



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 36 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RICHARD KIMUTAI CHOGE.....ACCUSED**

**JUDGMENT**

1. The accused, Richard Kimutai Choge, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information against him charged that on the night of 2<sup>nd</sup> and 3<sup>rd</sup> of August 2013, at Kambi Giza within Kapsoit in Kericho District, the accused murdered Daisy Cherotich Choge.

2. The prosecution case was that the accused and the deceased were cohabiting as husband and wife. They were living in a rental house at Kapsoit. On the night of 2<sup>nd</sup> August 2013, the accused started assaulting the deceased, who could be heard screaming. Police from the nearby Kapsoit Police Station were alerted by a neighbour of the accused and the deceased who heard the commotion. They went to the scene and found that the deceased had several wounds all over her body. The deceased was taken to Kericho District Hospital where she died the following day. The accused was arrested and charged with the offence he now faces.

3. The prosecution case was presented through 4 witnesses. Alice Kitur Chepkoech (PW1, Alice) a resident of Ngecherek in Chepkurbet, Kapsoit, was at home on 3<sup>rd</sup> August 2013, at 8.00. a.m. when she was called by a neighbour, Joyce Chebet, a relative of the accused, to assist to take the deceased to hospital. Daisy Cherotich was Alice's daughter. Joyce informed Alice that the deceased had been assaulted by the accused, with whom she was cohabiting in Kapsoit. Alice had never gone to the home the deceased shared with the accused as the accused had never paid dowry.

4. Alice and one Chepkorir, a sister of the deceased, went to Kapsoit where they were informed that the deceased had been taken to hospital. Alice had gone to Kericho District Hospital where she had seen the body of the deceased. The deceased had cut wounds in the head, hands, legs and a stab wound on her chest. She had been admitted at the hospital, but had died the following day. Alice had identified the body of the deceased for the doctor who performed the post mortem at the Kericho District Hospital.

5. Dr. Kibos Ezekiel (PW2), a doctor at the Kericho District Hospital, presented the post mortem report prepared by Dr. Ken Soy who had performed the post mortem on the deceased. The post mortem had been conducted on 7<sup>th</sup> August 2013. The report indicated that the body of the deceased had multiple cut wounds. One, which had been stitched, was above the right eye, another above the nasal bridge, also stitched, a third above the left eye, a fourth above the left parietal region, and yet another above the occiput (back of the head). All the cut wounds had been stitched.

6. The report further indicated that there were bruises on the neck on the left side, multiple bruises on the chest and back, and two cut wounds on the left leg. The deceased had haemorrhage on the occipital aspect of the brain with purulent material (material containing pus) and bruising on the brain. The cause of death, according to Dr. Soy, was intra-cranial haemorrhage (bleeding inside the cranium or skull) secondary to blunt force trauma to the head consistent with assault. The post mortem report dated 7<sup>th</sup> August 2013 was produced as Exhibit 1.

7. PW3, No. 75987 PC Zadock Sitati, was working at Kericho Police Station, Kapsoit Police Post, at the time of the incident. At about 8.00. a.m. on 3<sup>rd</sup> August 2013, he received a call from member of the public informing him that the deceased, Daisy Cherotich, had been injured by her husband during a quarrel at night. He had rushed to the scene at Kapsoit centre near Sky Bar. He had gone into the house where he had been directed and had found the woman lying on the floor in a pool of blood. She had been covered with a blanket. The woman was unconscious, while the accused was standing beside her.

8. PC had called fellow police officers who joined him under the command of Corporal Lumbasi. They had examined the woman who had wounds on her head and both hands. They had then taken her to Kericho District Hospital, and had arrested her husband, the accused, for interrogation.

