



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

**AT NAKURU**

**CRIMINAL CASE 19 OF 2003**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENJAMIN KIBET KITILIT.....ACCUSED**

**JUDGMENT**

The accused, Benjamin Kibet Kitilit, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the 26th September 2002 at Saos Village, Koibatek District the accused murdered Teriki Rotich. The accused pleaded not guilty to the charge. At the trial the prosecution called nine witnesses who gave evidence in support of the charge. According to PW1 Jonah Koech, a resident of Saos Village, Eldama Ravine, he was at his home on the 26th of October 2002 (he meant 26th of September 2002) at about 6.00 pm where he heard screams emanating from the residence of the accused. The person screaming was a woman.

PW1 went to investigate. When he reached the homestead of the accused, he saw the accused beating his wife called Salina. As the accused was beating his wife, Teriki Rotich (hereinafter referred to as the deceased) arrived at the scene. The wife of the accused took advantage of the distraction and ran away. PW1 testified that the accused then hit the deceased on the head with a leg of a stool. PW1 pleaded with the accused not to further beat the deceased. The accused heeded PW1's plea and left the deceased alone. When PW1 saw the deceased, she was bleeding from a wound on her head. The deceased told PW1 that she had gone to the residence of the accused to collect Kshs 20/= which was owed to her by the accused's wife, Salina. The deceased asked PW1 to give her water as she was seriously injured. PW1 gave her water. PW1 testified that the deceased at that point in time was unable to walk.

PW1 left the deceased lying on the ground next to the accused's house and went to his home. PW1 later learnt that the deceased had passed away. PW1 conceded that he was not aware if there existed a friendly relationship between the deceased and the wife of the accused. PW1 further reiterated that he went to the house of the accused in response to the screams by the accused's wife called Salina. PW1 reiterated that when he arrived at the scene, he saw the accused holding a piece of stool whilst the deceased was lying on the ground bleeding from a wound on her head. PW1 was not certain if either the accused or the deceased was drunk.

PW2 Gideon Salbei, a son of the deceased testified that on the 26th of September 2002 at about 7.30 am, the deceased went to his house and requested to be given money. PW2 gave the deceased Kshs 100/= . The deceased did not want Kshs 100/= but a lesser sum of Kshs 20/= . PW2 saw the deceased go to the other house of his father (who was married to two wives) where traditional brew was being sold. At about 10.30 a.m. the deceased came back to the house of PW2. She appeared to be moderately drunk. She told

PW2 that the accused had beaten her. PW2 referred the deceased to his father. He asked the deceased to ask his father to resolve the issue.

PW2 then went to herd his goats in another farm away from his home. When PW2 arrived back at home in the evening he was informed by Dinah Kigen that the deceased had been assaulted by the accused and seriously injured. PW2 sent his younger brother called Kiplimo Rotich to take the deceased to hospital. He testified that the deceased was admitted at Mercy hospital where she died while undergoing treatment. PW2 was at the hospital when the post-mortem was performed.

PW2 reiterated that he did not have any grudge against the accused. He reiterated that at 10.30 a.m. on the material day, when the deceased told him that she had been assaulted by the deceased, she had appeared drunk. PW2 further recalled that he had received information from Dinah Kigen to the effect that the deceased had been seriously injured by the accused at sunset when he was at his house with his friend called Chesire. PW2 admitted that there were discrepancies in the dates that were recorded in the statement that he had recorded with the police. PW2 testified that he did not see the accused assault or beat up the deceased. PW3 William Kiplimo Rotich, a son of the deceased, testified that on the 26th of October 2002 (he actually meant the 26th of September 2002) at about 9.00 pm, he was informed by his wife called Lorna Rotich that the deceased had been beaten. PW3 accompanied by Michael Chesire and Musa Koech went to the homestead of the accused. They found the deceased inside the kitchen of the accused. She was lying near the fire place. She was bleeding from an injury on the head and had vomited. PW3 saw that the deceased also had injuries on her hands and legs. The deceased could not walk.

PW3 procured a motor vehicle and took the deceased to hospital. The deceased was admitted at Mercy hospital where she died on the 27th September 2002. PW3 was present at hospital when the deceased passed away. PW3 further testified that on the next day, he informed the members of the family of the death of the deceased. PW3 reiterated that he was not aware if the deceased had made a report that she had been assaulted by the accused earlier on the material day. It was his testimony that he only became aware that his mother was injured when he was informed by his wife at about 9.00 pm on the material day. PW3 testified that the accused used to live with them when he was young but had moved on when he became an adult.

PW4 Chekochei Rotich, the husband of the deceased testified that on the 26th of September 2002 as he was resting in his house at Saos Village he was informed by his wife, the deceased, that people were quarrelling. He went outside to investigate. He saw many people drinking traditional liquor (busaa). He did not see anyone quarrelling. He returned to his house. Later he was informed that the deceased had been killed. He denied that he had been informed by the deceased that she had been assaulted.

