



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KERICHO**

**HCCR NO.24 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ELIZABETH MUHUNJA.....1<sup>ST</sup> ACCUSED**

**DENNIS MORURI.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused, Elizabeth Muhunja and Dennis Moruri, are 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 30<sup>th</sup> day of April 2012 at Majengo Estate in Kericho County within the Rift Valley, they jointly murdered Tony Rubea Lubanga.
2. This case has taken an unconscionably long time in the system, and it is sad that it has taken this long given that the accused were never admitted to bail.
3. The duo were first presented before the High Court on 21<sup>st</sup> May 2012 before Hon. (Rtd) Gacheche J. The accused were not present as they had been taken for mental assessment to Nakuru. The matter was then deferred to 16<sup>th</sup> July 2012. On that day, though Counsel (Mr. Meroka and Orayo) had been appointed to represent the accused, they were not present, and the plea was deferred to the 18<sup>th</sup> of September 2012. It appears that the court was not sitting then, and the matter was scheduled for mention on 11<sup>th</sup> October 2012. The accused took their plea on that day before the Hon. Mutende J, and they both denied committing the offence charged. The matter was then scheduled for hearing on 31<sup>st</sup> January 2013, and the accused were remanded in custody.
4. The case, however, did not proceed on the date scheduled as prosecution witnesses were not ready. Eventually, the case commenced before Hon. Ong'udi J on 28<sup>th</sup> May 2015. Hon. Ong'udi took the evidence of two witnesses. It turned out, however, that the Advocate appointed to represent the two accused, a Mr. Orayo, had some undisclosed issues with the Law Society of Kenya, so a new Advocate had to be appointed on 11<sup>th</sup> August 2015. Mr. Onganyi was then appointed to represent the accused.
5. He was, however, unable to proceed with the matter for health reasons, and yet another Advocate had to be appointed for the accused. This time, Mr. Maengwe was appointed in July of 2016. The accused elected to proceed from where the matter had reached when they appeared before me on 13<sup>th</sup> July 2016. Unfortunately for the accused, though Mr. Maengwe did take up the matter, he did not appear on several occasions when the matter was set for hearing. Eventually, the court appointed Mr. Davies Sang, to represent the accused. The case was finally concluded before me on 18<sup>th</sup> April 2018.
6. The deceased in this case was found hanging from the roof of his house while standing on a stool. He and the 1<sup>st</sup> accused had been living as husband and wife, but had separated. The 1<sup>st</sup> accused and the 2<sup>nd</sup> accused, who was an employee of the deceased and the 1<sup>st</sup> accused, were alleged to be lovers, and had conspired to kill the deceased. The prosecution alleged that rather than hang himself, the deceased had been strangled, and his death arranged to look like a suicide. The post mortem report produced in evidence by the prosecution showed that the deceased had died from manual strangulation.
7. The prosecution relied on the evidence of 7 witnesses. Dennis Gichana Marage was a neighbour of the deceased and the 1<sup>st</sup> accused. On 27<sup>th</sup> April 2012 at 10.00 p.m., when he was going home, he found the deceased standing near his gate. The deceased followed him into his house and started telling him about the trouble he was having with his wife, the 1<sup>st</sup> accused. The deceased, who was angry, informed him that he and the 1<sup>st</sup> accused had fought and the 1<sup>st</sup> accused had injured his genitals. The deceased had shown him his swollen and bruised genitals, and he had noted that the under-wear was soaked with blood. PW1 had comforted the deceased and they had had supper together,

then he had escorted him to his house.

8. At the deceased's house, they had found the 1<sup>st</sup> and 2<sup>nd</sup> accused watching television. The deceased had been upset at seeing the 2<sup>nd</sup> accused as he suspected that the 2<sup>nd</sup> accused was having an affair with the 1<sup>st</sup> accused. The deceased had wanted to attack the 2<sup>nd</sup> accused but the 1<sup>st</sup> accused had picked up the metal burner of a "gas meko" (cooker) and had hit the deceased on the head with it. PW1 had separated the 1<sup>st</sup> accused and the deceased and had then escorted the deceased to the kitchen where the children slept. He had left the deceased there and gone home.

