REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE (MURDER) NO. 16 OF 2011

REPUBLIC……PROSECUTOR

-VERSUS-

JOSEPH NAMAYI……ACCUSED

J U D G M E N T

1. The accused person was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge state that on 21st April, 2011 at Kisumu Ndogo area, Malindi the accused murdered Beatrice Mbura. The accused denied the charge. He was represented initially by Miss Ochieng, and later by Mr. Nyakoe.

2. The prosecution case is as follows. In the months preceding her death, Beatrice Mbura, age 26 years was cohabiting with accused at a place called Kisumu Ndogo. Beatrice was previously married or cohabiting with one Sammy Kalama with whom she had one child. Upon separation, she had joined the accused in his single room rented from one Asha Hamisi, (PW1).

3. On the night of the 19th and 20th April, 2011 neighbours witnessed a prolonged quarrel between the accused and the deceased, accompanied by commotion in the accused's room.

   One of the neighbours, a fellow tenant, Samuel Nguma (PW2) complained about the night disturbance to PW1. When PW1 confronted the accused he retorted that he was up to his own business and offered to move out in two days.

4. On the night of 20th and 21st April, 2011, PW2 while in his room heard the main gate click open at about 1.00am. When he got out to inquire, he found the accused carrying the unconscious deceased. The accused told PW2 that the deceased had taken strong drugs – flaggil – and that he was taking her to hospital. PW2 accompanied the accused to a local clinic run by a Dr. Maurice who was not available. The accused dismissed PW2 who went back home.

5. Not long afterwards the accused knocked on PW2's window requesting him to open the gate to let him in. The accused then informed PW1 and PW2 that the wife was admitted in hospital and he would be headed there. He showered and slept at 3.00am.

6. Early on 21/4/2011 the accused called Francis Mbura (PW4) who is father to the deceased. He informed him that the deceased had been assaulted by her former lover Sammy on the previous day and that she returned to his house where the couple had supper, before she collapsed and died in the night, after complaining of an illness. At 9.00am the accused visited the home of an uncle/father of the deceased Veneslas Mwafondo (PW7) and made to him a similar report.

He also made a report to the police. He was placed in custody. CPL Weldon Koross the investigating officer (PW10) visited the residence in the first instance and also observed the injuries on the body of the deceased at the mortuary.

7. A post mortem conducted by Dr. Kaudia 17 hours after the death noted bruises and laceration on the chest and was inconclusive on the cause of death. The doctor recommended further examination by a pathologist to rule out poisoning. A further post mortem was carried out by Dr. Ngare Mbuuko, a pathologist and forensic expert, on 29/4/2011. Apart from confirming the torso bruises and lacerations recorded in first postmortem, the pathologist noted contusion (bruises) on the scalp but found the brain to be normal. Internal organs of the deceased including the stomach contents, one kidney and piece of liver were removed as samples.

8. Meanwhile on 28/4/2011 the investigating officer returned to the house of the accused and upon conducting a search retrieved a glass bottle containing a black substance. This substance and the organs of deceased were taken by PW10 to the Government Chemist for analysis. John Njenga, the Government Chemist testified as PW9. He has over 20 years experience in analytical work at the Government Chemist. Upon examining the samples, he found that the stomach contents and the black paste recovered from the accused's room contained a highly toxic pesticide by the name rotenone.

He prepared a report produced as Exhibit 3. The accused was eventually charged.

9. In his sworn defence statement the accused stated that he resided at Kisumu Ndogo with his "wife" the deceased in the material period. On the night of 19/4/2011 the deceased reported to him that she had earlier in the day met with her estranged husband one Samuel Tokali who confronted her about a complaint she had allegedly made to the Children's Officer about their child, and that Samuel assaulted the deceased. That she was unable to reach him (accused) or her parents to report the assault but had reported to one PC Carlos of Malindi Police Station vide OB number 69 of 15th November 2010 (D. Exhibit 1). It is not clear whether it is on the same night the couple allegedly reported to PC Opiyo who allegedly made an OB entry promising to issue a P3 form later. But upon returning on 20th April 2011 the couple was advised to return on 31st. An attempt on 20/4/2011 to report to the uncle of the deceased was unsuccessful as he was away.

