



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Case 39 of 2006

REPUBLIC PROSECUTOR

VERSUS

HANNINGTON ALOO OYIER ACCUSED

JUDGEMENT

The Accused **HANNINGTON ALOO OYIER** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 22nd August, 2006 at Langas Estate, Eldoret Town within Uasin Gishu District of the Rift Valley Province murdered **JOYCE MAKENA MUSYOMI**.

The Prosecution called nine (9) witnesses. PW 1, Rosemary Nanjala Kimatia was a neighbour of the Accused. She sold vegetables. She testified that on 22nd August, 2006 at about 8 p.m. she was at her shop working. She was with her children. They were aged between five (5) years and sixteen (16) years. Her son called Timothy came and told her that someone had fallen outside in the rear of the shop. PW 1 went to the place indicated and found a girl sitting down. She said that she had seen the girl before. That she used to come to the Accused's house. PW 1 identified the Accused. She said that her premises are on their plot. She said that Hannington was present. He was asking her to enter his house. He told PW 1 that the girl was drunk. PW 1 decided to go to her house. The next morning, PW 1 learnt that the Accused and one Momanyi had been arrested. That Momanyi did not stay in the compound. The following day, the Police went to PW 1 and told her that the girl had died and her son Timothy had been taken to the Police Station. She later wrote her statement.

On cross-examination PW 1 said that she had not seen the girl enter the Accused's house.

PW 2, was Timothy Omondi Omollo, the son of PW 1. He is a student in Kitale at the time in Form 3. He said that on 22nd August, 2006 he went home at about 8 p.m. and found his mother in the front of their house at Langas Estate. He entered the house and opened the back door. It had rained and he wanted to remove mud from his shoes. PW said that a girl then fell near, on his side. He was shocked. He ran into his house and closed the door. He said that she did not stand up. He closed his door and went to tell his mother what had happened. PW 2 said he then went back to the scene and found the girl still there. She was now with a boy. PW 2 identified the boy as the Accused whom he identified in the dock. He said he knew his name as Antony.

PW 2's mother (PW 1) came and the Accused told her that the girl was drunk. The girl was not speaking but was alive. PW 2 said that he recognized the girl. They had been school mates in Primary School. He was in Standard eight (8) while the girl was then in Standard six (6). He said that her name was Joyce. He did not know where she lived. He said that the Accused was their neighbour. PW 2 had

not seen the girl in the compound before. PW 2 then went back into his house.

The next day he heard that the girl had died and Antony had been arrested. PW 2 then wrote his statement with the Police.

On Cross-examination PW 2 said that the girl fell on her face. He did not touch her. He ran away. That it was about 8 p.m. That Antony told that the girl was drunk. He said that there was a gate at the back of the house. He heard foot-steps from behind him. He then went to his mother for help.

PW 2 said that when the girl fell down there was a splash. The ground was wet. He thought that she could be drunk. She was not alert. He said that it was dark but they used a lantern. He said that the girl was lying down. She did not carry anything. PW 2 did not see any injury.

PW 3 was a sister to the mother of the deceased. She said that on 28th August, 2006 she went to identify the body of Joyce Makena Musyomi the deceased, at Moi Teaching & Referral Hospital. She identified the body and left. She did not wait for the post-mortem to be done.

PW 4 was Christopher Michael Oyier, a brother to the Accused. He resides in Langas and a teacher at Bright field Academy in Langas. He said that the Accused was his elder brother.

That on 22.08.06, he arrived at his house where he lived with his brother the Accused. It was at about 8 p.m. He said that it was a two-roomed house in Langas. He lived in one room and his brother in the other. It had one common door. He said that the Accused was present in the house. The deceased, Joyce Makena was also present. That she was lying on Hannington's bed.

PW 4 said that he saw tablets on the bedside on a stool. There was also some milk and water. He asked the Accused as to what had happened. He told PW 4 that the deceased had come as she was. PW 4 said that she had injuries on the forehead and on the wrist. She was conscious. PW 4 said that she recognized him and complained of stomach pains. After five (5) minutes a friend of theirs Momanyi Geoffrey arrived. The Accused then declared that he had to take the girl to the hospital.

PW 4 said that they decided to help the girl to the nearby bus-stop. The four of them then boarded a Nissan Matatu that took them to the hospital. That while undergoing treatment she was pronounced dead. PW 4 said that they were taken to the Hospital Security after which the Police came and took them to Langas Police Station.

