



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CRIMINAL CASE (MURDER) NO. 16 OF 2015**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**DAHN LETEIPA KASURA.....ACCUSED**

**J U D G M E N T**

1. The Accused **Dahn Leteipa Kasura**, is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 23<sup>rd</sup> December, 2014 at Kisiriri area within Narok North Sub-Country, he murdered **Grace Cherotich Karia**. The prosecution called ten witnesses.
2. The prosecution case was that **Grace Cherotich Karia** (the deceased) was the wife to **David Koiyaki Karia (PW1)**, and mother of **Florence Karia (PW4)**. Seemingly, **PW1** had two homesteads, in Narok: one at Empopongi and another at Kisiriri. The deceased normally resided at Kisiriri.
3. A few days before her death, the deceased had visited **PW4** in Narok town, leaving on 23/12/2014 ostensibly for Kisiriri. According to eye witnesses **Samuel Lesalon Oloitiki (PW3)** and **George Sankale Kidiis (PW8)** at about 7.30pm on that date, they witnessed the Accused assaulting the deceased with a stick. That the assault occurred on a road close to the home of the Accused within Kisiriri.
4. The deceased never got home and her family began searching for her. On 25/12/2014 her near-naked body was found on a wheat farm where it had seemingly been dragged. An assortment of the deceased's clothing, including rubber shoes were strewn at different points starting from the road into the wheat farm. She was only covered by her innerwear and had evidence of injuries to the head. Police were called to the scene.
5. **CPL Paul Kiilu (PW9)** took photographs of the body at the scene before the body was removed. On 29<sup>th</sup> December 2014, **Dr. Titus Ngulungu (PW6)** conducted the post mortem examination on the deceased. His conclusion was that death was due to massive blood loss secondary to multiple sharp injuries to the scalp.
6. The Accused elected to give a sworn statement. He called one witness, his mother, **Grace Wairimu Kasura (DW1)**. The defence case is that the Accused ordinarily resided at Oltetia Primary School some 40 kilometres from Oloropil, near Njoro. On 24/12/2014 the Accused went to Narok town in the day as he planned to spend the night there in order to leave for Nairobi early on the next day. He spent the night at a lodging in Narok, travelled to Nairobi for his shopping and returning to Narok later on 24<sup>th</sup> December, 2014. He again spent the night in a lodging and proceeded back to Oltetia Primary School on the following day. He was summoned by police early in March 2015 and denied any involvement in the offence.

7. His mother **DW1** denied allegations by **PW3** and **PW8** that on the material night she had come to the scene of the alleged assault and pleaded with her son (Accused) to stop assaulting the deceased. She stated that on the material night she was in her house watching television. According to the defence **PW3** and **PW8** have grudges, for different reasons against the Accused, and therefore gave false testimonies against him. Submissions were made by the defence at the close of the defence case.

8. I have considered the evidence on record as well as the submissions made. There is no dispute regarding the fact and cause of the death of the deceased herein. Neither is it disputed that her semi-naked body was found on a wheat farm within Kisiriri area on 25<sup>th</sup> December 2014. And clearly whoever inflicted the injuries leading to death intended to cause her grievous harm if not to kill her. The real dispute in this case relates to the identity of the person who inflicted on the deceased the injuries leading to her death.

9. The key prosecution witnesses were **PW3** and **PW8** who claimed to have witnessed a sustained assault on the deceased by the Accused on the evening on 23/12/2014. Both witnesses stated that the incident in question occurred at 7.30pm on a road within Kisiriri.

10. **PW3's** narration was as follows:-

**“.....[A]t 7.30pm I was leaving Kisiriri town centre headed home. I heard a lady crying by roadside “Mwalimu unaniua.” We used to call the lady “Cha Marinda” or “Mama Shiru”. Mwalimu is the nickname of the accused. They were at the gate of the compound of the accused.**

**The accused was hitting the lady with a stick. A torch appeared from home of accused. It was mum of the accused. She flashed torch and said “Dahn why are you attacking the lady”. But accused said: “Let me finish her.” Dahn’s mother tried to pull the son away. He was hitting her on the head. The accused had blood on his hands when his mother shone the torch.**

**Eventually, the lady dragged her son away and left the lady. She was badly off. I decided to go home. I hoped the mother of Dahn (Accused) would take her to hospital.”**