PW5 Ruth Rotich, the daughter of the deceased testified that on the 26th of September 2002 at about 10.00 a.m she was at home shelling beans. There was traditional liquor being sold at their home. She saw the accused drinking busaa with others. She then heard the accused telling the deceased to go and call her husband. The deceased went three times inside the house to call PW4 but each time she returned without him. After the third time, the accused pushed the deceased. The deceased fell to the ground. The accused hit the deceased once on her back and twice on her stomach with a stick. PW4 came out of the house. The accused sought forgiveness from the deceased. The deceased apparently forgave the accused because the two continued taking busaa together.

At 3.00 pm the deceased went home. At 9.00 pm, PW5 heard PW3 tell PW4 that the deceased had been injured and he (PW3) had taken the deceased to hospital. PW5 did not wake up. She did not see the deceased alive again as she was later informed that the deceased had died while being attended to at Mercy hospital. PW5 recalled seeing the deceased go to the house of PW2 to inform him that he had been beaten by the accused. PW5 did not know why the deceased and the accused had quarrelled. She reiterated that the deceased went to her (the deceased's) house at about 3.00 pm when the traditional liquor got sold out.

PW6 Henry Tepkeny Cherop, the then Chief of Saos Location, Koibatek District testified that on the 28th of September 2002, as he was walking to Saos trading centre from his house, he met with the Assistant

Chief Samson Koech who informed him of the incident that led to the death of the deceased. The Assistant Chief was with PW3. Shortly thereafter a motor vehicle arrived. In the motor vehicle was the accused person who had been apprehended. PW6 testified that he was requested to take the accused to the police. He accepted the request and took the accused to the police station at Eldama Ravine where the accused was detained by the police. He testified that, later, in the company of the police he went to the scene of crime and saw a broken stool. PW6 testified that he knew the accused as a person who was always involved in fights when he got drunk.

PW6 remembered an incident when the accused fractured the hand of the wife to his neighbour. He conceded that he had not seen the accused hit the deceased. PW7 Police Constable Josphat Muli (P/F No. 66116) testified that at the material time, he was attached to Eldama Ravine Police Station. He was at the police station on the 28th of September 2002 when he was assigned to investigate the case. The accused had been arrested by the members of the public and taken to the police station. On 30th September 2002, PW7 went to Mercy Hospital where he witnessed the post-mortem being performed on the body of the deceased by Dr Sergon. He collected the duly filled post-mortem form. On 24th of October 2002 he took the accused to Nakuru Provincial Hospital where the accused was examined by Dr Kogutu who determined that the accused was mentally fit to stand trial for murder. PW7 later charged the accused with the offence of murder. As the investigating officer, PW7 testified that he interviewed the witnesses and visited the scene of crime. At the scene, PW7 was not able to recover anything in connection with the crime. He further testified that although a piece of stool was handed over to him by the chief (PW6), he did not positively establish that the said piece of stool was the murder weapon. He was not able to establish the relationship between the accused and the deceased although he was told that the accused had lived with the deceased's family when he was a young child. PW7 did not establish the movements of the accused prior to the incident. PW7 established that the accused and the deceased were both drunk on the material day that the deceased was fatally injured.

PW7 was emphatic that he had sufficient evidence to charge the accused. PW8 Dr Vitalis Kogutu testified that he examined the accused at the Provincial General Hospital Nakuru on the 24th of October 2002. He established that the accused was mentally fit to stand trial, though he appeared to be in shock. The P3 form duly filled by PW8 was produced as prosecutions exhibit No. 1. PW9 Dr George Osiemo Bogonko attached to Eldama Ravine District Hospital testified that he had worked with Dr Sergon at the said hospital. He knew Dr Sergon's handwriting. He testified that Dr Sergon had since ceased to work at the hospital as he was undertaking further studies at the University of Nairobi.

He testified that Dr Sergon had conducted a post-mortem on the body of the deceased on the 30th of September 2002. He had established that the deceased had multiple cuts on her skull. There were multiple cuts on the skull which had been sutured. One cut measured eleven centimetres. All the other parts of the body were normal. Dr Sergon established the cause of death of the deceased to be head injury caused by an assault. The post-mortem report was produced as prosecutions exhibit No. 2. PW9 testified that the probable weapon used in the assault was not stated. He further stated that the fracture on the skull of the deceased was on the temporal region.

After the close of the prosecution's case, this court, on evaluating the evidence adduced by the prosecution, established that there was sufficient evidence to put the accused on his defence. In his defence, the accused, in his unsworn evidence, testified on the material day (the 26th of September 2002) he had drunk busaa upto the evening. He went to his home and quarrelled with his wife. On the 27th September 2002 he was at home. On the 28th September 2002 he was arrested on allegations that he had killed the deceased. He denied that he had killed the deceased as he could not remember seeing her on the fateful day. The accused did not call any other evidence. After the close of the prosecution and the defence case Mr Mongeri, Learned Counsel for the accused and Mr Gumo, the Assistant Deputy Public Prosecutor made submissions before this court urging their respective opposing positions.

