



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL CASE NO.14 OF 1999**

REPUBLIC ..... PROSECUTOR

VERSUS

1. ISAYA PIEMO TONY.....1ST ACCUSED

2. EUNICE AKEYO SIAGE .....2ND ACCUSED

**JUDGEMENT**

In the month of July, 1998 IP. ISAYA PIEMO TONY (“the first accused”) was the Deputy Officer-in-charge, Traffic Training School, Ngong (hereinafter referred to as “the School”). He lived within the School’s compound with his family members which included his wife ANGELA. Chief Inspector Stephen Watima (PW 7) was the Officer-in-charge of the school. He too lived within the school’s compound. It is on record that both the first accused and PW 7 shared one office Secretary, namely: MRS CHRISTINE NAFULA SITATI SUDI (PW 11)

SAMUEL OLIECH SIAGE (“the deceased”) was an employee of Kenya Revenue Authority whose residence was and still is a walking distance from the said school. The deceased lived in his residence with members of his family, namely: EUNICE AKEYO SIAGE his wife (“the second accused”) his daughters FAITH SIAGE (PW10) and DABEL ATIENO SIAGE (PW 12) and his son GEORGE SIAGE (PW 8). They had employed a house-help RAEL AKOTH (PW 4) a watchman (not called) and a gardener (not called).

The first and second accused are now charged with murder contrary to Section 203 read with Section 204 of the Penal Code. The particulars of the offence are that: on the 26th July, 1998 at Upper Matasia Reserve in Kajiado District of Rift Valley Province jointly murdered SAMUEL OLIECH SIAGE.

The accused persons have pleaded not guilty and the trial proceeded to conclusion. The prosecution, led by a Senior State Counsel Mr. Jacob Ondari, has called a total of seventeen witnesses. The first accused, represented initially by Mr. Waiganjo and then by Mr. Ratemo Oira, and the second accused represented by Mr. Mwanyumba, have each given unsworn statement and elected not to call any witness.

Murder is defined in Section 203 of the Penal Code. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

Essentially therefore there are three ingredients of murder and, with reference to this case, the prosecution must prove (a) that Samuel Oliech Siage is dead (b) that the two accused persons jointly caused his death and (c) that the accused had malice aforethought or intention to kill him. The burden to prove the existence of these three ingredients of murder lies throughout on the prosecution, it never shifts to the accused. The standard of proof is proof beyond reasonable doubt.

I remind myself that it is the duty of a trial judge to look at the evidence adduced by the prosecution and the accused as a whole in determining whether the guilt of the accused has been established on the required standard. This principle of law was stated by the Court of Appeal in the reported case of OKETHI OKALE AND OTHERS V. REPUBLIC (1965) E.A. 555.

The first ingredient of murder, with reference to this case, is that Samuel Oliech Siage is dead. It is on record that the deceased was driven to Nairobi Hospital by BENSON LEPARAKUO SALTON (PW 2) in a BMW Motor Vehicle Reg. No.KYP 509 in the company of the second accused and JOHN ORINYO NJOROGE (PW 3) PETER NURU KARANJA (PW 5) and P.C. WILLIAM TUBMAN VISIBWA (PW 15). They removed him from his bedroom where he had sustained serious injuries to his head and abdomen. The deceased died soon after his arrival in the said Hospital and his body was removed and taken to LEE FUNERAL Home. On the 29th July 1998 the deceased's body was identified by his brother JEREMIAH OPONDO SIAGE (PW 16) to DR. ALEX ONZERE KIRASI OLUMBE (PW 10) Chief Government Pathologist, who performed a postmortem examination.

Dr. Olumbe found significant injuries on the deceased's head, namely: an incised wound on the forehead in the midline measuring 4 cm long; an incised wound on the right front parietal region of the head measuring 14 cm; two semi-circular incised wounds on the left side of the head measuring 14 cm; and the other one measuring 12 cm in length; one incised wound on the middle of the head measuring 12 cm. On the neck the deceased sustained a stab wound measuring 2 cm in length, but it did not sever any major blood vessels. On the chest there was an incised wound measuring 12 cm in length. In the abdomen there was a T-shaped wound measuring 16 cm longitudinal and 24 cm transverse. There were multiple incised wounds on the left side of the abdomen in varying lengths but between 12 cm and 24 cm.

It is Dr. Olumbe's opinion that all these wounds were not defensive wounds at all. They all were offensive wounds. i.e. the deceased was not attacking when he sustained these wounds. He was being attacked.

Dr. Olumbe however found the following defensive wounds on the arms of the deceased: multiple incised wounds criss-crossing each other and concentrating on the back of the forearm of the right hand, with the right hand mid-finger almost severed off. There was partial amputation of the small ring and middle fingers of the left arm, with abrasions on the back of the same left arm.

When the deceased's skull and trunk were opened up, Dr. Olumbe found all the internal organs were pale due to loss of much blood, multiple and irregular fractures on the left back of the head. In Dr. Olumbe's opinion, the cause of the deceased's death was exsanguination external loss of blood – bleeding outside the body – due to the multiple incised wounds.

By reasons of the aforesaid, I find that the prosecution has proved beyond reasonable doubt that the deceased died due to external loss of blood due to the multiple incised wounds.

The prosecution must then prove, beyond reasonable doubt, that the deceased's death was caused jointly by these two accused persons. In this regard the prosecution set to adduce (i) direct evidence against the first accused (ii) dying declarations against both the first accused and the second accused and (iii) circumstantial evidence against the second accused in its endeavours to prove that they killed the deceased. I have reviewed the evidence of the prosecution witnesses and taken into consideration the unsworn statements of each of the accused.

