



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 40 OF 2006

REPUBLICPROSECUTOR

VERSUS

MARK LIMO CHESIRE.....ACCUSED

JUDGMENT

The prosecution evidence

The accused, MARK LIMO CHESIRE was charged with two counts of murder contrary to Section 203 as read with section 204 of the Penal Code. It was alleged that on 30th day of January 2006 at Kapcherebet Sub-Location in Baringo District within Rift Valley Province, the accused murdered T C. In the second count, it was alleged that the accused on the 31st day of January 2006, at Kapcherebet Sub-Location in Baringo District within Rift Valley Province, murdered E K C. The charges for the two counts were drafted on separate information which were later consolidated and heard in one case.

PW1, C C's evidence was that on 30/01/2006 at about midnight, while sleeping at the house of E C K K (deceased), she felt something touching her legs which woke her up. She stated that she then saw someone standing beside her bed who she recognized as Mark Limo. She stated that the door was open on the material night and that it was always left open since the deceased was blind. She also added that there was enough moonlight which enabled her to recognize the accused. She also stated that she had known the accused from the village for five (5) years.

PW1 screamed upon recognizing the accused who in turn aimed for her neck but instead cut her on the arm with a machete. PW1 screamed once more and the accused cut her again on the same arm. PW1 tried to get up but the accused cut her close to the waist. She got up and screamed again and at that time the deceased asked her what was wrong. She told her that there was someone in the house. PW1 then run and hid close to the deceased where the accused cut her on the legs. PW1 further stated that the accused then cut the deceased twice on the head with a *panga* and that she was able to hear the sound which the *panga* made as the accused cut the deceased. PW1 then run away to Everlene's house. It took her fifteen (15) minutes to get there. She informed Everlyne that they had been attacked by the accused and she asked Everlyne to call for help. Everlene got scared that she too would be attacked and refused to go out. The following morning, PW1 could not walk but people went to the house of the deceased and found her dead. The police arrived at the scene at about noon and PW1 was taken to hospital. In cross-examination, PW1 maintained that there was enough moonlight for him to recognize the accused.

PW2, E C's evidence was that on the 29th January 2006, she was at the home of the deceased when the accused and his father passed by at about 6.00 p.m. The deceased asked the accused's father why they were passing through her homestead. The accused and his father and the deceased then started

exchanging bitter words. She stated that the accused's father went away but the accused stayed and sat in the deceased compound. PW2 then went to bring the deceased's cows and upon her return, she did not find the accused. On 30/01/2006, PW2 spent the day at the deceased's house and returned to her house in the evening. At about midnight, PW1 went and woke her up and told her that someone had entered her house and cut them but that she did not know the person who had cut them. The following morning, PW2 called neighbours who witnessed how PW1 was badly hurt. They then went to the house of the deceased where they found her dead upon opening her door. PW2 stated that the body of the deceased had cuts on the head and other parts of the body. She stated that a neighbor went and reported to the police who came and carried the body of the deceased to the mortuary. She further stated that she asked PW1 who had cut her but PW1 was in shock and could not remember.

PW3, M K K, a minor, was examined and tested by the court on the need to tell the truth. The learned judge found that he understood the need to tell the truth and was sworn since he understood the nature and consequences of taking an oath. He testified that in 2006, he was living with his grandmother. At about 6:30 p.m., Mark Chelimo, the accused, who was his schoolmate, went to his grandmother's house. The accused gave him what he said was money and asked PW3 to go and buy tobacco for the grandmother. That while on his way, PW3 opened the paper to see how much money there was and saw something written 'trust'. He then went back to ask what sort of money that was which led to an argument between the two. PW1 wanted to go out of the house but the accused blocked the door. The accused then asked the deceased to lie down on the bed but the deceased did not do anything. The accused then took a *panga* from under the deceased's bed and cut her on the head close to the ear. PW3 then ran to call his father, J C K, who was 30 metres away and told him that the accused had cut the deceased. They went back and found that there was no one else apart from the deceased who was dead at that time.