10. Thus at 11.00am on 20/4/2011 the accused left for Mombasa to seek time off in order to resolve the matter. While in Mombasa he got a call from the deceased at 5.00pm who he informed him that due to harassment by Samuel she had depressive episodes. The accused took a taxi and travelled to Malindi, arriving at 11.00pm. She said she was unwell, was in a bad state and had taken pain killers. With PW2 the accused took the deceased for first aid to Imani Clinic hoping to move her later to Malindi hospital. She died at about 1.00am. He went back to report to PC Opiyo at the police station. PC Opiyo allegedly ordered him to take the body to the mortuary, which he did.

11. On the next day at 7.00am he notified PW4 and also went to the home of the deceased's uncle. He returned to the police station at 9.30am and that is when the OCS ordered one PC Carlos to book his report being OB number 23 of 21st April 2011 (D. Exhibit 2). He was placed in custody. He said he was planning to wed the deceased and denied he murdered her.

12. Several basic facts are not in dispute. These include the fact that the accused was in the material period cohabiting with the deceased at Kisumu Ndogo, Malindi. They occupied a single room rented from PW1. There were other residents on the compound including PW2. There is no dispute that the deceased, prior to commencing her relationship with the accused had broken off a relationship with one Samuel Kalama or Sammy Tokali. Out of that relationship a child had been born to the couple. It is further not disputed that on the night of 20th and 21st April 2011 both the deceased and the accused were in their room.

13. That further, arising from some medical emergency whose cause is disputed, the accused took the

deceased from the home and that she eventually died.

The body was taken to the mortuary and subsequently the accused relayed news of her death to her family. The body was subjected to post mortem examination thereafter. There are two key issues for determination namely:-

i. What was the cause of death of Beatrice Mbura.
ii. Whether the accused caused the said death and in what manner.

14. Regarding both questions all the relevant evidence is both direct and in most respects circumstantial. In analyzing this evidence the court is alive to the dictum in **R. -Vs- Kipkering Arap Koskei (1949) 16EACA**, **135** that:-

> **"……..In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."**

And in **Simon Musoke -Vs- Uganda (1958) EA 715,** where the Court of Appeal quoted the decision of the Privy Council in **Teper –Vs- Reginam (2) (1952) AC 480** as follows:-

> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."**

15. On the question relating to the cause of the death, there are firstly, two medical reports in the form of post mortem reports. The first post mortem examination was conducted 17 hours since death. Noting only some chest lacerations and bruises, the initial doctor could not ascertain the cause of death. She recommended that a further examination be carried out by a pathologist "to rule out poisoning". This post mortem was carried out on 21/4/2011 at 6.10pm. Apart from the lacerations and bruises there were no fractures or other injuries noted, hence, it would seem the recommendation.

16. The second post mortem examination was conducted on 29/4/2011 at 12.00 noon – 8 days since death. Lacerations and bruises on the chest and left arm were noted. Also noted was a contusion (bruise) on the scalp. Similarly this examination could not immediately assist to ascertain the cause of death, the pathologist indicating that "however foul play is not excluded."

17. On the basis of these findings several specimens were removed from the body for further examination, namely, stomach and contents, one kidney and piece of liver. It is clear from these two reports that the bruises and laceration on the deceased were not considered to be related to her death.

18. The report that solved the puzzle raised by the post mortems is the one done by Government Chemist on the extracted samples.

The analyst who examined the samples found a toxic pesticide – rotenone – in the stomach. He testified that the pesticide is lethal at a 300gm dose. The same pesticide was found in the bottle – marked "A" which was retrieved by the investigating officer (PW10) from the house of the accused, a day before the post mortem.