11. This witness was subjected to lengthy cross-examination. He replied, interalia that:

**“It was 7.30pm. Yes I first heard voices of both people – assailant and deceased. Then I confirmed when Accused’s mother came and shone a torch on them to try and rescue the woman..... Accused was not speaking but his name was being called. I have sat with Accused. I knew him all along. Before mother came the Accused did not speak but was busy hitting the deceased. The darkness was not pitch-dark. I was right close..... I was very close to them. It was not very dark. I stood there about 15 minutes before his mother came to intervene. I was standing on a ledge about 2 ½ metres away. Yes I am a Nyumba Kumi (security) elder..... I decided not to engage with the two and was considering matter when the mother came. I did not intervene before mother of the Accused came.....I did not make any report to police on the assault I had witnessed despite being elder. When body was found I went and told police what I had seen.”**

12. Apart from the obvious challenge presented by the fact that the described incident occurred in the night, **PW3** was unable to give a sound reason why, if he witnessed the assault on the deceased, he neither intervened in the 15 minutes he watched the assault, nor subsequently reported to any person in authority. He admitted that he was a local elder responsible for security matters (Nyumba Kumi) and claimed that the injuries were inflicted with a piece of wood directed at the head of the deceased, that the Accused’s hands appeared bloody.

13. Evidently, the deceased was not well regarded in the village due to her excessive drinking and quarrelsome conduct. Even then, that a witness could watch a brutal assault on such a vulnerable woman

by a young man but feel no need to intervene, sounds remarkable. PW3 may or may not have had a strained relationship with the Accused, but his testimony raises several questions.

14. The next eye witness PW8 also claimed that he was headed home on the material night when he witnessed the assault. He stated in his evidence in chief that :

**“.....I was going home from Kisiriri centre with one Ngatia. It was about 7.30pm. Close to the accused home (1 Kilometre from centre) we heard screaming of a woman. We drew close and my colleague became fearful. I noted “Cha Marinda” nick name of deceased who was being assaulted. She was saying: *Dan ni nini unaniuliza?*”**

**Dan was holding a stick with which he beat lady with. He also kicked her. I noted it was Dan beating the lady who lay down on the ground. The mother of the accused came with a torch and intervened. I decided to go away home..... The assault was taking place about 10 metres away. It was not very dark. I saw clearly. It took almost 10 minutes for Mama Dan (Accused’s mother) to come. She came with a torch which she flashed asking Dan: “What are you asking this lady?” Dan responded in English to his mother.....Scene of the assault is on road next to the homestead of Accused.....”**

15. During cross-examination **PW8** stated that although it was 7.30pm it was not very dark and he could see clearly. Like **PW3** he admitted that he did not intervene to stop the assault or lodge a report to authorities despite the assault lasting 10 minutes in his presence. He agreed too, that he had a past disagreement with the Accused.

16. The visual and voice identification evidence by **PW3** and **PW8** requires close scrutiny. In the case of **Wamunga -Vs- Republic, [1989] KLR 424** the Court of Appeal exhorted:

***“Where the only evidence against a defendant is evidence of identification on recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that circumstances of identification were favourable and free from possibility of error before court can safely make it a basis of a conviction.”***

17. In its more recent decision in **Joseph Muchangi Nyaga & Another -Vs- Republic [2013] eKLR** the court repeated the exhortation, stating inter alia that:

***14: “Evidence of visual identification should always be approached with great care and caution (see Waithaka Chege -Vs- Republic [1979] KLR 271). Greater care should be exercised where the conditions for a favorable identification are poor. (Gikonyo Karume & Another -Vs- Republic [1980] KLR 23). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See Abdalla Bin Wendo & Another -Vs- Republic (1953) 20 EACA 166; Wamunga -Vs- Republic [1989] KLR 42; and Maitanyi -Vs- Republic [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him...”***

18. Clearly, the conditions obtaining at the time of the incident allegedly witnessed by **PW3** and **PW8** were not favourable to positive identification of the two subjects mentioned or visibility regarding what was going on. Regarding the latter, it is notable that while both PW3 and PW8 asserted that the assault weapon was a stick or piece of wood, the post mortem examination revealed that the deceased had sustained sharp cuts to the scalp with massive blood loss.

