REPUBLIC OF KENYA

High Court at Nakuru

Criminal Case 46 of 2010

RICHARD KIPNGETICH KENDUIWA …......................................ACCUSED

VERSUS

REPUBLIC …..PROSECUTOR

JUDGMENT

Richard Kipngetich Kenduiwa *(the Accused)* is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code *(Cap 63 of the Laws of Kenya).*

The Republic alleged that the accused on the 25th day of April 2010 at Torokiet Reserve in Narok South District within the Rift Valley Province murdered RAEL CHEPKWONY *(the Deceased).*

The offence of murder is enshrined in Section 203 of the Penal Code in these terms-

"S.203. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

The essential element in the offence of murder is "***malice aforethought***".

It is the element of the guilty mind. It is satisfied by-

(a) an intention to cause the death of the deceased or any other person, or

(b) an intention to cause griveous harm to the deceased or any other person. It is immaterial that the person targeted is not the one who is finally killed or injured, or

(c) an intetion to commit a felony.

There is also a fourth element of malice aforethought to cause a prisoner to escape from lawful custody. This element is not of concern in this matter.

Associated with the offence of murder is the offence of manslaughter which is defined in Section 202 of the Penal Code-

"S. 202. Any person who by an unlawful act or ommission causes the death of another person is guilty of the felony termed manslaughter."

In this regard, Section 179 of the Criminal Procedure Code *(Cap 75 of the Laws of Kenya)* provides-

S. 179 (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

To prove its case of murder, the prosecution called five witness es including PW1, *(a doctor)* and PW5 *(the Investigating Officer)*. According to PW1, the deceased suffered lacerations on scalp right front temporal area, had missing teeth *(incissors)* and loose pre-molar and had excessive haemotoma at the left anterior chest, had severed scalp vessels from front temporal area, had no fracture to the head but had a cut on scalp fronto- temperal area. The doctor put the cause of death to *"Blunt chest trauma and shock following excessive haemorrhage from scalp laceration."*

On his part, PW2, an Administration Police Officer who arrested the accused testified that he arrested the accused when he went to report that his wife had died, that the deceased hit a timber joint while running away from the husband and that her body was not found at the house, but 300 metres away in a shamba of another person, Hellen in whose house illicit brew was being sold. He found no blood in the house, he found no evidence of a struggle or disturbance and had the body removed to Narok District Hospital Mortuary.

PW3 was the step-son to the deceased. He was telephoned by a lady called Salma Masawe that Rael Chepkwony had died, and that the accused was in Police custody. Upon visiting the accused in Police custody, the accused informed them that the accused had gone to drink and that a dispute arose and that he *(the accused)* slapped the deceased and that she ran out and in the course of running, she hit a sharp frame to the roof of the house and she ran and collapsed some distance on the path while running away, and that he *(the accused)* was later informed that the deceased had collapsed on the way. He was present when the Police came and removed the body to the mortuary.

In cross-examination, PW4 testified that the deceased liked her drink and that the accused had left drinking for about five years when the incident occurred.

PW4 was a brother to the deceased . He was informed by a friend called Rono that his sister had died after a fight with her husband, the accused. He travelled to the scene (Torokiat) and found the body of his sister covered in a blanket which he opened and found that she had injury on the right temple. The local neighbours informed him and his wife that the accused and the deceased had fought and that apart from bringing the body to the house, there was nothing else he had done.

PW5 was the Investigating Officer along with his colleagues P.C Douglas Wambua and P.C. Brian Omar, went to the A.P. Camp where the accused had been detained and visited the home of the accused with the assistance of A.P Richard Kones. They met many villagers and were shown the body of the deceased which had been removed from the maize plantation where it was first found. He observed blood oozing out of the wound at the forehead with physical injuries.

PW5 testified that they interrogated some members of the family including some children they found at the homestead and found them unwilling to give tangible evidence.

One villager called Wenston Rono however told them that the deceased had been sent to bring food *(potatoes)* but she however failed to do so and that the accused took a stick and hit her and that she ran away into a maize plantation where the body was later found with the area disturbed.

PW5 also testified that this 'Rono' disappeared completely and refused to tell them what had happened and that even the young boys were unwilling to come forward saying that the deceased had disturbed the old man for a long time. He noted however that there were two timber houses in the homestead and that one had a timber frame was sharp but had no blood stained to it.

On cross-examination, PW5 testified that by the time he visited the scene, it had already been disturbed and he would not recover any evidence from the scene, and Wenston Rono and the children all declined to assist him and his team in the investigations. In his opinion, there was no sufficient evidence because the the witnesses were not cooperative, and no photographs of the scene were taken. His view was not bending either upon the Provincial Criminal Investigations Officer or the State Counsel.

