



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU Criminal Case 78 of 2008

REPUBLIC.....PROSECUTOR

VERSUS

MARITA SIMIYU MICHELE..... ACCUSED

J U D G M E N T

MARITA SIMIYU MICHELE has been charged with the offence of murder **contrary to section 203 as read together with section 204 of the Penal Code.**

The particulars of the charge were that on 6th of September 2008, at Kibera, Kichinjio Estate, within Nairobi Province, the accused murdered **ALBERT KIPKOECH KESIO.**

During the trial, the prosecution called seven (7) witnesses. Thereafter, when the accused was put to her defence, she gave a sworn testimony, and she then called two (2) witnesses.

PW 1, DR. ZEPHANIA KAMAU, is a police surgeon, based at the Nairobi Area Police Headquarters.

On 18th September 2009 he examined the accused and ascertained three facts, namely;

- (i) The accused was about 17 years old;
- (ii) She was mentally fit to stand trial; and
- (iii) She did not have any physical injuries.

At the time when the doctor examined her, the accused was a student, in Form 3.

PW 2, ANNA NAMBUKO MUSUNGU, is the mother to the accused. She testified that the accused was born in 1992. By 2nd November 2009, when **PW 2** testified, she said that the accused was 18 years old.

It was the evidence of **PW 2** that she and the deceased had lived together as husband and wife from 1998. However, the two of

them were not blessed with any children.

Although **PW 2** had four (4) children, the deceased was not their father. The father of all the 4 children had died prior to the deceased getting involved with **PW 2**.

When **PW 2** got back to her house, from her place of work, at about 4.00p.m, on 6th September 2008, he found the accused outside the house, whilst the deceased was seated inside the house. **PW 2** asked the accused why she was not watching the football match on television, but the latter did not respond.

At that moment, none of **PW 2**'s other children was around the house.

It was the evidence of **PW 2** that whilst her daughter (the accused), complained to her about an abuse which the deceased had hurled at her; the deceased did complain to **PW 2** that the accused denied him the opportunity of watching the football match on television. Apparently, the accused had insisted on watching a movie of her choice, because it was being aired on a television belonging to his mother.

PW 2 tried to calm down the deceased, by telling him that the issue which had annoyed him would be sorted out.

PW 2 then went about washing some of her clothes. She did so within the same single room, where the deceased was sitting.

When **PW 2** got out of the house, to go and air the clothes she had washed, the deceased also stepped out of the house.

According to **PW 2**, the deceased went to his other house, which was located about 100 metres from **PW 2**'s house.

Although the accused had remained outside the house when **PW 2** reached there, she re-entered the house when the deceased went out.

After **PW 2** had aired her washing, she went to pour out the water she had used for washing. It is then that she had the accused screaming, saying that she was being killed. The scream caused **PW 2** to rush back into the house.

Inside the house, she found the deceased seated, whilst the accused was standing. When **PW 2** asked them what was happening, the deceased told her that he had been stabbed.

PW 2 also noted that the deceased was bleeding. The blood was on his T-shirt.

The deceased told **PW 2** that he would avenge the stabbing.

PW 2 reiterated that at the material time, the deceased and the accused were alone inside the house. Notwithstanding that fact, **PW**

2 said that she was not sure about who had stabbed the deceased.

PW 2 then saw a knife on the floor. The said knife was the same one that **PW 2** used to use in her house.

At the time when the accused screamed, **PW 2** entered her house in the company of **PW 5**, Samuel Omingo Aboki. **PW 5** was her neighbor, whose house was directly opposite **PW 2's** house.

Meanwhile, as **PW 2** was talking to the deceased, the accused left the house. The deceased then phoned his brother, **PW 3**, and asked him to have him taken to hospital.

Because, **PW 3** did not arrive at **PW 2's** house quickly enough, **PW 2** asked **PW 5** to look for a taxi, which would take the deceased to the hospital.

Whilst waiting for a vehicle, **PW 2** sprinkled some water on the deceased. She did so because the deceased was becoming faint.

Due to his condition, **PW 2** screamed, attracting some neighbours. The said neighbours then placed the deceased on a blanket, and they then carried him, on the said blanket, upto the District Officer's office.

Whilst at the said office, a matatu vehicle arrived and **PW 2** asked the driver to take the deceased to the M.P. Shah Hospital.

However, the driver said he was only prepared to take him to the Kenyatta National Hospital. **PW 2** declined the suggestion to have the deceased taken to Kenyatta Hospital.

As luck would have it, the taxi which **PW 5** had called for, arrived.

PW 2 had the deceased taken to M.P. Shah Hospital, using the taxi. However, the deceased was declared dead, upon his arrival at the hospital.

