



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NO. 27 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

MICAH KIPROTICH.....1<sup>ST</sup> ACCUSED

PROTUS KACHOMBE KIPKANIA.....2<sup>ND</sup> ACCUSED

J U D G M E N T

The accused **MICAH KIPROTICH** (accused 1) and **PROTUS KACHOMBE KIPKANIA** (accused 2) are charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that **MICAH KIPROTICH** (accused 1) and **PROTUS KACHOMBE KIPKANIA** (accused 2) at unknown time and between the 17<sup>th</sup> and 20<sup>th</sup> days of June 2019 at Banandika forest in Cheptais sub-county, Bungoma County within another not before court murdered **YANO KIPROP**.

The case for the prosecution is that accused 1 MICAH KIPROTICH is the son of accused 2 PROTUS KACHOMBE KIPKANIA. **PW2 Kevin Kiptoo** a minor knows accused 1 who goes to the same school in class 3. Both accused 1 and 3 are known to him as they come from the same area. When he is not in school he takes care of their cattle which they take for grazing in the forest. On this day he took them to the forest. He met accused 1 and Yonah the deceased. Accused 1 made a toy called 'Murungati' which they started playing with the deceased. While playing a quarrel arose between the accused and the deceased. Accused 1 then hit deceased with a stick on the head. He told them to stop fighting and accused and deceased stopped fighting. He stayed with the deceased upto upon when he left the forest. That is the last time he saw him alive. Later he received information that the body of deceased was recovered near the Kenya Defence Forces Camp.

**PW5 Leonard Kiptai** the father of the deceased testified that the deceased was staying with the grandmother. On 18.6.2019 the deceased grandmother informed him that deceased had taken cattle to graze in the forest and had to come back. She inquired if the deceased was at his home. He informed her he wasn't. They received information that PW2 Kevin had seen him. They traced PW2 Kevin who led them to where he had seen deceased. He together with Nyumba kumi official went to the site in the forest where they found the body of deceased covered with fresh tree branches. Police were then informed. He noticed deceased had a cut wound on back of head and leg. He confirmed on cross examination by Amani for accused 1 that at the time they were searching for the body accused 1 and Kevin (PW2) were present.

**PW6 Grace Cheptoo Kimutai** the grandmother of the deceased who was aged 8 years old testified that on 17.6.2019 he gave the deceased heard of cattle to take to the forest to graze. He did not come back. The next day she went to the forest and found the herd of cattle but did not find deceased. She reported to the village elder, Nyumba kumi and police.

**PW7 Godfrey Kipkalya Mabana** a nyumba kumi official was on 19.6.2019 informed by Grace (PW6) that the deceased had not been seen. He got hold of accused 1 who he had information had been with the deceased. They went with accused 1 to the forest and he led them to various places, while looking for deceased. They looked for deceased and found him already dead and body covered with tree branches. Members of public wanted to beat accused 1 but he called police. He observed the body had injuries on head and leg.

**PW12 No. 56870 PC Mohamed Farah** the Investigating Officer testimony was that on 27.6.2019 he received information of the murder. He went to Kipsegeru police station and together with other officers went to the scene. He observed sticks which were blood stained, which he recovered and produced as Exh.1. He then went to the home of accused 1 who had been arrested earlier. In a kitchen house of accused 1's home they recovered a lessa Exh.3, blood stained T-shirt (EXh4) and blood stained jacket (Exh.5). They went to accused 1's mothers bed-room and recovered a panga Exh.6. The recovered items were later forwarded to Government Analyst Kisumu whose DNA report showed that the blood stains on the items belonged to the deceased. Upon interrogation accused 1 mentioned his father as the person who killed deceased after deceased had assaulted accused 1. On receipt of this angle of investigation, he handed over accused 1 to Chief Inspector Kamande who recorded a confession.

In cross examination by Mr. Wekesa for accused he stated that on arrival at the scene he found the body had been removed by police officers from Kipsigon and accused 1 had been arrested. He went with the accused 1 to their homestead where they found the mother and sister but accused 2 the father had gone to Uganda. He testified that the exhibits they recovered were wrapped in a bed sheet. He confirmed that at times of commission of offence accused 1 was aged 12 years.

