



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CRIMINAL CASE NO. 53 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

ALEX KIPROP.....ACCUSED

JUDGMENT

1. **ALEX KIPROP (1st Accused)** and **ROSE CHELIMO (2nd accused)** are jointly charged with murder Contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars are that on 12.07.2011 at **KUINET** village within **UASIN GISHU** district, of the Rift Valley Province, jointly with others not before court, murdered **PHILLIP KIMTAI CHESIRE** both denied the charge.

2. The hearing begun before Kimondo (J) on 18.03.2015, but he was transferred to **MURANGA** before completing the matter, and I took over hearing the matter to completion.

3. **BENJAMIIN CHERUIYOT ROTICH (PW1)** a resident of Kuinet who does casual work, was cultivating at the home of **SAMUEL ROTICH** (a neighbour to the deceased), when the Accused, who was the deceased's 2nd wife called to him. She said there was a stench coming from a well inside her compound. PW1 noticed flies around the well, which was covered using a piece of mabati (iron sheet). When he lifted the iron sheet, he saw a decomposing body lying flat, inside the well.

4. The 2nd Accused screamed, and a crowd gathered. A call was made to the chief, fire brigade and police, when the body was retrieved, PW1 realized it was **PHILLIP CHESIRE** whom he had known for 5 years. PW1 did not know how the deceased (who was an Administration Police officer (AP) met his death.

5. PW1 explained that the bore-hole was near the couple's home, although there was a road near it. He ruled out the possibility of someone falling inside the bore hole, saying it was covered with mabati.

6. **BENJAMIN METTO (PW5)**, the chief of **KUINET** location received information that a body had been discovered in a well. He proceeded to the deceased's home and on arrival spoke to the wife, who said the deceased left for duty on 13.07.2011 and had not been heard of since then. Her co-wife (the 2nd Accused) likewise said she did not know the whereabouts of their husband. The 2nd Accused showed him the body which was lying inside the well. When it was eventually removed by personnel from Kapsoya Police Station and the Fire Brigade, PW5 recognized the body as that of **PHILIP KIMUTAI CHESIRE**. It had three cuts on the head, and was dressed in a pair of shorts.

Police took 2nd Accused for interrogation. The next day PW5 returned to the scene in the company of **APC SOGOMO** and PW2.

They entered the couple's house and noticed blood stains on the wall near the window as well as the opposite wall.

7. **CPL BENARD MBITHI (PW7)** who was among police officers from **KAPSOYA** Police Station, who visited the scene confirmed that the body was in the well inside the deceased's compound. When the body was pulled out PW7 noticed that it had a deep wound, and was only dressed in an inner pant.

On cross examination PW7 stated, that the 2nd Accused on being questioned at the scene, claimed that the deceased had been missing, and his calls were not going through, yet she had not made any report about him missing.

This is what stirred the interest of police and took the 2nd Accused for further questioning

8. **AP CPL DAVID NGENO (PW2)** of **KUINET** AP camp also got a call about the body which had been spotted in the well and he visited the scene. He met 2nd Accused whom he knew as the deceased's wife, and she told him that the deceased who was based at Rehema Camp,

had 3 days off duty, yet he could be traced, not even at his senior wife's home in Cherangany.

9. The next day PW2 returned to the scene accompanied by the chief and APC Sogomo. He confirms that upon entering the couple's house, he heard that there were blood stains on the wall. He stated;

“On the bed, or next to it, there was blood...”

Two rusted knives were also handed over to him although he did not see any blood stains on them.

10. On 25.07.2011, he received information that the 1st Accused had been seen at **KUINET TRADING CENTRE** dressed in AP uniform. PW2 proceeded to the centre accompanied by APC Sogomo, and arrested 1st Accused who was inside a bar.

11. Sometime in July, 2nd Accused said that 1st Accused had got the deceased's uniform so as to take pictures in them. He spoke to Accused1 who eventually gave her the uniform. However he did not book a report about this incident, it was only after the deceased's body was recovered – that he entered the issue about the uniform in an occurrence book (OB).

On cross examination PW2 stated

“Earlier in 2011, the deceased (who was known to him and was a fellow AP based at a camp 2.5km away from PW2's camp) had complained that Accused 1 was a friend of Rose...”

12. **PC SIMON LIKONYI** (PW3) took photos of the recovered body and noticed that it had visible head injuries. He attended the post mortem and took several pictures.

CHIEF INSPECTOR DAVID MULI (PW4) took a statement under inquiry from the 2nd Accused where he claims she admitted killing the deceased although she never elaborated the reasons for the killing.

Her statement under inquiry which was taken in the presence of her sister **NANCY CHERUTO** (PW8) purportedly confirmed that they killed the deceased. Indeed Nancy told this court that the 2nd Accused made the statement voluntarily in her presence and in her presence and with no threats made to 2nd Accused. The statement under inquiry was produced as Ex.3.

