REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 133 OF 2010

REPUBLIC.....STATE

VERSUS

KAREN CHEPKORIR KOECH.....ACCUSED

RULING

The accused **KAREN CHEPKORIR KOECH** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

> ***"On the 29th day of December, 2010 at Tachasis Village Kuresoi District within the Rift Valley Province murdered NEEMAH CHELANGAT"***

The accused entered a plea of **'Not Guilty'** to the charge. Her trial commenced on 4/7/2011 before **Hon. Justice Anyara Emukule** (retired). The Honourable Judge heard the first three (3) prosecution witnesses. Following his transfer to the Mombasa High Court I took over the case and heard the remaining four (4) witnesses. A total of seven (7) witnesses testified in the case.

PW1 N K a child of 15 years told the court that on 29/12/2010 at about noon he was on his way back home with his sister **'V'** and the deceased. **'Neemah Chelagat'**. The accused came up to them and threatened to stab the deceased. The accused then pulled out a knife and stabbed the deceased.

PW2 STEPHEN KIPKURUI told the court that on the material date he was at his home building a fence. He heard screams and went to check. He found the deceased had been stabbed. He removed the knife from her body and got a motor bike to rush her to hospital. The deceased unfortunately died on the way to hospital. The matter was reported to police who came to the scene and removed the body.

PW3 DAVID KIPLAGAT told the court that he is a farmer in the area. He confirms to the court the accused was his former girlfriend whilst the deceased was his lover whom people referred to as his wife. He denies having been married to either woman.

The accused was arrested and placed in custody. Upon conclusion of police investigations she was taken to court and charged with this offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto her defence. The accused opted to make an unsworn statement in which she denied having stabbed and killed the deceased.

The prosecution having closed its case this court must now analyse the evidence on record and make a determination as to whether the charge of murder has been proved to the standard required in law – that is beyond reasonable doubt.

The charge of murder is defined as follows, by Section 203 of the Penal Code, Cap 63 Laws of Kenya

> ***"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder".***

The prosecution must therefore adduce evidence sufficient to prove beyond reasonable doubt the following critical ingredients of the offence of murder

i. Proof of the fact as well as the cause of death of the deceased.

ii. Proof that the deceased met his death due to an unlawful act or omission on the part of the accused – this forms the ***actus reus*** for the offence of murder.

iii. Proof that said unlawful act or omission was committed with malice aforethought – this forms the ***mens rea*** of the offence.

Regarding the fact of the deceased's death there can be no doubt. **PW1** told the court that the deceased was stabbed in his presence. **PW2** said he rushed to the scene and found the deceased lying on the ground with a knife lodged in her body. **PW4 BENSON KIPKOECH TANUI** told the court that he was the maternal uncle to the deceased. He testified that on 3/1/2010 he went to the mortuary at Molo District Hospital where he identified the body of his niece to the doctor and witnessed the autopsy. All these witnesses who knew the deceased well identify her as **'Neemah Chelangat'.**

Evidence on the cause of death was tendered by **PW6 DR. TITUS NGULUNGU** a consultant pathologist based at the Nakuru PGH. **PW6** told the court that it was he who conducted the autopsy on the body of the deceased. Upon examination of the body **PW6** told the court that he noted a stab wound to the back of the chest. Upon internal examination he noted the following

- Incision wound on upper lobe of left lung
- Incision wound on the heart
- Clotted blood in the thorax and sac of the heart

PW6 opined that the cause of death was **'lung and heart injury with massive blood loss caused by a single stab wound to the back of the chest'**. The doctor filled and signed the post-mortem report which he produced as an exhibit before the court **P.exb 2**. **PW6** also collected a blood sample from the body of the deceased which he handed over to the police for further analysis.

The evidence of the pathologist was expert medical opinion evidence. It was neither challenged nor controverted by the defence. I find as a fact that the deceased met her untimely death as the result of being stabbed in the back.

Having satisfactorily proved the fact and cause of death, the prosecution must go further and prove that it was the accused who unlawfully stabbed the deceased and caused her death.

The only eyewitness to the actual stabbing of the deceased was **PW1**. He testified that he was walking home with his sister **'V'** and the deceased, when the accused came up to them. The accused declared that she would stab the deceased and then proceeded to do exactly that – she pulled out a knife and stabbed the deceased.

I am mindful of the fact that there is only one identifying witness being **PW1**. **PW2** did not witness the actual stabbing as he arrived on the scene after the fact. In the case of **MAITANYI Vs REPUBLIC [1986], 198** it was held that-

"1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision; it must do so when the evidence is being considered and before the decision is made".

In keeping with the holding in the **Maitanyi Case,** I do hereby warn myself of the dangers of relying on the evidence of a single identifying witness.

