



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL CASE 28 OF 2003**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**JULIUS SUVI NDAMBU ..... ACCUSED**

**J U D G E M E N T**

Julius Suvi Ndambu, is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 17/6/02 at Kavole village, Kauma sub location, Kauma location in Kitui district, he murdered Telesia Suvi. Accused denied the offence. The prosecution called a total of 10 witnesses. The accused gave an unsworn statement in his defence.

Briefly, the prosecution case is as follows:

The deceased was the wife of the accused person. However, at the time she met her death, she had returned to her parents' home with her two children after disagreements with the accused. On this fateful day, the 17/6/02, PW3 Mulwa Mwitwa, a resident of Kavole village was going to the shop at about 8.00 a.m when he met the deceased coming from the shop. As he came from the shop at about 9.00 a.m he again met the deceased going to the stream with a jericin and a basin of clothes and they talked. He said that she was with Suvi, the accused, her husband. He had known the accused for a long time whereas the deceased is her cousin. PW5, Antony Malombe, also said he met the accused at Kwa Kamola at about 11.00 a.m on the same day. They also conversed. He used to see Suvi come to the home of the deceased's parents.

At about 2.00 p.m of the same day, PW1 Musyoka Mwendwa, went to bath at Mavoko river (stream). He saw a jericin on a rock and noticed a body in the water. He went to call people who included Joseph Maende (PW6), the deceased's father. They removed the body from the water. On observing the body, deceased had injuries on the back of her head which was bleeding. He recognized the body as that of Telesia who she knew well as a school mate and who had returned to live with her parents.

PW6 on seeing the daughter's body, called the Assistant chief, Mary Joshua (PW7), who came to the scene and informed the police who came to the scene too. PW9, P.C Komen, went to the scene with I.P. Mwatene. He noted bruises on the deceased's face, forehead, the head and blood was oozing from the ears and nose. They started to look for accused who had been seen with the deceased on that day and was a suspect. PW10, Bosco Mutui, the Chief of Usiani location where the accused hails from arrested accused on 9/9/02 at his home.

Doctor Joshua Matu, who performed the postmortem on the deceased on 20/6/02 found dry blood around the right ear and temporal region; bruises on the forehead both cheeks; depressed fracture on right

temporal region. Upon opening the body, he found a depressed fracture on right temporal region with sub dural haematoma – pressing on the brain; torn blood vessels which caused bleeding, lungs were congested and oedematous and there was water in the stomach. He opined that cause of death was blunt injury with sub dural haematoma and possible drowning before death. He opined that the cause of death was actually the head injury and the drowning was secondary. He would have noted a difference in the lungs had drowning been the actual cause of death.

Cecilia Muya Suvi (PW4), the daughter of the accused and the deceased and Maende(PW6) the deceased father, recalled that the accused had visited PW6's home on 16/6/02, when he came to get the deceased and PW4 to return to his home and that the deceased refused to go back. PW6 added that in fact they agreed with accused that he goes to get his parents so that they could talk on 18th but this incident occurred on 17/10/02 and PW6 did not see accused again.

In his unsworn defence, the accused said that he had been married to the deceased, Teresia since 1981. They had two living children. She had left for her parents' home in 2001 because her father wanted more dowry. He went to ask for her but the father had insisted on more cattle being paid. He used to visit her at her home and she did likewise. He denied ever meeting his wife on the fateful day because he looked after his cattle the whole day and learnt of her death on 24th. He participated in her burial and denied that he ever went into hiding. He did not know how the wife died, nor was he told by his in laws.

I have considered all the evidence adduced by the prosecution, the defence and submissions by both counsels.

It is not in doubt that the evidence before the court is circumstantial. Nobody saw the accused assault or murder the deceased. The question is whether the circumstantial evidence available meets the test required for this court to find a conviction based on circumstantial evidence. In order to sustain a conviction, circumstantial evidence must satisfy three tests:

- i. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- ii. Those circumstances should be of a definite tendency unerringly pointing toward the guilt of the accused.
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

This is what the Court of Appeal restated in **OMAR CHIMERA versus REPUBLIC CR.APP 56/98**.