There is evidence to show that, prior to the 26th July, 1998, the first and the second accused persons had an intimate relationship. In view of the fact that the two accused persons were married but not to each other, for the first accused was married to ANGELA while the second accused was the wife of the deceased, I make a finding that they had an adulterous relationship, evidence of which was led through PW 8, PW 9 and PW 12, the children of the deceased and the second accused.

It is the evidence of these three children that the second accused used to bring men home in the absence of their father, the deceased, and she often took them to their bedroom. One such man was

positively identified by them to be the 1st accused.

It is also the evidence of these children, particularly of FAITH SIAGE PW 9, that whenever the second accused brought men home and took them to their bedroom she would warn her against telling her father, the deceased, about it. Upon that evidence I draw an inference that the second accused's association with the men she brought home and took to their bedroom was adulterous.

PW 8, PW 9 and PW 12 all gave evidence of how, prior to their father's death, the 1st accused drove them and the second accused to Ribshack Restaurant, and after food was ordered for them, the 1st accused took their mother away to a place unknown to them. 1st accused and their mother then returned much later, and drove them back home again.

These three children equally gave evidence of how their parents used to fight often and the second accused would run away from home and stay away for days or weeks on end, but would eventually return home. In her absence the deceased too would collect women and bring them home, and take them upstairs to their bedroom where they would spend a night. They said at no time did the second accused ever find women there but FAITH SIAGE (PW 9) said she often told her mother about them.

PW 8, PW 9 and PW 12 are young children. I allowed PW 8 to be affirmed after I was satisfied that he possessed sufficient intelligence and understood the meaning of telling the truth but not the meaning of an oath.

PW 9 and PW 12 gave sworn after I was satisfied that they possessed sufficient intelligence and understood the meaning of taking an oath. I was guided by the decision in JOHNSON NYOIKE MUIRURI V. R. (1982- 1988) IK.A.R. 150 where it was held that, before receiving the evidence of children of tender years, a judge must satisfy himself and must record, that the child has sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth. I have accepted the evidence of PW 8, PW 9 and PW 12 as regards the intimate association of their mother (second accused) and first accused. I have also accepted their evidence that each of their parents, but in the absence of the other, would bring in a partner who would spend a night in their bedroom.

I sadly hold that the second accused and the deceased lived an absolute immoral life in the complete glare of their children and blatantly abused and defiled the sanctity of their marriage. They shamefully and deliberately defiled their matrimonial home, matrimonial bedroom and matrimonial bed and literally transformed their beautiful maisonette into a seat of adultery where the first accused very often found sexual pleasure in with the second accused.

Mr. Mwanyumba has invited this court to ignore the second accused's immorality and to deal separately with issues relating to her innocence or guilt. The problem with Mr. Mwanyumba's submission is that the second accused's immorality takes centre stage in this case and cannot be ignored. She let herself loose into the sexual world of filth, and voluntarily brought the 1st accused into her life. This very act consumed and destroyed her marriage. How can this court possibly ignore the smell of rotten flesh in the marriage of the deceased and the second accused, when it is on record that the frequent fights between them invariably stemmed from their adulterous associations?

This court will proceed, however, on the basis that, despite the filth in this marriage, the prosecution has still the legal duty to prove beyond reasonable doubt that the 1st and 2nd accused jointly killed the deceased.

This evidence will now be reviewed.

The 26th July, 1998 was a Sunday. The prosecution has tendered evidence of several activities which took place both in the deceased's house and in the School in the morning. I shall begin with the activities in the deceased's house.

RAEL AKOTH PW 4 woke up at 7.30 a.m. She went to the kitchen to prepare breakfast but she found

when the second accused had already prepared it. It is her evidence that she (PW 4) used to prepare breakfast everyday. On this Sunday morning it was unusual for the second accused to have done it.

PW 4 said the second accused served the deceased with breakfast in their bedroom. She then came down and gave her shoes to polish, which she did. The second accused wore the polished shoes and said she was going to buy milk. According to PW 4 the second accused used never to go to buy milk before and she found it unusual that she was going to do it that morning. Whatever the case, it is the evidence of PW 4 that the second accused left their home compound on foot. By this time PW 12 had already woken up and was in the sitting room with George Siage (PW 8) and FAITH (PW 9).

It is the evidence of PW 4, PW 8, PW 9 and PW 12 that when their mother (second accused) left the home at about 8.00 a.m. they were having breakfast in the sitting room. The milk which second accused said she was to go and buy was not therefore for breakfast of that morning.

CHRISTINE NAFULA SITATI SUDI (PW 11) was in her house within the School that morning of 26th July, 1996 at 8.00 a.m. She saw 1st accused, PW 7 and other officers standing outside, but within the compound. She inquired from them what they were doing there. She was told that they wanted to evict one of the doctors who was living in one of the school's houses. This was also confirmed by PW 7 who testified that at 8.00 a.m. he summoned 1st accused, SGT. OWITI, CPL. OTIENO and P.C. Kyalo to proceed to evict Dr. Baratasa from the school house but when they found Dr. Baratasa co-operative, they allowed him to stay but agreed that he moves out soonest. From there PW 7 and 1st accused went to the office for handing over of the duties to him because he, PW 7, was proceeding on leave on 28th July, 1998. From the offices both PW 7 and 1st accused returned to their respective houses.

At about the same time (8.00 a.m.) the 2nd accused went to Mrs. Sudi's house (PW 11) and she was welcomed in. The second accused however, told PW 11 that she was in a hurry. The person she was looking for was the 1st accused. It is the evidence of PW 11 that she did not know the reason why the second accused wanted to see the 1st accused.