PW 4 said that they met the Officer In Charge of Station (OCS). They were taken back to the house. The Police inspected the house after which they went back to the Station at midnight. That the Police took a small hammer and a pillow that the deceased had used. PW 2 identified the two items in Court.

PW 4 said that he was subsequently released but the Police retained the Accused and Momanyi. PW 2 was taken back to his house.

PW 4 said that he had known the deceased for a while. She used to visit the Accused. They were boyfriend and girlfriend. That Accused worked as a Sales Representative for "Mandazis".

PW 4 said that the hammer belonged to his family. That the deceased was a pupil at Langas Primary School in Class eight (8). That she was fifteen (15) years or sixteen (16) years. The Accused was twenty four (24) years.

On Cross-examination PW 4 said that on the material day, he went home for lunch. He found Accused in the house but not the deceased. That the Accused was cleaning the house. That he was using the hammer to hang pictures on the wall. He used the hammer and small nails.

He said that the deceased kept on saying 'tumbo, tumbo, tumbo' i.e. (stomach, stomach, stomach). PW 4 suggested that they take her to her parents as she looked critical. That the deceased said that she

had not been at home and if she went there, there would be a quarrel with her mother. The Accused said that they could not take her to her home. The Accused asked PW 4 to help him. He added that Accused told him that the girl had been beaten but she did not disclose her assailant/s.

PW 4 said that they assisted the deceased to walk from the house. That she was leaning on the Accused and that did not show any hostility. PW 4 said that the parents of the girl were against the relationship between the Accused and the deceased. That they had said that they should stop seeing each other. This was a few days before.

PW 4 said that the reason for the parents of the girl objecting to the relationship was tribal. That the Accused was a Luo while the deceased was a Kikuyu. PW 4 said that at one time the mother had said that if the two wanted to be together then they should go somewhere far away. PW 4 said that the hammer had blood and so did the pillow. PW 4 said that at the doorstep, there was blood. He saw blood when entering the house.

PW 4 said that blood was oozing from her mouth. That blood was coming from her mouth when they assisted her out. PW 4 said that the deceased was in a critical condition and in total pain. PW 4 suggested that they take the deceased to hospital. He paid for the fare to the hospital. PW 4 said that he did not know what happened. That Hannington was in love but had to be separated due to mother's intervention. He said that the Accused and the deceased had broken up five days earlier. That the Accused had suggested that it was better that they separate. That the deceased did not want to be at loggerheads with the mother but they were still in love.

PW 5 was Dr. Joseph Embenzi who was allowed to produce the post-mortem under the provisions of Section 33 of the Evidence Act Chapter 80, of the Laws of Kenya. The post-mortem was carried out by Professor Koslova at the Moi Teaching and Referral Hospital. Dr. Embenzi had worked with her for six (6) years and was familiar with her handwriting and signature. He testified that the post-mortem report dated 28-8-06 was indeed written and signed by Prof. Koslova. It was produced as Ex. No. 1.

PW 5, Dr. Embenzi testified that the body was that of Joyce Makena Musyomi. He said that the report showed that the cause of death was severe torture. She had been tied with ligatures binding deep into soft tissues from the wrist. It was 0.5 cm. It was deep. She had a concave semi-lunar (half-moon) abrasions on the left side of the neck. These were marks of finger-nails. That it must have been a right-handed person who was strangling her. She had blunt injuries all over her body.

PW 5 said that he scalp was profusely infiltrated with blood. That death was due to traumatic shock. He produced the post-mortem report in evidence. PW 5 also produced a medical report on the Accused made by a Dr. Nyauru. The said doctor certified that the Accused was fit to plead to the Charge. The report was marked as Ex. No. 2.

Upon cross-examination, PW 5 testified that the deceased had been tortured severely. She died fifteen (15) minutes on arrival at the hospital. That she was tortured as if somebody was trying to extract information from her.

PW 6 was called Alice Nyakinyua. She said that she is the mother of the deceased JOYCE MAKENA MUSYOMI. She said she lived in Nakuru. She used to live in Langas, Eldoret but left after her daughter's death.

She remembered what happened on 22nd August, 2006 at 3 p.m. She was at home when her daughter, Joyce Makena asked for permission to go out. PW 6 gave her permission. She went but did not come back. She was with other girls. That it was unusual for her not to come back. She was sixteen (16) years old. She said the deceased was a student at Langas Primary School in Standard eight (8).

