REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 8 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

G K C.....ACCUSED

JUDGMENT

1. In the morning of 20th January 2007, the lifeless body of R S was found along a footpath. The path led to the home of the accused and onwards to a neighbouring village. The deceased was the wife of the accused. Her leg was broken; and, a piece of stick or an arrow had been inserted into her private parts.

2. The State brought information to the High Court charging the accused for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars were that on the night of 19th and 20th January 2007, in Marakwet District within the Rift Valley Province, he murdered R S. The accused denied the charge. The State called eight witnesses. At the close of their evidence, I found that the State had established a *prima facie* case against the accused under section 306 (2) of the Criminal Procedure Code. The accused elected to give sworn evidence. He did not call any witness.

3. The prosecution's case went as follows. PW1, Wilson Chepkurui, was the Senior Assistant Chief, Maina Location. He had known the accused for about three years. He testified that the accused was a drunkard; and that the drink was the source of his domestic problems. On the morning of 20th January 2007, he met the accused and a village elder. The two were heading to his office to report the incident. PW1 saw some blood stains on the clothes worn by the accused. However, he did not know whether the blood was from accused, the deceased or someone else. He escorted the accused to Kapsowar Police Station. He later visited the scene. He testified that the deceased's body lay on a footpath leading to the home of the accused and on to the next village. He was of the opinion that the murder was perpetrated there. Some trees and bushes at the scene were broken.

4. PW2, K K, is a son of the accused. On 20th January 2007 at about 9:00a.m., he met with the accused and Paul Cheboi (the village elder) at the nearby Maina Centre. The accused informed him that he had found the body of the deceased. He said the deceased had been killed by unknown persons. PW2 noticed that the trousers and shirt worn by the accused had bloodstains. He also had bruises on his face. When he asked him, the accused replied that when he was milking, the cow kicked him. PW2 became suspicious. He testified that his parents fought frequently; and that both used to take alcohol. He said the accused suspected the deceased was unfaithful.

5. The accused was escorted to Kapsowar Police Station. He was immediately arrested. PW1, PW2 and

the police took the accused to the scene. It was about a kilometer from the homestead of the accused. The public was milling around the body. PW2 testified that one leg of the deceased was broken; a stick had been inserted into her vagina. The deceased did not have underwear and her breasts were exposed. She had traces of blood on her shoulder. The police collected the body for autopsy.

6. On 19th February 2009, PW2 was cross-examined. He made a dramatic statement: He said that just before dark fall on 19th January 2007, he witnessed the accused shoot the deceased with a poisoned arrow. It was along a footpath leading to the school. The accused then instructed him and his siblings to go to their uncle's house. When PW2 was reexamined, he recanted the story; he said he did not see the accused shoot the deceased.

7. PW3, Gideon Yego, was a Senior Clinical officer at Chebiemit District Hospital. On 23rd January 2007, he examined the accused. There were blood stains on his shirt. There were bruises on the face. He had other bruises between the index and middle fingers. He also had bruises on both legs. PW3 opined that the injuries may have resulted from a fight or struggle. He found that the accused was in good mental condition. He formed the opinion that the accused could stand trial.

8. PW4, Paulina Gabriel, is a midwife. On 19th January 2007 at about 8:00p.m, she was in the house of R C (PW5). She was with another lady known as Kimaina and the deceased. They were to assist S, the wife of PW5, to give birth. PW5 confirmed that narrative. PW4 testified that at about 8:30p.m., the accused called the deceased. The accused did not enter the house. PW4 did not talk to the accused but stated that she knew his voice. PW5 also said that he heard the accused calling out for the deceased.

9. PW4 testified that the next morning, the accused told her and PW5 that the deceased was been beaten by thugs. She and PW5 went to the scene and saw the body of the deceased. She said the deceased had confided to her that the accused had beaten her. PW4 knew that the couple used to have squabbles. PW5 said that when he viewed the body at the scene, it was dressed in a skirt. He said the accused was holding a blouse in his hands. The accused dressed up the body in the blouse before he left to report the matter to the authorities. PW5 said the accused is ill tempered and rough.

10. PW6, H K, is a brother of the deceased. He, a police officer and another member of the family identified the body of the deceased to the pathologist. The pathologist was not called to the stand.

11. PW7, Police Sergeant Joseph Asugo, received a report of the murder from the Assistant Chief (PW1). PW1 had escorted the accused to the station. PW7 noted that the accused had injuries on toes and fingers. He also had some bloodstains on the left leg and right toe nail and a minor bloodstain on the trouser. He interviewed him. He was not satisfied with the explanation offered by the accused. At the scene, there were pieces of sticks that were broken and bloodstained. He said they were the size of a walking stick. The three sticks were identified in Court (Exhibit 3). He said there were signs of a struggle; the grass was flattened. He drew a sketch–plan of the scene (Exhibit 4). It shows the location of the sticks and the home of the accused. From the scene to the home of the accused was a distance of about 500 meters.