NICHOLAS KAITHIA MUNGATHIA (PW 1) was an employee in that school. He recalled that in the morning of 26th July, 1998 at about 8.30 a.m. he met the 2nd accused near the administration block and she asked him to go and call the 1st accused from his house for her. PW 1 obliged. He went to the house of 1st accused and told him that the 2nd accused was calling him. 1st accused responded by saying it was okay. PW 1 then left the 1st accused in his house. As he was walking away PW 7 asked him where he had come from that early and PW 1 informed him he had gone to call the 1st accused for the 2nd accused.

PW 11 who by then was with the 2nd accused escorted her out of the house towards the administration block where they met the 1st accused. It is the evidence of PW 11 that the 1st accused and the 2nd accused started to talk in Dholuo, which she does not understand, and she left them there and returned to her house. It is also the evidence of PW 7 that he went back to the offices so as to lock them and he found the 1st accused and the 2nd accused standing outside the offices, talking. He locked the offices and left them there.

Rael Akoth (PW 4) in the meantime remained in the kitchen after serving the children with breakfast and after the second accused had gone out supposedly to buy milk. She said the second accused stayed away for about 30 minutes. This means by about 8.30 a.m. the second accused had not yet returned with milk. From the analysis of the above evidence, it is easy to find out where the second accused was. She was in the School looking for the 1st accused and, after meeting with him at the administration block, they talked. Rael Akoth (PW 4) nevertheless said that, after about the thirty minutes she saw the second accused returning home. PW 4 was not however asked whether the second accused came carrying milk.

It is also the evidence of PW 4 that after the second accused had returned home, she drove out again almost immediately in the BMW motor vehicle, Registration Nos. KYP 509. She did not stay away for long before she drove back into the compound.

Back to the school. After PW 7 locked his office at about 8.30 a.m., he left the 1st and the 2nd accused standing there, talking. He said he intended to go and buy a newspaper at Ngong Town. Before he actually left the compound he realised that he did not have money on him. He therefore came back and went to his house to get the money. He then came out and decided to use the outside road which passes outside the school compound instead of one passing through the school. This one passes by the main gate to the school. When he neared the main gate he saw the 1st accused entering into the 2nd accused's vehicle. He did not then find it unusual. So he ignored it and continued to Ngong Town where he bought his newspaper. He said he must have seen the 1st accused getting into the 2nd accused's vehicle at about 9.55 a.m.

The second accused's explanation is however different. According to her she woke up at 8.30 a.m., went downstairs for breakfast as usual, found tea in a thermos. She made some eggs and toasted bread and took to her husband in the bedroom. She then left the deceased smoking an Embassy cigarette and went downstairs again. She thought of going to see Mrs. Sudi (PW 11) who had told her that her husband had not come home on Saturday. She therefore walked through the backdoor and the back gate and went up to school. But at the gate of the School she found more than five men standing there. She got worried that may be Mr. And Mrs. Sudi had fought, as they usually did or something bad had befallen him. She was scared and she went back to the house and told Rael Akoth the situation. Rael Akoth urged her to go back to the school and check on Mrs. Sudi. Thereupon she made up her mind to go back, but this time she decided to drive.

Pausing here, it is the explanation of the 2nd accused that the first time she left the house on foot was not to go and buy milk but to go and see Mrs. Sudi. She did not actually reach Mrs. Sudi's house but returned back home.

Upon arrival home she said she went upstairs where she found the deceased drinking cold milk from the fridge due to ulcers. She told him she intended to go and buy some more milk. According to her the deceased also told her to buy some meat. The deceased gave her Shs.600 for milk, and fuel for the car. She then left him in the bedroom and drove out of the home in the BMW Reg. KYP 509.

The second accused said she drove up to the school's gate but found it locked. She parked the vehicle outside the gate and walked through the side gate. She said she found the same people still standing by the gate and these included 1st accused and PW 7. She went straight to Mrs. Sudi's house and found her at home with her children. She was ushered into the bedroom where they talked. She said she looked at Mrs. Sudi straight into her eyes and Mrs. Sudi also looked at her straight in the eyes, like they were passing signals. Mrs. Sudi told her "IMAGINE. He has not turned up again!" meaning her husband. Then she told Mrs. Sudi "IMAGINE! Mine is just at home!" also meaning her husband. According to the 2nd accused, they walked outside, towards the same men standing at the gate, and she greeted them. She said she talked to the 1st accused and told him that if the house of Dr. Baratasa were to fall vacant she would like it to be given to one of her relatives. 1st accused reportedly told her that this could be arranged. 1st Accused then told her that he wanted charcoal and she told him that charcoal was still there. She and Christine then walked up to the gate and she got into her car and drove up to Ngong town.

That explanation must be given due consideration with the rest of the evidence adduced relating to those events. I have already referred to the evidence of NICHOLAS KAITHIA MUNGATHIA (PW 1) whom 2nd accused found in the school and whom she sent to call 1st accused from his house. 2nd accused has made no mention of this man. Mrs. Sudi (PW 11) also gave evidence and said that the 2nd accused called on her in the house but that the second accused was in a hurry. It is further the evidence of Mrs. Sudi that the 2nd accused informed her that she wanted to see the 1st accused. Indeed there is evidence that she escorted the 2nd accused to the administration block where they met the 1st accused. She left the 1st accused and the 2nd accused speaking in Dholuo.

From that evidence I hold that the 2nd accused's principal reason of going to the School that morning was to see the 1st accused, and not to see Mrs. Sudi (PW 11)

The prosecution then set out to prove that the second accused is the one who drove the 1st accused

from the School to her home that morning.

