



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL CASE NO. 15 OF 2004**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**BENARD IMBIRU MISIGO ..... ACCUSED**

**JUDGMENT**

The accused, Benard Imbiru Misigo was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the charge are that on the 15th day of February, 2004 at Kipture Village in Nandi North District within the Rift Valley Province, murdered Sarah Seanzu.

**THE EVIDENCE**

The prosecution called a total of seven (7) witnesses whose evidence I shall summarize as hereunder.

Before I summarize the evidence, it is important to note that this trial has gone through the hands of three other Judges. Honourable Justice Dulu heard the evidence of PW1 and 2. Justice Ibrahim (as he then was) continued with the evidence of PW3 and PW4. When Justice Karanja took over the conduct of the matter on 10th May, 2011, it started De Novo. He then heard the evidence of PW1 to 5 after which I continued with the testimonies of PW6 and 7. The evidence summarized hereunder relates to that taken by the latter Judge, Justice Karanja.

**PW1**, Purity Chemutai then aged 20 years testified that on the 15th of February, 2004, at about 2.00 p.m. she was at her aunt's place in Kipture Village in the company of her friend called Ann Chepkoech. She then heard screams coming from the house of the accused who she identified in court. On rushing to the scene, the screams were still live from the house. There was cutting noise (similar to somebody cutting wood). After about five (5) minutes, the door to the house was opened. The accused ran out without a shirt and was holding a machete (panga).

PW1 testified that they were standing about 30 metres from the house. The accused signalled her and both returned to the house. The panga had blood stains. His wife (Sarah) was lying on the floor of the house. She rushed to call her aunt while her friend, Ann went to their home.

PW1 went on to state that she returned to the scene with her aunt. At that time many members of public had gathered at the scene. The house was open. The accused too was lying on the ground and was bleeding. He had injuries on his legs and head. Sarah was dead and her body had multiple injuries. She also identified the panga in court (MFI-1).

On cross-examination, PW1 stated that she did not see the accused cutting the deceased. She said that the only single tree that stood near the accused's house did not obstruct them from seeing the entry of the house. She stated that the deceased and the accused had lived as a husband and wife for the last one month. That previously the deceased lived elsewhere. She said she did not know if the deceased had a boyfriend.

In re-examination, she insisted that nothing obstructed them from directly seeing the entry to the house of the accused.

**PW2**, Selina Chemeli Kirongo testified that on 15th February, 2004 at about 3.00 p.m., she was called by her niece who told her that Sarah (deceased) was being beaten by the accused (identified in court). On rushing to the scene, she found a crowd of people gathered. She entered into the house and found the deceased's body lying in a pool of blood. The accused also lay on the floor with blood covering his body. She alerted the area Chief and reported the matter at Kapsabet Police Station. Police later visited the scene and carried away the body.

On cross-examination, PW2 stated that it was one Purity who informed her that the deceased had been cut. She stated that the deceased and the accused had lived together for between one and three months. She stated she did not know how one David Kipngetch related with the deceased. She said that there was a panga and a knife on the floor of the house. She identified the panga (MFI-1) that she saw in the house.

**PW3**, Linus Cheruiyot Kirongo a farmer at Kipture Village testified that on 15th February, 2004 at about 2.00 p.m. he was informed by one Esther that the deceased was lying on the floor of the deceased's house where both lived together. She went to the scene and found both the accused and the deceased lying on the floor of the house. The accused had injuries on the leg. The deceased was covered with a cloth and her body was blood stained.

On cross-examination, he stated that his house was about 300 metres from that of the accused while one David Kipngetch lived about three kilometres from the accused's house. He stated that David Kipngetch was arrested when he went to record a statement but could not tell the reason for his arrest.

**PW4**, Paul Kipkemboi Mosbei, the Assistant Chief of Kapture Sub-location testified that on 15th February, 2004 at about 5.30 p.m. he received information that a fight had occurred in the home of the accused who was an employee of Paul Kirongo. He proceeded to the scene and found both the accused and the deceased lying in a pool of blood inside the house. Blood had spilt all over the house. He called the police who went to the scene. They took away the panga (MFI-1) and a knife (MFI-2) that were inside the house. The accused was injured while the deceased was already dead. The accused was admitted at Kapsabet District Hospital while the deceased's body was taken to the mortuary.

In cross-examination, PW4 stated that it was PW3 (Linus) who had informed him that the accused and the deceased had fought. At the scene he found the accused lying down and had an injury on the leg.

**PW5**, Chief Inspector of Police Thomas Mukabwa then of Kapsabet Police Station testified that on 15th February, 2004 at about 7.00 p.m. he received information that somebody had been killed. He proceeded to the scene where he found the deceased lying in a pool of blood. She was dead. The accused also lay on the floor and had been injured. He collected a panga (MFI-1) and a knife (MFI-2) which were inside the house and were blood stained. He took the accused to the hospital and the deceased's body to the mortuary.

