



REPUBLIC OF KENYA



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**Republic v Kipkoech alias Sonko & another (Criminal Case
21 of 2023) [2023] KEHC 24231 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 21 OF 2023
RB NGETICH, J
OCTOBER 25, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ALEX KIPKOECH ALIAS SONKO 1ST ACCUSED

VICTOR KIRWA KANGOGO 2ND ACCUSED

JUDGMENT

1. The accused's Alex Kipkoech Alias Sonko & Victor Kirwa Kangogo have been jointly charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. Particulars of the charge being that the accused persons on the 26th day of April, 2017 at Embogong in Mogotio Sub-County within Baringo County, jointly with another not before court murdered Solomon Kertich Kiplagat.
2. The accused persons pleaded not guilty to the charge and the matter was set down for full trial where the prosecution summoned a total of 7 witnesses in support of the charge preferred against the accused.

Prosecution Evidence

3. PW1 Joshua Ruto Kiplagat testified that on the 26th April, 2017 at 4: 00 p.m, he was at home when he received a call from one Kipkemboi Keitany who is his friend requesting him to go and purchase cows from his home. He testified that he heeded to the call and went to his home where he was shown a bull and after negotiations which did not bear fruits, it started raining and they went into his house and while in the house Kipkemboi informed him that he had been conned by his brother the deceased KShs. 500,000/= after a plan to purchase beans with the deceased. He advised him that the matter may be resolved by the elders and the chief.



4. He said Kipkemboi further informed him that he had decided to kill the deceased and he still maintained that it was not a solution but he (Keitany) should tell the elders so that they would resolve the matter. He stated that when the rain stopped at about 7:00-7:30 p.m, they left and Kipkemboi begged him to give him Kshs.2,000/= but he only gave him Kshs.1000/= as the money he had was for business. He stated that they parted ways but before they could part ways, he heard someone call him telling him to hurry; out of fear he decided to take another route since he had money with him.
5. PW1 said he arrived home at around 8:00p.m and slept at about 10:00 p.m. He said his cousin namely Kiprono Cheruiyot called him but he refused to pick the call as it was late; at about 12-1:00a.m, he received a message from his uncle one David informing him that he should receive the call. He said he received the call and he was informed that his brother had been killed along the road at Kimose – Embogony Road and because of fear, he did not go to the scene immediately. He slept and the following day at around 10:00a.m, he went to the scene and found the suspect had been arrested by police. He said he found the suspects namely Kirwa Kangogo, Peter Tallam and Chebii Yatich. He said Kirwa Kangogo being the 1st accused while the 2nd accused is called Sonko. He said he knew them since they were neighbours at Kimose.
6. He later went to police to record his statement. He said Kipkemboi Keitany was not at the scene and he has never seen him since the day he called him seeking to purchase cattle. He stated that the body of his brother was taken to Eldama Ravine; that at the time he arrived at the scene, the body had already been removed and postmortem was conducted on 3rd May, 2017 where he was present and identified the body of his brother to the doctor. He said the deceased had a cut on the head, and the mouth and his mouth was twisted.
7. PW2 Judy Lagat testified that on the 26th April, 2017 at 8:00 p.m, she was informed by her co-worker Kevin that there was a customer who wanted hay. she went outside of the hotel and found Solomon alone in a vehicle make Toyota Fielder who inquired on the price of the hay and she told him that it was Kshs.400/=. He told her he wanted to buy hay and asked for her phone number which she gave him.
8. PW2 testified that she asked for a lift from him since they were about to close the hotel and he agreed. She travelled with him from Eming Junction towards Marigat and she alighted at about 1km. she stated that the next day, she reported to work and learnt from the person in the hotel that the person who had given her a lift had been killed. She testified that she got home at about 8:30 p.m and was with the deceased at 8:10 p.m. She stated that she did not know the name of the deceased but she got to know later when she gave him her phone number and she inquired how she should save his contacts and he said he was Solomon. She later recorded her statement with the police.
9. PW3 Mary Cherorich Korir testified that on the 26th April, 2017 at around 9:00 p.m, she was at Kimose centre heading home. She took a motorbike towards home and while on the way as they reached a junction branching to her home, she found a big stone blocking the road and the boda boda rider namely Elvis who was carrying her with one Dan Kamotang stopped and alighted. She said they found a person running along the road towards them and they recognized him as Mike Sonko his true name being Kipkoech who pushed her away and told them they should not use the road as there were people who were fighting. She said they turned back and Elvis was requested to take Kipkoech's friend to the road where Kipkoech was coming from but he refused and Mary and her friend used another road and went back. She testified that she was taken by her friend Kamotany to her home and later at about 10:00P.M in the night, she got a call from Kiplagat who informed her to go and wake her uncle Ezekiel and inform him that there was someone who had been killed along the road.
10. She testified that she woke up her uncle and he went to the scene and on the following day, she got a report that it was Solomon, a child of her sister who was killed. she learnt of the incident from people



