



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Criminal Case 5 of 2010

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH CLARENCE TUM.....ACCUSED

JUDGMENT

Joseph Clarence Tum is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on 27th December 2009, at Kamara Area in Molo, he murdered Mary Chepkosgei Tum. He denied committing the offence. The prosecution called a total of 7 witnesses in support of their case while the accused person made unsworn statement in his defence. He did not call any witness.

The brief facts of this case are as follows; that the deceased was accused's wife; that accused, John Kipkoech Bii (PW1), the accused's son, Zainabu Bii (PW2), the deceased's daughter in law and Peter Bii (PW7) and PW1 and PW2's young children lived together at Kamara. PW1 recalled that his mother, the deceased left their home to visit a bereaved family about 10.00 a.m. on 27/12/2009. Before she left, the accused asked for Kshs.100 which the deceased gave her. PW1 said that PW2 cooked food and they ate with the accused who left home between 1.00 p.m. and 2.00 p.m. PW1 next saw the accused about 6 p.m. and the deceased's mother returned about 6.30 p.m. to 7.00 p.m. The deceased took fire from PW1's house and went to light her own fire in her kitchen. It is then accused came out of the house with a metal bar and chased PW2 who had gone to milk the cows. When the accused tried to hit PW2, PW1 locked the door and instead the accused hit the door and iron sheets to PW1's house and the accused threatened to kill them all on that day. The deceased came out of her house asking what the noise was all about PW1 managed to take away the metal bar from the accused and gave it to the deceased because it was bollow and used to light fire. The deceased went back to her kitchen while accused went to his house. The accused kept on making noise threatening to kill somebody. The accused entered the kitchen and PW2 followed to find out what he had gone to do. PW2 went back to the kitchen again about 8 p.m. and came back to tell PW1 that all was not well. At that time the accused came and hit the iron sheets to their house and claimed to have killed their mother (deceased). The accused tried to attack PW1 too but PW1 escaped. PW1 went to see what had happened to the mother, found her lying on the floor of her kitchen dead. He fainted and by the time he came back to, the police had come. The accused disappeared that evening and they found his clothes along the road. PW1 contacted his step mother who lives in Londiani on phone but the accused had not arrived there. Later, the step mother informed PW1 that the accused had been seen in the area and the next day he was arrested by police and charged for the offence. PW1 recalled that the deceased used to take '**changaa**' and sometimes used to behave funny and had been blaming them for sending his son, Eric away. PW1 said that Eric was sent away by neighbours because he was a thief.

Zainabu Chepngeno Bii (PW2) PW1's wife recalled that on 27/12/09 about 6.00 p.m. she went to milk the cows but the accused while armed with a metal bar chased her saying that he would kill her but PW1 rescued her. He knocked the door to PW2's house hit the window and PW1 snatched the metal. The accused kept making noises and it is then the deceased who had left in the morning arrived and she enquired from the accused what was the wrong. It is then PW2 asked PW6 to go milk the cows. Accused blamed PW1 and PW2 of sending his son, Eric away. It is then the accused came back shouting that he had killed the deceased. PW2 ran to the kitchen and found the deceased injured on the head meanwhile the accused had chased PW1. PW2 started to scream, PW1 managed to come back and went to the kitchen where the deceased's body was. Next day they called Kiplogi where accused's other wife lives and found accused was there. PW2 denied that accused was drunk on that day though he used to drink alcohol.

Joel Kiplimo Boiwo (PW3) was a neighbour of the accused at Kamara. On 27/12/09, he was at his home when he heard screams in the accused's home at about 8.00 p.m. He ran there and found PW1 lying at the door of the kitchen crying. Upon enquiry he was told that the accused had killed the deceased. The body of the deceased was in the kitchen. A lantern was on. He observed the body a lot of blood was oozing from the head. He called the Chief of the area. The police came, took the body and people started to look for the accused.