PW4, William Koima Lemoi, who was the Assistant Chief of Kapcherebet Sub-Location recalled that early on the morning of 31st January 2006, certain youth by the names of Anthony Kandie and Henry Rotich went to his home and reported that two women, namely; T C and K C had been killed from cut wounds and that the third lady had been injured and suffered cut wounds on the hands and legs. He stated that the three women were from the same family and that one of the deceased was an old, blind lady. PW4 stated that the reportees had said that the killings happened in the night and that they had heard screams at night. He stated that the reportees did not say the cause of the death but suspected the assailant to be a young man who lived with T C, one J K, the grandson of Chepkonga. He then reiterated the evidence of PW3. He did not know who had sent the reportees but he reported at Kabarnet Police Station, where he found other men making the report. He then went with the police to the home of Chepkonga and on reaching there found her dead, with cut wounds on the neck and head. He then proceeded to the blind lady's house who also had severe head cut wounds. They collected the two bodies and an injured person who was dropped at the Kabarnet District Hospital. The bodies of the deceased were dropped at the hospital mortuary. The following morning they were told that the accused had been arrested and thereafter re-arrested by the police. While under police custody, the accused directed PW4 together with the police to where he had hidden the murder weapon which was a *panga*.

PW5, S C recalled that on 31/1/2006, at about 8:00 am, while at Keptemo, one Kiboino Kandako went and informed him that his mother had been killed and that he was a witness to the crime. Kiboino further informed him that in addition to PW5's mother, T C, his wife E K C had also been killed but he was not told who had killed them. He then went home and confirmed that the body of his mother was in her house with cut wounds on the neck and head and that of his wife in his house with several cut wounds on the head and on the head. He stated that the police then arrived and took the bodies to the mortuary.

PW6, J C C was the son to one of the deceased, T C. His only testimony was that he recalled the killing of the deceased persons but did not go to the mortuary to identify the body of the deceased. In cross-examination, he stated that he informed the police that Teriki had been killed, which information he received from his grandchild. He also maintained that he did not go to the hospital to identify the bodies for purposes of the post-mortem. In re-examination, he stated that he did not record his own statement; rather, he narrated to the police what he knew and the police recorded it in writing.

PW7, D C, also a son to the deceased T C, stated that he knew that the accused had killed his mother. He

stated that his son, M T, who lived with his mother, informed him on the morning of 1st January 2006 about the killing of the deceased persons. He stated that he did not know the cause of death and he proceeded to inform the chief and the police. The police visited the scene. He stated that he had earlier on viewed the body which had injuries on the head. According to PW7, his son informed him that it was the accused who had killed his mother. In cross-examination, he stated that he was at home on 1st January 2006. He added that his mother's body had cut wounds on the head and that his son had witnessed the killings.

PW8, M K C, is a grandson to the deceased T C while the other deceased, E K was his mother. On 7th February, 2006, PW8, while accompanied by three of his relatives identified the bodies of the deceased at the Kabarnet District Hospital where the post-mortem was conducted in their presence.

PW9, DR. JOSEPH KIPLIMO, worked at Kabarnet Hospital produced the post-mortem report prepared by DR. STEPHEN MWANGANGI with whom he had worked for 3 years and was therefore, well-versed with his handwriting. With respect to the deceased E K, PW8 testified that an external examination revealed that the deceased had dried blood stains all over the body, and multiple stab wounds on the front side of the body extending to the jaws and completed distorting the skeleton. In particular, the body of the deceased had three (3) deep cut wounds on the right shoulders, two (2) cut wounds on the left shoulder, one (1) wound on the left knee. Each wound was approximately 10 by 2 cm long and 5 cm deep. The deceased suffered a fracture of the skull causing severe injury to the brain tissue. Following this examination, it was concluded that the cause of death was severe head injury with subsequent hemorrhage secondary to multiple cut wounds.

Following the court's finding that the accused had a case to answer, the accused was put in his defence. He gave a sworn statement and did not call any witnesses. He denied the charges levelled against him. He stated that on 30th January 2006, he had visited his farm in Kerio Valley. As he went home, that morning, he met three people who asked him where he was going and then arrested him and took him to a nearby shopping centre. The chief was then called, and the accused narrated to him how he was arrested. The accused further testified that he could not recall anything that happened on 31st January 2006. He also stated that he did not know the deceased persons or the three persons who arrested him. In cross-examination, he stated that PW2 was not known to him. He stated that PW1 was known to him but he did not know that PW1 lived with the deceased T C. The accused stated he could not recall PW1's testimony having seen the accused at the house of the second deceased.