The prosecution relies heavily on the evidence of PW 7. It is the evidence of PW 7 that when he returned from Ngong Town he met FRANCO who broke the sad news that the 1st accused had been arrested and was at Ngong Police Station. PW 7 said he got concerned because the 1st accused was his deputy and he therefore decided to find out what the problem was. He went to Ngong Police Station and met the 1st accused who was under arrest. Among the many things which 1st accused told him was that the 2nd accused had collected him from home and taken him to her home to give him charcoal and water. This evidence is, of course, to be taken against only the 1st accused.

PW 7 had also stated earlier on that, when he was going to buy his newspaper at Ngong Town he had seen the 1st accused getting into the 2nd accused's vehicle and the two had driven away towards the deceased's home. This evidence can be taken against both the 1st accused and the 2nd accused.

The prosecution also relied on the evidence of Rael Akoth (PW 4) whose testimony was that, after the 2nd accused had driven out of their compound, she remained in the kitchen cleaning up. The 2nd accused drove back very shortly thereafter. Indeed the 2nd accused in her unsworn statement stated that when she drove back home she found the maid in the kitchen, washing up dishes and generally cleaning up. It is the evidence of Rael Akoth that when the 2nd accused drove back home she could not be able to tell if there was somebody else inside the vehicle with her, because the vehicle was far from where she was, and the windows of that vehicle were such that from afar, one could not see inside it properly. She was, however, positive that Peter Ochieng, the shamba boy, opened the gate for the vehicle to pass through. I note, however, that Peter Ochieng was not called by the prosecution to give that evidence. Benson Leparakuo (PW 2) and JOHN ORINYO NJOROGI (PW 3) saw the deceased's vehicle being driven into the compound but were unable to say if there was another person inside besides the driver. The explanation of the 1st accused is that, he left his house at the said school at 11.00 a.m., walked up to the 2nd accused's home, reached the gate and knocked. There was no response. He knocked again but using his car keys. The 2nd accused appeared, to whom he explained that he had come for charcoal and water. He said the 2nd accused received him, told him to sit down and said she would take care of his problems.

The explanation of the 2nd accused is that, after parting with Mrs. Sudi, she drove to Ngong Town, bought milk, meat and fuel and drove straight home. Peter Ochieng opened the gate for her, she took her shopping to the kitchen and then went upstairs to join her husband.

I have given due consideration to that evidence. If the 1st accused indeed had walked to the deceased's home as explained by him, he would have been seen by Rael Akoth who was in the kitchen and by Benson Leparakuo (PW 2) John Orinyo Njoroge (PW 3) the neighbours and by the three children PW 8, PW 9 and PW 12. As for the explanation of the 2nd accused, if it is correct, then the evidence of PW 7 to the effect that 1st and 2nd accused drove together towards the direction of the deceased's home, is incorrect. I have given due consideration to the evidence of PW 7 and I have no reason at all for disbelieving it. I accept his evidence that he saw the 1st accused getting into the 2nd accused's vehicle at the school's gate at about 9.55 a.m. and that they drove off towards the direction of the deceased's home; I accept his evidence also that he met the 1st accused at Ngong Police Station who told him that he had gone with the 2nd accused to her home that morning. My three assessors advised me on this important fact that they too accepted the testimony of PW 7 and rejected the explanation of both the 1st accused (that he walked to the deceased's home) and of the 2nd accused (that she had gone shopping at Ngong and drove to her home alone).

It is the prosecution's case, through the testimony of Rael Akoth, that the 2nd accused did the following things when she drove into the compound. First, that she told Peter Ochieng to go and buy bread. Akoth's evidence is that bread was being sold in at some kiosks, far, but PW 9 said the kiosks were 100-200 metres away. Akoth Peter Ochieng closed the main gate and walked through the side gate to go and buy bread. Secondly Akoth said the 2nd accused, after parking the vehicle, walked straight to her and told her to leave the kitchen and go to iron clothes. Rael said she obeyed, test the kitchen and went into a room where clothes are usually ironed.

It is the prosecution's case that the significance of that evidence is that both Peter Ochieng and Rael Akoth were effectively removed from the vicinity of the entrances into the main house at that point in time by the 2nd accused.

I have also given due consideration to the evidence of PW 8, PW 9 and PW 12 to the effect that, when the 2nd accused drove back home that morning they were in the sitting room watching TV and did not see anybody getting into the house, though PW 9 informed the court in reexamination by Mr. Ondari that she had seen somebody going upstairs a few moments before she heard screams. She did not, however, identify that person.

From that recorded evidence, and taking into account the fact that the 1st accused was indeed arrested in the deceased's master bedroom, meaning that he indeed gained entry into the house, I hold that the 1st accused got into the deceased's house unnoticed by PW 4, PW 8, PW 9 and PW 12 aided by the 2nd accused, who had brought him home.

The accused persons' explanation for the presence of the 1st accused in that house, is that he had come to buy charcoal and to get water from the 2nd accused that morning. The 1st accused has maintained throughout that his wife Angela, who had given birth a week or so earlier, had sent him to get water from 2nd accused's home and charcoal to provide energy to warm up the house for the new born baby.

I have given due consideration whether that explanation is possibly true. The explanation that there was a request for water from the deceased's home is, of course unreasonable and ridiculous. The 1st accused, in his own unsworn statement, stated that before he left for 2nd accused's home, he had taken bath in his house. Mrs. Sudi had also said she took bath in her house and prepared her children for church. PW 7 did not say there was any water shortage in the school on that day or at all. Why would ANGELA be asking for water from the deceased's home when there was plenty of it at her own house and within the school? This explanation is definitely for rejection.

