killed by the Samson and Wala Tapa and that Dorcas knew of the plan and became an accessory after the fact by washing the blood stained clothes.

The contention of the prosecution is based on the fact that Samson and Wala Tapa were the last people to be seen with Margaret. Margaret has not been seen or heard of up to today. Samson did not appear to be concerned about the disappearance of his wife Margaret. The clothes of Margaret which were blood stained and a kiondo were found. The police initially arrested many people, but released the rest and chose to charge the three accused herein.

All the accused persons gave sworn defences. They denied killing the deceased. They were cross examined.

I have to decide first whether or not the evidence established that Margaret is dead. Margaret has not been seen from 16/5/2003. Both the prosecution and defence agree on this. Searches at her shop did not uncover any clues as to her whereabouts. However items such as a kiondo and jacket, said to belong to her, were found and produced in court. Nobody testified as to where exactly Margaret originally came from before getting married to Samson. However Luka (PW2) mentioned is evidence that she might have gone to her home at Kerugoya. Nobody testified that her relatives were known and that they said that they also could not trace her. No evidence was given that anybody enquired about Margaret from Kerugoya. No postmortem report was produced to confirm the death or cause of death. The burden was on the prosecution to establish beyond any reasonable doubt that Margaret is dead. I find that the prosecution failed to prove that Margaret died especially as, even the investigating officer (PW9) did not state in court whether he tried to confirm whether Margaret had gone to her rural home or not. There is also a contradiction on where and how the clothes and kiondo were recovered. I think that is a lapse on the prosecution side. That evidence on record, in my view, falls short of the proof required to establish that Margaret is dead.

The second issue is whether the accused or any of them killed Margaret. I have found that the prosecution did not prove that Margaret died. However, even assuming that she died, the circumstantial

evidence does not point irresistibly to the guilty of the accused persons. Obviously there is strong suspicion especially against Samson and Wala Tapa. They were said by the PW1 and PW2 to have escorted Margaret. Margaret has not been seen since then. However, there is no evidence of any quarrel or disagreement between these two accused and Margaret. Both accused persons denied escorting Margaret. There is no evidence from the scene where some items of Margaret were recovered that connects the two accused persons to the death. The witnesses who testified against the two accused persons were initially suspects and were also initially arrested. There is no evidence that the clothes which the Dorcas is said to have washed, were taken to the Government Analyst for examination, as to whether indeed they were blood stained. The mere evidence of PW2 that the said clothes had blood stains could not be satisfactory. He could have been mistaken about the stains.

Samson also reported the disappearance of the Margaret to the administration police before he was arrested. His conduct might be suspect, because it took him from 15/5/2003 to 19/5/2003 to report. When he said that he went to look for Margaret on a bicycle 80 kilometers away without mentioning where, it creates suspicion. He certainly did not attempt to go to the original home of Margaret to find out what had happened to her. However, mere suspicion, however strong cannot be a basis for founding a conviction in a criminal case.

The burden was on the prosecution to prove that each of the accused persons participated in killing Margaret, or was accessory fact beyond any reasonable doubt. From the evidence on record they have failed to do so. I do not therefore find it necessary to go into the issue as to whether there was malice aforethought. It is not necessary because I have find that the prosecution did not prove that Margaret died, and also that even assuming that Margaret died, that she was killed by the act or omission of the accused persons. It is possible that Margaret died. It is possible that she was killed. This court cannot however speculate that she died or speculate as to who killed her. It was for the prosecution to prove both elements beyond any reasonable doubt, and they have failed to do so.

I am therefore in agreement with the unanimous opinion of the assessors that the prosecution did not prove that the accused are guilty of the offence charged.

Consequently, I find all the three accused persons not guilty of the offence of murder and acquit them accordingly.

Dated and delivered at Eldoret this 24<sup>th</sup> day of November 2006.

**GEORGE DULU**

**Ag. GEORGE DULU**