19. The court noted two anomalies regarding this evidence. First, PW10 did not produce that bottle before this court, or photograph thereof. Secondly, in light of the fact that the 2nd post mortem was conducted on 29/4/2011 at noon, and the poison bottle allegedly retrieved by PW10 on

28/4/2011, it is unlikely, as the exhibit memo form (Exh. 4) and Government Chemist report (Exh. 3) suggests, that the body samples and pesticide bottle were received by the Government Chemist on 28/4/2011.

20. More likely the exhibits were received on 29/4/2011 upon extraction of the organ samples, which at any rate could not be kept without proper preservation. With regard to the failure to produce the pesticide bottle, or photograph, it may well be an omission. However, there is no doubt from the evidence by the analyst that he received and examined the glass bottle containing the pesticide. In the same way the court must accept the evidence of the Government Chemist that he received stomach and contents, liver and kidney which he subsequently examined, without the benefit of seeing the body samples or photographs thereof.
21. Regarding the latter, poisoning and or foul play were already suspected in the first two post mortems conducted as injuries on the deceased did not justify as cause of death. Hence even the presence of the pesticide in the stomach alone, without the evidence of recovery of glass bottle is unchallenged evidence that the death of Beatrice Mbura was not from natural causes.

22. Indeed, at some point in his defence the accused appeared to suggest that the deceased was so distressed and or depressed by "harassment" at the hands of her former husband/boyfriend that she likely ingested the pesticide. I will be saying more about the alleged harassment and assault on the deceased by the said estranged lover. Suffice to say, that on the medical evidence tendered, there can be no doubt that the deceased met her death through poisoning resulting from ingestion of the pesticide rotenone.

23. Consequently the question is whether the deceased administered the drug to herself out of frustration or that she was poisoned by the accused? Unfortunately, dead (wo) men tell no tales. Because the accused was the last person to be with the deceased in the hours preceding her death, most of the witnesses who gave evidence merely restated to the court what he told them. The common thread running through this narrative is that the deceased was assaulted on the 19th of April 2011 by her estranged lover/husband Sammy Kalama.

That she came home to the accused and that the matter was reported to the police on the same date.

24. Kalama was not called as a witness in the case and no explanation was given by the prosecution for the failure. However, even if the allegation that he assaulted the deceased on the 19th April, were believed it is not the said assault that caused her death. Equally, there is credible though circumstantial evidence from PW1, PW2 and PW3 that the accused and the deceased quarreled and were engaged in a commotion on the night of 19th and 20th April, 2011. The commotion seemingly continued for a while in the night causing annoyance to other tenants. When confronted by the landlady (PW1) the accused was defensive and even offered to move out of the premises. So that even though the neighbours say they had not witnessed a similar incident with their relatively new neighbours, there was clearly a serious fight between the accused and the deceased on the night of 19th and 20th April 2011.

25. Therefore, rather than the accused acting a concerned and helpful 'spouse' towards the deceased, the picture painted by witnesses on the events of that night is different. Secondly, the accused produced as evidence a report of the alleged assault by the Kalama on the deceased as D. Exhibit 1. This report is dated 15/11/2010, some four months previously. The next report was made on 21/4/2011, after the death of the deceased. The accused produced it as D. Exhibit 2.
26. The prosecution witnesses PW1, 2 and 3 testified that there was a prolonged angry exchange of words between the deceased and the accused on the night preceding her death. Unfortunately nobody could testify regarding the cause of the disagreement. Could it be that the accused was angry that the deceased was following up Kalama for upkeep of their child, or the fact that the assault reportedly occurred near Kalama's residence? Whatever the case, the deceased and accused were engaged in a lengthy argument and commotion on the night of 19th and 20th April, allegedly, subsequent to her being assaulted by Kalama in the course of the day on 19th April,