Submissions by accused

The accused relied on written submission filed on 21st November 2014 by Kamau Lagat Advocates. It was submitted that the prosecution evidence was contradictory. In particular, PW1's contradicted PW2 when he stated in court that when they were attacked, he escaped to PW2's house and informed her that the accused had attacked them, yet, PW2 indicated that PW1 had informed her that he did not know and could not remember the person who had attacked them. Further, PW1 contradicted himself when he stated that the offence occurred at 8.00 p.m. and later stated in cross-examination that it was at midnight. Furthermore, PW1's stated that the offence occurred on 30th January 2006 whereas the information indicated that E K was murdered on 31st January 2006. Again, PW3 contradicted himself when he stated that on the material date he was standing on the door of the house when he saw the accused attack his grandmother, yet, in cross-examination, he stated that he had hidden in a nearby bush when he witnessed the accused cut the deceased. It was urged that these contradictions should be resolved in favour of the accused.

It was further submitted that, from the defence testimony, it could be inferred that the accused might have committed the offences while mentally unstable. This is because the accused could not recall what happened on the days he allegedly committed the offences. This court was therefore, urged to find that, if indeed the accused committed the offences, his state of mind was not proper.

Counsel for the accused submitted the accused had not proved the case beyond reasonable doubt and the

accused should be acquitted.

Analysis of the evidence

The prosecution is under an obligation to prove the fact of the death of the deceased persons, that the death was unlawfully caused, and that such death was caused by the accused acting with malice aforethought. **Section 206** of the **Penal Code** provides that malice aforethought may be proved by establishing any 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.”

Death of the deceased persons

The two deceased persons in this case are T C and E K C. The death of the deceased persons is not in question. PW1 testified that he was attacked together with the deceased E K. He escaped to PW2's house in the night. The following morning, PW2, accompanied by other people, went to the house of the deceased and found her dead. PW3 testified regarding the other deceased person, T C. He testified to have witnessed the attack on his grandmother. PW3 stated that he called his father J C K after he ran away from the attacker and on his way back, they found that the deceased was already dead at that time.

The cause of death in respect of the deceased E K was certified by the post-mortem that was conducted by Dr. Stephen Mwangangi. In the post-mortem report that was produced on his behalf by PW9, it was found that E K had suffered multiple stab wounds on her body. Following the post-mortem report, it was concluded that the cause of death was severe head injury with subsequent haemorrhage secondary to multiple cut wounds.

There was no post-mortem conducted in respect of the death of T C. However, it is not disputed that Teriki had been attacked and suffered fatal injuries. PW7, the son to the deceased Teriki, testified that he had viewed the body of his mother which had injuries on the head. According to PW3, who testified to have witnessed the attack, Teriki had been attacked with a *panga* on the head. PW5, also a son to the deceased T C, testified that upon learning of the death of his mother, he went to the scene and saw that the body of his mother had cut wounds on the neck and head. **PW8**, M K C, is a grandson to Teriki and son to the deceased E K was his mother, together with his other relatives, was present when the post-mortem was conducted on 7th February, 2006 on the bodies of the deceased at the Kabarnet District Hospital.

Therefore, while there was no post-mortem report produced in court in respect of the death and cause of the death of Teriki, I am satisfied that the evidence of the witnesses satisfactorily settles these issues. Both the deceased died as a result of fatal stab wounds inflicted on them, and as such, their death was unlawfully caused.

Whether the accused caused the unlawful death of the deceased.

The next issue for determination by this court is whether the accused persons caused the death of the accused, and whether in doing so, he acted with malice aforethought.

With respect to the death of E K, the evidence of PW1 and PW2 is crucial.

PW1 testified that on the night of 30/01/2006 at about midnight, while she was sleeping at the house of E K, the accused entered the house and attacked them. According to PW1, the accused first attacked her and PW1 ran to take refuge from behind the deceased, Esther, who, had by then been alerted by PW1's screams. The accused continued to attack her and then descended upon Esther by cutting her in the head. PW1 at this point ran to the house of PW2 to seek help. PW1 stated that she recognized the attacker as the accused person. According to her, there was enough moonlight which enabled her to recognize the accused.

While it was said that there was moonlight on the night of the attack, this court must nevertheless warn itself before relying on this evidence of identification. The accused, according to PW1's testimony, let himself into the house which was unlocked. As such, even if there was moonlight, the circumstances under which the accused would have been identified were difficult.

