



**REPUBLIC OF KENYA**

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

**HCR. NO. 4 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VS**

**RONALD KIPKOECH BII.....ACCUSED**

**JUDGMENT**

1. The accused, Ronald Kipkoech Bii, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 16<sup>th</sup> day of February 2015, at Getarwet Village within Buret District within Kericho County, he murdered Mercy Cherono.

2. The accused pleaded not guilty to the offence and his trial started. The prosecution evidence against the accused was presented through 4 witnesses.

3. PW1 was Andrew Kiptere Langat (Andrew), a farmer and resident of Litein. He is also the accused's uncle. On the material day, the 16<sup>th</sup> of February 2015, he was at home at about 5.30 p.m. when he saw the accused beating his wife with a piece of wood. The piece of wood broke into pieces and he took another, then a third, and continued to beat his wife. Both the accused and his wife were drunk, and the accused also had a panga so Andrew could not approach them. When the deceased fell down, the accused proceeded to kick her on the back, then took her inside his house.

4. At about 3.00 a.m., Andrew saw a vehicle arrive in their compound. He later saw that it was a police vehicle. He went to check and found that the wife of the accused was dead. Her body had blood all over. It was taken to the mortuary, while the accused was taken away by police.

5. In cross-examination by Ms. Koech for the accused, he stated that his house was about 100 metres from that of the accused. He was therefore able to see clearly what was happening at the accused's house. Although there was a fence between the houses, he was able to see clearly what was happening as it is a short fence, the height of his chest. The accused was using a piece of wood, which was as thick as a walking stick or staff, which he was cutting from a blue gum tree nearby. Andrew was standing ten metres away from the accused and his wife and was able to see clearly the pieces of wood the accused was using. The accused had started beating his wife around 5.00 p.m. and had beaten her for an hour, till 6.00 p.m. The deceased was crying and begging for mercy, but the accused had only stopped beating her when she fell down.

6. I took over the hearing of this matter from Muya J, who had taken the evidence of PW1. When the provisions of section 200 of the Criminal Procedure Code were explained to the accused by the court, he elected to proceed with the matter from where it had reached.

7. PW2 was Samuel Kiprop Bii (Samuel), an older brother of the accused. His evidence was that on the 16<sup>th</sup> February 2015, he had taken his father to hospital at around 8.00 a.m., where they had stayed till 5.00 p.m., and they had arrived home at around 7.00 p.m. They had taken supper and he had gone to sleep. At around 9.00 p.m., the accused had woken him up and told him that his wife, Mercy, was sick, and requested Samuel to help him to take her to hospital. He had gone into the accused's house which was about 50 metres away. There was a lantern on. Samuel had found the deceased sleeping on the bed she shared with the accused, naked. She was sleeping with her body facing up, but her face was facing the side. He had called her name but she did not respond. He had gone closer and seen that she was dead, and there was blood on her legs. He had tried to ask the accused what had happened, what had killed the deceased, and the accused had responded that the deceased had taken too much alcohol. They had left the deceased inside the house, which the accused had locked, and gone to look for a vehicle and report at a police station.

8. The accused had gone to report at Litein Police Station and Samuel had gone back to his house. A few hours later, the police passed by his house and he directed them to the accused's house. The police had locked the house and told Samuel and the others not to enter the house. The police had collected the body of the deceased the following day and taken it to Kapkatet District Hospital mortuary.

9. In cross-examination, he stated that when he got to the accused's bedroom where the deceased was, he noticed that she was naked and that

there was blood on her legs. He had also seen bruises on her legs. When he asked the accused what had happened, the accused had said that he had beaten her slightly, and Samuel could see that she had minor bruises. He had seen an empty alcohol bottle in the room, but did not see the brand. He further stated that the accused and the deceased had been living together for six months, and that they had had no differences and their relationship was stable.

10. Dr. Langat Samuel, who was employed at the Kapkatet District Hospital as a medical officer, was the third prosecution witness. He had performed the post mortem on the body of the deceased on 5<sup>th</sup> March 2015 at Kapkatet District Hospital. His examination of the body established that it had bruises on both lower limbs and upper limbs, on the stomach and on the face. It also had stripe marks as a sign of being beaten. He had also noted obvious strangulation marks on the neck, as well as peripheral cyanosis or bluish discoloration of the finger nails. The body also had frothing of the mouth.

11. His examination of the body's internally revealed that she had a fracture of the neck or cervical bone at the cervical bones C4 – C6. His conclusion was that the cause of death was strangulation. The spinal cord had a fracture at the same point, and had been interfered with from cervical bones C4, C5 and C6. He produced the post mortem report on the deceased dated 5<sup>th</sup> March 2015 as P. Exhibit 1.