Thereafter, **PW 2** made a report to the police. She was then permitted to take the body to the Chiromo Mortuary.

During cross-examination, **PW 2** said that when she first saw the knife, it was on the floor; and it was nearer to where the accused was standing than to where the deceased was sitting.

She also explained that she declined to have the deceased taken to Kenyatta Hospital because she believed that he would not be accorded the necessary medical attention as soon as was necessary.

PW 2 also said that the accused did tell her that the deceased had tried to rape her. The accused provided that information when she had been brought to the Kilimani Police Station, after being arrested in Kibera.

PW 2 said that the accused and the deceased had had a good relationship from the time when the deceased started living with **PW 2**. The accused was then 6 years old.

It was not until the accused reached secondary school that she and the deceased begun disagreeing. **PW 2** knew about the disagreement because both the accused and the deceased used to complain to her about each other.

In answer to a question asked by the court, **PW 2** said that she told the accused that she had killed the deceased. When asked why she did so, **PW 2** said that it was because the accused ran away from home after the incident.

PW 3, TITUS KIPCHIRCHIR SEGO, is a brother to the deceased. He was living in Kibera, at the material time. He was staying in a house belonging to the deceased.

In that house, **PW 3** lived with Javan, who is a son to **PW 2**. Meanwhile, the wife of the deceased lived at their rural home, in Kapsamoch village, South Nandi District.

PW 3 knew **PW 2** to be a girlfriend of the deceased. However, he also knew that on most occasions, the deceased was staying at the house of **PW 2**. That house was about 100 metres away from where **PW 3** lived.

On 6th September 2008, at about 4.35p.m., **PW 3** left the house. He was going to Nairobi West Estate, where he worked as a security guard. As he was leaving, the deceased also left his house. The deceased told him that he was going to **PW 2's** house, to watch a football match on television.

PW 3 had hardly covered some 200 metres from the house when the deceased phoned him. The deceased asked him to go and help him. When **PW 3** asked him what was wrong, the deceased did not answer.

The deceased then called, a second time: however, on that occasion, he did not talk to **PW 3**. **PW 3** then phoned back, but the deceased was not answering his phone. It is then that **PW 3** decided to rush back to **PW 2's** house.

On arrival, **PW 3** found many people near the house. He passed them and entered the house, where he found the deceased sitting on the sofa. When **PW 3** asked him what was wrong, the deceased did not reply.

PW 3 saw some blood on the left part of the deceased's chest. He also noted that the clothing of the deceased was all wet, from the water which **PW 2** had sprinkled on him.

PW 3 told the court that **PW 2** informed him, that it was the accused who had stabbed the deceased. As **PW 2** is the mother to the accused, **PW 3** believed what she told him. Therefore, when he recorded his statement with the police, **PW 3** told them that it was the accused who stabbed the deceased.

During cross-examination, **PW 3** said that it is he who made the decision to have the deceased taken to the M.P. Shah Hospital. **PW 3** explained that he did so because the deceased had previously informed him that that is the hospital that he went to whenever he needed medical treatment.

PW 4, PC WILLIAM CHEPSO, was the arresting officer. He arrested the accused on 7th September 2008, at Kibera Laini Saba. He then escorted her to the Kilimani Police Station, where he booked her in.

PW 5, SAMUEL OMINGO ABOKI, is a businessman. He operates a posho-mill at Makina Kichinjio, in Kibera Estate, Nairobi.

On 6th September 2009, at about 5.00p.m., **PW 5** heard people screaming. He thought that it was the people who were playing football- in Harambee Estate.

When **PW 5** came outside his posho-mill, he found a crowd outside **PW 2's** house. That house was located only about 10 metres away from the posho-mill.

PW 5 entered **PW 2's** house, and he found the deceased lying on the floor. According to **PW 5**, the deceased was bleeding from the stomach.

When **PW 5** asked **PW 2** what had happened, the latter did not answer; she was just crying. **PW 5** then rushed to go and fetch a taxi, which would ferry the deceased to hospital.

PW 5 was with **PW 2** when the deceased was ferried to the M.P. Shah Hospital.

Whilst they were still on the way to the hospital, **PW 2** informed **PW 5** that it was the accused who had stabbed the deceased. However, **PW 2** did not tell **PW 5** the reason why the accused did so.

Earlier, when **PW 5** had heard screams, he saw the accused standing aside. **PW 5** recalled that whilst **PW 2** was crying, the

accused was not crying.

PW 6, DR.FRANCIS MAINA NDIANGUI, is a pathologist. **PW 6** performed a post-mortem examination on the body of the deceased. He noted that the clothing of the deceased was soaked in blood.