With that evidence, I put the accused to his defence. He elected to give an unsworn statement. He denied killing his wife. He had left the house early in the morning after the morning tea with his wife, the deceased, to go graze and water his cattle. At about 6.00pm one Weldon Kiprono came and informed him that his wife, the deceased, was drunk at Hellen's house. This Weldon Kiprono was his son-in-law. He took his cattle home, found some food on the table and then took one of his grandchildren *(a son to his son)* to go and look for her where she was said to have gone to a posho mill. He did not however find her there.

He went to Hellen's house and met four men including William, Chepkoigut, Philip Jeremy, Mungot and Hellen. They informed him that Hellen's body was in the maize plantation, near Hellen's house, and that being so informed, he went to the maize plantation and found her body covered in a leso and that she had vomited beer and that when he sought to know from the four people where she had taken the beer, they did not tell him. He decided to go and inform the Police in the company of Rono and his son.

He explained to the Police what had happened. He was detained and the **Aps** went to the scene and does not know what happened later. He had never disagreed with his wife over her drinking although he himself never drank. He does not know how his wife died.

ANALYSIS OF EVIDENCE AND SUBMISSIONS

At the close of the defence case, both State Counsel and the Counsel for the accused made submissions for and against the conviction of the accused. Whereas Mr. Omwenga learned State Counsel submitted that the prosecution had proved its case beyond reasonable doubt, Counsel for the accused submitted to the contrary that the State had not proved its case beyond reasonable doubt.

I have consequently reviewed the evidence of both the prosecution along with the unsworn statement of the accused.

Both State Counsel and Counsel for the accused submitted that the evidence against the accused was entirely circumstantial. I have often stated that in these cases that a lot of cases of murder are determined on the basis of circumstantial evidence. It is the evidence of all surrounding circumstances which go to prove a proposition with the accuracy of mathematics. It has also been held as early back as 1949 in the case of **Kipkering Arap Koske VS- Republic** **(1949)16 E.A.C.A, 135,**that for an accused to be found guilty, the prosecution must show that-

(a) the inculpatory facts must be incompatible with the innocence of the accused, and

(b) they must be capable of no other conclusion except the guilt of the accused.

It was clear from the evidence of PW5, the Investigating Officer that the many villagers and young boys- children he and his colleagues had found at the scene of murder were unwilling to tender any evidence to assist him and his colleagues in their investigations as to the cause of the deceased's death.

PW2 who originally arrested the accused visited the scene, he found no blood in the house, no evidence of struggle or disturbance. PW3 was informed by the accused of what had happened. PW4 a brother to the deceased was informed by a caller and found the body of his sister with a cut or wound on the right temple and indicated that there had been a fight.

According to PW5 the Investigating Officer, Weston Rono had informed them that the accused had

taken out a stick and hit the deceased before she ran away and that the children then followed her to the maize plantation. However, this Rono had "disappeared" and he had been unable to record a statement from him. If a statement had been recorded from him and he had not been called and no explanation was given by the prosecution it could be said as it was held in the case of **Joseph Peitun Losur -VS- Republic Court of Appeal at Nakuru Cr. App. No. 168 of 2001,-**

*"**that the defence and the court would have been entitled to draw the inference that had he been called as a witness his evidence would have been adverse to the prosecution."***

In this case, the more accurate inference to draw would be that there was no or little effort put to the investigation of this matter. The Officers concerned appear to have been taken in by the statements of the children and others that the accused had suffered for a long time in the hands of the deceased and by inference she would now rest in peace and leave the accused alone. The aspect of domestic violence by the accused upon the deceased was not explored. The deceased's explanation that he had tea in the morning with his wife, and he had gone to graze and water his cattle and did not know what had happened to his wife was tacitly accepted as the case. The picture would have been different if Weldon Rono's information gave the accused had taken a stick and hit the deceased would have thrown light as not merely to the cause of the injuries described by PW1 but indeed her cause death.

In the absence of either direct or circumstantial evidence, I am unable to say that the three elements constituting the *mens rea* and malice aforethought were established by the prosecution.

In the premises therefore, I find the accused, Richard Kipngetich Kenduiwa, not guilty of the offence of murder contrary to Section 203 of the Penal Code. I therefore direct that he be released forthwith unless otherwise held for a lawful cause.

It is so ordered.

Dated, signed and delivered at Nakuru this 5th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE