



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 4 OF 2017**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**OLYMPIA KINYA THIANE.....ACCUSED**

**JUDGMENT**

The accused Olympia Kinya Thiane was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.

Particulars are that Olympia Kinya Thiane on the 27<sup>th</sup> day of January 2014 at, Kulamanie area in Isiolo Township, in Isiolo County jointly with others not before court, murdered peter Thiane Tarotisio.

The prosecutions case was supported by evidence of Seven Witnesses including David Kimathi Mugo a neighbour to the accused and the deceased person – **PW1**. He said that accused and the deceased used to quarrel from time to time and that on the material night he heard as if accused and the deceased were quarrelling. **PW1** said he heard the deceased person say “ *utanisumbua mpaka lini?*” but he didn’t know to whom the words were directed.

**PW1** didn’t bother to know whom the words were directed – **PW1** didn’t bother to know why the deceased was quarrelling and with whom he went to sleep. That the following day at 8.00 am his daughter went to wake him up and told him Baba Moses had been killed. He said he woke up and found police, chief and area MP were at scene and deceased had indeed died. He said he didn’t look keenly to know which parts of his body were injured.

**PW1** said he recorded a statement as a neighbour. He said the deceased had mental incapacity and was also diabetic and his conduct was not a normal person. **PW1** said the evidence that he heard the deceased quarrel was not in his statement. He said his 23 years old daughter and his wife who were in the house did tell him if they heard anything on the material night the deceased was murdered. He said and that of the deceased was separated by a road. He said he didn’t go to deceased house to find out why he was quarrelling.

**PW2** the father of the deceased got phone call from the accused who reported that Chokoras had killed the deceased. He proceeded to scene in the morning and found police had arrived and the body of his son was taken to mortuary whereas accused was arrested and taken to police station. **PW2** informed police that the accused and her son Moses had in 2013 ganged up to beat the deceased but matter was not reported to police but they later reconciled and accused and son were not charged.

**PW2** identified the body for post-mortem. **PW2** said the deceased and the accused lived cordially and had nothing much to quarrel about.

**PW3** Chief of Waso Location testified that when he went to scene when he was alerted of Police presence and found it was Peter who had been murdered, he interrogated the accused and his children and they told him that when the deceased came back at night and the gate was opened for him by the son **DW2** unknown people followed and attacked them injuring the deceased.

He said he questioned why they didn’t call him and yet they used to call whenever they had domestic disputes. He said in 2013 he had resolved a dispute where the deceased claimed his son had assaulted him but accused said she is the one who assaulted the deceased.

**PW3** reported matter to DO, DCIO and OCS and they came to scene and photographs were taken and body taken to mortuary. **PW3** said he got suspicious when accused failed to report to him such a serious issue and he stays very close by. **PW3** said there are suspects who were arrested but he didn’t know why they were released. He said accused and her son were arrested on 27.1.2014.

**PW3** said none of the neighbours at the plot where offence was committed were aware of the thugs accused claimed attacked the deceased. He said that if accused raised alarm he would have heard and responded.

**PW4** a security guard at Safaricom booster which was 40 M from the deceased persons house said that nobody entered or left the deceased persons house on the material night. **PW4** said the accused had an open love affair with one Kirimi and he could visit the deceased person's house anytime during the day or night and could leave with the accused person. He said that when he accompanied police to the deceased person's house on the material morning he found the body lay at the door of his house and he had injuries on the forehead. He said he didn't see anyone seated or standing along the road on the material night. He said he was employee of BM security which was guarding the Safaricom Booster by 27.1.2014 but later Vikas Security Company took up the tender and BM Security went with their attendance register. **PW4** said that he didn't see Kirimi kill deceased but he knew him as accused person's lover. He said he didn't hear any commotion on the material night.

**PW5** CPL Paul Lagat testified that on 27.1.2014 at 3.45 am he was with PC Wachira at Kula Mawe Police Patrol Base in Isiolo when PC Wafula informed them that the accused herein had reported that they had been attacked by thieves. That they proceeded to accused persons residence and found the deceased lying outside the door and was bleeding from the ears, nose and mouth and that he had an injury near left ear. That blood from the ear, nose and mouth was already dry. Those 2 cushions were placed to support his head. That there was blood stained blanket and cushions next to the wall.

