

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Case 1 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

ROSELINE CHEMTAI KOECH.....ACCUSED

JUDGMENT

The accused was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 26th December, 2003 at Manyani Estate in Nakuru District of the Rift Valley Province she murdered Benta Atieno.

The prosecution called four witnesses. PW1 was the deceased's brother. He testified that on 26th December, 2003 at about 10 a.m. he went with the deceased to her estranged husband's house at Manyani Estate where he was living with the accused, the deceased co-wife. The deceased had left her children there when she separated with her husband and she now wanted to take the children. They found the accused washing utensils outside the house and they went in and sat down. PW1 further stated that the accused asked the deceased why she had left her children in the house as though the accused were her maid and as they were talking, the accused attacked the deceased with a knife on her face and PW1 tried to separate them. The deceased also bit the accused on her face. PW1 said that his sister's condition was very bad as her intestines were almost out and so he ran out to look for a taxi. He came back with a taxi and put the deceased therein and he went and reported the matter to Bondeni Police Station then thereafter took her to Nakuru Provincial General Hospital where she was admitted but died at about 9.00 p.m. The deceased's brother did not say that the accused stabbed the deceased in her abdomen.

In cross examination, he stated that when the accused allegedly stabbed the deceased he had just stepped out and so he did not see the accused stabbing his sister. He did not know who attacked the other first. He also did not see the deceased biting the accused on her face but he saw the teeth marks on her face. He denied that he had gone to the accused's house with the deceased and her brothers and that it was him who accidentally stabbed his sister when he was intending to stab the accused. The witness saw the accused bringing into the house the utensils she was washing but did not see her carrying any knife yet the attack took place seconds after she entered the house. The prosecution did not produce the murder weapon as an exhibit.

The second prosecution witness, Dr. Aduro Peter testified that he performed a post mortem examination on the body of the deceased which had a stab wound on the right upper part of the abdomen and on the head where there was a linear wound. He also examined the accused who had blood stained clothing and was complaining of pain in the left cheek and on the small finger and was expectant, about 36 weeks. She also had a cut wound on the left small finger which in his opinion had been caused by a sharp object.

PW3 was staying near the accused's house and he testified that on 26/12/2003 at about 11 a.m. his child told him that he had seen a lady lying on the road with a knife stab. He went there and saw that the wounded lady had a cut on her head and in the abdomen and some of her intestines were out and was bleeding. PW3 borrowed a "lesso" and tied her abdomen. After a little while, PW1 arrived in a taxi and took her to hospital. He then accompanied the accused to the police station where the accused was booked in. PW4, Police constable Opinyi was at Bondeni Police Station at the material day. He testified that members of the public escorted the accused to the police station because of an alleged assault upon the

deceased. He then re-arrested her and proceeded to Manyani Estate where the alleged offence was committed. He did not recover any object at the scene. He only saw utensils there but did not get any knife. The accused did not leave her house before her arrest.

He also said that the occurrence book at the police station showed that a domestic misunderstanding occurred between family members and one member of the family armed himself and cut the accused on the head with a panga. The accused recorded a statement to the effect that she was attacked with a panga by the deceased's brother and that it was the deceased's brother who stabbed the deceased. The accused in her defence stated that she was married to Fredrick Owino in 2002 after he separated with the deceased. They were also staying with the deceased's two children. The house they were staying in had only one room. She further said that on 26/12/2003 the deceased came to her house with 6 of her relatives, all men and found her outside the house washing clothes and without talking to her, they went into the house and she followed them after about three minutes.

She found the accused dressing the children and when she asked the deceased what she was doing, PW1 told her that it was none of her business. She then gave them the children's clothes which were in a paper bag and then PW1 taunted her that she was happy to give away the children so that she stays with the deceased's former husband and then he stabbed her on the left cheek. She held the knife and a struggle ensued. The deceased then joined in and as PW1 tried to stab the accused, the knife missed her and stabbed the deceased. The deceased's brothers ran out and PW1 started screaming saying that the accused had stabbed the deceased. She therefore disputed the evidence of PW1. She said that the cut which she sustained on her small finger occurred when she attempted to hold the knife. She denied having murdered the deceased.

At the close of the trial, there were only two assessors, one of them having absented himself in the middle of the trial. Each of the assessors returned a verdict of **"NOT GUILTY"**. In this particular case, there was no eye witness who witnessed what may have happened between the accused and the deceased. According to PW1, he had just stepped out when he heard his deceased sister screaming and when he went in he found that his sister had been stabbed. He also saw a mark on the accused's face suggesting that she had been bitten. According to him this took place when he was walking out of the house, in a matter of seconds. PW1 said that he never saw the accused stabbing the deceased but only saw the wound on the deceased's abdomen. That explanation differs from that of the accused who alleged that PW1 was in the house with the deceased and her other relatives and that it was PW1 who began to assault the accused and as he was aiming at stabbing her, due to the struggle that was taking place he missed his intended target and instead stabbed the deceased.

The accused's explanation that PW1 stabbed her on the face and then she held the knife causing her to suffer a cut on her small finger is consistent with the evidence of PW2 and that in the P3. If PW1 was just turning to walk out as he alleged he would have seen the deceased biting the accused on her left cheek. According to the evidence of PW2, what the accused had on her left cheek was a cut wound 2cms deep and in my view that was not caused by teeth bite but most likely by a knife as explained by the accused. There was also no indication that the accused had a knife. PW1 said that when they arrived in the accused's house she was washing utensils outside and he saw her coming into the house but did not see her having any knife. The accused said she was washing clothes and not utensils. Evidence adduced showed that the accused never went out after the incident until she was taken to the police who visited the house when the accused was in custody and they did not recover any knife.

It is also instructive to note that the deceased and PW1 (and perhaps some other relatives) went to the accused's house without her permission and even without talking to her and that in itself shows that they were spoiling for a fight or a quarrel with the accused and they were most likely the aggressors as opposed to the accused who was alone and was also very pregnant. The information that was recorded in the occurrence book immediately the accused was booked in at Bondeni Police Station is also quite telling. According to PW4, it showed that a domestic misunderstanding occurred between family members and one member of the family armed himself and cut the accused on the head. That explanation is very close to the defence put forward by the accused.

In criminal cases, the standard of proof required before an accused can be convicted is quite high, that is, beyond any reasonable doubt. Where doubts are created in the judge's mind, the accused has to be given the benefit of doubt. In this matter, I am of the view that the prosecution has not proved its case to the required level and I am unable to convict the accused as charged. Consequently I acquit her and order that she be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED & DELIVERED at Nakuru this 16th day of December, 2004.

DANIEL MUSINGA

JUDGE

16/12/2004