She said that the next day she received information at 10 a.m. that her daughter had been sick and had died. She said that the daughter's boyfriend was called Antony and that he was in Court (identifies the Accused in the dock). She said that she knew him. That she had told him to stop having any relationship

with her daughter. She said that she knew where the Accused stayed. She said that after hearing the death of her daughter she went to the Accused's sister who told her that her daughter's body was at the mortuary while Antony had been arrested. She went to Langas Police Station.

She later saw her daughter's body at the mortuary. She could not look at her and she never went back. She saw the body at the burial.

She said that although she asked the Accused to stop having any relationship with her daughter, he did not stop. She said that there is a time that the Accused had beaten the deceased.

Upon cross-examination, PW 6 said that her daughter did not say where she was going the previous day before she heard of her death.

She said that she was against the relationship between her daughter and the Accused. That her daughter was still young. She said that the Accused had beaten her daughter a month before she died.

PW 7 was Police Constable Elam Juma Mutonyi. He said that he was based at Eldoret Police Station. That on 22nd August, 2006 at about 11 p.m. he was at the Station on standby duties. He received an information from the Division 99 Control Room through VHF set that there was a report from Moi Teaching & Referral Hospital that they had received a patient from three (3) young boys for medical treatment. That the patient died immediately after being received at the Station.

PW 7 rushed to the Hospital and on arrival went to the Observation Room. He met the doctor on duty. He showed him the body of a young girl. He said that she had been taken to the hospital by three (3) young boys. PW 7 noticed injuries on the body of the girl. There were marks on her ankles and hands indicating that she had been tied by a rope.

There were marks all over the body like burns including the head. PW 7 was led to the Security Room at the hospital. He met three (3) young boys. One of them was the Accused. He identified the Accused the dock.

PW 7 said that he interrogated them. He did not remember the other two (2). They were in shock but were not yet aware that she had died. They said that they were from Langas. PW 7 went to the Police vehicle and notified Control Room so that the Officer In Charge of Station (O.C.S.) could be alerted as the incident happened in his jurisdiction. The body was placed in the Hospital mortuary.

PW 7 said that he later met with the O.C.S. Mr. Omukolongolo. They went to the scene. The house belonged to one of the suspects. PW 7 said that they entered the house. There was enough light to see. Things or items were displaced in the house. It was now about midnight. There was a lamp. He said that things were disarranged which was an indication of a struggle. He said that they found a pillow case that had blood stains. There was also a hammer recovered. PW 7 handed them to the OCS of Langas. He said that there were no blood stains on the floor. He said that they were led to the house by the accused and the teacher – PW 4.

Upon cross-examination by Counsel for the Accused, PW 7 said that he saw a blanket on the floor. He saw some stools with some 'lying' on the ground which this Court understood to mean "overturned." Nothing was broken. PW 7 said that in the house, there was a lady who was sleeping. She woke up when they arrived. The Chief Inspector interviewed her. She was in the second room.

PW 8 was Police Constable Mr. Joel Omwitsa attached to Langas Police Station. He said that on 28th August, 2006, he left Langas Police Station to Moi Teaching and Referral Hospital. It was about 10 a.m. He said that he had gone therefore to attend the post-mortem on the deceased. He identified the deceased Joyce Makena Musyomi a girl aged sixteen (16) years old to the Pathologist. The Pathologist was Professor Koslova. He had seen the body at the mortuary on 23-08-07. He was accompanied when he visited the mortuary the first time. He spotted marks on the hands and legs. She had been tied. There were small marks all over – black in colour. He said that they seemed to have been burns on the chest

and stomach. He was accompanied by the mother of the deceased at the mortuary. That Professor Koslova said that the deceased had died from traumatic shock.

PW 9 was the last witness. He was Chief Inspector Bosita Omukolongolo Mukoya. When he testified he was in Charge of Muthaiga Police Station in Nairobi. He had been based at Langas Police Station before that.

He said that on the night of 22nd – 23rd August, 2006 he was asleep. He got a call about midnight from Police Control Room. He was told that some young men had been arrested at the Moi Teaching and Referral Hospital who had assaulted a young girl. PW 9 then went to the Hospital. He said that he found that the young men had been taken to Central Police Station at Eldoret. The girl had died.