That they entered the house and found the accused with a young man known as Moses. That Moses who is son to the deceased narrated that the deceased arrived at 2.30 pm and knocked at the bedroom window and Moses went to open the gate. That when he opened gate for the deceased, robbers also entered with him.

That when the deceased entered the removed his shirt and vowed to fight the robbers. That Moses said the deceased used a stool to hit the robbers and a stool was found turned upside down on the floor but it was not broken and had no blood stains. That the shirt the deceased was wearing didn't also have blood stains. That accused told the police she gave the robbers 4000/=. The murder was reported to OCS Isiolo CIP Ochilo and OC crime Ag IP Gabia as well as DCIO and they visited scene at 7.00 am where scene of crime personnel took photographs and body removed to mortuary. That accused was arrested and taken to police station and charged.

**PW5** produced cushions, blankets and cushion covers recovered at scene – Exp2 (a) and (b); Exp4, Exp5(a) to (d).

**PW6** PC Kennedy Titus Kimondio was called by CPL Ruingile and they proceeded to scene of murder where they found body of deceased lying on its back at the doorstep of accused persons house. Inside the house they found accused and 2 boys. That the floor of the sitting room had water and there was a lot of blood stains inside the house. That there were blood soaked clothes and blood stains on sofa sets. Scenes of crime personnel were contacted and they went to scene and took photographs after which the body of the deceased was taken to mortuary to await post-mortem. That accused person upon arrest and interrogation said that some people knocked at the door and when they opened they turned to be thugs who ordered them to surrender everything as they also started struggling with the deceased.

**PW6** said the suspected foul play as cushions which were heavily stained with blood suggested the deceased was hit while seated on the sofa set and there was blood on the wall, wall hangings and cushions. He said there were several seat covers that were removed and thrown outside which had blood stains. There was a flowered bedsheet found in the sitting room which was soaked with water and blood stains. There was a blanket that was used to mop the house which was also recovered – Exp8.

That on further interrogation of accused she said deceased was killed inside the house and not outside the way she had earlier said.

**PW6** said that there were reports made at Isiolo Police Station concerning difference between the accused and the deceased. **PW5** said accused and her brother were arrested and charged but *nolle prosequi* was entered for the brother. **PW5** said that accused tried to interfere with evidence.

**PW6** said that Purity Kathure who was accused persons tenant went missing after the incident and her phone went off. **PW5** said they got suspicious at the constant calls accused made to her brother during the time the offence was committed.

**PW7** DR Mohamed Abid Kadir produced post-mortem Report prepared by Dr. Murungi in which he established cause of death of the deceased herein as cardiopulmonary Arrest secondary to multiple skull fractural and subdural haematoma. He said the fragmented skull was caused by multiple blunt injuries.

Accused was placed on defence and in sworn statement and said that on the evening of 27.1.2014 the deceased went to town as usual and she remained with her 2 sons in the house. That she went to sleep at 10.00 pm after having supper and while sleeping she was woken up by the voice of their son saying “ *Mum ndio hawa watu wanafuata baba.*”

That she woke up and rushed to the sitting room where she met the deceased enter with 2 people who wore jumpers that had caps that concealed their faces. That the 2 people ordered them to lie down. That the deceased picked the stool and used it to hit one of the attackers. That the 2<sup>nd</sup> person who was at the door used an object to hit the deceased on the head twice and he fell at the door and the 2 people escaped. That when the 2 people escaped she stood from where she was lying and untied the belt and unbuttoned the husband's shirt. That the husband was bleeding and she tried to do 1<sup>st</sup> Aid. That her children came with cushions and table clothes to help raise his head he was groaning. That she rushed to her neighbour Purity who gave her credit to call the police. That officers from Kula Mawe went to the scene. She said she contacted the father and uncle to the accused. She said 3 police officers Wachira, Wafula and Lagat arrived at scene less than one hour after she called them. She said PC Langat told her, her husband was already dead and could not be taken to hospital. That it is police who asked for a blanket to cover the body of the deceased and called the OCS.