2011. There is no evidence of the neighbours seeing the deceased in the course of the day on 20th April 2011.

27. According to PW2, on the night of 20th and 21st April, 2011 he spotted the accused at 1.00am carrying his unconscious wife to the gate. Indeed PW2 was woken up by the clicking of the metal gate which stood open. PW2 said the accused said he had given the deceased some 'flagyl' medication hence her condition. PW2 stated that though the body of the deceased was warm he could not tell if she was alive at the time. He helped escort the deceased to a clinic before the accused dismissed him. Not long afterwards the accused returned home and went to bed after announcing that he would take the wife to the General Hospital, presumably Malindi District Hospital as apparently the first hospital to which she was taken was a local clinic from where the accused dismissed PW2.

28. PW2 stated during cross-examination that "Dr. Maurice" was not at that clinic and that they were received by his staff. Is it possible that the deceased was already dead by the time PW2 saw the accused carrying her out of the compound, and that is why the accused had not willingly enlisted the help of his neighbours to take her for treatment? It is unfortunate that neither the workers nor the alleged Doctor Maurice were called to testify, but it would seem from the first post mortem report that the deceased had been dead since about midnight or 1.00am on the night of 20th and 21st April, 2011.

29. In his defence, the accused stated that the deceased was declared dead at 1.00am and he took the body to the mortuary on the same night. However it was not until 9.50am on 21st April that the accused made a report to police – according to the OB extract D. Exhibit 2. Even in that report the accused repeated that the deceased had been assaulted on 19th April 2011. How did the accused report the murder to the father of the deceased? Even though by accused's account the deceased was dead by 1.00am of 21st April 2011, it was not until the morning of 21st April 2011 that he placed a call to the father of the deceased, PW4. The call came through at 7.30am. He made the allegations of assault by Kalama and said that by the material morning the deceased was dead.

30. During cross-examination PW4 confirmed that the accused told him that the deceased fell in the bathroom after dinner. This report was repeated in almost similar version to PW7 by the accused. That the deceased made dinner and that she fell ill in the night and died. Two things that are striking about this evidence are firstly, that it took the accused about five hours to inform the father of the deceased about the death of his daughter.

31. Secondly, that the accused did not disclose to relatives of the deceased who testified – PW4, 5 and 7 what he was later to assert in his defence, namely, the deceased had urgently summoned him from Mombasa on the evening of 20th April, 2011 to say she was depressed due to the harassment occasioned to her by Samuel Kalama. He was over consistent in stating that she had been beaten by him. Was she? Could it be that this story was made up to cover up for the fight the couple had on the night of 19th and 20th April 2011 resulting in bruises on the deceased? After all the OB extract produced in attempted proof of assault on the deceased by Kalama is dated 2010.

32. To PW1 and PW2, the accused on returning home on the night of 20th and 21st April from escorting the deceased to hospital reported, not the fact that she was dead, but that he would be taking her to hospital. Why this posture when the deceased had by the accused's account been dead by 1.00am. Secondly PW2 said the accused on returning home showered and slept at 3.00am. He kept up this act when early the next day he informed PW1 that he was headed to hospital and she should take care of his goods. PW2 only learned of the death of the deceased when he took the initiative to visit the clinic (Dr. Maurice) to make inquiries.

33. It is unbelievable that police failed to record the report of death made by the accused at night and ordered that instead the accused take the body to the mortuary and that they only accepted to record the report on the next morning at 9.30am. When the evidence of PW1, 2, 3, 4, 5, 7 and 10, is taken together, it casts serious doubt on the version given by the accused as to the circumstances

of death of the deceased. He surreptitiously, attempted carry his unconscious (possibly dead) wife out of the compound, dispatched PW2 to leave him alone when offered company, took body to the mortuary before reporting to the police and failed to report even to the relatives of the deceased, police and concerned neighbours regarding the death for as long as five hours. When he finally did he was anxious to blame the death on assault by Kalama, which in my view is most likely on invention, but which at any rate could not have occasioned any life threatening injury on the deceased.