12. The State then called PW8, A K. He could however not testify because his evidence had been dispensed with vide the order of court of 6th November 2012. A further adjournment was denied for want of merit and for considered reasons on the record. The State closed its case.

13. The accused gave sworn testimony. He denied committing the offence. He testified that on 19th January 2007 at 7:00 a.m. he left his house for [particulars withheld] School. He left the deceased at home. He said his three children had gone to school except one who is blind. He did some manual tasks at the school until 5:00 p.m. when he returned home. The deceased was not there. His children had returned from school. He said the deceased did not return that night. The following day, in the morning, he woke up the children. He asked them about the deceased. He left some money on the table for the deceased to take to her *Merry-Go-Round* group.

14. The accused testified that he thereafter went for a drink. While there, he was told by a person called

Richard that the deceased was in a place called Kokwopuswo. He went there but did not find her. He went back to Richard who told him to search elsewhere in Kokwopuswo. That is when he says he found the body of the deceased. He screamed; members of the public responded. They advised him to report to the chief. The accused however decided to go to the village elder first. They met the chief (PW1) on the way. PW1 escorted them to Kapsowar Police Station.

15. The accused maintained he does not know who killed the deceased. He denied visiting the home of R C (PW5) on the night of 19th January 2007. He said he does not know PW4. Upon being cross-examined, he stated that when the deceased's body was discovered, he was at home. He said it was at about 7:30 in the morning. Regarding his movements on 19th of January 2007, he claimed he was at the school compound from 7:30 a.m. until 5:00 p.m. when he returned home. He said he was slashing some grass. He then went to get his cows, milked, ate and slept at 9:00 p.m. He said he woke up at 6:30 a.m. on 20th January 2007. He denied that he had physical injuries or that his clothes had bloodstains. He also denied telling anyone that a cow had kicked him. Upon further cross-examination, he denied telling his children that the deceased would never return or that they move to their grandmother's house. He denied having domestic quarrels with the deceased or beating her.

16. Learned counsel for the accused filed submissions dated 15th December 2014. The learned State Counsel filed a reply on 10th February 2015. I have considered all the evidence, the authorities and rival submissions.

17. Section 203 of the Penal Code provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*. In *Republic v Andrew Mueche Omwenga* [2009] eKLR, Maraga J. (as he then was) succinctly dealt with the subject-

> *"What is murder? Before I deal with the definition of murder, it is important to bear in mind the fact that criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or the existence of a state of affairs prohibited by criminal law before conviction can result. Whether a conviction results will depend further on the accused's state of mind at the time; usually intention or recklessness is required. The Latin maxim—actus non facit reum, nisi mens sit rea—"the act itself does not constitute guilt unless done with a guilty mind," encapsulates this principle."*

18. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*. In *Ndungu v Republic* [1985] KLR 487 the Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial unless the cause of death is too obvious. The Court stated at page 493 as follows:-

> *"Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post- mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced."*

19. Malice aforethought on the other hand is the *mens rea* or the *intention* to kill another person. Section 206 of the Penal Code defines it as follows;

> *"206. 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) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

20. Malice aforethought can take various forms. It can be express, constructive, implied or inferred from a set of circumstances. Where the homicide is committed in furtherance of a felony or when resisting or preventing lawful arrest, notwithstanding the absence of an intention to kill or to cause grievous bodily harm, the accused is deemed to have constructive malice aforethought. See *Raphael Mbuvi Kimasi v Republic* Court of Appeal at Nyeri, Criminal Appeal 61 of 2013 [2014] eKLR. Generally, there are three main *tests*: the first is the intention to cause *death*; secondly, the intention to cause *grievous bodily harm*; and, thirdly if it is shown that the accused knew that there was a *serious risk* that death or grievous bodily harm could result from his conduct but he proceeds to do so without any lawful excuse. See *Nzuki v Republic*, [1993] KLR 171, *Republic v Andrew Mueche Omwenga* [2009] eKLR. While the *motive* can strengthen the prosecution's case, it is not obliged to prove it. See generally *Republic v Sharmpal Singh s/o Pritam Singh* [1962] EA 13 at page 17.

21. Applying those principles to the evidence in this case, I find as follows. There was *no* eye witness to the murder. Initially, PW2 had said he witnessed the attack on the deceased. He said that just before dark fall on 19th January 2007, he saw the accused shoot the deceased with a poisoned arrow. It was along a footpath leading to the school. The accused then instructed him and his siblings to go to their uncle's house. But when PW2 was reexamined, he *recanted* the story; he said he did *not* see the accused shoot the deceased. By changing the version of his evidence he punctured his credibility irreversibly.