I note that the evidence of PW1 in respect of the identification of the accused was direct evidence of recognition. She stated that she had known the accused for five years. On the material night, she was stirred from sleep and she recognized the accused, at which point, she screamed. The accused attacked PW1 for a while. He continued attacking her even when she ran to take refuge behind the deceased Esther and thereafter attacked the deceased. PW1 vividly described how she witnessed the accused cut the head of the deceased, Esther. Evidence of recognition is much more reliable than the identification of a stranger. See **Karanja & Another –Vs- Republic (2004) 2 KLR, 140** in which the court held;

“Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made.”

In the instant case, PW1 knew the accused for five years. PW3 gave direct evidence. Hence, the issue of mistaken identity is out of question.

When PW1 ran to the house of PW2, she stated that she told PW1 that the accused had attacked them. However, PW2 did not corroborate the account by PW1 in this regard. She stated that PW1 told her that she did not know who had attacked them. However, I also note that PW2 stated that on the material night, PW1 was in shock and could not remember who had attacked them. The evidence of PW1, in my view is solid with regard to the identification of the accused. Furthermore, the period of the attack was not fleeting. PW1 recognized the accused when she was stirred from sleep before he even attacked them. PW1 fled from the house when the accused was still attacking them. The following morning, the deceased Esther was found dead. There could not have been any intervening circumstances between the time the deceased was attacked and her death.

With regard to the death of Teriki, PW3's direct evidence is sufficient to prove that the death of T C was caused by the accused. PW3 testified that the accused went to the house of Teriki and gave him what he thought was money to go to the shop to buy tobacco for the deceased. However, he noticed that what the accused had given him was not money which prompted him to go back to the house to inquire from the accused what kind of money the accused had given him. Following an argument, the accused reached for the deceased's panga from under the bed and cut her on the head. He then ran to his father and told him that the accused had killed the deceased. The submission that PW3 had indicated that he was standing on the door and later stating the he hid in a nearby bush is immaterial. It does not diminish the fact that PW3 witnessed the accused attacking the deceased.

Element of malice aforethought

Section 206 of the Penal Code enumerates circumstances when malice aforethought can be proved. From its wording, malice aforethought may be direct or discerned from the facts of the case. As the Court of Appeal elaborated in the case of **Joseph KimaniNjau v Republic (Nyeri) Criminal Appeal No. 375 of 2011 [2014] eKLR** citing with approval earlier sentiments in the case in the case of **IsaakKimanthi**

Kanuachobi–Vs- Republic (Nyeri) Criminal Appeal No. 96 of 2007 (unreported):

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape, or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See Republic –v –Stephen Kiprotich Leting & 3 Others (2009) e KLR HCCC No. 34 of 2008). In the circumstances of this case, where there was a fight involving the appellant and others in a place of worship leading to another fight where the appellant stabbed the deceased with fatal consequences, we do not think there was malice aforethought at all. The appellant should not have been convicted of murder but should have been convicted of manslaughter. (See Juma Onyango Ibrahim – vs- R, Criminal Appeal No. 312 of 2009 Court of Appeal (Kisumu).)”

There was evidence to show that both deceased persons suffered fatal injuries. The injuries were inflicted on the deceased persons were vicious and deliberate. The person who inflicted these injuries intended to cause their death. From the above, I am satisfied that the prosecution has satisfactorily established that the death of the deceased persons was caused by the accused acting with malice aforethought. This observation is made notwithstanding the fact that the investigating officer did not testify as the direct evidence on record wholly implicates the accused. The direct evidence also squarely places the accused person as guilty notwithstanding that a postmortem was not conducted on the body of the 2nd deceased person. See **Ndungu –Vs- Republic (1985) KLR 487, at page 493** the Court of Appeal observed as follows:-

“.....in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crashed, where the cause of death would be so obvious that the absence of a postmortem report would not be fatal.”

In the end, I find the accused guilty and I proceed to convict him on both counts of murder contrary to Section 203 as read with Section 204 of the Penal Code.

DATED and SIGNED this 3rd day of July, 2015.

G. W. NGENYE – MACHARIA

JUDGE

DELIVERED at **ELDORET** this 7th day of July, 2015.

BY: G. K. KIMONDO

JUDGE

In the presence of:-

1. Mr. Omboto for Mr. Kamau for the accused.
2. M/S Karanja for the state