The explanation that the 1st accused wanted to buy charcoal from the deceased's home is also unattainable. Whereas it is conceded by the prosecution through PW 7, PW 11 and PW 12 that charcoal was being burnt and available in the deceased's home, none of them accepted the proposition that the 2nd accused was trading in charcoal.

It is also on record that the 2nd accused told neither the maid PW 4, her children PW 8, PW 9 and PW 12 nor her husband, that she was going to the School to bring somebody who wanted to buy charcoal or to be given charcoal free. It looks to me that the 2nd accused did not want anybody else to know about the presence of the 1st accused in her home that morning. Why the secrecy, if the 1st accused's purpose of going to the deceased's home was to buy her charcoal? But most important, why would the 2nd accused wake up so early in the morning, walk over to see the 1st accused and walk back to her home, then drive to the school just to collect a charcoal buyer? Why did she take all that trouble?

The prosecution then set out to prove that the 1st accused, aided by the 2nd accused, both acting in concert and with a common intention, attacked the deceased in his bedroom, inflicting these fatal injuries. Reliance is put on the evidence of the maid PW 4, the children PW 8, PW 9 and PW 12, the neighbours PW 2, PW 3 and PW 5, and the investigating officers PW 6 and PW 15.

In this connection the prosecution first set out to prove that the attack on the deceased did not start on the ground floor. It was the explanation of both the accused persons that the fight between the 1st accused and the deceased had started off somewhere along the corridor between the kitchen and the rear door on the ground floor, after the deceased had allegedly come down the stairs and found the 1st accused in the dining rooms. There is indeed a dining room adjacent to the kitchen and a sitting room, where the children were watching the TV, next. The evidence on record from PW 8, PW 9 and PW 12 is that, before they heard any screams, there had been no noise or any commotion outside the sitting room. No doubt, if there was a commotion, fighting and shouting between the deceased and the two accused person just outside their sitting room, of the magnitude described by the accused, these children would have heard.

In any case there is material contradiction in the account of the events as told by the accused. Whereas in court they explained that the 1st accused was attacked by the deceased with slaps and a sword and that the 1st accused, in a bid to escape, inadvertently ran upstairs into the bedrooms in hot pursuit by the deceased, the same 2nd accused had recorded in the Police Statement that the deceased is the one who had in fact asked the 1st accused to follow him upstairs. If that police statement is correct then the 1st accused and the deceased fought in the bedroom throughout and this would be supported by the testimony of PW 2, PW 3, PW 4, PW 5, PW 8, PW 9 and PW 12. In the light of this. I do hold that the deceased was in fact attacked and fatally stabbed in his bedroom.

The next issue for my determination is whether the deceased was attacked by the 1st accused alone or 1st accused did so jointly with the 2nd accused. This calls for the review of the evidence PW 2 Benson Leparakuo and that of and PW 3 JOHN ORINYO NJOROGÉ, the two neighbours who rushed to the scene and went upstairs to the deceased's bedroom. It also calls for the review of the evidence of the children of the deceased PW 8, PW 9 and PW 12.

Beginning with the evidence of PW 2 and PW 3, the general effect of that evidence is that the 1st accused attacked the deceased with a dagger (produced as exhibit 6) and a sword (produced as exhibit 4). It is the evidence of these two witnesses that that the door to the deceased's bedroom was opened by PW 2 and the 1st accused was seen standing over the deceased who was lying on the floor at the foot of his bed. PW 2 said that when he actually opened the door, the 1st accused turned to him and walked towards him. Fearing that the 1st accused would harm him, he quickly closed the door. PW 3, who was standing immediately behind PW 2 said that when PW 2 opened the door he saw the 1st accused holding a blood stained dagger (Exhibit 6) with which he stabbed the deceased, and holding a sword (Exhibit 4).

These two witnesses were cross-examined at length, particularly as to whether the 1st accused actually stabbed the deceased with the dagger in the stomach. PW 3 maintained that he saw 1st accused doing so. After giving due consideration to their evidence, and to the fact that the deceased was found to have sustained a serious stab wound in the abdomen, which was not self inflicted, I hold that PW 2 and PW 3 have given evidence of what they saw 1st accused doing and that included stabbing the deceased in the abdomen.

It is further evidence of PW 2 and PW 3 that when they came to the deceased's compound they met his children running out of the house crying or screaming. When they ran upstairs they met 2nd accused descending down the stairs. According to PW 2 he actually saw the 2nd accused shutting the bedroom door and coming down the stairs. They maintained throughout cross-examination, that the 2nd accused had blood on her face and on the clothes she was wearing. The maid (PW 4) in fact testified that she saw the 2nd accused coming out of the bedroom with blood on her hands and clothes.

George Siage PW 8 who had ran upstairs soon after hearing his father's screams testified that he actually found both the 1st accused and his mother (2nd accused) inside the deceased's bedroom. The 1st accused was hitting the deceased who was by then lying on the floor. He heard his mother telling the 1st accused to stop beating or hitting the deceased.

FAITH SIAGE (PW 9) also ran upstairs when she heard screams but she said she met her mother when she was coming out of the bedroom. She told her to go and call the watchman called PETER. FAITH said she went downstairs, out of the house and She found Peter whom she told. She saw Peter going upstairs and she followed. She heard her mother telling Peter to hold the door to the bedroom as she goes to call the police. The evidence of (PW 9) also placed the 2nd accused inside the deceased's bedroom during and at the end of the attack of her husband.