The deceased's daughter PW4 and father PW6 both testified that the deceased had gone back to her parents' home due to disagreements between the deceased and accused. PW6 recalled that deceased had come back home severally and they had reconciled the two. Accused's explanation that PW6 had taken his daughter back because he wanted more dowry is highly unlikely and unbelievable.

The accused did accept that he had gone to ask for his wife back from her parents. He was however vague as to when. PW4 and 6 specifically said that accused had gone to PW6's home on 16/6/02 the day before the deceased's death and had been asked to come back on 18th with his parents. Accused never made mention of this incident of 16/6/02 but I have no reason to doubt PW4 and 6. The deceased had refused to go back with the accused.

On 17/6/02 at about 9.00 a.m, PW3 testified that he saw the deceased and accused at the stream where the deceased was found dead a few hours later. PW3 said he even talked to both the deceased and accused. Accused's defence is that he never left his home on that day and was looking after his cattle all day. PW3 cannot have made a mistake as to when he saw the deceased and accused at the stream because at 4.00 p.m when he passed by the stream again the deceased was dead. I have no reason to doubt PW3's evidence that he saw the two. Though it is not clear where Kwa Kamola is, PW5 also saw the accused at Kwa Kamola at about 11.00 a.m on the same day. PW5 hails from the deceased's village whereas the accused is said to come from about 15 Kilometres away in another location but same division.

Accused cannot have been herding his cattle when these two witnesses saw him in different places on the fateful day. In my view, the alibi has in no way displaced the prosecution case. The accused was the last person to be seen with the deceased alive on the morning of 17/6/02. He had been to see her parents the day before, that is, 16/6/02, to seek reconciliation and was asked to come back on 18/6/02 with his parents. What was he doing in a stream in the deceased's village at 9.00 a.m? Common sense demanded that the accused explain why he was at the stream with the deceased on that fateful morning and when did they part since that was a matter which was within his knowledge and it is only him who would be expected to explain it.

This is in accordance with provisions of Section III (1) of the Evidence Act. Because he did not explain, a rebuttable presumption arises that accused knew under what circumstances the deceased died. It is a presumption of fact which a court is entitled to make under the provisions of Section 119 of the Evidence Act and it does not mean that the burden of proof has shifted to the accused in any way.

In his defence, the accused claims to have learnt of his wife's death on 24/6/02 and he sought an explanation from her parents but none was forthcoming. We heard the evidence of PW6, whose testimony I have believed, that the accused was required to bring his parents on 18/6/02. It is a wonder why the deceased had not gone back to PW6's home on 18/6/02 for reconciliation with his wife if he did not know she was dead.

It was not clear why accused was not arrested immediately. Though PW9 and 10 said that accused had gone underground, neither PW9 nor 10 went to look for accused at his home after the murder. It is only PW6 who said that messages were sent to accused's home to come and collect the deceased's body but accused never came save for his brother who came for it. If the accused had been available it would have been only prudent for him to come for his wife's body with whom he had been seeking reconciliation and ask questions as to why and how she had died. He never did.

The Doctor opined that the cause of death was a head injury and secondary to it was drowning. He said that the drowning must have occurred when the deceased was unconscious. I am satisfied that even though nobody saw the deceased inflict injury to the deceased, yet the fact that accused was with the deceased on the material day at the spot she was found dead a few hours later and lack of an explanation by the accused as to what happened to deceased or when they parted, the accused must have inflicted the head injury and pushed her into the river. Injury to the head implies malice aforethought. Accused's motive must have been deceased's refusal to return to her matrimonial home. I am satisfied that the circumstantial evidence meets the test considered above. The evidence is cogent, irresistibly points at the guilty of the accused and all circumstances considered form a chain such that it is impossible for this court to reach any other conclusion other than that the deceased's death was caused by the accused and no one else. I am in agreement with the assessor's verdict.

I accordingly convict the accused of the offence of Murder Contrary to Section 203 and 204 of the Penal Code.

**R.V. WENDOH**

**JUDGE**

Dated at Machakos this 19th day of September 2005

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**