Dr. Daniel Kariuki (PW4), was based at Molo District Hospital on 30/12/09. PW4 performed a post mortem on the deceased on whom he found an open cut wound on the scalp, on front of the face, and another on the upper right side brain matter was oozing and bleeding within the skull and cause of death was head injury secondary to blunt trauma. Benard Kipkurgat Ruto (PW5), Assistant Chief of Benditani Sublocation knew the accused and deceased though they were from a different Sublocation. He received a call from John Bii (PW1) who asked him to check whether the accused was at his 2nd wife's home in Kaplogi. PW1 informed PW5 that the accused was being sought for killing his wife who lived in Kamara. PW5 went to the home of Samuel Kimetto in company of some villagers, found accused and asked him to go to his office where he handed the accused over to Administration Police.

APC Josephat Barongo (PW6) re-arrested the accused from the Assistant chief, PW5, and took him to Mau Summit Police Station on 28/12/09. PW7, Peter Kiprotich Bii the son of the accused. He told the court that on that day he arrived at home from Kamara at about 6.00 p.m., went to milk the cows, took the milk to the kitchen and went to the house where he used to sleep. After about 20 minutes he heard screams, PW1 went where he was and informed him that accused was screaming that he had killed somebody. They went to the kitchen together and found that the deceased was lying in a pool of blood. He got confused and ran away. He denied seeing the accused at that time but he had earlier seen accused at the gate and he looked drunk. He ran to the neighbour's home (PW3) and came back later when people had gathered. PW7 told the court that the deceased was his step mother and he had lived with her for 4 years and they had a good relationship.

PC Timothy Muoki of Mau Summit Police Station was at work when he received a call from the Chief of Kamara about the murder. He went to the scene with Sgt Audi, found the body of the deceased lying in a pool of blood in the kitchen and had injuries to the head. Based on information received he went to collect the accused from Mau Summit Police. He said accused seemed to be acting abnormally and he took him for a psychiatrist examination.

When called upon to enter his defence, accused gave an unsworn statement, denied the allegation that he murdered his first wife. He recalled that on 14/12/09 he withdrew Kshs.100,000/- from the bank after he got Kshs.1 million from his former employer, TSC. He took part of the money to his wife, the deceased, to share out amongst family members. He went to Maucho on 19/12/09 till 23rd when he went back to Londiani where he stayed till 27th December. On 26/12/2009 his cousin, Daniel Koskei met with him and they went to drink. On 2nd December 2009, he went to Kamara, the deceased served him with tea, they ate and budgeted for the money. He took 300/- to go and relax when PW1 interjected and wanted to give him money but he refused. He went and drunk '**changaa**' and slept on the way to see his wife Lily because he was too drunk. He slept on the road till 6.00 a.m. and he was arrested by the Assistant Chief. According to accused, PW1 wanted his money and PW1 was not happy that accused was going to

pay fees for the step brother for a degree course. That PW1 also wanted a tractor and he refused to bring it; That in 2008, he became abnormal was hospitalized. He was poisoned on 10/12/09 but survived. He said that he did not get along with PW2 because of her bad behavior of coming home late; That PW2 took PW7's money while PW1 took his Kshs.600,000/- which he had refused to pay. He said that it is PW1 who killed the deceased.

There was no eye witness to the murder of the deceased. The case turns on circumstantial evidence. There is a wealth of authority on what the prosecution should satisfy before circumstantial evidence can be a basis for a conviction. In the case of **Kariuki Karanja V Rep. (1986) KLR 190 :-**

“2. In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.

3. An aggregation of separate facts is inconclusive because they are as consistent with innocence as with guilt is not good enough evidence.”

The persons who were present in the accused's home on the fateful evening of 27/12/2012 were PW1, PW2 and PW7, the accused and the deceased. PW2 recalled that on that evening, while going to milk the cows at about 6.00 p.m., the accused had chased her for no apparent reason. The accused was armed with a metal bar but PW1 intervened. PW1 corroborated PW2's evidence. Both witnesses said that later, the deceased came home and asked the accused not to harass the children. Both PW1 and PW2 also recalled how the accused came brandishing a metal bar claiming to have killed their mother and wanted to kill them. While PW1 ran off, PW2 went to check whether what the accused had said was true and she did find the deceased lying in a pool of blood in the kitchen. PW1 and PW2's evidence was consistent and believable. There were no major inconsistencies in their evidence. PW7's demeanor was questionable. He was reluctant to tell the court exactly what he saw that evening and hesitated to answer questions. PW7 however, agreed to seeing the accused at the gate of their home when he arrived back home at about 7.00 p.m. and that the accused was quarrelling, talking to himself and looking drunk. What is not in dispute from the evidence of the three witnesses is that the accused was at the said home on the evening of this incident. It places the accused at the scene of the crime.