19. There was admittedly, no real source of light before the alleged appearance of the Accused’s mother with a torch. It is true that the witnesses were well known to the deceased and the Accused, but it is unlikely that at 7.30pm, **PW3** and **PW8** could identify him without light at a distance of about 2 ½ metres and 10 metres, respectively. Evidently remaining at the same distance, the witnesses claim to have seen

the mother of the Accused come to the scene with a torch. For PW3, the light confirmed for him the identities of the people in the incident, so clearly as to see blood in the hands of the Accused. He did not state how close the Accused's mother came to the scene or how bright the torch was and its proximity in relation to the Accused person. Ditto **PW8**.

20. The Accused's mother testifying as a defence witness denied having witnessed the assault incident, asserting that she was in her house on the material night watching television, hence putting to doubt the only possible chance that the witnesses saw the Accused in the light of her torch. In addition to the evidence by **DW1**, it is notable that **PW3** and **PW8** who from their testimony must have witnessed the same incident simultaneously, were unable to see each other, if present at the scene.

21. **PW3** did not mention the presence of **PW8** but the latter clearly denied having seen **PW3** at the scene at the material time. Secondly, even as news of the disappearance of the deceased spread within Kisiriri, neither **PW3** nor **PW8** volunteered information of what they claim to have witnessed on the material night even to fellow elders including **Peter Odedia Keleli (PW2)** and **Julius Olonana (PW5)**. They only recorded statements after the body was discovered on 25<sup>th</sup> December, 2014,

22. Not only is the identification evidence by PW3 and PW8 doubtful, in the circumstances, but also their claims to have identified the voices of the Accused, deceased and Accused's mother are equally challenged. Significantly, while PW3 said the deceased referred to the Accused as "*Mwalimu*" which the witness understood to refer to the Accused, PW8 said she called him by his name "Dan".

23. Regarding voice recognition, the Court of Appeal observed in **Karani –Vs- Republic [1985] KLR 290** that:-

**“Identification by voice nearly always amounts to identification by recognition. Yet as in other cases, care has to be taken to ensure that the voice was that of the Accused, that the Complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring sate identification.”**

24. Possibly, the witnesses were familiar with the voice of the Accused and the deceased in light of the fact that they had previously interacted as residents of Kisiriri. However, this evidence too must be viewed within the context of the entire testimony of the witnesses. To this court, the admitted conduct of both **PW3** and **PW8** speaks louder than their words.

25. Here were two men, allegedly drawn to a scene by the cry for help by an old drunken woman who is known to them. They watch her brutalized by a man equally known to them for well over 15 minutes, do nothing and eventually go away. They do not report to any authority including **Julius Olonana (PW5)** the local chair of Nyumba Kumi, or the police officer identified as 'Nick' and with whom **PW3** was seemingly on phone contact, even after news of the woman's disappearance was received in the village. This evidence sounded more incredible in light of **DW1's** testimony.

26. The Accused had no duty to prove his *alibi* defence (**See Osiwa –Vs- Republic [1989] KLR 469**). The onus lay on the prosecution to establish by water tight identification evidence that the Accused committed the unlawful act leading to the death of the deceased. Reviewing all the evidence placed before me, I am not satisfied that the prosecution has successfully discharged that burden in this case.

27. It would seem that other suspects, including one **Meeli**, a brother to **Peter Odedia Keleli (PW2)** and one **Mapengo Kasi** had been implicated in the murder. Inexplicably, these persons were not pursued by police even though, with regard to **Meeli** there was established to have been a serious disagreement with the deceased some days before her death. **PW4** was alarmed enough by the incident to call her mother warning her to avoid "those people" who had, after the incident threatened to harm the deceased.

28. Evidently, the body of the deceased was found in a wheat farm a distance from the Accused's home. While **PW1** stated that the first set of the deceased's clothes were found on the road close to the Accused's home, there is no firm connection between the presence of the body in the wheat farm and the

Accused. Possibly, the Accused became a suspect for the very reason given by **PW1**. Whatever the case, the prosecution case as presented was shaky and does not rise up to the threshold of proof beyond reasonable doubt. I therefore find the Accused not guilty as charged and acquit him under Section 322 (1) of the Criminal Procedure Code.

Delivered and signed in Naivasha this **14<sup>th</sup>** day of **July, 2016**.

In the presence of:-

For the DPP : Mr. Koima

For the Accused : Mr. Waigwa

Accused : Present

Court Assistant : Barasa

**C. MEOLI**

**JUDGE**