



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Siwakapel (Criminal Case 28 of 2017)  
[2023] KEHC 2598 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2598 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CRIMINAL CASE 28 OF 2017  
HK CHEMITEI, J  
MARCH 30, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**AMORU SIWAKAPEL ..... ACCUSED**

**JUDGMENT**

1. The accused and two others were charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on the 19<sup>th</sup> day of February 2015 at Komolion village, Komolion sub location, Komolion location Baringo county jointly with others not before court murdered Wesley Kiplagat Longochom alias Longochile.
2. The accused when the matter came up for plea denied the offence and the prosecution called 6 witnesses to establish its case against him. Before looking on the merits or otherwise of the same its worthy to summarise their evidence as presented during trial.
3. PW1 Chemadewo Motii testified that on the material day she was heading home when on the way she heard some screams. As they checked she saw someone lying down on the road having been wounded. There were three people next to the body one of them was the accused. She went on to state that the accused then said that he had killed his enemy and they should go away. She said that she knew the deceased.
4. PW2 John Muktani the area chief Komolion location was informed of the incident through a phone call from one Samuel Kalokon. The following day and in the company of the police and the area sub chief they went to the scene and they found the body in the middle of the road with severe neck injury. There was also a sharp knife next to the body,
5. He went on to state that the three suspected persons disappeared and the accused was later arrested as he sought treatment after a fight with one Poon.



6. PW3 Jackson Kiposee Kiplagat the elder brother to the deceased identified the body at the mortuary for purposes of post mortem exercise.
7. PW4 Naparikiwa Kiriti testified that they were heading home with pw1 on the material day at 6 pm when they saw blood on the road and upon checking they saw the accused, Cherokee Chekoro and Grader Losiker searching the pockets of the deceased's clothes. Upon inquiry the accused told her to leave immediately. She was afraid and they left but she had seen the deceased body, a person she knew.
8. She went on to state that the accused and the friends had run away and that on February 20, 2015 the accused fought with one Roger near a forest in her home. He saw him the following day heading to the hospital and she told one Tomereng to call and notify the chief. The chief went to the hospital and arrested the accused.
9. He said that he knew the accused together with the other two. One Grader felled in the water and died and the other one disappeared to date.
10. PW5 Doctor Oscar Mwangi produced the post mortem report on behalf of Dr Paul Odero who opined that the cause of death was severe haemorrhage secondary to systematic rupture of major blood vessels.
11. PW6 Corporal Charles Mwita carried out the investigations after visiting the scene and taking the photos of the deceased body. He went ahead to produce the same as well as the sword which had been used to fatally wound the deceased. He said that he recorded statements from the witnesses and preferred the charges against the accused. The other co accused disappeared.
12. When placed on his defence the accused gave sworn evidence denying the charge. He said that he was not in Natosha market on that particular day and that he was in his home.
13. On his way home however he met two persons next to the body, one was Kireta and he did not know the other one. The said Kireta told him to go and see the deceased and he thereafter left the scene.
14. He said that he was arrested on March 2015 after he had fought with Poon as they were both drunk. He was taken to Nginyang police station and accused of killing someone. He said that he went away from the area because of drought. He denied knowing the other two persons who were also suspected.
15. The parties were then directed to file written submissions but none complied.

### **Analysis and Determination**

16. Looking at the evidence on record it is apparent that there was no eye witness to the incident and therefore this case solely in my view relies on circumstantial evidence.
17. Circumstantial evidence was defined in now leading major authorities as a strong grounds to warrant a conviction.
18. In *Sawe Vs Republic* [2003] KLR 364, the Court of Appeal amplified on the above thus: "In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."



19. Taking the totality of the evidence herein, it is obvious that the cause of deceased death was the cut that was inflicted on the neck by use of a sharp object. Each witness was able to confirm that the sword which was produced was the probable weapon used.
20. The key witnesses were pw1 and 4 who saw the accused and other two persons at the scene. She told the court that the deceased whom she knew was lying on the ground and the accused standing nearby. She said one Kireta told her that he had killed his friend and that she should go away. The accused however did not talk and she did not see him with the knife.
21. PW4 said that he saw the three people searching the pockets of the deceased clothes and the accused told her to go away quickly. The said persons however run away and were not found the following day.
22. The totality of the matter herein is between the three persons who killed the deceased.? Was it a joint venture.? Was there a common intend? It becomes difficult to reasonably reach a conclusion as the rest of the co suspects were not charged. One of them has since died and the other one disappeared. There was no evidence of any attempt to arrest him.
23. Secondly the path where the incident occurred was public and being close to a market it is possible that the accused just as he said in his defence found the deceased already dead. Although he was seen to frisk the deceased clothes the same does not explain why the deceased was killed.
24. The element of malice aforethought which is a key ingredient herein was not proved against the accused. There was no evidence of an earlier dispute between the accused and the deceased. None of the witnesses was able to tell what happened between the accused and the deceased or between the other two persons with the deceased. There was no evidence of an earlier dispute.
25. In the premises, this court shall grant the accused the benefit of doubt. Although his defence was not entirely convincing, nevertheless to convict him without cogent circumstantial evidence would be a grave injustice.
26. It is noted that the accused has been in custody for a long time despite being granted bail.
27. Consequently, the accused is hereby set free under the provisions of Section 215 of the [Criminal Procedure Code](#) unless lawfully held.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 30<sup>TH</sup> DAY OF MARCH 2023.**

**H. K. CHEMITEI.**

**JUDGE.**