She said that the 3 officers stayed at scene until in the morning when other police officers came and she was arrested. She said that **PW1**'s house is across the road from her house and it is not possible to hear when one is talking at **PW1**'s house. She said she didn't plan with anyone to kill her husband and she didn't fight with her husband. She denied having wiped the house. She said the blood stained table clothes and cushions were thrown outside by the children because they were blood stained. She said the bed sheet produced was removed

from dust bin. She said she respected her family and didn't have an affair with anyone. She said the people who killed her husband attacked him when he returned home after midnight. She said her father in law secured her release. She said there was commotion in the house but the neighbours in the same house didn't respond as the neighbours had gone for overnight prayers. She said she didn't raise alarm after the thugs had left but decided to call the police.

She said her tenant known as Purity gave her credit which she used to call the police. She said Purity told her she was deep a sleep and didn't hear commotion. Accused said **PW1**'s testimony was not truthful.

Accused persons witness **DW2** – Moses Thuranira Thiane testified and reiterated what the accused said that when the deceased knocked the window for the gate to be opened, he went to open and some 2 people came running after the deceased and forcefully entered with the deceased. **DW2** said the deceased came back at around midnight. He said when he saw 2 people run after his father he ran back to the house while shouting and he and his brother hid under the bed. That he heard commotion in the house and his mother was crying. He said the commotion lasted less than 30 minutes. That the attackers told his parents to lie down and the accused told them to take anything but the deceased shouted and said he would not lie down. That when his father resisted the commotion intensified and utensils which were on the table were broken. That he heard a loud bang like someone had been hit. That after a while he heard accused cry outside the house calling them to come out as the deceased had been injured. That he went out and found the deceased bleeding at the entrance of the house. That he was groaning and they picked cushion to support his head and Administer First Aid. That while administering First Aid their neighbour mama Esther came and the accused asked for credit to call the police.

That accused called a police officer known as Wambua from Kula Mawe police post and he came to scene with 2 other officers. That the next day he went and recorded his statement - EXD3. He said **PW1** lives across the road from their house. He said that it is the window to their sitting room which faces Kimathi's house – **PW1**. He said he didn't hear the deceased utter the words “ *Utanisumbua mpaka lini?*”

**DW2** said the accused made phone call to his grandfather on the material night. He said the accused and the deceased sacrificed for each other. That accused quit her job to take care of the deceased who was diabetic and suffered from insomnia. He said the deceased had to get a monthly injection for his condition. He said the 2 suspects wore hoods and their faces could not be seen. He said his father's phone and money from purse was stolen by the 2 people. He said their neighbour came after the suspects had left. He said he heard the accused cry outside after the thugs had left.

From the evidence of the prosecution, the evidence of accused person and her witness and from the submissions filed, this court is to determine whether prosecution has proved beyond all reasonable doubt that accused committed offence. The ingredients of the offence of murder that the prosecution is expected to prove to attain a conviction as provided for under section 203 of the penal code are:

The ingredients /elements to be proved by the prosecution as spelt out in the case of **Anthony Ndegwa Ngari vs Republic [2014] eKLR** are as follows:-

- a) The death of the deceased occurred
- b) That the accused committed the unlawful act which caused the death of the deceased; and
- c) That the accused had malice aforethought.

Regarding the fact of death of the deceased both the prosecution witnesses and the accused as well as **DW2** the son of the deceased confirmed he died.

The Postmortem Report – EXP1 produced by Dr Mohamed Abdi Kadir – **PW7** and compiled by Dr Murungi who conducted post mortem established cause of death cardio-pulmonary arrest secondary to multiple skull fracture and subdural haematoma. He observed an open wound above the forehead of the deceased. There was also an open wound involving parietal region with depressed skull fracture. There were 8 fragments of skull loosely held.

The accused person denied having committed the offence. She says that the deceased on being ordered by the 2 thugs to lie down did not heed. He took a stool and used it to hit one of the attackers. That the 2<sup>nd</sup> attacker used unidentified object to hit the deceased on the head and as the deceased tried to go towards the 2<sup>nd</sup> attacker he was hit again and he fell at the door and the 2 people escaped. The parietal region of the head is behind the frontal lobe and central sullivan. If the deceased was hit while facing his assailant it would have expected that the frontal lobe would have been the one that was fractured, but the 8 fragmented fractures were towards the back of the head.

**PW1** said that he heard the voice of the deceased in the house when he returned to his house at about 11.30 pm. **PW1**'s house is across the road from accused and deceased person's house. Said he got suspicious when accused failed to report to him that thugs had attacked them and killed her husband and yet they are neighbours.

