



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**CRIMINAL CASE NO. 17 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**VICTOR KIPNGETICH SIELE.....ACCUSED**

**JUDGMENT**

**The Charge**

1. Victor Kipngetch Siele (Accused) 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 the 12<sup>th</sup> day of September, 2018 at Tegat location within Bomet County murdered Ezra Kipkemoi Siele.

**The Prosecution Case**

2. The accused denied the charge and the case proceeded to trial before Muya J. who heard the prosecution case in which 12 witnesses were called. Dulu J. took over the trial and heard one defence witness. I subsequently took over the case and heard one defence witness and perused and considered all the evidence on record as well as the submissions filed by the parties. I therefore had no advantage of observing the demeanor of the witnesses.

3. Joseph Musee Tangus (PW1) testified the he was conversing with one Robert (PW2) at Ezra's (deceased's) shop on 12<sup>th</sup> September, 2018 at about 6.00pm when Victor (Accused) whipped out a knife from his waist and stabbed Ezra (the deceased) who immediately fell down.

4. Robert Kipngetch (PW2) testified that Victor arrived at the shop uttering words to the effect that the deceased had given him enough problems and proceeded to stab him several times. Tobias Siele (PW3) was present at a shop nearby making mutura when he saw Victor enter Ezra's shop and shortly thereafter heard a commotion. He responded and found Ezra lying inside the shop having already been stabbed. Victor was outside the shop holding a knife.

Elkana Siele (PW4) stated that he arrived at the scene after the incident and rushed the deceased to Longisa hospital here he was pronounced dead on arrival.

5. Mercy Cheron Rotich (PW5) stated that she saw Victor (Accused) alight from a motor bike and enter Ezra's shop and shortly Ezra screamed. Upon rushing there in the company of Tobias (PW3) she found that Ezra had already been stabbed. PW6 Anna Chepkemio testified that she heard screams from the direction of her home on 12<sup>th</sup> September, 2018 at around 6pm and on rushing there found Ezra the deceased being rushed to hospital.

6. No 215442 Senior Sergeant AP Samuel Kipkurui Towett (PW7) received the Accused at Tegat AP Police Post who told him that he was seeking refuge from members of the public. He stated that the accused had bruises on his head and was escorted to Tegat dispensary. That shortly, some 10 minutes later the Accused's brother one Theophilus (Tobias) PW3 arrived at the station carrying a bloodstained knife and made a report that the Accused had stabbed his brother. PW7 was later recalled to identify the murder weapon (MFI II) Dr. Mutai (PW8) conducted the post mortem and produced the Postmortem Form as Exhibit No. 1.

7. No.52897 PC James Ndungu (PW9) testified that he was at Longisa Police Patrol Base on 12<sup>th</sup> September, 2018 when he received information from Tegat AP Post that a man (Accused) had stabbed his brother. He visited the scene and found that the victim had been taken to Longisa hospital while the accused had been detained at Tegat dispensary. He received a blood stained knife from the officer in charge of Tegat AP camp.

8. Government Analyst Richard Kimutai Langat (PW10) testified on behalf of his colleague one Chesang who analyzed exhibits presented to him vide Police Exhibit Memo. (MFI) the result of the analysis showed that the DNA extracted from the blood on the knife matched that extracted from the blood sample of the deceased. He produced the report as prosecution Exhibit 3.

9. PW11 was No. 61187 CPL. Henry Kiboma then of CCIO Narok who produced photographs (Exhibit 4(a)–(g)) depicting the scene and the deceased's body which was photographed at the morgue.

10. The Investigating Officer was one No. 112158 PC Allan Karanja who testified as PW12. He told the court that he visited the mortuary to see the body of the deceased and called the scenes of crime personnel to take photographs. That on 13/9/2018 he visited the scene with IP Ringera, PC Mwayi and Senior Sergeant Towett. He received the murder weapon from Senior Sergeant Towett who had received it from PW3. He prepared the Exhibit Memo (Exhibit 5) and forwarded the samples to the Government Chemist for analysis. He interrogated witnesses and recorded statements. PW12 stated in cross examination that the accused was arrested by members of the public. He produced the murder weapon (Exhibit 2).