The witness **PW1** was a child aged 15 years. He was taken through a ***'voire dire'*** examination. He told the court that he was a class seven student. The court after examining him found that the boy understood the nature of an oath, and was therefore capable of giving sworn evidence.

The incident according to the witnesses occurred at about 12.00 noon. It was broad daylight and visibility was good. **PW1** was in close proximity with the accused as she came up to where he and the deceased were. The accused spoke to the trio when she threatened to stab the deceased and the incident took some time. Thus **PW1** caught much more than a fleeting glimpse of her. The witness therefore had ample time ad opportunity to see the accused well.

PW1 told the court that the accused was a person whom he knew before and in his evidence he refers to the accused by her given name **'Karen' PW1** stated

"We saw Karen come with a knife. I had known her for a long time. She came to us and told Neemah, I would stab you. She stabbed the deceased"

Therefore aside from visual identification the witness was able to recognize the accused whom he knew well. In **ANJONONI and OTHERS Vs REPUBLIC [1980] KLR, 59** the Court of Appeal held that

"Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other".

PW1 was able to identify the accused because he knew her before. She was not a stranger to him.

Having interrogated the identification of the accused by **PW1** I am satisfied that it passes muster. The witness had ample time and opportunity to see the accused well. **PW1** though a child gave clear and cogent evidence and he remained unshaken under cross-examination by counsel. I am satisfied that he was a truthful witness. I find that there has been a clear positive and reliable identification of the accused as the person who stabbed and killed the deceased.

The knife used to stab accused was recovered at the scene. **PW2** told the court that when he arrived he found the knife still lodged in the body of the deceased and it was he who pulled it out. Both **PW1** and **PW2** identified that blood-stained knife which was produced in court as an exhibit **Pexb 1**. The knife was taken to the Government Chemist for analysis.

PW7 LAWRENCE KINYUA an analyst at the Government Chemist laboratory told the court that the conducted a comparison of the blood stains on the knife with the blood sample taken from the deceased. He found that the DNA profile generated from the blood stains on the knife matched the DNA profile of the blood sample taken from the accused. **PW7** prepared and signed his report dated 29/11/2013 which he

produced as an exhibit **P. Exb 3**. This evidence provides incontrovertible proof that this was the very knife used to stab the deceased.

In her defence the accused denied that it was she who stabbed the deceased. The accused told the court that on the material day at about 11.30 am she was coming from her shamba when she found the deceased lying on the road. The accused claims that she tried to assist the deceased and lifted her up and noticed a knife lodged in her back. The accused goes on to state that she removed the knife and people came and found her holding the bloody knife. The crowd concluded that it was she who had stabbed the deceased.

The accused defence does not hold water for various reasons. Firstly there was no evidence that the accused was found at the scene holding a bloody knife. Indeed the evidence is that the accused was not arrested holding the knife. **PW2** told the court that it was he who removed the knife from the body of the deceased. The knife was found lying next to the deceased. At no time during cross-examination was the accused's version of events put to any of the witnesses.

Secondly the accused makes no mention of **PW1** having been present at the scene. There was no reason for **PW1** to lie about his presence at the scene and the events that he witnessed. There was no suggestion or proof that **PW1** had any grudge against the accused that would cause him to lie against her. Again this version was not put to **PW1** when he was being cross-examined by defence counsel.

On the whole I find the accused's defence to be a concocted afterthought and I do dismiss it as such.

The final ingredient required to prove the charge of murder is the ***'mens rea'***. In law this is described as malice aforethought. It must be shown that in stabbing the deceased as she did, the accused has a pre-meditated intention to kill or grievously harm the deceased. Section 206 of the Penal Code defines malice aforethought in the following terms

> ***"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. ....."***

The accused here launched an unprovoked attack on the deceased who was unnamed at the time. There can be no doubt that in stabbing the deceased in the back as she did the accused fully intended to cause death or grievous bodily harm to the deceased.

Although it is not essential that motive be proved the evidence of **PW3** makes clear the motive the accused had in acting as she did. This was a case of a love triangle. **PW3** confirmed to the court that he had been involved in a love affair with accused and was at the time romantically involved with the deceased. It is clear that the accused acted out of jealousy. Probably feel cing angry at having been dumped by **PW3** in favour of the deceased, the accused vented this anger on the deceased with very tragic consequences. I am satisfied that malice aforethought has been proved.

Finally I am satisfied that this charge of murder has been proved beyond reasonable doubt. I enter a verdict of **'guilty'** and I convict the accused as charged.

Dated and Delivered in Nakuru this 20th day of March, 2017.

Mr. Ooga holding brief for Ms Kerubo

Mr. Motende for State

Maureen A. Odero

Judge