9. Later at 2.00 a.m., the deceased had knocked on PW1's door and informed him that the 1<sup>st</sup> accused was sleeping with the 2<sup>nd</sup> accused in the deceased's house. They had gone to the deceased's house and the deceased had locked the door of his house from outside. PW1 had advised the deceased to inform his relatives.

10. On 28<sup>th</sup> April 2012, at 8.00 a.m., relatives from the 1<sup>st</sup> accused's and the deceased's side had been called, and when they came, the two accused persons had emerged from the house. The 1<sup>st</sup> accused had gone to a neighbour's house, while the 2<sup>nd</sup> accused had gone to work. The deceased had, upon seeing the accused persons, asked the 1<sup>st</sup> accused for money which he had given her for business. PW1 had then left for his work.

11. On returning home at 10 p.m. that night, he had again found the deceased waiting at his gate. They had sat in his house and talked, then he had escorted the deceased to his children's room.

12. Again, on 29<sup>th</sup> April 2012, at 10.00 p.m., the deceased was waiting at PW1's gate. He had asked him to escort him to the 1<sup>st</sup> accused to get his money. They had gone together but before reaching the 1<sup>st</sup> accused's house, had met the two accused persons at a corner. The witness could see them well as there was security light at the scene. PW1 testified that the 2<sup>nd</sup> accused was looking at him badly, and he and the deceased decided to enter his house. He, however, left the deceased outside and entered his house. He later heard the deceased and the 1<sup>st</sup> accused quarrelling and went and separated them. He then took the deceased with him to his house where they had supper, then escorted him to the children's room and left him there. On the way back to his house, he found the two accused persons standing at a corner but did not speak to them. He got a phone call the following day that the deceased had hanged himself.

13. Caroline Kagesi, PW2, told the court that on 29<sup>th</sup> April 2012 at 10.00 a.m., she had gone to the 1<sup>st</sup> accused's house in Majengo to borrow money from her. The 1<sup>st</sup> accused had no money to lend her, so she left. The 1<sup>st</sup> accused then followed her and informed her that her husband was unbearable and she was tired of his noise. According to PW2, the 1<sup>st</sup> accused stated that "since he was unbearable she would kill him." PW2 had advised her to give him money to go home, but the 1<sup>st</sup> accused had said she could not as she had given him money several times but he always returned, so she had to kill him. PW2 had thought that the 1<sup>st</sup> accused was joking.

14. According to PW2, the 1<sup>st</sup> accused was saying these things on a Friday, and on the following Monday, she had been called by her sister and had followed her to the 1<sup>st</sup> accused's house where she found the deceased hanging. She identified clothes which she said the deceased had been wearing on the Sunday before, which were different from what he was wearing when he was found hanging in his house.

15. PW3 was Anthony Buyabu, a friend of the deceased. He knew the deceased and the 1<sup>st</sup> accused. He alleged that as they were going to work, the deceased told him that he did not trust his wife, the 1<sup>st</sup> accused. The deceased had also told PW3 that he would go to his home in Moi's Bridge as his wife had said she would finish him. He stated in cross-examination that the 1<sup>st</sup> accused had leased a house and had left the deceased, and that the deceased used to go to sleep there by force.

16. Charles Wanyonyi, PW4, was also a friend of the deceased. He had spent the 27<sup>th</sup> of April 2012 with the deceased. The deceased had gone home at about 7.00 p.m. On 28<sup>th</sup> April 2012, at about 6.00 a.m., the deceased had gone to his place of work and told him to "go and see" for themselves. They had gone to the deceased's house, which the deceased had locked from outside, and found the 1<sup>st</sup> accused with another man. They had calmed down the deceased. On 29<sup>th</sup> April 2012, the deceased had gone to PW4 and borrowed Kshs 40/- which he wanted to use for fare to go to Moi's Bridge as he was being troubled by his wife. PW4 had heard the next day that the deceased was dead. He had gone to the scene and found him hanging from the roof, wearing clothes that were different from what he had worn the day before.

17. PW5, Musa Mudori Gibengi, was an uncle of the deceased. He had travelled from Kitale after he was informed by Anthony Buyabu (PW3) about the death of the deceased. He had identified the body of the deceased at the post mortem.