He then went and collected two boys from Central Police Station to Langas Police Station. He then commenced investigations on the same night. PW 9 went to scene at Panama Estate in Langas. He entered the house where the girl had been. He said that the arrangement of the items in the house showed that something was amiss. That something had happened. He said that first, he saw blood stains on the floor and on the pillow on the bed. The sofa set was disarranged. The house belonged to one of the suspects, Hannington Aloo Oyier.

PW 9 said that he searched the house and found a hammer. It was stained with blood. It was beside the bed. He identified the hammer in Court and produced it as Ex. No. 4. He identified the Pillow Case which was produced as Ex. P. 3. He said that he preserved the scene as he wanted the officers from scene of crime to come and take photographs.

He said his investigations revealed that Hannington, was the boyfriend of the deceased. He said that he found out that he had differed with his girlfriend and there had been a fight. That during the fight the deceased had received serious injuries. PW 9 formed the opinion that the Accused had caused the death of the deceased. He was later charged with murder. He said that the girl had an injury on the forehead. She also had injuries on the back.

PW 9 said that after recording statements, he found that the other suspect was not involved and he was released. PW 9 identified the accused in Court. PW 9 said he does not remember the 3rd suspect. He said that he did not record the statement of PW 2. He said that the lady in the house was not a necessary witness.

At this stage the Prosecution closed their case. The Prosecutor Mr. Omutelema said that they could not trace one witness called Geoffrey Momanyi who was one of the young men who had taken the deceased to hospital.

The Accused was subsequently placed on his Defence and gave a sworn statement.

The Accused said that he lived in Langas Eldoret, and understood the Charge against him. That on 22-08-06 he was at home in Langas. That he knew the deceased Joyce Makena Musyomi and that she was his girlfriend. He said that he did not leave the house on the said day. He said that he was with his sisters Ann and Chira.

That at around 11 a.m. he was re-arranging things in his room. He said that he painted the inside walls of the room. He said that the house was a two bed-roomed house. One was his and the other was his brother's – PW 4.

He said that his brother came to the home at 12 noon for lunch break. PW 4 is a teacher. That the room was in disarray. That he was re-pinning the pictures on the wall after painting the walls of the room. He said he was using the hammer. That PW 4 went back on duty at 2 p.m. The Accused said that he is the one who folded the carpet and mopped the PVC Carpet. He had placed his clothes and table on the couch. He said he did not re-arrange the furniture. He said that his brother's girlfriend Michelle came while he was mopping around 3 p.m. He said that he gave Michelle some clothes of his brother to iron.

The Accused said that since he wanted to watch the 7 p.m. news on T.V. he went to his the family's main house within the same compound and where his sisters lived. He said that he then heard a dog bark. And then he heard something fall down. The dog barked again. He left his family's main house and went outside. He said that it was then that he met the deceased lying on the ground near PW 2's house. He saw PW 2 who is a son of his neighbour PW 1. He said he tried to assist the deceased to stand up. That PW 2 returned with his mother PW 1.

The Accused said that the deceased had a punctured forehead and blood was oozing from it. That PW 1 asked what the matter was and he told her that he thought she was drunk. He said that he said so since she was not steady.

The Accused said that he took her to his house and placed her on the bed. That the couch was full of items. He said that the deceased sat on the bed and did not speak.

The Accused said that he left the deceased on the bed while Michelle was in her room. He went to bring pain killers and a cup of milk. That the Accused was complaining of stomach pains. He stated that she was not actually drunk. He gave her 'Actal' tablets which she swallowed. She declined to take the milk. He said blood was oozing from her head. He gave her a piece of cloth to place on her bleeding forehead.

The Accused said that he saw she had deep impressions on her left hand. He said that he asked her what had happened and she said that she had been assaulted by some boys. She was in pain. That he asked his brother called Kevin and told him what she had said. That she did not disclose the names of her assaulters.

The Accused said that a friend of his called Momanyi came. That he asked Momanyi and his brother to take her to hospital. Blood was oozing from her mouth. She could not walk. That they carried her to the road and boarded a matatu.

He testified that they went to Moi Teaching and Referral Hospital. They went to the casualty and left her being attended by doctors. They sat at the Waiting Bay at the Hospital.

He testified that at around 10 p.m. they were called by security officers to enter the Hospital's Radio Room. While there, three (3) policemen from Eldoret Police Station came and interrogated them. The Accused and his colleagues were told that the girl had died.

The Accused explained that the deceased was bleeding. The blood flowed on the bed and clothes. He said that the hammer was in a container with nails. That the deceased's blood oozed unto it.