### **The Defence Case**

11. The Accused stated in his sworn defence that the deceased was his brother. That on the material date, he went to the deceased's shop and had an argument with him (Deceased) that he (Accused) had had an accident before he got to the brother's shop and they fought. He said that he did not have a knife and did not stab him and that Theophilus (PW3) was the one who had a knife and chased him (Accused) away.

12. In cross examination, and upon being referred to the post mortem findings and photographs of the deceased, the Accused admitted that he stabbed the deceased with a knife several times. He also admitted that he met Joseph Tangu (PW1) and Robert (PW2) and Theophilus (PW3) who came to the deceased's shop shortly. He also stated that he usually did not carry a knife when selling cakes and that he had bought a knife that day because the old knife did not cut cakes well. In re-examination, the Accused stated that Robert (PW2) witnessed him fighting with his brother and that it was true that he stabbed his brother severally with a knife.

### **Analysis and Determination**

13. The evidence above must be analyzed against the three ingredients which constitute the offence of murder. The Prosecution must prove the fact of death and that the death was caused by the unlawful act or omission by the accused, and; that the accused acted with malice aforethought. All three elements must be proved beyond reasonable doubt. See **R.V. Elizabeth Onyango Ojwang 2018 eKLR**;

### **Death of the Deceased.**

14. There was no dispute that the deceased died on 12<sup>th</sup> September, 2018. Musee Tangu (PW1) Robert Kipnetich (PW2), Tobias Siele (PW3) were at the scene when he got stabbed. Mercy Cheron (PW5) rushed to the scene on hearing screams and found the deceased lying on the floor. Elkana Siele (PW4) arrived at the scene shortly after the deceased had been stabbed and rushed him to Longisa hospital where he was pronounced dead on arrival.

15. Dr. Nickson Mutai (PW8) conducted an autopsy on the deceased on 14<sup>th</sup> September, 2018. He observed multiple cut wounds on the left lower limb, anterior left knee joint, on the thighs, right leg, and right knee joint. There were also stab wounds below the neck, on the head and forehead. There was a cut wound on the upper stomach exposing the large and small intestines. A penetrating stab pierced through the liver and heart and the right lung had collapsed. Dr. Mutai opined that the deceased died of haemorrhage or excessive bleeding due to the injuries caused by a sharp object. He produced the post mortem report as Prosecution Exhibit No.1.

16. I am satisfied from the evidence above that the prosecution proved beyond reasonable doubt the fact of death of the deceased and the cause thereof. The Post Mortem Report (Exhibit 1) and the testimony of the pathologist (PW8) proved that the deceased suffered an unlawful death. The post mortem results accorded with the testimony of PW1, PW2 and PW3 who had seen the deceased being stabbed with a kitchen knife.

### **Whether the Accused was linked to the unlawful death of the deceased.**

17. It is trite that the identification of the accused must be proved beyond reasonable doubt. See **Matianyi vs. Republic [1988-92] 2 KAR 75; Cleophas Otieno Wamunga Republic (1989) eKLR**.

18. In this case the prosecution presented evidence linking the accused to the offence. Firstly, there were eye witnesses. The scene of crime was the deceased's shop at Tegat market center. Joseph Musee Tangu (PW1) described the scene. He told the court that he was at the deceased's shop conversing with one Robert (PW2) when the Accused arrived, disembarked from a motor cycle, entered the shop and whipped a knife from his waist and proceeded to stab the deceased. His testimony was corroborated by (PW2) and (PW3).

19. Secondly, the incident happened at about 6.00 pm which was still day light. The circumstances of identification were therefore favourable.