18. PC Titus Rukunga (PW6) had testified on behalf of Inspector Kiilu who had visited the scene of crime and taken photographs of the scene and the deceased. PC Rukunga produced various photographs from the crime scene and of the body of the deceased.

19. PW7 was the investigating officer in the matter IP Abdirahman Mohamed. He had received information that a person had been found hanging from the roof top of his house. He had found no sign of a struggle in the house, though he stated that the house was in a mess. The body had bruises on the head, neck and hands. It was standing flat on a stool. He had found out in the course of his investigation that the deceased was the husband of the 1<sup>st</sup> accused, and that they had been having a bad relationship.

20. Dr. Raymond Churyai, the last prosecution witness, had performed the post mortem on the body of the deceased. He had noted a scar on the left leg, a laceration on the right side of the head, and another on the temporal region above the left ear. He had a white sheet with blue

flowers round his neck, with a knot on the left side. The knot left a ligature mark around the neck in a horizontal manner. His hyoid bone was broken. Dr. Churyai formed the opinion that the deceased had died from manual strangulation.

21. When placed on their defence, the accused gave sworn evidence. The 1<sup>st</sup> accused stated that she used to live in Majengo and was a business woman selling clothes. She also had a roadside kiosk in which she had employed the 2<sup>nd</sup> accused. He had worked for her for 5 months.

22. She used to live with the deceased as husband and wife, but they were always quarrelling as the deceased used to drink a lot, and when drunk, he would quarrel and fight. She had therefore decided to leave and had found a house not far from where she used to live with the deceased.

23. With respect to the events preceding the death of the deceased, she stated that on 27<sup>th</sup> April 2012, which was a Friday, at around 7.00 p.m., she had arrived home from Kapsoit where she had been selling clothes. The 2<sup>nd</sup> accused had come to her house to give her the accounts for the day. While he was doing so, the deceased had come into her house as the door was open and found the 2<sup>nd</sup> accused giving her the day's account from the shop. He had demanded to know why the 2<sup>nd</sup> accused was still in the house at that hour and the 2<sup>nd</sup> accused had explained that the 2<sup>nd</sup> accused had just arrived to give her the account and would leave soon. The deceased, who was drunk, had started making noise then had left, locking the door from outside and locking the two accused persons inside, and had gone to his house. The 1<sup>st</sup> accused had then called a neighbour, a Mama Brenda, to come and open the house for them. She had done so and the 2<sup>nd</sup> accused had left.

24. The following day, 28<sup>th</sup> April 2012, she went on with her work as usual. On 30<sup>th</sup> April 2012, a Monday, while she was washing clothes at the plot she had rented, at around 7.00 a.m., she heard screams coming from plots lower down the road in Majengo. She went there with neighbours and found a crowd at the plot where the screams were coming from. She heard people saying that the deceased had killed himself. She went to the door to the deceased's house and found people peeping in through the window as the door was locked. She looked in through the window and saw that the deceased had hang himself using a bed sheet which was hung from the roof of the house.

25. The 1<sup>st</sup> accused had heard one of the neighbours, one Evans Nyangau, say he knew the deceased had hang himself as he had woken up to borrow a basin for washing clothes from the deceased but had found that the deceased had locked himself from the inside. The said Evans had knocked continuously but did not get an answer from the deceased, so he had decided to check through the window to see what was going on and had seen the deceased hanging from the roof.

26. The 1<sup>st</sup> accused testified that she had then gone to the Kericho Police Station with neighbours to report the incident and had returned to the scene with four officers from Kericho, one of whom was the OCS, Mohamed (PW7). That it was the OCS who broke the door to the deceased's house as it was still locked. The police had gone in and the 1<sup>st</sup> accused and neighbours had followed them in. It was her evidence that there was no disturbance in the house and no sign of a struggle. They had taken the deceased to the Kericho District Hospital mortuary with the investigating officer.

27. The 1<sup>st</sup> accused had then been asked to go to the police station to record a statement. She had been locked up by Mohamed when she went to record a statement, and had been in remand for six years, though she did not do anything. She denied that she had killed the deceased, stating that there was no need to commit the offence. She had parted from the deceased and started a new life.