who were along the road. She stated that she did not pass by the scene and she did not know who was fighting and the following day on the morning of 27th April, 2017, she recorded her statement.

11. PW 4 Elvis Amos Kipruto testified in court that he resides at Kimose and on the 26th April, 2017, he was at Kimose centre where he operates a boda boda. He stated that he got two passengers who requested to be ferried to Embongony centre from Kimose which is about 1 kilometer. He stated that he knew the passengers as Kamtany and Cherotich; and he carried the two and half way, Cherotich requested that they use a short cut through Cheplogot and after the junction while entering the rough road, he found stones blocking the road from one side of the road to the other. He opened up a space for the motor bike to pass and he left the motor bike running with engine on while the passengers were on the motor bike and suddenly someone came from the front and asked him to switch off the lights on the motor bike and went ahead to cover the headlight of the motor bike using his hands.
12. He said he did not recognize him but Cherotich identified him as Kipkoech having identified him by his voice when he requested them to switch off the lights. He testified that the said person pushed the lady and told her to use another route as there were people fighting ahead and at this time, Cherotich alighted. He stated that the person requested him to take him to the place where people were fighting and having sensed danger, he refused to take him and turned his bike and went back to Kimose Centre where he got a customer to Sossion Centre. He used the road and when coming back, he got a report from the members of the public that somebody had been killed at Cheplogot which is near where he had dropped the two customers. He did not go to the scene.
13. He said he cannot identify the person who covered the lights of his motor bike. On the 27th April, 2017, he gave a report to the CID. He stated that he knew the deceased who he had carried with his motor bike long time ago but he did not know how he was killed. He stated that he knew both the accused persons as they come from the same sub-location.
14. PW 5 Robinson Yatich Chebii testified that on the 26th April, 2017, at 2: 00P.M, he was at Kimose when he received a call from Mr. Kiborek who asked to meet him at Emining to discuss payment for nominations for 2017 elections. He went there using a motor bike of one Kirwa Kangogo; on reaching there, he left the motor rider at the pool place and went away. He called Kiborek who informed him that he would not be able to come. At about 8:30P.M, he left Emining Centre to Emining junction walking and he got home at about 8:50 p.m. That he waited for a matatu but it took time. He called the boda boda rider who told him that he had seen a vehicle belonging to Solomon at Emining and on checking around, he found the deceased's vehicle outside Terik's bar.
15. He testified that he went to the toilet and when he came back, he found the vehicle had left and there were boda boda riders there; he requested for one to take him to Kimose but he said he was waiting for his sister and he could not leave saying that the sister was coming by matatu and he told him he could take the matatu. The matatu arrived at 9:30P.M and he boarded to Kimose around 10:00P.M where he went to his pool business at Kimose and requested the people playing to leave so that they could close the pool and after closing, he went to watch football match in a video shop and while there the owner of the shop Amos Kipkele received a call informing him that Solomon had been killed on the road towards Kipchopet; he closed the video business and they went to the scene. They found deceased's vehicle with the front door open and there was a big stone beside the deceased's head and stones. That the deceased who lay facing upwards was besides the car but with no blood and the stone he saw besides the deceased's head was the one he identified in court.
16. The witness stated that there were many people at the scene trying to establish what had happened; the police arrived later at 12:00a.m- 9P.M. He stated that there were footprints and on the next day they went with many people to the scene and followed the footsteps which led them to Keitany and they



found that he had washed his coat and hanged it to dry. They inquired the whereabouts of Keitany from his wife who informed them that he had left in the morning; they followed the direction she said he had taken but they did not see him.