13. The deceased's body was identified by his two brothers **JOSEPH KOMEN** (PW6) and **LUKA KIMAIYO KIPTOO** (PW10), to the Doctor who conducted the post mortem. Externally he had bruises on the left side of the stomach, and when the head was opened he saw a deep injury on the left side of the head. He however did not know who murdered his brother, or whether the deceased slipped and fell inside the bore hole which was on the left side of that – compound, just as one enters the main gate.

14. **DR. MACHARIA BENSON** (PW 11) who produced the postmortem report on behalf of **DR. NDIANGUI** told this court that the deceased's body which was partially decomposing, had multiple injuries – being a laceration on the left side of the head measuring 3cm from the ear, a laceration on the same side of the head, measuring 3cm from the ear, a twisted laceration at the back of the head.

The skull was depressed with a fracture on the left side, extending to the base of the skull. There was also evidence of bleeding in the brain. The cause of death was severe head injury due to blunt force trauma.

The post mortem report was produced as Ex.6. The Doctor explained that blood samples could not be taken due to the level of decomposition.

15. The 1st accused in his sworn testimony maintained that he did not kill the deceased, saying on the date in question, he was at this home, and nothing unusual happened. It was his evidence that he used to run a bar in Kuinet, and knew the 2nd Accused as a neighbour who used to frequent the bar.

16. He also knew the deceased, and knew that 2nd Accused was deceased's wife. According to 1st Accused, the 2nd Accused and deceased had frequent domestic quarrels, although he did not know the cause but at no time did he (1st Accused) disagree with the deceased. He stated on cross examination;

“...I had no reason to murder him. I was framed up for no reason.”

17. He denied ever visiting the deceased's home and he only got to learn of his death when the body was recovered from the bore hole. He denied having any amorous relations and stated that he was arrested 3 months after the incident. The 1st Accused was adamant that he did not have a love affair with 2nd Accused nor had he promised to marry her.

18. The 2nd Accused in her unsworn defence stated that the deceased at home from work on 10th July 2011, by which time she was still at her salon at the trading centre. Their child **BRIAN** was sent to call her, and when she got home, she prepared supper and they ate. The deceased remained home for 2 days during which time he and the 2nd Accused sprayed their crops on the farm.

19. The deceased left on 12th April 2011 saying she was going to the office – he never returned. On 18th April, she called to talk to him, but

his phone rang unanswered. After another 2 days of failed attempts to reach him, she assumed he had gone to be with the senior wife in **KACHBORA**. However when she called the senior wife, she realized the deceased was not at the senior home.

20. By 24th April 2011, she had begun informing neighbours that her husband was missing. There was a power blackout, and he was milling maize for customers, which she sensed a putrid smell whose source she could not pick.

21. She mentioned this to some young man and they begin to search around, - that is when they realized the stench emanated from the borehole and upon the lid being opened they saw the deceased's body lying in the borehole.

The next thing she realized was that she had been arrested and taken to the police station and that is when she got to realize that 1st Accused had also been arrested.

22. Mr. Omboto appeared for Accused 1 while Mr Mutei was for 2nd Accused. Mr. Omboto submitted that none of the prosecution witnessed linked 1st Accused to the deceased's death whether by direct or circumstantial evidence.

Counsel argued that the key ingredient in murder, which is malice aforethought was lacking in this matter, and warranted the 1st Accused being acquitted.

23. Mr. Mutei on the other hand submitted that none of the witnesses claimed that the accused killed the deceased, no murder weapon was recovered, and there was nothing to link the 2nd Accused to the death. He contended that the prosecution had not discharged its burden of proving the case whatsoever.

24. Counsel argued that although prosecution sought to rely on circumstantial evidence to link the 2nd accused to the murder the threshold set in the case of *ABANGA alias ONYANGO V R Cr. Appeal no.32 of 1990 (UR)* which had not been met, that case stated that in cases relying on circumstantial evidence;

- a) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- b) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused,
- c) The circumstances taken circumstantially should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by accused and no one else.

25. In this instance there are several possibilities – that the deceased may have fallen into the well in his drunken state. Claims that this was blood on the bed and walls were not established and no further follow-up investigation was conducted.

The purported confession turned out not to be self-incriminating and had no other evidence to support what the 2nd Accused (who was an accomplice) claimed against the 1st Accused.

None of the prosecution witnesses suggested disagreements or differences between the Accused and the deceased' and in fact if it were not for the purported confession by way of statement under inquiry, there would be nothing to hold on to.

The evidence is at best speculative and at most based on suspicion preferred to what an accomplice said for reasons which are not clear, both prosecution and Accused were not keen on pursuing the contents of this suit.

Consequently I hold and find that the evidence is not sufficient to sustain a conviction and I return a finding of **NOT GUILTY** in respect of both accused.

They shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF JUNE 2019

H. A. OMONDI

JUDGE