12. In cross-examination, he stated that the deceased had cyanosis, which means lack of oxygen in the tissues. He further confirmed that there are many causes of cyanosis, but in this case, he could see marks of strangulation on the neck of the deceased. He had also seen fractures of the cervical bones, and he testified that once the spinal cord is cut between C4-C6, there is no communication with the vital organs. His conclusion was that the strangulation and fracture of the cervical bones caused the death of the deceased by cutting off communication with the heart and lungs.

13. PW4 was No. 63867 Police Constable Paul Oguta, the investigating officer in the case. He was at the time of his testimony attached to the Directorate of Criminal Investigations (DCIO) in Bureti.

14. His evidence was that on 17<sup>th</sup> February 2015 at around 3.00 a.m., he was on duty at Litein Police Station as the CID duty officer when the accused, Ronald Kipkoech Bii, had gone to the station and reported that he had a dispute with his wife and they had fought the previous evening. At around 2.00 a.m., while they were sleeping, he had felt that his wife had grown cold. He had got up and checked and found that she was dead, so he had gone to the police station to make a report.

15. PC Oguta had gone with the Officer Commanding Station (OCS), Chief Inspector Ouma and the accused to his home in the police vehicle. The accused had led the officers to one of the houses, which was padlocked. The accused had opened the door, and they had gone into the house, which was a one-room house. There was a table and a bed in the room. On the bed was the body of the deceased, Mercy Cheron, which was covered with a blanket. They had checked the body and found that it had multiple injuries, cut wounds, on the back, the thighs and the left shoulder.

16. PW4 had performed preliminary investigations and had got witnesses, one of whom was an uncle of the accused who had witnessed the accused beating the deceased the previous day. They had also noticed that some pieces of hair which the deceased had plaited had been plucked out from her head and were found outside in the compound. They had moved the body to Kapkatet District Hospital mortuary where a post mortem was later performed.

17. PW4 further testified that his inquiries established that the accused and the deceased had been in Kericho Town where they took alcohol. On getting home, the accused wanted the deceased to prepare a meal but she was so drunk that she could not, and this is where the beating started. She had died later in the night due to the injuries inflicted by the accused. PW4 stated that they had later arrested the accused.

18. In cross-examination, PC Oguta stated that he found out from his investigations that the accused had beaten the deceased the previous evening, and the strangulation was part of the beating. The witnesses whom he had interviewed had told him that they were outside when the accused beat the deceased.

19. After the close of the prosecution case, this court found that the accused had a case to answer and placed him on his defence. Initially, the accused indicated that he would give sworn testimony and call witnesses, but he changed his mind on the day of the defence hearing and elected to give an unsworn statement and call no witnesses.

20. In his statement, the accused stated that on the 16<sup>th</sup> of February 2015, he and his wife, the deceased, had woken up as usual. They had taken tea and then he had gone to Kaptebeswet. As the place was far, he had arrived there at 1.00p.m. He had gone for a fundraising meeting in aid of someone who had passed away. The meeting had gone on till 9.00 p.m. at night, and he had returned home, alone, at 9.30 p.m., where he had arrived some minutes to 11.00p.m. On arrival, he had woken up his wife, the deceased, and called her by name three times, but there was no response. He had peeped in through an opening in the door and seen light inside. He had touched the door and found that it was not locked from inside. When he got into the house, he found the deceased sleeping across the bed, foam oozing from her mouth. She did not answer when he tried to talk to her. She was lying face up on the bed.

21. He had rushed outside to call his brother, Samuel Kiprop Bii. Samuel had accompanied him to his house and when he saw the accused's wife, had told him that she was dead.

22. The accused further stated that he had lived with the deceased for a year. She had enjoyed good health but she suffered from an illness that would make her fall down. That the illness would occur every three days and she was on traditional medicine. It was his testimony that the deceased was epileptic. He also suggested that the deceased may have taken a herbicide, by the name roundup, which was in the house. He had given the herbicide to the police, as well as empty bottles of an alcoholic drink called "Kenya Cane" which they confiscated.

23. With regard to the evidence of PW1, the accused stated that he had a long standing dispute with PW1; that PW1 has a longstanding land dispute with his family; and that they had been in court over the issue in 2010. He alleged that he had been charged in this matter due to the

efforts of PW1 with whom he had a long dispute. He denied that he had beaten his wife. He further stated that he did not know that the deceased died of strangulation; that he had just found her dead and thought she had died of the 'illness'.