The Accused said that he had suspended their relationship a few days before. That his brother George and an uncle asked him to stop the relationship. They told him that the deceased was a minor. That he told her of his decision but she insisted on continuing with the relationship. That the mother of the deceased also complained and asked him to allow her to finish school first.

The Accused denied killing the deceased. He said that he did not know who killed her. That the deceased used to come to see him whenever she had any problems or had quarreled with her mother. That she did not cheat on him.

Upon cross-examination, he said that the deceased occasionally drank. That he thought she was drunk since she was not steady. She was sixteen (16) years old. That he was twenty five (25) years old. At the time he was twenty three (23) years old. He agreed that it was not proper to have a relationship with a sixteen (16) year old. He was present when the hammer was retrieved. The pillow was blood-stained.

The Accused denied that there was a trail of blood from where she had fallen to the room. However, that from the door there were drops of blood. He denied that the Deceased was injured in his house. He said he did not involve the neighbours. That they decided to take her to hospital when blood started

oozing from her mouth. He said that he met the accused at about 8 p.m. on the fateful night. He said that he did not assault her.

I have carefully considered the testimonies of the prosecution witnesses and that of the Accused. I have considered all the evidence and submissions by Counsel. I have perused the proceedings and analysed the evidence.

I do hereby find that the Accused was then about twenty three (23) years old while the deceased was a school-girl aged sixteen (16) years old. She was in Standard eight (8) at Langas Primary School. The Accused as PW 4 his brother testified was a sales representative for “Mandazis” (sic).

I do hereby find that the Accused and the deceased were having a relationship as boyfriend and girlfriend despite the disparity of ages and the fact that the deceased was a minor.

The evidence of PW 6, the mother of the deceased, PW 4 the brother of the Accused and the Accused’s own evidence show that the two had been having this relationship for sometime. It is clear that the mother of the deceased was opposed to the relationship between the two. Her daughter the deceased was a child of sixteen (16) years old and still in school. She beseeched the Accused to stop the relationship and to allow her daughter to continue with her education.

I do find as a matter of fact that the Accused did not comply with the deceased’s mother’s pleas for him to stop the clearly illicit relationship between the two. The Accused as the adult continued with having the relationship which he admitted. It is certain that this involved sexual intercourse between the Accused and the deceased. The witnesses left no doubt in the mind of the Court that this is what was meant by “**boyfriend and girlfriend relationship.**”

From the evidence on record, PW 6 the mother of the deceased said that on 22nd August, 2006 at about 3 p.m. her daughter the deceased asked for permission to go out. Her mother appears to have allowed her. In any event the deceased left the mother’s house. The mother did not know where she had gone and with whom.

The next day the mother was told that the daughter had fallen sick and died in hospital.

Among the witnesses the first persons who expressly states that he saw the deceased thereafter are PW 1 and PW 2 initially.

PW 2, Timothy Omondi Omollo a student at Kitale in Form three (3) went to his home at Langas on 22nd August, 2006. From the evidence, it comes out clearly that the family of PW 2 lived in the same compound as the Accused. They were neighbours. At about 8 p.m. he found his mother PW 1 in front of their house. He entered the house and opened the back door to remove mud from his shoes as it had rained.

From his evidence suddenly a girl fell on the ground near him. He was so shocked that he ran away. He entered his home and closed the door. He then told his mother what had happened. PW 2 said that he went back to the scene where the girl was. This time the girl was still lying on the ground but there was a boy. He testified that the boy was the Accused whom he knew as Antony. He identified the Accused in Court. He said that the Accused was the person he saw with the girl. He said that the Accused said that the girl was drunk. PW 2 recognised the girl as he had gone with her to the same Primary School.

The question that this Court must ask itself is where had the deceased been since she had left her home at 3 p.m. to 8 p.m., a period of five (5) hours? Where did she fall from and how?

I have carefully considered the evidence of PW 2 and found him to be honest and truthful. The deceased violently fell down on her face next to him at 8 p.m. near his home. His home is near the Accused’s house. He ran away in shock when he heard foot-steps and when he came back he found the Accused with the girl. He had gone to tell his mother of the incident. The Accused told PW 2 that she

was drunk. Later in his testimony the Accused admitted that the deceased was not drunk. That he thought that she was drunk because she was not steady.