17. That later CID officers came and they were taken back to the road. They were told to sit down by members of the public and the chief who sought to know where he was going with the boda boda. He was arrested together with Kangogo, Tallam, house searched and were locked up but he was released after 2 weeks and informed he would be a witness in the case. He recorded statement with the police and confirmed that he knew the 2 accused persons, 1st accused being his cousin while the 2nd accused a boda boda rider. He testified that he knew the deceased who is from his clan and that he did not know whether there was any relationship between the deceased and Alex. Footprints led them to Kipkemoi Keitany's home.
18. PW 6 one Dr. Philip Wainaina Kamau a holder of Bachelor of surgery degree from Moi University with 20 years' experience and a Master's in Business Administration testified that on the 3rd May, 2017 he conducted post-mortem on the body of the deceased one Solomon Kerich Kiplagat which was identified to him by Simon Kemboi Kering and Joshua Ruto Kiplagat at Eldama Ravine Sub-County Hospital. On examination of the body, he formed the opinion that the cause of death was multiple injuries secondary to blunt force trauma consistent with assault. He signed the post-mortem on 3rd May, 2017. He said they took blood sample for the DNA matching with the objects allegedly used to assault the deceased. He produced the post-mortem in court as exhibit.
19. PW7 Inspector Sarah Bokosh No. 240078 who was previously stationed at Mogotio DCIO's office testified that she was the investigating officer in this case. She said on 26th April, 2017 at around 9:00 p.m, the chief of Kimose location made a call to the OCS informing him of the murder of one Solomon Kerich. She visited the scene being Embokong along Mogotio Marigat Road with her colleagues. She said at the scene were stones barricading the road and there was stationery vehicle with hazard lights on, front doors open. she saw the body of the deceased lying down near the driver's door with legs below the door and lying on his back. she checked around and saw skid marks running for about 5 meters; the right rear door was partially open and there was a yellow manila tied on the driver's seat and a brown jacket on the chair behind the driver's seat. She said there was a stone which had blood stains near the brake pedal while the ignition keys were in place and the identity card of the deceased with a driving license inside the flap above the wind screen. She said motor vehicle was Registration No. KCG 866U white in colour make Toyota Fielder and members of public were at the scene and having identified the family members of the deceased, they took the body to Eldama Ravine for preservation.
20. PW7 further stated that the body of the deceased had injuries on the face and blood was oozing from the nose and mouth. She said members of public arrested three people namely Peter Talam, Robinson Yatich and Victor Kirwa the 2nd accused in court, she recorded statement from them and statements of the witnesses and forwarded the file to the DPP. She said after investigations, she charged the accused with the murder of the deceased and Shadrack Keitany was arrested and charged in a different file over the same deceased.
21. Upon close of prosecution case, the court found that prima facie case had been established to warrant accused persons be place on his defence.

Accused's Defence Case

22. The 1st accused Alex Kipkoech gave a sworn statement. He denied having committed the offence and stated that he did not know how the deceased was killed. He said on the 26th April, 2017, he was in Marigat in the morning with his driver; that they left Marigat at 2:00 p.m and reached Eminging at 5:30