The pathologist noted two stab wounds on the body. The first one was on the left anterior chest wall. That wound had traversed between the 3rd and the 4th ribs; and had lacerated the left lung and the left side of the heart.

Meanwhile, the second stab wound was on the left upper arm.

Following the post-mortem examination, the pathologist formed the considered opinion that the cause of death was internal bleeding, due to the stab wound to the chest.

PW 7, PC JOSEPH KIMANZI, was the Investigating Officer in this case.

On 6th September 2008, he was at the Kilimani Police Station, when a report was made regarding the deceased. The report indicated that the deceased had been stabbed, and that he had died whilst being taken to the M.P. Shah Hospital.

The report also indicated that the deceased had been stabbed by the accused.

The person who made the report was **PW 2**, the mother of the accused.

PW 7 visited the scene of crime, where he found some members of the family. **PW 2** showed to the police, the place where she had found the deceased lying on a sofa, with blood oozing from the left side of his chest.

By the time **PW 7** visited the scene, the house had been washed. The blood that had been on the sofa had also been washed away.

When **PW 7** inquired about the accused, **PW 2** said that she did not know. **PW 7** therefore instructed **PW 2** to call the police, if the accused was located.

On the next day, the police were notified that the accused had been seen in Kibera, Laini Saba. The police arrested her and she was then escorted to the Kilimani Police Station, where **PW 7** talked to her.

It is the evidence of **PW 7** that the accused told him that she was watching a movie on television, when the deceased arrived and sought to watch the football match between Namibia and Harambee Stars. The accused told the deceased to wait for awhile.

The deceased got annoyed because of the response of the accused. The two of them then exchanged words, leading to the accused

walking out of the house.

Before long, the deceased returned to the house, where he found the accused. It is then that the accused is said to have stabbed the deceased. And the reason given by the Investigating Officer, for the alleged action, was that the accused feared that the deceased would beat her.

During cross-examination, **PW 7** conceded that by the time he visited the scene of crime, the evidence had been tampered with.

The alleged killer knife had been either washed or wiped clean. It had no blood on it. Because of that fact, **PW 7** did not take the knife to the Government Chemist for analysis.

When he was asked how he knew the particular knife which was used to stab the deceased, **PW 7** said that he relied on what **PW 2** told him. But he also conceded that **PW 2** was not present when the actual stabbing took place.

PW 7 also said that the accused did confirm that the knife which was produced before this court, was the one that she had used to stab the deceased.

PW 7 told the court that the accused informed him that the deceased had attempted to rape her. Regardless of that information, **PW 7** formed the view that the accused cannot have been acting in self defence.

As the mother of the accused was within the vicinity, **PW 7** believed that the deceased could not have attempted to rape the accused.

That marked the close of the prosecution case.

When she was put to her defence, the accused (**DW 1**) gave sworn testimony. She first said that she was 17 years old, as at 6th September 2008, when the incident occurred.

She then said that when the deceased had told her that he wanted to watch the football match on television, he requested her to allow him only 10 minutes, to finish watching the ongoing movie.

According to the accused, the deceased walked out of the house, and returned about 6 minutes later. He then switched channels from the one showing the movie, to the one showing the football match.

When the accused asked her why he had done so, the deceased told her that she had started becoming arrogant. He told her that

she had started behaving as if the house was hers.

The accused pointed out that the house was neither hers nor his.

The deceased then told the accused that she needed to live with the devil, who would teach her good habits.

When the accused pretended not to hear what the deceased was saying, the deceased went to the seat where the accused was sitting, and he then slapped her. He demanded to know why the accused had rejected his advances, yet the deceased was ready to give her a lot of pocket-money.

The deceased wanted to know why the accused did not want him, whereas many other girls wanted him. The accused told him to go after those other girls, and to leave her alone.

The deceased then pushed the accused from the position in which she was sitting, so that she was then lying down on the sofa. He told her that that would be her day of reckoning.

The accused screamed. That prompted the deceased to remove a knife from the right-hand pocket of his trousers. When the accused saw the knife, she kept quiet.

The deceased then tried to remove the jeans trousers, which the accused was wearing. However, the trousers did not come-off.

Meanwhile, the accused struggled with him, and she finally pushed him off. The deceased fell onto a table near the sofa. The table moved when he fell on it, and the deceased landed on the floor.

The accused got the opportunity to get up. She then tried to escape. However, the deceased went for the knife, which had fallen down. When the accused saw the knife, she noticed that it had some blood on it.

According to the accused, she could not escape without first jumping over the deceased, because he occupied the space between her and the door. Therefore, the accused went for the knife, before the deceased could reach it. She used the knife to stab the deceased on the arm. Thereafter, she escaped.

As she was running away, the deceased told her that he would get even with her, even if she ran away.

Outside the door, the accused met her mother (**PW 2**) and a neighbor (**PW 5**)

Before the material date, the accused had confided in her sister (Gertrude) and her auntie (Susan) about the sexual advances which the deceased had been making towards her.

As far as the accused was concerned, she did not kill the deceased. By the time she was running away, she saw the deceased getting up.

During cross-examination, **DW 1** said that when the incident happened, her mother had gone to the salon. She said that her mother had finished washing clothes much earlier, and had then informed her, that she was going to the salon.

DW 1 also said that when the deceased held up the knife, he told her that he would kill her if she made noise.

It was her evidence that the injury to the chest of the deceased may have been caused when the deceased fell on the knife which he had been holding. **DW 1** was categorical that she only stabbed the deceased on his arm.

DW 2, SUSAN NAMAEMBA MUSUNGU, is a sister to **PW 2**.

She recalled that in April 2008, the accused visited her at her house, in Kawangware. The accused asked for permission to stay with **DW 2**.

When **DW 2** asked her why she would want to live away from her home, the accused told her that it was because the deceased used to touch her whenever she passed near him. She did not like his said conduct.

The accused had, however, not told her mother about the advances, because the mother used to believe the deceased more than the accused.

DW 2 did not think that the issue was so serious as to require her to make a special effort to talk to both **PW 2** and the deceased. **DW 2** knew the deceased was not a bad person; therefore, she thought that the accused was only raising "teenage issues".

DW 2 believed that the accused and the deceased were fighting, on the material day, even though the accused was smaller than the deceased, and yet she had no injuries.

DW 3, GERTUDE WAKUKHA, is a cousin to the accused. Her mother, Margaret Wakukha, is a sister to **PW 2**.

She testified that the accused used to visit her for a few days, whenever schools were on holiday. During one such visit, in

November 2007, the accused asked **DW 3** if she could live with her.

When **DW 3** asked her why, the accused explained that the deceased used to touch the accused whenever the two of them were alone.

However, **DW 3** did not want to rush into raising the issue with **PW 2** before first carrying out investigations. **DW 3** found it hard to raise the issue with **PW 2**.

Eventually, **DW 3** did not succeed in unearthing any facts regarding the complaint which the accused had registered with her.

From the foregoing evidence, I now have the responsibility to analyse the same, to ascertain whether or not the prosecution had discharged its obligation of proving that the accused was guilty. If there should be any reasonable doubt as to the guilt of the accused, the court would be obliged to give her the benefit of such doubt.

First, it is clear that none of the prosecution witnesses saw the accused stabbing the deceased. In other words, there was no eye-witness to the incident which resulted in the death of the deceased.

At the time of the said incident, there were only two people in the single-roomed house where the deceased was stabbed. Those two persons were the deceased, **ALBERT KIPKOECH KESIO** and the accused, **MARITA SIMIYU MICHELE**.

The last person to talk to both the deceased and the accused, before the incident was **PW 2**. She told the court that when she arrived at her house, on the evening of 6th September 2008, she found the accused seated outside the house. Meanwhile, the deceased was seated inside the house.

The deceased complained to **PW 2**, that the accused had denied him an opportunity to watch the football match on television. On the other hand, the accused complained to **PW 2**, that the deceased had abused her.

Although the accused did not deny the assertion that she had blocked the deceased from watching the football match, she explained that she had persuaded the deceased to allow her to watch a movie for only 10 more minutes.

In my considered view, it is unlikely that the deceased and the accused did agree on whether or not the accused should have 10 more minutes to watch the movie. I say so because if there was such an agreement, there would have been no reason for the deceased changing the television channels after only 6 minutes. It defies logic that after agreeing to wait for 10 minutes, the deceased should suddenly decide that he could not wait for the final 4 minutes.

To my mind, it is more probable than not that the deceased felt slighted by the conduct of the accused; when she did not permit him to immediately commence watching the football match. That would explain the anger which the deceased showed when he complained to **PW 2**.

Both **PW 2** and the accused confirmed that the deceased walked out of the house, and that he went to his house which was located about 100 metres away.

Thereafter, the deceased went back to **PW 2's** house, where he found the accused.

At that time, **PW 2** was not in the house. She was either nearby, pouring out water after she had washed her clothes, or she had gone to the salon. **PW 2** said that she was close to the house, but the accused testified that **PW 2** had gone to a salon.