All the three witnesses PW1, PW2 and PW7 talked of the accused having been quarrelsome on that day. According to PW1 and PW2, the accused person accused them of having chased away his son by name Eric. PW1 and PW2 said that the said Eric had been sent away by neighbours who complained that he was a thief. PW7 seemed to have heard the accused quarreling about property. He did not specify what the quarrel was all about.

After the deceased's murder, the accused mysteriously disappeared from his home in Kamara. PW1, PW2 and PW3 confirmed the fact that they looked for the accused on that night but did not get him. PW3, a neighbour who came on hearing screams helped in the search and they did not get accused. He fled to Kiplogei on the same night.

In his defence, the accused said that he had been in his home in Kamara, went to drink 'changaa' and after that left for his other home in Kiplogei at about 4.00 p.m. I am convinced by the prosecution witnesses that the accused never left for Kipkogei at 4.00 p.m. but disappeared soon after the deceased was found dead after 8.00 p.m. The accused's conduct of disappearance from his home soon after the death of his wife in the dark is suspect and that conduct points at him as the murderer. He was running away from what he had just done. The court was told that Kamara and Kiplogei are about 4km separated by a forest yet the accused managed to flee in the dark through the forest to Kiplogei.

The accused made allegations against PW1 having objected to accused paying fees for his step brother, that PW1 wanted money from accused to buy a tractor. All these allegations come too late in the day. When PW1 and PW2 testified, one of those allegations were put to them so that they could accept or deny

them. The accused's defence was an afterthought and untrue.

All the above circumstances considered on their totality, I am satisfied beyond any doubt that it is the accused who murdered the deceased, informed PW1 and PW2 about it as he harassed them, PW2 was the first to see the deceased's body followed by PW1 and PW7. The accused then escaped and fled the same night to his other home in Kaplogei. The deceased was found to have sustained a fracture to the skull with depression on the frontal head from which brain matter was oozing. PW4 formed the opinion that the cause of death was cardio respiratory arrest due to severe head injury secondary to blunt trauma. PW1 and PW2 told the court that the accused was armed with a metal bar when he chased them when he claimed to have caused the deceased's death. That weapon is consistent with the injuries found on the deceased.

From the evidence on record, I am satisfied beyond any doubt that it is the accused who caused the death of the deceased.

The next question is whether malice aforethought has been proved. There is no evidence that the accused had disagreed with the deceased on that day or even therebefore. Both PW1 and PW2 told the court that accused used to have quarrels with them when he was drunk. On that day, PW1 and PW2 said accused was alleging that they sent his son, Eric, away which they denied. PW7 who is a step son to the deceased said that he had lived with the deceased for 4 years and their relationship was good. PW4 found two open cut wounds on front and side of the head. They created comminuted fractures. The injuries found on the deceased were so serious that the one who inflicted them intended and knew that he was inflicting grievous injuries on the deceased and that forms the necessary malice aforethought.

I need to point out that though PW1 and PW2 testified that the accused sometimes behaved strangely, he was examined before the plea was taken and found to be mentally fit to stand trial. On 21/2/2012 after the accused made his defence the court again directed that the accused be examined by a psychiatrist. He was examined by Dr. Njau of Rift Valley Provincial General Hospital who filed a report on 12/4/2012. His view is that the accused is of sound mind and fit to plead.

Having found that the circumstantial evidence points at none else but at the accused as the one who murdered the deceased, I will find him guilty of the offence of murder and convict him under **Section 322** of the **Criminal Procedure Code**.

DATED and DELIVERED this 9th day of July, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Omwenyo for the accused

Mr. Omari

for the State

Kennedy – Court Clerk