PW5 further testified that he commenced the investigations but was transferred before he could complete them. He recorded the accused's statement under inquiry.

In cross-examination, he stated that the accused had injuries on his legs, which portrayed as deep cut wounds. He lay unconscious. The knife and the panga were collected from the scene by his colleague.

PW5 further stated that the accused claimed that his injuries were occasioned by a former lover of the deceased, one David Kipngetich.

**PW6**, Doctor Ismael Ayabei testified that he worked as a medical officer at Kapsabet District Hospital. He stated that he knew Doctor Kiprotich. He stated that he joined Kapsabet District Hospital when Doctor Kiprotich had left, although he knew him as he was the doctor in charge of Tuberculosis in the Province. He had also trained him. He left on study leave and never returned to the hospital.

PW6 produced the post mortem report that was filled by Doctor Kiprotich. The latter had conducted the post mortem on the deceased body three (3) days after her death. The same had deep cut wounds on the head which had severed the neck trachea and blood vessels, the nasal bridge, the hand and one on the right finger. He formed the opinion that the cause of death of the deceased was anaemia due to bleeding due to cut wounds. The report was signed on 23rd February, 2004.

In cross-examination, he stated that the post mortem form showed that it was issued on 23rd December, 2004, which date could have been a typographical error.

PW6 was shown a P3 form by the defence counsel which was in respect of the accused. It indicated that the accused had sustained cut wound injuries. The same was filled on 3rd March, 2004.

In re-examination, PW6 indicated that although the post mortem showed that it was issued on 23rd December, 2004, it had the date of 23rd February, 2004 when it was filled.

**PW7**, Corporal Stephen Moinde stated that on 15th February, 2004 at about 6.40 p.m. the Assistant Chief of Kipture Sub-location one Paul Mosbei and Salina Kirongo reported at Kapsabet Police Station on the incident. Police officers, himself included proceeded to the scene which was inside the accused's house. The accused worked for Salina Kirongo as a tea plucker. The deceased Sarah lay on the floor dead. The accused also lay on the floor unconscious. The deceased had cut wounds on the neck extended to the nose and the finger. The accused had cut wounds on the feet, head and behind the neck. He recovered a panga and a knife which he produced as exhibits.

PW7 further testified that the accused had no shirt. The police thereafter took the body to the mortuary. The accused was admitted to hospital for two weeks.

He stated that the post mortem was done on 23rd February, 2004. He filled it on the same date. He said that he made an error on the first page of the form as he indicated he issued it on 23rd December, 2004.

PW7 also escorted the accused to hospital on 3rd March, 2004 for purposes of his mental assessment. He was certified to be of sound mind and fit to stand trial. He produced his P3 form in this respect.

In cross-examination, PW7 stated that he did not collect any blood samples for examination and neither took the panga nor the knife for examination of the blood stains on them. He stated that the accused had injuries on his heels, neck and head. The latter had a minor cut.

He further stated that although one David Kipngetich had been arrested, he was released because there was no evidence to link him with the offence. The reason for his arrest was that the accused had claimed he had attacked him and the deceased.

The accused gave an unsworn statement of defence. He denied he killed the deceased. He denied that the deceased was his wife. He said that he was employed by his boss like a house help. He stated that the boyfriend of the deceased was one David Kipngetich with whom he was arrested. He said David Kipngetich related with the deceased before he (accused) was employed in that farm. The accused went on to state that earlier on before the incident, David Kipngetich had said that he would kill somebody. On the fateful day, his employer gave the deceased maize to take to him. As she handed over the maize to him, David found them talking inside the house. He was seated on the bed while the deceased sat on a stool. David then said he had found them together. He then removed a panga from inside his jacket. He

cut the deceased on the head who fell on the ground. He then turned on him. He screamed for help and hid under the bed, but he managed to cut his feet.

The accused further told the court that as he lay under the bed, David continued to attack the deceased with a panga. Members of the public then arrived and he heard them say that the deceased was dead and that they would call the Chief and the police. By then, David had fled.

According to the accused, it is David Kipngetch who killed the Sarah because he feared that he would take away his girlfriend (the deceased).

### **SUBMISSIONS**

In submissions, counsel for the accused stated that the prosecution had not proved its case beyond reasonable doubts. First, there was no eye witness. Second, it was clear that the deceased was killed by David Kipngetch who was the deceased's boyfriend. Third, the murder weapons were not taken for forensic examination to determine whose blood was on them and who had handled them. Fourth, no explanation was given by the police as to why David Kipngetch was released without any charges being preferred against him.

The counsel urged the court to acquit the accused.

Learned state counsel Miss Mwaniki stated that the prosecution did not wish to make any submissions.

### **EVALUATION OF EVIDENCE**

I summarize the issues for determination as follows:-

- (a) The fact of the death of the deceased.
- (b) Who caused the death of the deceased.
- (c) Whether the death was caused by an unlawful act or omission of the accused.