DABEL ATIENO SIAGE (PW 12) said she also went upstairs after hearing the screams and met her mother (2nd accused) coming downstairs and telling the watchman to switch off the alarm.

According to the unsworn statement of the 2nd accused, she did not at all during the fight between the deceased and 1st accused ever get into the bedroom. It is her defence that the fight started down stairs, that the deceased was the one attacking the 1st accused, that the 1st accused was in fact trying to retreat

and did retreat into their bedroom and when she tried to follow them, the deceased kicked shut the bedroom door to her face.

I have given that evidence serious consideration, particularly the evidence of PW 2 and PW 3 who said they met the 2nd accused at the corridor upstairs when she came out of the bedroom, with blood on her face and clothes; the evidence of the maid (PW 4) to the effect that she saw the 2nd accused getting out of the deceased's bedroom with blood on her hands and clothes; the evidence of George Siage (PW 8) that he saw the 1st accused beating up his father in the bedroom and that his mother was with him (1st accused) inside that room. I find that the accused persons have lied in their unsworn statements. The 2nd accused has lied when she said that she did not go into the bedroom. Accepting the evidence of the prosecution witnesses, I hold that 2nd accused was in that bedroom when the 1st accused attacked and fatally wounded the deceased.

Mr. Mwanyumba has made a strong submission to the effect that the 2nd accused disassociated herself from the actions of the 1st accused. He referred the court to the evidence of George Siage (PW 8) to the effect that he heard 2nd accused pleading with the 1st accused inside the bedroom to stop beating up the deceased. He also relied on the evidence of PW 2 who testified that, when he arrived at the deceased's home and ran upstairs, he met the 2nd accused whom he observed was shaken and in panic, that the 2nd accused actually drove with him to the police station and reported that her husband and the boy friend (1st accused) were fighting in the bedroom; that she drove with him and the deceased to Nairobi Hospital.

Mr. Mwanyumba also relied on the evidence of PW 3 and PW 15 to the effect that the 2nd accused had uttered, on their return journey to Ngong from Nairobi Hospital, words to the effect that she had told the 1st accused to drop his plans to kill the deceased and that the 1st accused had not done so.

The answer to that submission is that, it is not what the 2nd accused said and did after the 1st accused had fatally wounded the deceased, which would constitute disassociation from the commission of this offence. Rather it is what she did before and during the attack of the deceased by the 1st accused which ought to be taken into consideration. In this particular case I have taken into account all facts placed before the court. Particularly evidence to the effect that the 2nd accused drove with the 1st accused to her home, but not to give him charcoal and water. Evidence has also shown that she has lied about several things e.g the area the fight started from, about the actual sequence of events immediately leading to the attack and about the attack itself, and to have lied that she was not in the bedroom where and when the deceased was attacked. She was also heard by P.W.3 P.W.5 and P.W.15 saying outside Nairobi Hospital that if the deceased survived the attack, she would file a divorce.

The prosecution evidence has thus placed both the 1st and 2nd accused in the deceased's bedroom. What did they go to do there? I will first deal with the case against the 1st accused.

It is reasonable to infer that the deceased's reaction after he saw 1st accused in his bedroom was to evict him forthwith. There is evidence to show that the 1st accused and 2nd accused had an adulterous relationship. This came out clearly and strongly in the evidence before the court. The 1st accused's presence in the bedroom obviously angered the deceased. Besides, the 1st accused was a trespasser or an intruder in the deceased's bedroom. This alone entitled the deceased to remove the 1st accused from his bedroom by force. It also explains the reason for the fight which ensued between the 1st accused and the deceased, which resulted in the fatal wounding of the deceased.

There can also be no doubt from the medical evidence that the multiple injuries which were inflicted on the deceased by the 1st accused were so severe as to amount to grievous harm. These injuries themselves would show a deliberate and wicked intention on the part of 1st accused to kill deceased.. But the 1st accused's explanation is that he acted in self defence and under provocation.

Dealing first with self defence, I remind myself that criminal responsibility for use of force in self defence is to be determined according to the Principles of English Common Law. It is generally accepted that a man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily harm, may use such force as on reasonable ground he believes to be

necessary to prevent and resist that attack on him. It is also generally accepted that, in deciding in a particular case whether it was reasonably necessary to have such force used, regard must be had to all the circumstances of the case.

In his judgment in PARMER V. REGINAM (1971) 1 All.E.R. 1077 Lord Morris of Borth-Y-Gest stated that it is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary.

Everything must, however, depend on the particular facts and circumstances.

It may in some case be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there has been no attack, if the attack is all over and no sort of danger remains, then clearly there will be no need for defence.

Applying these legal principles of law to this case, I hold that the deceased was not attacking the 1st accused. The serious and fatal injuries which the deceased sustained, according to Dr Olumbe (PW 10) were offensive wounds. Indeed, even if the unsworn statement of the 1st accused is to be taken into account, the alleged attack by the deceased was all over when the 1st accused inflicted the fatal wounds.

This means that the defence of self-defence raised by the 1st accused is not available to him and I accordingly so hold .

That brings me to the defence of Provocation. The term “Provocation” is defined in Section 208(1) Penal Code to include any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

It is further provided in Section 207 of the Penal Code that when a person, who unlawfully kills another under circumstances which, but for the provisions of this Section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.

The 1st accused explained in his unsworn statement that it was the deceased who first asked him what he was doing in his house, that the deceased slapped him twice and attacked him with a sword, that the actions of the deceased provoked him, hence the attack.