28. The 2<sup>nd</sup> accused also gave a sworn statement. He stated that he lived at Michael, near the Teacher's College, before Brooke. In 2012, he used to work for the 1<sup>st</sup> accused and the deceased at their shop at Majengo. He had worked there for five months prior to his arrest.

29. On 27<sup>th</sup> April 2012, he had gone to the shop as usual and had worked till evening. He had closed the shop at 7.00 p.m. and taken the proceeds to the 1<sup>st</sup> accused. He used to give her the money, and she would pay him and he would leave. On the 27<sup>th</sup> of April 2012, he was in her house, which was a short distance from the shop, with her two children. At about 8.00 p.m., while they were doing the accounts, he heard the deceased, who was drunk, enter the house. He asked the 1<sup>st</sup> accused what the 2<sup>nd</sup> accused was doing in the house. The 1<sup>st</sup> accused told him that they were doing the accounts for the day. The deceased then left and locked the door from outside. The 1<sup>st</sup> and 2<sup>nd</sup> accused had finished the accounts, and the 1<sup>st</sup> accused had called a neighbour to open the door for them, and the 2<sup>nd</sup> accused had left.

30. The 2<sup>nd</sup> accused had gone to work as usual on 28<sup>th</sup> April 2012, and in the evening had gone to do the accounts with the 1<sup>st</sup> accused. He had followed a similar pattern on 29<sup>th</sup> April 2012- he had opened the shop, worked till evening, done the accounts with the 1<sup>st</sup> accused in the evening, then gone home.

31. On the Monday, 30<sup>th</sup> April 2012, he had woken up and opened the shop at around 7.00 a.m. At around 8.00 a.m., while at the shop, he had heard screaming from the residential plots. He had closed the shop and ran to where the screams were coming from. He had found a large crowd of people peeping in through a glass window which had a broken pane. This was the house where the deceased used to live. The door, which was wooden, had been locked from inside and so people could not get in. He too, peeped in and saw the deceased. The deceased had hanged himself with a bed sheet from the roof, and the 2<sup>nd</sup> accused could see the sheet round the neck.

32. The 2<sup>nd</sup> accused had gone back to the shop and continued with his work. He had heard later that the 1<sup>st</sup> accused had gone to the police and been arrested, and he was himself later arrested. He confirmed that he had worked for the 1<sup>st</sup> accused for 5 months; that she and the deceased were married; that the deceased used to drink a lot. He denied ever assisting the 1<sup>st</sup> accused to beat the deceased, or that he ever slept in her house, or that he and the 1<sup>st</sup> accused were lovers.

33. I have considered the prosecution case and the sworn testimony of the accused persons. I have also considered the submissions of the

prosecution and the defence made at the close of the prosecution case, which both Counsel elected to rely on. The accused are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The prosecution has a duty to prove, beyond reasonable doubt, that it was the accused who, with malice aforethought, caused the death of the deceased.

34. Both the prosecution and the defence agree that there is no direct evidence linking the two accused persons to the death of the deceased. As submitted by Ms. Keli, this is a case that is based purely on circumstantial evidence. There was no witness to the murder. The state argues that from the evidence, the inference of guilt cannot be pointed to any person other than the accused.

35. It is the law that a court can convict on circumstantial evidence. Such evidence, however, must point irresistibly to the accused as the perpetrator of the offence charged. In **R vs Kipkering arap Koske & Another 16 EACA 135** the court stated:

***“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”***

36. In its decision in **Sawe vs Republic [2003] KLR 364 at page 375, the Court of Appeal** stated as follows:

***“There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”***

37. In the earlier case of **Abanga alias Onyango v. Rep CR. A NO. 32 of 1990(UR)**, the Court of Appeal stated as follows:

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

38. In this case, the evidence of PW1, Dennis Gichana Marage, points to the troubled relationship between the 1<sup>st</sup> accused and the deceased. His evidence was that he had been with the deceased a few days prior to his death. He had seen the 1<sup>st</sup> accused hit the deceased. He alleged that he had seen the two accused persons lurking at a corner as he escorted the deceased home, and that the accused were eavesdropping on his conversation with the deceased.