It is the considered view of the Court that the Accused deliberately and knowingly lied to PW 2 that the deceased was drunk. The Court finds that the deceased was never drunk and the Accused's statement was to mislead PW 2 as to the circumstances under which she had fallen and was in the condition she was. PW 2 said that the girl was not speaking. The truth as will become established is that the girl had already been severely tortured, beaten and assaulted. She could not speak because she could not do so in her condition.

After a careful analysis of the evidence and testimonies, I do find that the Accused had been violently pushed or felled to the ground as she was being beaten and assaulted by someone. PW 1 the mother of PW 2 stated that her son came to tell her at about 8 p.m. that someone had fallen outside in the rear of her house. When she went to the scene she found a girl sitting on the ground. She had seen the girl before as she used to come to the Accused house. From the testimonies of PW 1, PW 4 and the Accused himself, I do find that the girl was the deceased. PW 1 said that the deceased was present and he was asking the girl to enter his house. He told PW 1 that the girl was drunk. PW 1 decided to go into her house.

The Accused in his testimony, examination-in-chief said that around 7 p.m. or thereafter as he was watching News on T.V. at his family's house near his house, he heard a dog bark twice. That on going out he found the deceased lying on the ground near PW 2's house. That he tried to assist the deceased to stand up. He said that she had a puncture forehead and blood was oozing out.

I have considered the evidence of PW 1 and PW 2 and that of the Accused. I have also considered all other testimonies.

I find that the Accused lied once again lied, this time to PW 1 when he said that the deceased was drunk. If he truly found her lying on the ground how could she be unsteady for him to form the opinion that she was drunk. If he was seeing the deceased for the first time when he came out why should he jump to the conclusion that she was drunk?

Is this the reaction of a loving boyfriend who sees his girlfriend at night lying on the ground with blood oozing from her forehead? Is this the reaction of a person who knew nothing of the whereabouts of the deceased before 8 p.m. and what had befallen her?

I find that the Accused lied to both PW 1 and PW 2 that the deceased was drunk. He lied because he intended to mislead them as to why she was lying on the ground in a comatose state.

I do find that the Accused lied to the Court when he testified that he had come from his family's house while watching news on T.V. to come out only to find out why the dogs were barking or on his way to his house.

I do find that the Accused was with the deceased when she violently fell down on her face outside his house near PW2's house.

Someone must have thrown her to the ground or she fell down as she tried to escape from her assailant/s. PW 1, PW 2 and the Accused confirmed that the deceased was not speaking while on the ground. This suggests that she was severely wounded or injured and could not stand or speak. The Court had found as admitted later by Accused that she was not drunk.

The question is where was the deceased from 3 p.m. to 8 p.m. and where and how did she sustain her injuries? No one gave any evidence as to the whereabouts of the deceased between this period. However, it is the duty of this Court to make a finding and determine where she was at the said period whether through direct or circumstantial evidence.

PW 5 was Dr. Joseph Embenzi, he produced the post-mortem report in respect of the deceased under the

provisions of Section 33 (b) of the Evidence Act, Cap. 80. The post-mortem was carried out by Prof. Koslova on 28-08-2006. The post-mortem report revealed that the cause of death was severe torture of the deceased. She had been tied with ligatures, binding deep into the soft-tissues around her wrist. It was 0.5 cm. It was deep. She had concave semi-lunar (half-moon) abrasions on the left side of the neck, they were abrasions left by finger nails. A right-handed person had strangled her. There were blunt injuries all over the body. The scalp was profusely infiltrated with blood.

The conclusion of Prof. Koslova was that the cause of death were these multiple soft tissue injuries (abrasions and bruises) all over the body with severe oedema) inflicted by blows from a blunt object. Imprint of finger nails on the neck. There was circumferential imprint of a thin rope, deeply going into subcutaneous tissue on the right wrist while she was untied. Semicircular imprint at the right shin in lower ankle. There was severe bloodless of organs. Death was by traumatic shock.

It is the finding of the Court that the said severe and fatal injuries were sustained over a long period of time. Dr. Embenzi, PW 5 stated that the deceased was tortured as if somebody was trying to extract information from her.

The injuries were severe. They were sustained over a period of time. It is my considered view and finding that the injuries were sustained in the house of the Accused between shortly after 3 p.m. and 8 p.m.

By the time she fell to the ground at 8 p.m. she was not in a position or condition to walk. She did not come out of the compound through the back gate. The deceased must have fallen to the ground outside the Accused house as she tried to escape from being tortured, molested and assaulted.