22. The evidence against the accused is thus largely *circumstantial*. PW1, PW4, and PW5 all confirmed that the accused and deceased used to quarrel or fight. The couple used to drink. PW4 said that on the night the deceased died, she had confided to her that the accused had beaten her. PW5 said the accused is ill tempered and rough. PW2 had said in evidence in chief that his father suspected the deceased was unfaithful. The accused denied it. I formed the clear impression that the accused was lying when he said that they never quarreled or fought with the deceased. The accused may have wished his wife the worst; but the previous wrangles and fights did *not* establish the offence of murder. On the night the deceased died, no one saw the accused fight or kill the deceased.

23. The other circumstantial evidence is as follows: firstly, that PW4 and PW5 heard the accused calling out the deceased outside PW5's house on the night of 19th January 2007; and, secondly, that the accused lied to PW2, PW4 and PW5 that the deceased had been attacked by thugs. Those accounts are problematic. The accused never entered the house of PW5. PW4 said she recognized his voice, but never testified on what words were spoken by the accused; PW5 said he heard the voice of the accused outside. Again no evidence of the words spoken. In *Limbambula v Republic* [2003] KLR 683, the Court of Appeal stated that evidence of voice identification is receivable so long as the person giving the evidence is familiar with it, recognizes it and there is no *mistake in testifying to that which was said and who said it*. I cannot then say conclusively that the accused was *positively identified* as the person who called out the deceased or who was last seen with her. It remains only a strong *suspicion*.

24. The more significant circumstantial evidence is the unexplained injuries on the accused and the bloodstains on his clothing. Again, I did not believe the accused when he said that he had no physical injuries or bloodstains on the morning of 20th January 2007. There was overwhelming evidence to the contrary. PW1 saw some blood stains on the clothes worn by the accused. However, he did not know whether the blood was from accused, the deceased or another person. PW2, notwithstanding that his evidence is *unreliable*, noticed that the trouser and the shirt worn by the accused had bloodstains. The accused also had bruises on his face. The injuries and bloodstains were corroborated by the clinical officer (PW3). PW3 testified that the accused had bruises between the index and middle fingers. He had

bruises on both legs. He opined that the injuries may have resulted from a fight or struggle. PW7 noted that the accused had injuries on toes and fingers. He also had some bloodstains on the left leg and right toe nail and a minor bloodstain on the trousers.

25. However, expert evidence was not led to show that the bloodstains on the clothing of the accused matched that of the deceased. There was no connection between the sticks recovered at the scene (exhibit 3) and the deceased. The alleged arrow was never recovered. Even the pathologist was not called to the stand. Doubts on the cause of death would have been laid to rest by medical evidence. See *Ndungu v Republic* [1985] KLR 487 at 493.

26. It is thus tempting to assume that the accused engaged in a struggle or fought with the deceased or even killed her. The defence proffered by the accused does not give an accurate account of his movements between 5:00 p.m. on 19th January 2007 and the early hours of 20th January 2007. Police Sergeant Joseph Asugo testified that the *locus in quo* was between 500 meters and one kilometer from the homestead of the accused; and it was about 50 metres from the house of PW5. That is where the deceased was last seen on the night of 19th and 20th January 2007. The accused had an opportunity to commit the offence. It can also be presumed that the deceased succumbed to the injuries on her leg or private parts.

27. Those are all assumptions and suspicions. There is *no* room for such *presumptions* in a criminal trial. The court can only convict on strong circumstantial evidence that *must* point *irresistibly* to the accused. The test in a matter of this nature was well stated in *R v Kipkering arap Koske & another* 16 EACA 135 where the court held-

> *"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"*

28. See also *Kipngetich v Republic* [1985] KLR 392. The ratio in those two cases is this: a court may convict on circumstantial evidence; but the circumstantial evidence *must* point *irresistibly* to the accused to the *exclusion* of all others. In *Sawe v Republic* [2003] KLR 364, the Court of Appeal affirmed that position. At page 375 the following passage appears-

> *"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"*

29. Furthermore, subject to section 111 of the Evidence Act, the legal burden of proof rests with the prosecution. See also *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332 at 334, *Abdalla Bin Wendo & another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported). The accused may have lied; he might have held some cards close to his chest; or he might have concealed vital information. Quite apart from his denials under oath, he was entitled under our Constitution and the Criminal Procedure Code to remain mute. He was not under any duty to fill in the gaps for the prosecution.

30. In the end I am not satisfied that the prosecution *proved* beyond reasonable doubt that the accused, *of malice aforethought caused the death of R S by an unlawful act or omission.* It must follow as a corollary, that the accused is not culpable. I accordingly enter a finding of *not* guilty. The accused is hereby acquitted.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 8th day of May 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Accused.

Mr. J. C. K. Cheptarus for the accused.

Ms. K. Mwaniki for the State.

Mr. J. Kemboi, Court clerk.