9. According to PW3, the accused had narrated to him how he had suffered at the hands of the deceased. That he was on anti-retroviral medicine and he believed that the deceased, his wife, was the cause.
10. PW3 had visited the deceased in hospital on the 4<sup>th</sup> of August 2013. She had been able to communicate with him, although in a low tone. She had informed him that her husband, Richard Kimutai, had come home the previous day while drunk and had picked a quarrel with her. He had stabbed her several times on the body using a knife. She had cried for help and neighbours had responded, but the accused had locked her inside and the neighbours had feared rescuing her until she was unconscious.
11. PW3 had recorded a statement from the deceased. He had signed the statement, as had the deceased, though she was able to write with difficulty.
12. PC Sitati had then prepared to charge the accused with the offence of causing serious harm (sic). However, on 5<sup>th</sup> August 2013, while preparing to take the accused to court, he had received information that the deceased had passed away, and the matter had then been taken over by Corporal Lumbasi. The statement recorded by Sitati on 4<sup>th</sup> August 2013 from the deceased was produced as Exhibit 2, there being no objection from the defence.
13. PW4, No. 41025 Corporal William Lumbasi, the investigating officer, was at the Kapsoit Police Post on 3<sup>rd</sup> August 2013 when he was called at around 9.00 a.m. by his colleague (PW3). His colleague informed him that he was at a scene where there was a serious assault, with the victim lying in her house in a serious condition. He had gone to the scene at Kambi Giza estate within Kapsoit and found the victim covered with a blanket. He had seen an injury on her head, and she could not speak.
14. With the help of members of the public, they had taken her outside then put her in a vehicle and taken her to Kericho District Hospital for treatment. They had arrested the husband of the woman, who was standing at a verandah at the scene, and taken him to Kapsoit Police Post as they had been informed that he had fought with the deceased on the night of 2<sup>nd</sup> – 3<sup>rd</sup> August 2013.
15. On 5<sup>th</sup> August 2013, as the accused was being taken to court, PW4 had received information that the complainant, who had been admitted to hospital, had passed away. Subsequently, the accused had been charged with the present offence. PW4 had previously encountered the accused when he had been charged with assault of the deceased, whom the accused alleged had infected him with HIV.
16. When placed on his defence, the accused elected to give an unsworn statement and call no witnesses. He stated that on 3<sup>rd</sup> August 2013, he woke up in the morning at home and went to pluck tea, which he was plucking with his brothers. After that they had gone to Kapsoit centre where they were told that there was a child who had been beaten and injured. When he made inquiries, he was able to know who the child was as she had worked for him in 2010. He had gone with his brothers to the house where the child was living in Kapsoit centre, and on arrival, they had been told she had been taken to hospital.
17. They had found many people, including two police officers, at the child's house. He and his two brothers, Bernard Kipkorir Choge and Benjamin Langat had been arrested and taken to Kapsoit Police Post. His two brothers had been released on the third day, but he was not released but was brought to court and charged with a case of assault and later with the offence of murder.
18. According to the accused, at the time "this woman Daisy was working for me," there had been a fight and a customer had thrown a bottle which had hit Daisy on the cheek. Daisy's sister had reported him to the police and he was taken to court but the charges were later withdrawn after it was learnt that he was not the one who had injured Daisy.
19. In his submissions on behalf of the accused, Mr. Koske raised two issues on the basis of which he submitted that the prosecution had not proved its case against the accused beyond reasonable doubt. The first was whether the circumstantial evidence adduced by the prosecution formed a chain that was sufficient to lead to a finding that the accused was guilty of the offence of murder beyond reasonable doubt.
20. His submission was that the circumstantial evidence adduced by PW1, PW3 and PW4 cannot form a chain of evidence that links the accused to the death of the deceased. He observed that PW1's testimony was that she had been called by one Joyce and informed that the deceased had been assaulted. She had only reached the stage at Kapsoit, and had not gone to the scene of the crime. PW3 had visited the scene and found the deceased lying on the floor, with wounds on her hands and head. PW 4, according to Mr. Koske, had arrested the accused out of suspicion. He had failed to call essential witnesses who had heard the commotion between the accused and the deceased in the night. Counsel cited **Cr. App No. 84 of 2015 – Erick Odhiambo Okumu vs R** on the test that circumstantial evidence must pass to submit that the circumstantial evidence in this case does not meet that test.
21. The second argument raised for the accused related to the dying declaration as contained in the evidence of PW3, and the evidential value and weight of such a dying declaration. Counsel noted that PW3, PC Sitati, had testified that he had recorded the statement from the deceased on 4<sup>th</sup> August 2013 at around 10.00 a.m. Counsel submitted that the dying declaration is without evidential value or any weight. He submitted, first, that PW3 had admitted in cross-examination that the deceased had difficulties in communicating. Her hands had wounds so she was not able to write. He observed that the statement had not been signed or dated.
22. Counsel further submitted that it was doubtful that the statement was made when the deceased was alive. He notes that the post mortem report (exhibit 1) indicates the date and time of death of the deceased as 4.8.2013 at 2.00 a.m. In his view, it was impossible for PW3 to record the dying declaration from the deceased person at around 10.00 a.m. on 4.8.2013.
23. Mr. Koske further submitted that there was a variance in the date indicated in the charge sheet and the date the dying declaration was made. Counsel relied on the decision in **R vs Fredrick Indeché Asamani & Another (2018) eKLR** for the proposition that though a dying declaration is admissible in evidence, the court has to exercise the necessary caution in the reception of such declarations into evidence as it is generally unsafe to base a conviction solely on such declaration. It was his submission that in this case, if we can believe that there was a