39. The evidence of PW2 also went to show the bad relationship between the deceased and the 1<sup>st</sup> accused. PW2 alleged that she was a maternal cousin of the 1<sup>st</sup> accused. She had allegedly been informed by the 1<sup>st</sup> accused that the deceased was a bother, and that the 1<sup>st</sup> accused would kill him. He had been found dead a few days later. PW3 (Anthony Buyabu) and PW4 (Charles Wanyonyi) also testified to this bad relationship. The deceased had called PW4 and one Charlie to go and confirm that the two accused persons were having an affair. He had also borrowed Kshs 40/= from PW4 to travel to Kitale as he had been troubled by the 1<sup>st</sup> accused.

40. Does this evidence point irresistibly to the accused as the persons who, with malice aforethought, caused the death of the deceased? The 1<sup>st</sup> accused testified that she had a bad relationship with the deceased. He used to drink a lot, and would quarrel and fight with her when he was drunk. She had therefore left him and rented a house not too far from where he was living. From her testimony, she was living with her children. It is not clear which children PW1 was referring to when he says that he had taken the deceased to the children's room and left him with them there. There is some evidence, also, that the deceased was polygamous, so perhaps these children were children of the deceased with his first wife. So there is no dispute that the 1<sup>st</sup> accused and the deceased had a relationship, the relationship was troubled, the 1<sup>st</sup> accused had left, but the deceased appeared not to have accepted the separation.

41. The question is whether these facts point irresistibly to the accused as the perpetrators of the offence they are charged with. I watched their demeanour as they testified in their defence, and denied any romantic relationship between them, or having any part in the death of the deceased. To the question why they did not bring any witnesses to testify on their behalf, the 1<sup>st</sup> accused responded that the neighbours had moved away from the plot where they used to live. Given, however, that the accused had been in custody for 6 years, it is unlikely that they would have been able to find any of their neighbours to testify on their behalf.

42. So there is nothing, other than the fact that the 1<sup>st</sup> accused and the deceased were having a bad relationship, that points to the accused as the persons who caused the death of the deceased. No-one saw them on the night of his death with the deceased. There was no sign of a struggle in the house, though IP Mohamed mentioned, without elaboration, that the house was 'a mess'.

43. In addition, one little but significant item that casts doubt, in my mind, in the entire prosecution evidence is the testimony of the 1<sup>st</sup> accused that the house of the deceased had been locked from inside when he was found dead. This testimony in her defence was not challenged by the prosecution in cross-examination. According to the 1<sup>st</sup> accused, all the neighbours were peeping in at the deceased through a broken window pane. It was, according to the 1<sup>st</sup> accused, the Officer Commanding Station (PW7) who had broken the door to the deceased's house. If the door was locked from the inside, there was no sign of a struggle inside the house, and no evidence that someone got into the house, strangled the deceased, then left through a window, perhaps, after locking the door from inside, how could the accused have managed to get out of the deceased's house, if they indeed caused his death?

44. The evidence of the prosecution, in my view, is based purely on suspicion. Because the 1<sup>st</sup> accused had a bad romantic relationship with the deceased, she must have caused his death. It has been said, in countless decisions, that suspicion is not enough: the prosecution must

prove its case beyond reasonable doubt. In this regard, see **Sawe vs Republic (2003) KLR 364**.

45. In this case, the prosecution case against the accused has not been proved beyond reasonable doubt. It appears that the deceased did not hang himself, as the scene was arranged to look like, but was murdered by someone else who somehow got out of the house after committing the crime. The prosecution wants the court to accept its case that it was the accused in this case who murdered the deceased. Regrettably, I am unable to do this. There is, in my view, reasonable doubt raised by the accused's defence to justify their acquittal.

46. I therefore find and hold that the prosecution has failed to discharge the burden placed on it by law. They have not been able to show that the accused caused the death of the deceased with malice aforethought. The accused are hereby acquitted in accordance with section 215 of the Criminal Procedure Code.

**Dated Delivered and Signed at Kericho this 11<sup>th</sup> day of October 2018**

**MUMBI NGUGI**

**JUDGE**