24. The accused faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. In order to establish its case against the accused, the prosecution must prove, beyond reasonable doubt, that the accused did, **"with malice aforethought"** cause the death of the deceased by an unlawful act or omission. Section 206 defines malice aforethought as follows:

***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—***

***(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

***(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***

***(c) an intent to commit a felony;***

***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

25. The evidence before me shows that the accused was seen by PW1 assault the deceased, with pieces of wood, for about an hour, as the deceased cried and begged for mercy. He cut a piece of wood, as thick as a walking staff, from a blue gum tree. He beat the deceased with it till it broke. He picked up another piece of wood and used it on the deceased, and it also broke. He picked up a third, and he used it till the deceased collapsed on the ground. He took her inside the house. A few hours later, he woke up his brother, PW3, to tell him that his wife was ill. They went to his house, and Samuel saw bruises on the deceased, foam in her mouth, and on closer inspection, saw that she was dead.

26. The medical evidence produced by Dr. Langat was that the deceased died of strangulation. She had three broken cervical bones, from C4 to C6. She had also cyanosis in the nails. The cause of death, according to Dr. Langat who performed the post mortem on her body, was strangulation.

27. In her submission at the no case to answer stage which she indicated she would still rely on at the close of the defence case, defence Counsel, Ms. Koech, suggested that there was no eye witness to the murder of the deceased. She suggested further that someone else could have entered the accused's house and strangled the deceased while the accused had gone to his brother's house to inform him that the deceased was unwell.

28. On his part, the accused suggests in his defence that the deceased died either of epilepsy, or that she may have taken a herbicide, roundup.

29. The evidence before me with respect to the murder of the deceased is purely circumstantial. While PW1 saw the accused assaulting the deceased, there was no one who saw him strangle the deceased. The question is whether the prosecution case against the accused, though circumstantial, is credible and establishes his guilt beyond reasonable doubt, and what is to be made of the accused's defence.

30. It has long been held that a court may convict on circumstantial evidence where the inculpatory facts are incompatible with the innocence of the accused, and are incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused. This is what the court stated in its decision in **Simon Musoke vs R [1958] EA 717**:

***"... in a case depending exclusively upon circumstantial evidence he (the trial judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."***

31. In **Okeno vs R [1972] EA 32** it was held that:

***"In our view the magistrate clearly appreciated that a conviction based on circumstantial evidence can only be had where the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."***

32. The Court of Appeal sitting in Mombasa held in **Peter Mote Obero & Another vs Republic [2011] eKLR** that:

***"It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – TEPER V R [1952] AC 480."***

33. The accused in this case was seen at 5.00 o'clock assaulting his wife with such violence that two of the three pieces of wood he was using to assault her broke. He started kicking her when she collapsed on the ground. He took her inside the house they shared, and a few hours later, she was dead from strangulation. He called his brother, who lived a few metres away, to tell him that his wife was ill. His brother went

with him to his house immediately, saw the bruises on the deceased, and realised she was dead.

34. Was it possible that someone else entered the house in the few minutes that the accused went to call his brother and strangled the deceased? In my view, the evidence adduced by the prosecution points irresistibly to the accused as the perpetrator of the offence with which he is charged. The inculpatory facts are incompatible with the innocence of the accused, and are incapable of explanation upon any other reasonable hypothesis than that of his guilt. He assaulted his wife viciously. He took her into the house. No-one was there to see what transpired, but by 9.00 p.m. that night when he went to call his brother, Samuel, the accused's wife was dead, in the house and in the bed she shared with the accused.

35. The cause of death, from the post mortem report, was strangulations. She had three broken cervical bones, and the medical evidence was that the strangulation and these three broken bones in her spinal column caused her death. She also had stripe marks on her legs, which from the medical evidence, were consistent with the assault using pieces of wood that Andrew, PW1, had witnessed.

36. I have considered the defence of the accused. It ranges from an alibi-that he had left home early that morning and did not return until late in the night-to a suggestion that the deceased died from epilepsy or committed suicide with a herbicide. He also blames his woes on his uncle, PW1, with whom he alleges to have had a grudge. However, the evidence of his uncle, that of his older brother, Samuel, and the medical evidence together lead to no other conclusion than that the accused did, with malice aforethought, cause the death of the deceased by strangling her in the house they shared, after assaulting her mercilessly.

37. I accordingly find the accused, Ronald Kipkoech Bii, guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code as charged in the information against him, and convict him in accordance with section 215 of the Criminal Procedure Code.

**Dated, Delivered and Signed at Kericho this 13<sup>th</sup> day of June 2018**

**MUMBI NGUGI**

**JUDGE**