- p.m and since the driver had informed him that they would go to Busia the next day, he decided that he would go to sleep at his home which was near the junction. He testified that he met his ex-girlfriend, Mary Cherotich and asked where she was going but she responded by telling him that there was no point bothering with her since they had parted ways.
23. He testified that he stayed at the junction up to 6:10P.M when he got a boda boda for a neighbor called Victor Kirwa to take him home. He said another person whom he cannot recall boarded the same motor bike with him to his home and they arrived at around 6:45-6:50P.M. He alighted at the junction to their home. He stated that he went to the house took a bath and slept early.
 24. He testified that the next morning, he woke up at 5:30 a.m and called the driver then went to Emining where he boarded the lorry and went to Eldama Ravine then to Eldoret. He said on reaching Eldoret, he logged into Facebook and saw post saying a person called Solomon Kerich had been killed at Emokong and 3 suspects had been arrested. He stated that he called his cousin Robinson Yatich who is a witness in this case who informed him that he had been arrested by members of public. He said thereafter, his cousin was unreachable on phone. They proceeded with their journey, reached Malaba, packed maize and came back and reached Eldama Ravine in the evening, took supper and took maize to Marigat and reached Marigat at 1:00 a.m where they off loaded the maize and rested then came the next morning to Emining.
 25. He further stated that on 17th August,2017 they were at Kobil Petrol station where he met the deceased's cousin who greeted him well and sat with him; then he called and 4 police officers arrived from Mogotio and arrested him.
 26. He testified that PW 1 Joshua Kiplagat stated that his brother was killed because he had conned Shadrack Keitany Kshs.500,000/= and PW 2 never mentioned him as having killed the deceased. He confirmed knowing PW3 Mary Cherotich who testified that she identified his voice but said voices can be the same while PW 4 stated that he did not identify the person yet he has known him for 20 years. He denied meeting Mary Cherotich on 26th April,2017 and said Shadrack Keitany was in Nakuru prison but he is in Eldoret prison now. He stated the PW3 was not sure of what she was saying; she may have been a person but never identified. He denied telling them not to use the path they were using and proceeded to state that Shadrack was arrested in March, 2020 in Kitale and was charged for killing the deceased in this case and their case had proceeded when he was arrested. He denied killing the deceased and sought justice.
 27. The second accused Victor Kirwa Kangogo denied killing the deceased herein. He testified that on the 26th April,2017, he woke up and operated his motor bike up to evening when he left Emining junction at around 6/7 p.m where he met A1 who is known as Mike Sonko but his official name is Alex at the junction. He said A1 requested to be carried by him in his motor bike. He said he called Peter Kipkoech Talam and Robinson Yatich Chebii whom he had carried in the morning and Peter came but Yatich told him that he was not ready.
 28. Accused 2 said he carried Peter and Accused 1. He said he dropped Accused 1 and proceeded with Peter Talam and on reaching Kimosi, he gave Peter Talam his motorbike to return with since his had been repaired. He stated that he took his motor bike and went home reaching home at around 8p.m. The next day, he started work as usual and on reaching Embokong Centre, he was told there was a person who had been killed. He said he went there and found a crowd of people; he found Robinson Yatich, Chebii and Peter Tallam had been made to sit down under interrogation and he was mentioned. He said they checked his leg and stated that his foot looked like footprint they saw and shortly CID officers came and arrested them and took them to Kemboi's home where they found a shoe which had blood stains. His wife who was interrogated by the officers and they later left to where Peter lived in the



Centre but did not find anything in his house. He stated that they were arrested and police requested for 7 days to finalize investigations. He said Robinson and Peter were released but he was told to keep reporting to the DCI. He reported for 2 months and was arrested after 4 months and charged the next day. He said he knows the deceased as he is from their area; that he had no relationship with him and had not disagreed with him; and that no witness placed him at the scene.

29. Upon the closure of the case, the prosecution informed the court that they did not wish to file written submissions as they will be relying on the evidence on record. The accused persons through their counsel on record informed the court that they wish not to file written submissions and that they will rely on the written submissions in respect to the case to answer.