From the record, it is not clear whether PW 4's girlfriend was in the room or not or what time she arrived. It is unclear why she was not brought as a witness and whether she could have been involved.

What is certain is that the Accused as he admitted himself was in his house the whole day and upto 8 p.m. and thereafter when they took the deceased to hospital.

I do find that sometime after 3 p.m. the deceased went to the Accused house where there was a disagreement or fight between the Accused and the deceased. There is sufficient evidence to prove that there was a strained relationship between the Accused and the deceased. The mother of the deceased had put pressure on the deceased to terminate the relationship. The deceased appeared to have decided to break with the accused.

I do find that the accused severely tortured the deceased on 22-07-2006 between shortly after 3 p.m. and 8 p.m. A hammer was found in the house, Ex. P 4, which the Accused used to hit the deceased with all over the body. He used the said hammer/weapon to systematically and brutally to hit and pound the deceased all over the body. He tortured her to a pulp that she bled from all organs that the body turned black. He tied her with a thin rope on the neck and ankle/s.

I do find that the hammer was the main murder weapon as it was found in his house covered in blood. He also used a thin rope to strangle the deceased and also used his hands to strangle her.

I have considered the evidence of PW 7 and PW 9 who went to the scene, the house of the accused the same night. They found the house in disarray. They testified that there must have been a struggle as the items in the house were in disarray. They found the hammer and the pillow case full of blood. There was blood all over the mattress.

If the Accused was truthful, then why did he not seek assistance and take the deceased for medical attention at 8 p.m. having seen the severe wounds and bleeding on her head? Instead PW 5, the doctor stated that the deceased died at 11 p.m. within fifteen (15) minutes of being taken to Hospital.

This Court finds that the Accused and his brother PW 4 were not truthful and lied to the Court about the

circumstances in which the deceased was found in the house. If the deceased went to the house at 8 p.m. injured severely then it beats reason and logic why they did not rush the deceased to hospital at 8 p.m. They took three (3) hours to take the deceased to hospital for assistance and treatment. If there was nothing to hide then why the delay of three (3) hours. What were they doing between 8 p.m. and shortly before 11 p.m. It cannot take three (3) hours from Langas to Moi Teaching and Referral Hospital.

PW 4 and the Accused could not account as to what happened between 8 p.m. and at least 10 p.m. Was this the time, the Accused was mopping up the P.V.C floor and rolling up the carpet?

The Accused and PW 4 also economized on the truth about PW 4's girl friend, Michelle. They did not tell the Court what time she arrived in the house and her whereabouts during the trial. It is strange that the Prosecution did not attempt to summon her as a witness. She had much to tell.

All in all, from the direct and circumstantial evidence I do find that the Accused had malice aforethought and that he did cause the death of the deceased.

The Accused had differences or disputes with the deceased or her mother as to the termination of there illicit relationship which itself suggested possibility that the Accused was committing the felony of defilement. I do find that there was a serious disagreement on the aid evening and there was a fight or struggle. The accused over-powered the deceased and in event tied her up and brutally beat her with a hammer. He caused her grievous harm that she died. While he may not have had the intention at the outset yet the grievous harm was so horrendous, brutal, and inhuman that he must have subsequently decided to kill her or do such grievous harm that led to her death.

The direct and circumstantial evidence leads me to find and which I do hereby find that the Accused with malice aforethought caused the death of the deceased by unlawful acts and omissions. I do find the Accused guilty of murder of Joyce Makena Musyomi contrary to the provisions of Section 204 and 205 of the Penal Code.

DATED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF JUNE, 2009.

M. K. IBRAHIM

JUDGE

I now call upon the Accused to mitigate before sentence.

M. K. IBRAHIM

JUDGE

3/06/09

MITIGATION

Mr. Magare:

I am instructed to mitigate. He is 24 years. He is orphan. He is in charge of taking care of his younger sisters. He took the deceased to hospital. He tried to save the deceased. This is conduct befitting leniency. He has no criminal record. He deserves mercies of the Court.

Mr. Chirchir:

The Accused is a first offender. There is only one mandatory sentence.

SENTENCE

I have considered the mitigation by the Accused.

The only and mandatory sentence provided by the Law under Section 204 of the Penal Code is that of death.

I now hereby sentence the Accused to death.

Right of Appeal within fourteen (14) days.

DATED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF JUNE, 2009.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Alwanga for Mr. Magare for the Accused

Mr. Chirchir for the State