I have considered the evidence adduced in this case. I have also considered the able submissions made on behalf of the accused and by the prosecution. The issue for determination by this court is whether the prosecution has established to the required standard that the accused indeed murdered the deceased. The facts of this case are not seriously disputed. On the 26th of September 2002 the deceased went to the

house of her son PW2 and asked him to give her money. PW2 gave her Kshs 100/=. The deceased protested that the amount given to her was too much. She gave the Kshs 100/= to the wife of PW2 and instead asked her (the wife of PW2) to give her Kshs 20/=.

She was given the Kshs 20/-. She went to the house of her husband, PW4, where traditional liquor had been prepared for sale. She took the traditional liquor (busaa) in the company of the accused and other people. At about 10.00 a.m. PW5, the daughter of the deceased, saw the accused hit the deceased at her back and stomach with a stick. The deceased reported the incident to PW2 and PW4. Apparently it appears that the accused and the deceased made up after the accused had apologised to the deceased. PW5 saw the accused and the deceased drink busaa until 3.00 p.m. when the busaa was sold out at PW4's house. PW5 saw the deceased go to her home. At about 6.00 p.m. while PW1 was at his residence, he heard a woman scream.

He went out to investigate. He saw the accused, who was his neighbour, beat his wife called Salina. PW1 went to the house of the accused. He then saw the deceased arrive at the homestead of the accused. The accused's wife then ran away. The accused then hit the deceased several times all over her body. PW1 intervened and asked the accused not to further beat the deceased. The accused stopped assaulting the deceased. PW1 saw that the deceased was bleeding from an injury that she had sustained on her head. PW1 had a conversation with the deceased. The deceased told him that she had gone to the residence of the accused to collect the sum of Kshs 20 which was owed to her by the accused's wife.

The deceased asked PW1 to give her water. PW1 obliged and gave her water which she drank. PW1 testified that the deceased was immobile. PW1 left her lying on the ground. Later information reached PW3 that his mother (the deceased) had been seriously injured. PW3 received this information at about 9.00 p.m. He went to the house of the accused and found the deceased lying inside the kitchen of the accused near the fire place. PW3 testified that the deceased appeared to be in poor health. She had injuries on her head, hands and legs. She was bleeding from the head injury. PW3 looked for a motor vehicle and took the deceased to Mercy hospital where she was admitted. The deceased succumbed to her injuries and died on the 27th September 2002 at 11.00 pm.

On 30th September 2002 a post-mortem was conducted on the body of the deceased. Dr Sergon established the cause of death to be head injury as a result of the assault. He observed that the skull of the deceased had been fractured on the temporal region. There was an eleven centimetre cut on the skull which had been sutured. PW6 assisted the members of the public in the arrest of the accused. PW7 investigated the case and charged the accused. PW8 examined the deceased and established that the accused was mentally fit to stand trial.

I have evaluated the evidence adduced by the prosecution and the defence offered by the accused. The prosecution has established that the accused assaulted the deceased twice on the material day. He first assaulted the deceased at about 10.00 a.m. He was seen by PW5. The deceased made a report of the assault to PW2. This assault appears not to have caused serious injuries on the deceased. At 6.00 p.m. PW1 saw the accused again hit the deceased with a piece of wood on the head and severally over her body. After the assault PW1 saw that the deceased had sustained a head injury. She was bleeding from the injury that she had sustained on her head. PW1 recalled that the injury which the deceased had sustained appeared to be serious as the deceased was unable to walk after the assault. The deceased was left lying down on the ground. PW9 testified that the cause of death of the deceased was the head injury that she had sustained.

The assault on her had resulted in her skull being fractured. The injury that caused the death of the deceased was consistent to the blow administered on her head by the accused, as stated by PW1 who saw the accused administer the fatal blow. The accused in his testimony stated that he could not remember meeting the deceased. On evaluating the evidence, I do find that the prosecution has established beyond any reasonable doubt that it is the accused who had killed the deceased. The issue for determination by this court is whether the accused had the requisite men's rea to kill the deceased for the offence of murder to be established. PW5, PW1 and PW2 testified that the accused and the deceased drank traditional liquor from about 10.00 a.m. to 3.00 p.m.

PW5 and PW1 testified that the accused appeared drunk when they saw him respectively at 3.00 p.m. and at 6.00 p.m. After evaluating the evidence, it is the finding of this court that the accused was drunk when he assaulted the deceased. In his defence the accused testified that he was drunk and could not recall meeting with the deceased. The accused therefore lacked the requisite men's rea to kill the deceased. For that reason, I do hold that the prosecution has established a lesser but cognate offence of manslaughter. The three assessors who assisted the court with the assessment of this trial all agree that the accused unintentionally killed the deceased and was therefore guilty of manslaughter and not murder. I agree with their finding. I therefore convict the accused for the lesser but cognate charge of manslaughter.

The accused is accordingly convicted.

**DATED at NAKURU this 30th day of June 2005.**

**L. KIMARU**

**JUDGE**