dying declaration, there is no guarantee of its accuracy on whether the accused assaulted the deceased person. As the dying declaration is the only evidence produced by the prosecution to prove their case against the accused, there is insufficient evidence to prove the offence of murder beyond reasonable doubt, and the accused should, accordingly, be acquitted.

24. I have considered the prosecution evidence on record and the unsworn statement of the accused. The accused is charged with the offence of murder. In order to prove the case against him beyond reasonable doubt, the prosecution must prove the death of the deceased, that the accused caused the death of the deceased, and that he did so with malice aforethought as defined in section 206 of the Penal Code.

25. The evidence of PW2, Dr. Kibos Ezekiel, on the basis of the post mortem report prepared by Dr. Soy, is that the deceased died from bleeding inside the cranium or skull following blunt force trauma to the head consistent with assault. The deceased had severe injuries to the head and hands. The death of the deceased was caused by a person who assaulted her with such violence and ferocity that it can only be inferred that he intended to cause her death, or he knew that his action would probably cause the death or grievous harm to the deceased, or with indifference that his actions would cause her death or result in grievous harm to her.

26. The question to determine is whether the prosecution has adduced sufficient evidence to prove, beyond reasonable doubt, that it was the accused who, with malice aforethought, caused the death of the deceased. As submitted by Mr. Koske, the evidence before the court is predominantly circumstantial. No-one saw the accused attack the deceased and cause the grievous injuries to which she succumbed. Mention was made of some two persons who heard the commotion in the house that the deceased and the accused allegedly lived in, but these persons were not called as witnesses.

27. In the case of **Erick Odhiambo Okumu vs R (2015) eKLR** relied on by Counsel for the accused, the Court of Appeal stated as follows:

**“It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in Musili Tulo vs Republic (supra),:**

**“[C]ircumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”**

**But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In Abanga Alias Onyango vs Republic, Cr. App. No.32 OF 1990 this Court tabulated the conditions 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.”**

28. The Court in **Erick Odhiambo Okumu vs R** went on to cite various decisions with respect to what a court should consider before it convicts an accused person on the basis of circumstantial evidence:

**“Before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt. (See Teper vs R [1952] All ER 480 and Musoke vs R [1958] EA (715). in Dhalay Singh vs Republic, Cr. App. no. 10 of 1997 this Court reiterated this principle as follows:**

**“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”**

29. In this case, the evidence before the court that links the accused to the deceased came from PW1, the deceased’s mother, PW3, the first police officer to arrive at the scene of the crime, and PW4, the investigating officer. PW1’s evidence was that the deceased and the accused were living as husband and wife at Kapsoit. She had been called by one Joyce Chebet, a relative of the accused, to assist to take the deceased to hospital. The information from the said Joyce Chebet was that the deceased had been assaulted by the accused. PW1 did not reach the scene of crime.

30. PW3’s evidence placed the accused at the scene where the deceased was found, badly injured. PC Sitati had gone to the house where he had been directed and found the deceased, covered with a blanket, lying unconscious. The accused was in the same house, a single room, standing besides the deceased.