From the facts which have been proved by the prosecution I hold that the defence of provocation is not available to the 1st accused as well. Even assuming that the deceased slapped him twice, that deceased’s action was not wrongful. A man is entitled to use reasonable force to evict a trespasser from his house, more importantly from his bedroom which is his castle and when such force is used, the trespasser or intruder cannot be heard to say that he suffered provocation. In the circumstances of this case it is the deceased who suffered grave provocation and insult when the 1st accused confronted him in his own bedroom. Upon these facts, therefore, the only inference to be drawn, which I hereby draw, is that the 1st accused’s actions throughout that fateful Sunday morning showed a deliberate and wicked intention to kill the deceased.

There is the final aspect of this case which must be disposed off before I can determine whether the 2nd accused acted in concert with her lover (1st accused) to kill her husband or whether it can be said that she disassociated herself from her lover’s wicked and illegal actions. This aspect of the case relates to dying declarations.

Section 33(a) Evidence Act allows oral statements of admissible facts made by a person who has died to be admitted into evidence. Such statements are deemed to be dying declarations if (a) the maker is dead (b) they relate to the cause of his death or to the circumstances of the transaction which resulted in his death and (c) his death is in question in the Criminal proceedings. Thereafter the issue becomes one of weight to be attached to such statement. Usually considerable weight will be placed in dying declaration

which have been corroborated by some independent and material evidence.

The prosecution led evidence of what the deceased allegedly told PW 2 upon the latter's return to the bedroom from Ngong Police Station. It was the evidence of PW 2 that, upon his entry into the bedroom, he went straight to the deceased who was lying on the bed and asked him to say what had happened to him. He said the deceased told him "WANANIUA" three times. PW 2 said he asked the deceased, who by? The deceased replied "MAMA FAITH", that was the 2nd accused, who was also present in the same bedroom. PW 2 maintained while under cross-examination that the deceased was conscious and talking. PW 3 John Orinyo Njoroge was at the door to the same bedroom when PW 2, 2nd accused, PW 6 and PW 15 arrived from the Police Station. He confirmed that they all entered into that bedroom, though he was not asked to say their order of entry. He said he did not hear PW 2 talking with the deceased and did not hear the deceased utter the words "WANANIUA" and "Mama Faith". PW 3's explanation in reexamination is that he had remained at the door when the others walked into the bedroom. This can only mean that PW 2 had the opportunity to talk to the deceased when he (PW 3) was not near to hear what they said to each other.

I have gone through the evidence of PETER NURU KARANJA (PW 5) and I note that he got into the bedroom of the deceased after the 2nd accused, PW 2, PW 6 and PW 15 had already arrived from the Police Station. Though he said he did not hear the deceased and PW 2 talking, there was an opportunity for them to have talked before his arrival into the bedroom.

I have then gone through the evidence of PC Patrick Mutuku (PW 6) and PC William Tubman Visibwa (PW 15) and I find that both of them arrived at the deceased's home in the company of PW 2 and the 2nd accused and went straight into the deceased's bedroom where they found the deceased lying on the bed severely injured. They both were not familiar with the bedroom and busied themselves with locating the whereabouts of the 1st accused. Once they had established that he was in the bathroom, they busied themselves with his arrest and removal from there. PW 2 had therefore the opportunity to talk to the deceased without PW 6 and PW 15 hearing. It is in fact the evidence of PW 6, when they realised that the 1st accused was in the bathroom, he cocked his gun and PW 15 opened the bathroom door. Both of them entered into that bathroom to arrest the first accused. In my view their short absence from the actual bedroom gave PW 2 the opportunity to talk to the deceased without them hearing. It is also the evidence of PW 6 that the two young men who were holding the bedroom door were left at the door steps but were not blocking it. From the evidence on record, those were PW 3 and PW 5.

I have further given due consideration to the evidence of Dr. Olumbe (PW 10) which essentially was that the deceased had not suffered cuts of major blood vessels leading to gradual bleeding (loss of blood). The result was that the deceased would still have been conscious and talking when PW 2 arrived the police from Ngong Police Station.

For the above reasons, I find that Benson Leparakuo (PW 2) had an opportunity to talk to the deceased inside the bedroom immediately he returned from Ngong Police Station. I find in the words uttered by the deceased that the deceased implicated the 2nd accused in his death. He identified her as one of the people that were responsible.

The prosecution then led evidence of another alleged dying declaration through JOHN ORINYO NJOROGI (PW 3) to the effect that, when the deceased was being driven to Nairobi Hospital and upon reaching Dagoretti Corner, the deceased cried out that "Mama Faith" and "her boyfriend" have killed him, to mean that the 1st and 2nd accused. From the evidence on record the other person who was sitting at the rear of that vehicle next to, and holding, the deceased was PETER NURU KARANJA (PW 5). PW 5 denied to have heard the deceased speaking those words

I do make a finding that, if the deceased had uttered those words, PW 5 had the opportunity to hear them but did not. The evidence of PW 3 is thus not supported by the other evidence of PW 5. I therefore reject the evidence of this dying declaration.

The prosecution further led evidence of another alleged dying declaration through the evidence of

both PW 3 and PW 5 to the effect that, in that same vehicle the deceased asked them. “Why are you carrying this wife of mine and she is the one who was killing me with somebody else?” said in Kiswahili ***“Kwa nini unambeba huyu Mwanamke na ni yeye alikuwa ananiua wakiwa na mtu mwingine?”*** As told by PW 3 the words uttered by the deceased were ***“KWA NINI NIMUMBEBE MAMA FAITH NA HI GARI NA NI YEYE ANANIUA ?”*** Given the prevailing circumstances when the deceased uttered these words, when the deceased was writhing in pain and was being rushed to hospital, and the fact that there was shouting and talking going on, it is possible that both PW 3 and PW 5 did not hear the exact words the deceased spoke on that occasion. The two versions given by these witnesses also do not convey the same meaning. In view of the conflict or inconsistencies in the two statements, there is a doubt in my mind as to what exactly was said by the deceased on that occasion. I give the benefit of that doubt to both accused and I reject the deceased’s alleged dying declaration of that occasion.