20. Thirdly, the Accused and the deceased were siblings. Both of them were very well known to PW1 and PW2. Tobias Siele (PW3) testified that both the deceased and the accused were his brothers. PW3 testified that he was in a nearby kiosk making mutura when he heard commotion in the deceased's shop and on responding, found the accused holding a knife and the deceased lying on the floor having been stabbed. Their other brother Elkana Siele (PW4) rushed to the scene and found the deceased having been stabbed. Together with PW3 they rushed the deceased to Longisa Hospital where he was pronounced dead on arrival. PW3 told the court that he disarmed the Accused and later handed over the knife which was the murder weapon (Exhibit 2) to Senior Sergeant AP Samuel Kipkurui (PW7) of Tegat AP Post who

in turn handed it to PC James Ndungu (PW9) of Longisa Police Patrol Base.

21. From the above evidence, I am satisfied that the Accused was properly identified as the person who stabbed the deceased causing him fatal injuries. His identification was established beyond reasonable doubt.

22. Other than the prosecution evidence, the Accused admitted in his defence that he stabbed the deceased. When shown photographs of the deceased during cross examination, he admitted that, "I agree I stabbed him with a knife severally".

### **Whether the Accused had malice aforethought**

23. A charge of murder cannot be sustained unless the prosecution proves malice aforethought on the part of the accused. Under section 206 of the Penal Code, malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -

(a) An intention cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.

(b) Knowing that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused:

(c) An intent to commit a felony.

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

24. In **Nzuki V. Republic (1993) 171**, the Court of Appeal stated that malice a forethought can be inferred from the acts of an accused person. The court elaborated as follows: -

**"Malice a forethought" is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim: or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result..."**

25. In this case, the Accused armed himself with a new knife and went to seek out his brother at his shop. According to the post mortem report (Exhibit No.1) the stab wounds were multiple and deep. He cut him on the neck, and limbs. The stab pierced the heart and liver, tore through the chest into the lungs, and through the stomach leaving both the large and small intestines protruding. He also inflicted deep cut wounds on the head and mouth.

26. The nature of the injuries described above and the sharp weapon used demonstrate that the Accused had malicious intention to harm the deceased. It is my finding that both the weapon used and the injuries inflicted bring the case within the Provisions of Section 206 of the Penal Code.

### **The Defence Case**

27. The Accused stated in his defence that the deceased owed him some money and that when he arrived at the shop, they fought. He denied having had a knife and having stabbed him. He however admitted in cross examination that he did stab him several times.

28. The Accused also called his mother Alice Lokos (DW2) who informed the court that she learnt after the incident that her son had stabbed her other son. She beseeched the court to empathize with her situation as one son was now dead and she did not wish to lose the other to jail. She told the court that her sons had quarreled over a jembe.

29. The Accused's defence did nothing to exonerate him from the offence. In his statement, he said that the deceased owed him money from sale of cakes while his mother said they quarreled over a jembe. The defence was incoherent.

30. Having considered both the prosecution and the defence evidence, it is my finding that the prosecution evidence has established that the Accused had malicious intent to kill his brother. He attacked his brother mercilessly and stabbed him multiple times with a sharp knife causing his unlawful death. He gave no coherent reason for his malicious and heinous act. The defence evidence neither dented the prosecution case nor even cast an iota of doubt on it. There was no attempt on the part of the defence to explain the actions of the accused, so as to cast any doubt on the prosecution case. If anything, the Accused made an unequivocal admission that he stabbed his brother severally thereby strengthening the prosecution case.

31. In the end, it is my finding that the charge against the Accused has been proved to the required legal standard. He unlawfully, maliciously and mercilessly ended the life of his brother. I find him guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. I convict him accordingly under section 215 of the Penal Code.

32. Orders accordingly

**JUDGMENT DELIVERED, DATED AND SIGNED THIS 31ST DAY OF JANUARY, 2022**

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**R. LAGAT KORIR**

**JUDGE**

**Judgement delivered in open court in the presence of Accused, Ms.Chepkemai for the Accused, Mr. Muriithi for the State and Kiprotich (Court Assistant).**