As to the death of the deceased, the same was confirmed by PW6 who produced the post mortem report. PW1, 2, 3, 4, 5 and 7 did also state that when they arrived at the scene they found the deceased lying dead on the floor of the house of the accused. Although it was important that a medical examination confirmed the death of the deceased, it cannot be disputed that she died at the scene as testified by these witnesses.

So then, it is the accused who occasioned the death of the deceased? It was PW1's evidence that when she and her friend Ann heard some screams, they rushed towards the scene. They then stood a few metres to the accused's house which is where the screams were coming from. PW1 then saw the accused open the house door and run out while holding a panga. The accused then beckoned her into the house. That is when she found the deceased lying on the floor of the house. Before rushing to the house, PW1 and Ann had heard 'cutting' sounds "similar to those made while a person is cutting wound". Her testimony was as follows:-

***"I was at my aunt's place at Kipture Village in the company of a friend called Ann Chepkoech when we heard screams coming from the house of the accused in the dock (identified). We rushed to the scene and found that the house was locked. The screams were still coming from within. We heard sounds similar to those made while a person is cutting wound. After a few minutes, the house door was opened and the accused emerged from within without a shirt and holding this machete (panga) (P.MFI.1). We were 30 metres away. The accused beckoned me and returned to the house. He locked the door but I had noticed that the panga had blood stains and that the accused's wife Sarah (now deceased) was lying on the floor of the house."***

At this juncture, it is important to note that from the time PW1 and Ann approached the accused's house,

no other person save for the accused emerged from that house. Also, he returned to the house accompanied by PW1 and Ann. The latter two did not find any other person inside except the deceased who was lying on the floor. The accused did not also mention to them that they had been attacked by anybody.

Further, what attracted PW1 and her friend to the scene were the screams from inside and the “cutting” sounds. When the accused came out rushing, he was holding a blood stained panga. As such, it is only the accused who would have been making the cutting sounds. I conclude that the 'cutting' sounds were made by the accused as he cut the deceased. This was confirmed by PW6 who stated that the deceased had multiple cut wounds including a severed head.

PW1 remained firm and consistent on cross-examination. She was categorical that nothing would have obstructed her and Ann from directly seeing the entrance of the accused's house. In this regard, I disregard the accused's contention that there was a third party in the house, namely David Kipngetch who had attacked them.

The accused claimed that David Kipngetch attacked him and the deceased because he was apprehensive that he (accused) would take away David's girlfriend (deceased). But this theory is in total contrast from the facts on the ground as no one except the accused opened the door of his house as PW1 watched. And when himself, PW1 and Ann returned inside, there was only the deceased lying down in a pool of blood.

What was not clearly articulated by PW1 is whether, when they saw the accused run out of the house holding a panga, he had any injuries. At the point PW1 noted that things were not alright, she returned to her aunt's place and informed her what she had seen. She then returned with her aunt and both found the accused and the deceased on the floor.

All the witnesses (P1, 2, 3, 4, 5 and 7) confirmed that they found both the deceased and the accused lying on the floor of the house. Of course the deceased had died and the accused had injuries. I then post the question, who injured the accused?

The weapons retrieved from the scene were both a panga and a knife. Both were blood stained. Both accused and deceased sustained cut wounds. There is totally no evidence that a third party entered into that house. Hence, the probable conclusion that I make is that the two must have fought with the weapons but the accused overpowered the deceased and he ended up killing her.

In those circumstances, I then delve into considering whether the accused possessed malice aforethought when he killed the deceased.

The word malice aforethought is defined under Section 206 of the Penal Code 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. ”**

All the evidence collated, it appears that there existed a love triangle. It seems that the deceased related with both the accused and David Kipngetich in an intimate way. As stated by PW1 and 2, they knew that the accused and deceased were a husband and wife respectively and had lived as such for a period between one and three months. On the other hand, the accused stated that the deceased was a girlfriend of David Kipngetich. These contentions rounded up make me to deduce that the deceased had not fully cut her ties with David Kipngetich which fact may have angered the accused as a result of which both fought.

In lieu thereof, both the deceased and the accused having shortly lived as a husband and wife may just have picked a domestic quarrel. The same escalated to a fight and finally to the death of the deceased.

In such a scenario, it cannot be concluded that the accused intended the death of the deceased. He could have used excessive force in the stupor of anger and the fight. He can only then be held guilty for the offence of manslaughter and not murder as provided by Section 202 of the Penal Code.

Finally, I wish to point out that the error on the date that the post mortem report was issued was well explained by PW7 which explanation this court upholds.

Effectively, I dismiss the accused's defence as lacking credibility. I uphold the prosecution's evidence to the extent that the same has proved the offence of manslaughter under S. 202 of the Penal Code. I find the accused guilty of the same and I convict him accordingly.

**DATED and DELIVERED at ELDORET this 1<sup>st</sup> day of October, 2014.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:-**

..... for the Accused

..... for the State