**PW13 Chief Inspector David Kamadi** took a charge and cautioning statement of the accused 1 in the present of James Fundi. Production of confession was objected to by Wekesa for accused. A trial within a trial was conducted. This court delivered a ruling allowing the production of the witness statements as exhibit. The charge and cautioning statement which was adduced in evidence as Exh.10

The Government analyst report dated 14.2.2020 was produced by the Investigating Officer there being no objection by Wekesa for the accused. The report showed that the DNA profiles generated from the wooden sticks, panga, jacket and T-shirt matched the DNA profile of the deceased. And did not match the DNA profiles for accused.

**PW10 Dr. Edward Vilembo** produced a post mortem form prepared by Dr. Wanyama who performed the post mortem on body of deceased on 7.7.2019. He found deceased had several cut wound on neck and head. There was peeling of skin on face, knee and back. He formed opinion that the cause of death was due to severe bleeding secondary to severe cut wounds.

The accused upon being placed on their defence gave sworn statement. **Accused 1 Micah Kiptotich** testified that the deceased was his friend. He stated that he was with the deceased at the forest taking care of the cattle when deceased beat him on the head using a stick. He also beat the deceased who then died. He left him there at 5 p.m. and went home. He stated he did not intend to kill him but they were fighting.

**Accused 2 Protus Katyembe Kipkania** the father of accused testified that he was not at home then as he was at his farm at Cherangany.

He denied that he assisted accused 1 to kill the deceased and stated he came to court to see accused 1 when he was arrested.

Mr. Wekesa for the accused filed written submission. He isolated the issues for determination is to whether accused 2 Protus committed the offence; whether the offence was sufficiently proved, and finally whether accused 1 Micah Kiptotich is criminally responsible for the offence of murder. Counsel submitted that the prosecution witnesses did not mention accused 2 Protus as being present in the forest and that even accused 1 said the father was at Cherangani. He submits that accused 1 being a child below 12 years has no criminal responsibility for acts unless it is proved that at time of doing the act he had the capacity to know that it was wrong. Counsel made reference to Section. 41 of the Penal Code. On whether the prosecution established all the elements of the offence of murder, counsel submitted that the prosecution failed to do so and no malice aforethought was adduced and that even the accused 1 testified that he did not intend to kill the deceased and that they were only fighting.

The accused are charged with the offence of murder. Section 203 of the Penal code provides to wit;

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”***

This therefore brings us to the ingredients of the offence of murder. The law is well laid down that to establish the offence of murder against an accused person the following four elements must be proved beyond reasonable doubt;

- a) The death of the deceased.***
- b) The unlawful cause of death***
- c) That in causing death the accused committed it with malice aforethought.***
- d) That there is direct or circumstantial evidence placing the accused at the scene of the crime.***

Section 206 defines malice aforethought is deemed to be established by evidence when any of the following circumstances are proved by evidence adduced against any defendant.

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

**PW10 Dr. Edward Vilembwa** who produced the post mortem form prepared by Dr. Wanambisi testified that the deceased had numerous cut wounds on neck and head. These severe cut wounds led to excessive bleeding causing death. He therefore confirmed the fact of death and issued death certificate NO. 1212321. He confirmed the unlawful act that caused the death as inflicting of several cut wounds on the

head and neck.

As how the deceased sustained the injuries, the prosecution called **PW2 Kevin Kiptoo** who testified that on the material day he was in the forest and saw accused 1 who was with the deceased start fighting. The prosecution also called **PW12 PC Mohamed Farah** the Investigating officer who testified that together with accused 1 who had already been arrested, they went in the home of accused 1 where in his mother's house they recovered pieces of clothing and panga which were blood stained. These items were forwarded to Government analyst Kisumu whose report showed that the blood stains on the items belonged to the deceased. Items were recovered from home of accused 1 which indicates a strong connection of the deceased in the forest and blood stains found in items found in home of accused 1. It therefore confirms that after the murder both the murder weapon and items of clothing of deceased were brought by a person to the home of accused 1.

**PW13 Chief Inspector David Makadi** recorded a charge and cautioning statement from accused 1. Mr. Wekesa objected to the product on two grounds.

1. That the language used was English and translated to Kiswahili by James Fundi.
2. The statement was not given voluntarily.