The prosecution then called P.C Patrick Mutuku (PW 6) as one of the Policemen from Ngong Police station who rushed to the scene in the deceased’s vehicle after PW 2 and the 2nd accused had made a report. While under lengthy, searching and serious cross-examination by Mr. Mwanyumba, the advocate for the 2nd accused, PC Mutuku recalled that, while they were in the deceased’s bedroom and after removing the 1st accused from the bathroom, the deceased was talking, more or less to himself, and was saying that the 1st and 2nd accused are the ones who had killed him, meaning who had fatally wounded him. The actual kiswahili words the deceased spoke which PW 6 heard were:

***“Huyu mtu na bibi yangu ndio Wananiua ”***

Mr. Mwanyumba reminded PW 6 that he had not said this before in his earlier testimony. PW 6’s answer was this:

***“This I did not mention yesterday in my evidence -in-chief because I was not asked. I also did not say so when being cross-examined by the Advocate of the 1 st accused. I have now recalled that the deceased said that the first accused and his wife killed him. I am able to recall this from your system of questioning”.***

PW 6 was again subjected to lengthy and searching cross-examination by Mr. Mwanyumba but he maintained that he heard the deceased crying out, almost saying to himself, that he had been killed by his wife and the 1st accused. PW 6 maintained throughout that he was able to recall this by the manner he was being cross-examined by Mr. Mwanyumba.

I am of course aware that PW 6 did not record these words in his police statement, and did not say them in evidence-in-chief. But here is a witness who, through lengthy and searching questioning, was able to recall and remember that the deceased had implicated his wife and the 1st accused in his death. In my view the 2nd accused is bound by the answers given to court by PW 6. I have no reason at all for rejecting that evidence. I have to take it into account with the rest of the evidence adduced before me.

There is evidence to prove that the 1st accused actually cut the deceased. When PW 6 and PW 15 entered the bedroom of the deceased, they found him lying on the bed, with blood virtually everywhere. The deceased was crying for help but they did not immediately respond to his pleas. Their concern was to look for the person who was said to have been fighting the deceased. PW 15 opened the bathroom door and they saw the 1st accused sitting on the toilet sink, holding his head and facing down. PW 6 cocked his gun and PW 15 ordered him to surrender, which 1st accused did. Next to him lay a sword and next to it was an under pant, produced as exhibit 9, with blood stains. There was a water basin in that bathroom, with blood in it. PW 15 said he thought the 1st accused had tried to wash the sword in that water basin and to have tried to clean and dry the sword with the under pant. PW 6 took a close look at the 1st accused. He noted that 1st accused had no injuries on him but his clothes were blood stained. Shoes, produced as exhibit 11, were recovered from the bedroom and 1st accused identified them as his.

Dabel Siage (PW 12) identified the sword (Exhibit 4) as that of the deceased ordinarily kept in the same bedroom and it is this same sword which the 1st accused has stated in his unsworn statement that he used to cut the deceased with.

The totality of that evidence leaves no doubt whatsoever that the 1st accused inflicted the fatal wounds on the body of the deceased and thereby caused his death. From the injuries themselves, the 1st accused had a deliberate and wicked intention to kill the deceased. This evidence substantially corroborates the deceased's' dying declarations as stated separately by PW 2 and PW 6.

That brings me to the question which I had posed in this judgment: did the 2nd accused disassociate herself from the actions of the 1st accused or did she take part in killing him?

I remind myself of the clear provisions of Section 20 of the Penal Code in which it is enacted that, when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty, and may be charged with actually committing it i.e. every person who actually does the act which constitutes the offence; every person who does any act for the purpose of enabling or aiding another person to commit that offence; and every person who aids or abets another person in committing it.

I have accepted the evidence of PW 7 that the 1st accused told him that he was collected from the School by the 2nd accused and taken to her home. I have rejected the explanation of the 1st and 2nd accused that the 1st accused had gone to the deceased's home there to collect charcoal and water. I have rejected their explanation that the fight between the deceased and the 1st accused had started on the ground floor, near the kitchen and the dining room. I have held that the deceased was attacked and severely wounded by the 1st accused in his bedroom. I have further held that the 1st accused was neither defending himself nor acting under provocation and that, from the offensive injuries he inflicted on the deceased, the 1st accused had a deliberate and wicked intention to kill the deceased. I have also accepted that the deceased cried out, in his agony, that the people who had fatally wounded him are his wife, 2nd accused, and the 1st accused.

The totality of that evidence is that it points irresistibly to one and only one conclusion that 2nd accused was a principal participant in the killing of the deceased. For these reasons I agree with the unanimous opinion of my three assessors, who have advised me on questions of facts in this case, that the 2nd accused, jointly with her lover, the 1st accused, caused the deceased's death. They had a deliberate and wicked intention to kill him and proceeded to do so.

I therefore find, again in agreement with the unanimous opinion of the assessors, that ISAYA PIEMO TONY and EUNICE AKEYO SIAGE are guilty of murder contrary to section 203 of the Penal Code and do hereby convict them accordingly.

It is so ordered.

Dated this 28th June, 2001.

**A.G.A. ETYANG'**

**JUDGE**