31. PW4, PC Lumbasi, also placed the accused at the scene of the crime. When PW3 called him and he went to the scene, he was informed that the husband of the injured woman, the deceased, was standing at a verandah, and he arrested him. There is thus, in my view, sufficient evidence to show that it was the accused who had attacked the deceased, with whom he was living as husband and wife, with a weapon that was never found, and caused her death. In my view, the inculpatory facts point to the guilt of the accused, and are incompatible with his innocence and incapable of explanation upon any other reasonable hypothesis than that of his guilt-see **Kipkering Arap Koske vs Rex (1949) 16 EACA 135**.

32. Then there is the dying declaration of the deceased, recorded in the statement of the deceased taken by PW3 on 4<sup>th</sup> August 2013, which the defence attacks as of no probative value. The law is that it is, as a general rule, unsafe to base a conviction solely on a dying declaration without corroboration. In its decision in **Aluta vs Republic [1985] KLR 543** at page 547, the Court of Appeal stated:

***“A trial judge should approach the evidence of the dying declaration with necessary circumspection. It is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. Okale & Others vs Republic [1965] EA 555.”***

33. I have considered the statement recorded by PW3 from the deceased. The statement has some writings at the back, which PW3 states were not there when he wrote the statement. In the statement, the deceased is alleged to have said that on the night of 2<sup>nd</sup> August 2013, the accused had come home and picked a quarrel with her, and had used a knife to cut her all over the body. She did not know what happened thereafter. She found herself in hospital with stiches all over her body.

34. Counsel for the accused submitted that this declaration did not accord with the charge sheet as PW3 testified that he took the statement on 4.8.2013 at 10.00 a.m. while the post mortem report indicates that the deceased died at 2,00 a.m. on the same day. However, I note that PW4 testified that on 5<sup>th</sup> August 2013, as he was preparing to charge the accused with assault, he was informed that the deceased had died, which suggests that she died in the morning of 5<sup>th</sup> August 2013. I note further that PW3 stated that he had gone to see the deceased and recorded the statement the day after she had been taken to hospital, which would be the 4<sup>th</sup> of August 2013, since she had been taken to hospital on 3<sup>rd</sup> August 2013. I am therefore satisfied that the deceased did make the dying declaration that it was her husband, the accused, who caused her the injuries that led to her death.

35. Taken together, the circumstantial evidence that the deceased and the accused were living as husband and wife, that she was assaulted in the night of 2<sup>nd</sup> and 3<sup>rd</sup> August 2013 in the house that she shared with the accused, that she told PW3 that it was the accused who had assaulted her, and that the accused was found standing beside the deceased, who was gravely injured, on the morning following the assault, 3<sup>rd</sup> August 2013, can only lead to the conclusion that it was the accused who caused the injuries that led to the death of the deceased.

36. In his defence, the accused does not directly deny assaulting the deceased. He speaks of hearing that a ‘child’ who had once worked for him had been beaten and injured, and that he was arrested, together with his brothers, when they went to the house in which the child was living. He also confirms, albeit indirectly, that he had faced previous charges in connection with an injury to the deceased, but which charges had been withdrawn.

37. I must observe that the prosecution could have done a much better job of investigating this matter and bringing witnesses to court who had heard the commotion between the accused and the deceased, such as the person who called PW3. However, taken together, the circumstantial evidence and the dying declaration of the deceased establish, beyond reasonable doubt, that it was the accused who, with malice aforethought, caused the death of the deceased.

38. There are no other co-existing circumstances which would weaken or destroy the inference of guilt. There was no evidence that someone else had been in the house in which the accused and the deceased were found on the morning of 3<sup>rd</sup> August 2013, and no evidence that someone else had entered the house and attacked the deceased.

39. In the circumstances, I find that the prosecution has established, beyond reasonable doubt, that it was the accused who, with malice aforethought, caused the death of the deceased. I accordingly proceed to convict him of the offence of murder contrary to section 203 as read with section 204 of the Penal Code in accordance with section 215 of the Criminal Procedure Code.

**Dated Delivered and Signed at Kericho this 21<sup>st</sup> day of November 2018**

**MUMBI NGUGI**

**JUDGE**

In the presence of:

Nelson Kenei – Court Assistant

Ms Keli – For Director of Public Prosecutions

Mr. Koske for the accused