This court conducted a trial within a trial. During the trial within trial it was proved that the accused understands Kiswahili language. This fact is reinforced by the fact that at the beginning of these proceedings, accused indicated that he understands Kiswahili language well. On the issue of voluntaries the accused 1 stated that he made the statement voluntarily in presence of his uncle James Fundi. For those reasons this court allowed the production of the charge and cautioning statement which as produced as Exh. 10.

In the statement accused 1 stated:

*"I remember very well on 17<sup>th</sup> June 2019 at around 2.00 p.m, I and my friend Yonah Kiprop we were herding our sheep in a forest in Mt. Elgon and as I was going to turn the sheep back, yonah called (Haramis) a mad person that roams on the road in Kipsigon and Banandega.*

*This name (Haramis) annoyed me. I raised the panga that I had in my hand and cut Yonah on the head and he fell down. He cried in pain and blood started oozing from his head. Then he went silent. I continued herding my sheep.*

*I went back home with the sheep at 5.00 pm. The cows that Yonah was herding remained in the forest. On 18.6.2019, I informed Yonah's grandmother that Yonah was dead asleep in the forest. The morning of 18.6.2019 as I was taking sheep to the forest for grazing I was arrested by the public. I was taken to Kipsigon police station then later I was taken to Chesikaki."*

This is asserting the same as the defence evidence of PW1 in court where he stated:

*"I was with him taking care of cattle at the forest. He then annoyed me. He beat me using a stick. He hit me on the head. I also beat him and he died. At 5 p.m. I went home. I left him there. I did not want to kill him. We were fighting".*

From the evidence of accused 1 both in the statement and in court, I am satisfied and do find that the injuries on the deceased were inflicted by accused 1 Micah Kiprotich and not accused 2 Protus Katiembe Kipkania.

The prosecution besides provided the fact and cause of death, the unlawful act that caused the death and that it is the accused who committed the unlawful act must prove that accused had the requisite mensrea, that is malice aforethought. Section 206 defines malice aforethought as.....

**Section 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances**

**a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**b) knowledge 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.**

From the evidence the weapon used was a panga and the areas targeted for injury were the head and neck of the deceased. Malice aforethought can or intention to cause death can be inferred by consideration of the weapon used in the murder, the part of the body targeted and the conduct of the accused after the murder. From the evidence the deceased was cut several times on the head and neck by a panga. This demonstrated an intention of accused 1 to cause grievous harm or death as it happened in this cause. I am therefore satisfied that malice aforethought was established. The accused's defence that he did not intend to kill is displaced by the nature of weapon used. Viciousness of the attack and the part of the body targeted.

Mr. Wekesa for the accused submitted that accused 1 is not criminally responsible for the murder on the basis that at time the offence was committed he was under 12 years old.

Criminal responsibility is the mental capacity of a child to commit a crime for which they will be prosecuted and found guilty. Section 14 of the Penal Code provides:

**Section 14:**

***(1) A person under the age of eight years is not criminally responsible for any act or omission.***

***(2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.***

***(3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.***

The subject Micah Kiprotich was taken for age assessment at Bungoma County Hospital on 25.6.2019. He was examined and **Dr. Elizabeth Sunye** gave the age assessment as approximately 12 years old. He is not therefore a subject of Section 14 (2) of the Penal Code because the Section only applied to a person under the age of 12 years. Even if he was subject to Section 14, from his evidence in court he knew what he was doing and that it was wrong but justifies the same on the allegation that deceased had abused him. He therefore knew what he was doing and that it was wrong.

I have considered the whole evidence, I find that the prosecution has not proved the charge of murder against accused 2 Protus Kachombe Kipkania who is the father of Micah Kiprotich. I therefore find accused 2 Protus Kachombe Kipkania not guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and acquit him under Section 215 C.P.C. Accused 2 Protus to be released forthwith unless lawfully detained.

As for Micah Kiprotich, I find the prosecution has shown that the subject and the deceased fought while in the forest arising from what the subject considered an insult by deceased. Section 207 of the Penal Code provides:

***207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.***

What amounts to provocation is defined in Section 208 of the Penal Code.

**208.**

***1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.***

***2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.***

***3) A lawful act is not provocation to any person for an assault.***

***4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.***

***5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.***

I therefore find that Micah Kiprotich did kill the deceased under circumstances of provocation. Under Section 207 of the Penal Code I make a find of guilt against him for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**Dated at Bungoma this 29<sup>th</sup> day of March, 2022**

**S.N RIECHI**

**JUDGE**