Regardless of where **PW 2** was, this court is convinced that **PW 2** was close at hand. I so find because **PW 2** responded to the screams of the accused, by quickly going back to her house.

As soon as **PW 2** entered the house, she saw the deceased seated, whilst the accused was standing. The deceased told **PW 2** that he had been stabbed, and that he would avenge the said stabbing.

Surely, if the deceased had stabbed himself, he could not avenge against himself. The fact that he talked of revenge, implies that he was stabbed by someone other than himself. And that fact was confirmed by the accused herself.

However, the accused said that she only stabbed the deceased on his arm, once.

According to the pathologist who conducted the post mortem examination on the body of the deceased, the cause of death was internal bleeding, due to the stab wound to the chest of the deceased.

In effect, if this court were to believe the evidence of the accused, that she only stabbed the deceased on his arm, that would imply that the accused did not cause the death of the deceased. Yet, by her own admission, the accused was all alone with the deceased, inside the house where the incident took place. That would imply that if the deceased was injured by another person, that person can only have been the accused.

The important question is whether the accused stabbed the deceased only on the arm or if she also inflicted the fatal stab wound to the chest.

From the evidence adduced, there is no basis for concluding that the accused stabbed the deceased on his chest. Secondly, the prosecution did not lead any evidence to prove that the injury which the accused inflicted on the arm of the deceased, played any role leading to the death.

Furthermore, it is noteworthy that **PW 2** confirmed that the accused used to complain to her, about the deceased. That corroborates the defence of the accused.

More significantly, **PW 2** confirmed that when the accused was first brought to the Kilimani Police Station, after being arrested, the accused told **PW 2** that the deceased had tried to rape her. That means that the defence which the accused put forward before this court, was not something which she simply manufactured in her fertile imagination.

Even the Investigating Officer, **PC JOSEPH KIMANZI**, confirmed to this court that the accused had told him of an attempt by the deceased, to rape her.

However, **PW 7** did not believe the accused, because, in his view, the deceased cannot have attempted to rape the accused when her mother was within the vicinity.

I have already made a finding to the effect that **PW 2** was within close proximity to the house where the incident took place. Therefore, in the said circumstances, the opinion of **PW 7** is not without some measure of justification. In other words, it sounds very improbable that the deceased could have tried to rape the accused, when he knew that the mother of the accused was nearby.

On the other hand, if the court had accepted the evidence of the accused, to the effect that **PW 2** had gone-off to the salon, that would weaken the defence.

But I do take cognizance of the fact that an accused person does not have any duty to prove his innocence.

The burden of proof remains vested on the prosecution at all times.

In that regard, although it is improbable that the deceased may have attempted to rape the accused, I find and hold that there was nevertheless, a possibility that such an attempt was made.

If that be so, the accused was entitled to defend herself. She said that she did so by reaching out for the knife which the deceased was trying to retrieve, from where it had fallen, when the accused pushed him away. She then stabbed the deceased.

If she only stabbed him once, on the arm, she would be deemed to have used no more force than was necessary to destabilise the deceased sufficiently, to earn the accused the opportunity to escape.

However, if the accused stabbed the deceased on the chest, the issue would be more complex. I say so because the court would then

have had to ask itself if the force used was or was not excessive, in the prevailing circumstances.

Would not a loud scream have been sufficient, considering that **PW 5's** door was not more than 10 metres from the house where the incident took place?

In my considered view, a stab wound inflicted to the hand, coupled with loud screams could have been sufficient. But then again, one might say that that would only be so, with the benefit of hindsight. When a lady is staring at a kitchen-knife, being brandished by her father-figure, who is threatening to use it unless she gives in to his sexual demands, the lady might be forgiven for taking drastic action, in the spur of the moment.

In this instance, the accused denies having inflicted the stab wound. She insists that she pushed away the deceased, causing him to fall backwards onto a table, which then gave way. At that moment, the accused intended to run away.

And she then moved swiftly, to get the knife which had fallen from the hand of the deceased. She did so because otherwise the deceased would have reached the knife first.

Meanwhile, the deceased was in between the accused and the door, which was the only escape route.

In order to have any meaningful chance of escape, the accused stabbed the deceased on the hand. By so doing, the accused did not act unlawfully.

And there is no proof that she also inflicted the fatal stab wound. It is possible that the said wound was caused when the deceased fell on the knife.

In effect, I find that the prosecution have not proved that the accused is guilty of murder, as per the charge sheet. Accordingly, this court gives to the accused, the benefit of doubt. She is acquitted; and the charge against her is dismissed.

I order that she be set at liberty forthwith unless she is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 27th day of September, 2010

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**FRED A. OCHIENG
JUDGE**