Analysis and Determination

30. The accused persons are charged with the offence of murder. Under section 203 of the *penal code*, ingredients for the offence of murder are proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.
31. I have considered the evidence adduced by prosecution and the two accused persons. It is not disputed that the deceased died; all the prosecution witnesses testified that the deceased died on the night of the 26th April, 2017 and a PW6 Dr. Philip Wainaina Kamau who performed postmortem on the deceased's body confirmed that on the 3rd May, 2017 one Solomon Kerich Kiplagat who was identified to him by Simon Kemboi Kering and Joshua Ruto Kiplagat at Eldama Ravine Sub-County Hospital and on examination, he formed the opinion that the cause of death was multiple injuries secondary to blunt force trauma consistent with assault.
32. What I now wish to consider is whether evidence adduced by prosecution witnesses prove beyond reasonable doubt that the two accused persons caused the death of the deceased herein. No direct evidence was adduced. No one witness testified seeing any of the two accused persons cause the death of the deceased; what follows is whether there is circumstantial evidence connecting the accused persons to the offence. PW 3 Mary Cherotich Korir testified that she was at Kimose Centre on the evening of 24th June, 2014 and while going home she boarded pw4's motorbike with her friend Dan Kamotang and near a junction they found stones blocking the road prompting the motor rider to stop and when they stopped, she saw a person she recognized as Mike Sonko (Accused 1) whose true name is Kipkoech. She said Accused 1 pushed her away and told her they should not use the road as there were people fighting ahead. She said she heeded to the warning and she together with his friend took another road where they again met Accused 1 and on enquiring what was happening, A1 told her there were people fighting. She went home and at around 10:00P.M she received a call from one Kiplagat who informed her to go and notify her uncle that someone had been killed. She went to inform her uncle and the next day she learnt that Solomon a son to her sister had been killed.
33. PW4 one Elvis Amos Kipruto confirmed that on the material evening, he was carrying PW3 and another passenger when they found stones on the road and shortly a person he did not identify arrived and asked him to switch off motorbike lights and proceeded to cover the lights using his hands. He said PW3 identified the person by his voice. He said the person asked them to use another route. He said PW3 had already alighted; He further said the person then requested him to take him where the fight was ongoing but since he sensed danger, he refused, turned the bike and went back to Kimose.



34. The Court of Appeal has set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. In the case of *Abanga alias Onyango -v- Republic* Criminal Appeal No. 32/1990 UR. The court held:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: -

- (i) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- (ii) Those circumstances should be of a definite tendency, unerring pointing towards guilt of the accused.
- (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else”.

35. From evidence of PW3, it was dark at the time she met A1. She said she did not see the people who A1 said were fighting. She said identification was by voice. On cross examination, PW3 said she met Accused 1 twice first near the junction where stones were used to block the road and the second time when they were using another route with another motor rider. She said she did not recognize him the first time they met but recognized him the second time. On the other hand, PW4 the motor rider who carried PW3 the first time said he did identify the person who emerged from the junction who is said to be Accused 1 but PW3 identified him. It is worth noting that the two witnesses contradicted themselves in respect to identification of the person suspected to be Accused1. Further PW4 said that PW3 was able to identify the voice of accused 1. While testifying further, PW4 said he knew the two accused persons since they come from the same sub location. He said he has known them since they were small children. The question that arise is, why he failed to recognize his voice as PW3 did if the accused persons were known to him. None of the two witnesses mentioned Accused 2.

36. PW7 the Investigating Officer testified that he arrested Accused 1 because Shadrack’s wife allegedly informed her that Shadrack confessed to her that he killed the deceased with the assistance of his friends who included Accused 1 Alex; and Shadrack had threatened to kill the deceased over kshs 500, 000.and further, accused 1 was seen from direction of the scene and told PW3 not to pass the road because there were people fighting. There was no mention of Accused 2’s name. From evidence of PW 1, there is no evidence to the effect that the two accused persons aided or together with the said Shadrack caused the death of the deceased.

37. From the foregoing I find that there is no strong circumstantial evidence linking the accused persons to the offence. In view of the above finding, I will not consider the ingredient of malice aforethought.

38. Final Orders: -

1. Accused 1 and accused 2 are each acquitted of the charge of murder.
2. Accused 1 and Accused 2 to be set at liberty.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 25TH DAY OF OCTOBER 2023.

RACHEL NGETICH

JUDGE



In the presence of

Ms Bett for 2nd accused present.

Mr. Kipkulei for 1st accused present.

Ms Ratemo for State