34. As the last and only person to be with the deceased while she was alive and to share a meal with her, the delay and his surreptitious conduct is telling. If indeed the accused found the deceased unwell at 11.00pm and her state deteriorated to unconsciousness, why did he attempt to remove her two hours later quietly from the residence, without informing neighbours or relatives? And why was he desperate to convince the relatives, police and even this court against all odds that the deceased had been assaulted by another person and the matter was reported to police when even the death was reported over 6 hours later.

35. It appears strange that the accused seemingly had no conversation, going by his statement, with the deceased when he returned at 11.00pm. He variously, stated the deceased was resting on a chair, that she fell in the bathroom, that they had a meal, that he gave her some medication. But nothing was said regarding any words spoken by the deceased in the final hours. For one allegedly summoned urgently from Mombasa by a distressed deceased, it seems unusual that no conversation is mentioned in the hours between 11.00pm and 1.00am.

36. I think the answer lies in the cause of death of the deceased: poisoning. The alleged assault by Sammy Kalama was intended to suggest that death was due to the injuries sustained in the assault. The report made to police as 9.50am on 21st April, 2011 leaves no doubt about that. Unfortunately the medical examination revealed otherwise. The deceased died of poisoning after sharing a meal with the accused a day after a serious fight between them. The reason why the accused brought up the alleged depressed state of the deceased late in the trial (in his defence) was that the proof of death by poisoning was irrebuttable.

37. The alleged distress or depression was intended to suggest that the deceased deliberately ingested the poison and thereby committed suicide. That proposition does not sit well with the proven conduct of the accused in this case. He could not have had the courage to raise this matter of depression in his earlier reports to authorities or in court with those, including the deceased father (PW4) who knew the deceased well because it is an untruth. Similarly, his alleged travel to Mombasa on the morning of 20th April 2011 is a fiction designed to remove him from the scene of the death before 11.00pm. However, as he told PW4 and 7 he returned and had dinner with the deceased who collapsed and died within hours thereafter. The circumstances in which the deceased died are within the special knowledge of the accused who was with her in the material moments **(See Section 111 Evidence Act).**

38. In his defence, the accused despite his emphasis on the assault was unable to give even the barest details of the injuries sustained by the deceased consequent to the alleged assault on 19th April 2011. Notably the alleged assault was timed to coincide with a fight between the accused and the deceased. His conduct as proved by the prosecution witnesses displays a guilty mind.

39. In my considered view, the finding of the poison bottle in the room of the accused and his own conduct is proof that he knew more about the deceased's death than he cared to admit to police, her relatives and to this court. In the circumstances of this case, I am satisfied that the circumstantial evidence consistently points at the accused as the person who administered the poison to the deceased. He had the opportunity.

40. On the contrary, there is no evidence to suggest that the deceased was previously depressed and that she deliberately ingested the poison to commit suicide. It is doubtful that having taken the poison the deceased would also have take steps to conceal the poison bottle in a box under the bed,

which is where PW10 found it.

41. I therefore find that there are no co-existing factors to destroy the inference of guilt on the part of the accused. The accused came across as a man with little regard for truth, a callous man with no qualms about making up stories and invoking false pieties for purposes of deception. His defence, as improbable as it was implausible, was designed to latch onto Sammy Kalama as the scape goat for the death of the deceased. That version has been thoroughly rebutted by the prosecution evidence even though Kalama was not a witness.

42. I am satisfied beyond any reasonable doubt that the accused is guilty of the murder of Beatrice Mbura and will convict him accordingly.

Written and signed this……day of December 2014 at Naivasha.

C. W. MEOLI

JUDGE

Delivered and signed at Malindi this 3rd day of March, 2015

SAID J. CHITEMBWE

JUDGE