**PW2** the father of the deceased and **PW3** the chief also testified that in 2013 the accused and **DW2** had assaulted the deceased but the matter was resolved and they reconciled.

**PW4** who was a guard at Safaricom booster which he said was 40 M away from the deceased person house said he didn't see anyone enter or come out of the accused person's house on the material night while he was on duty.

Purity the tenant to accused and the deceased disappeared in thin air after recording statement and accused claims that she was deep a sleep after going for a night vigil and didn't hear the commotion that resulted in the multiple fracture on the deceased persons head and which **DW2** describes as a bang. The accused says that she is the one who went to wake up her tenant known as Purity to give her credit so she

could call the police but her son **DW2** says that Mama Esther came to the scene after the thieves had left and she gave the accused credit to call the police.

Accused said she went to sleep at 10.00 pm and left **DW2** and his younger brother watching TV but **DW2** says that accused and his younger brother who was 12 years by then went to sleep and left him watching movies. **DW2** doesn't specify at what time the accused and his mother went to sleep. **DW2** said that the deceased returned at around midnight and that is when 2 people who ran after him also forced their way into the house and attacked them. Accused person called her father in law **PW2** at 3.00 am. She avoided calling the chief – **PW3** who was a closer neighbor and a provincial administrator. Accused never raised alarm so that **PW4** who was 40 metres away and **PW1** who lived across the road approx. 40 m away didn't hear the bang alleged by **DW2**. It was not until 3.45 am that **PW5** CPL Langat got report of alleged attack on accused and her husband and on arrival at scene he says that blood that was coming from the deceased persons ears, nose and mouth had started drying up. **PW5** said **DW2** told them the deceased returned home at 2.30 am but in his testimony he says the deceased returned at about midnight. According to **PW5** although accused said she removed the deceased persons shirt and belt to do first aid after he had been attacked. The shirt didn't have any blood stains. It is not possible that the deceased could have bled from the head without the blood that stained almost everything in the sitting room staining a shirt he was wearing.

**DW2** also said that he heard utensils that had been left in the sitting room breaking but there are no debris of utensils recovered by Police as exhibits.

The duration of time taken by accused and her son without reporting alleged attack from midnight to 3.00 am leaves a lot to be desired in the conduct of accused and her son and this court believes the evidence of **PW5** and **PW6** as well as **PW3** and **PW4** that they suspected foul play on the part of the accused. The distances between the houses of **PW1** and **PW3** as well as the booster according to prosecution witnesses are so close that if indeed the accused and deceased were attacked by people from outside the house, both the accused and the deceased as well as their children could have raised alarm and the neighbours especially the tenant would have responded in one way or another particularly by using their mobile phones to call the police from the nearby police patrol base.

AS **PW6** said the accused were found trying to clean the house to conceal evidence that they had inflicted fatal injuries on the deceased. The accused person and **DW2** tried to develop a well calculated narrative of an attack by unknown thieves but from the evidence adduced by the prosecution witnesses the circumstances surrounding the case, the failure by accused person to raise alarm and time taken to report to police or even neighbours and the fact that it is only deceased who suffered injuries makes this court infer that the culprits were not strangers but the accused person probably with the assistance of **DW2** who inflicted the fatal injuries on the deceased. Their conduct was actuated with malice and that is why they think that their actions can just be handled casually. This court finds accused guilty of the charge of murder and she is convicted.

**HON. A. ONG'INJO J**

**JUDGE**

**JUDGMENT DELIVERED, DATED, AND SIGNED IN COURT ON 11<sup>TH</sup> JULY 2019**

**HON A.ONGINJO**

**JUDGE**

**IN THE PRESENCE OF:**

Kinoti-CA

Mrs Ntarangwi Advocate for accused

Ms Mbithe for state

Accused: Present in person

**Ms Mbithe**

I don't have records for the accused.

**Mrs Ntarangwi Advocate**

The accused is a 1<sup>st</sup> offender. She is aged about 45 years old. Before getting bond she was in remand for 1 year and 2 months. She has 2 children. The last born is in form 3 and a day scholar. It is the mother who takes care of him because he has ulcers. Accused is hypertensive. She pleads to be treated with leniency. She is remorseful.

**Order**

Accused remanded in custody for Victim Impact Statement on 11.9.2019.

**HON. A. ONGINJO**

**JUDGE.**