



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CRIMINAL CASE NO. 6 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MATHEW KIPSEMON KULEI.....ACCUSED**

***(Formerly Eldoret High Court Criminal Case No. 82 of 2012, R v Mathew Kipsemon Kulei)***

**JUDGMENT**

**Procedural history.**

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya; in respect of the deceased Willy Cheluk, which is alleged to have occurred on 1/10/2012.
2. The prosecution called five (5) witnesses in support of the charge.
3. The accused made an unsworn statement and called no witnesses.
4. Three prosecution witnesses (Pw 1, Pw 2 and Pw 3) testified before Ochieng, J. and the remaining two (Pw 4 and Pw 5) witnesses testified before Muriithi, J.
5. It is only the accused who testified before me.
6. The accused after his rights under section 200 (3) as read with section 201 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya, were explained to him. After being explained of his rights, the accused informed the court that he wanted his trial to proceed from where it had reached; which position was confirmed by his advocate.

**The case for the prosecution.**

7. The prosecution called Kenneth Kimaron (Pw 1), who is the brother of the deceased. The evidence of Pw 1 was that on 28/10/2012 at about 6.30 pm, he was with the deceased and the accused. They were drinking chang'aa. The deceased told the accused not to go to his home to disturb his children. The deceased had two girls namely Gladys Kankwony and Chesang Cheluk. The accused then told the deceased that Gladys Kankwony was a prostitute. An arguing ensued between the accused and the deceased.
8. Pw 1 continued to testify that he managed to persuade the deceased to leave for his home. Suddenly the accused, picked two stones and started to chase the deceased. Pw 1 and Joseph Kulei (Pw 2) followed them (the deceased and the accused).
9. Pw 1 then saw the accused hit the deceased on the head with a stone. As a result of being hit, the deceased fell down and became unconscious. Pw 1 and Joseph Kulei tried to help him, but the accused threatened to beat both him and his brother Vincent. Pw 1 further testified that the accused used to be wild. As a result, they ran away, leaving the deceased on the ground. Pw 1 then went to the house of the deceased and informed his wife. Pw 1 went and returned to the scene with the son of the deceased called Kimutai Cheluk.
10. Pw 1 continued to testify that they found the deceased still lying down. He was not talking. Pw 1 and the son of the deceased supported the deceased and took him to his house. Pw 1 then proceeded to his home.
11. Furthermore, Pw 1 testified that the following day he went to the house of the deceased. Pw 1 then told the son of the deceased to go and inform his father (father of Pw 1). When the father of Pw 1 arrived, village elders were called. The father of Pw 1 told the deceased and accused to talk before the elders talked. They talked and the accused promised to take the deceased to hospital.

12. The accused then gave the deceased shs 100/= and said that he was going to follow the deceased to the hospital. The deceased did not manage to go to hospital. He was later taken to Kabarnet hospital, where he was admitted. On 1/10/2012 Pw 1 learned that the deceased had died. Pw 1 also testified that although it was dark, he had a torch. Pw 1 identified in court the stone, which the accused used to hit the deceased in the head. He did not hand over that stone to the police.

13. In addition to Pw 1, the prosecution called Joseph Kulei (Pw 2), who was a GSU officer stationed at Embakasi Training School. On 28/10/2012, Pw 2 was on leave and after buying some items for his children, he left Kabarnet and proceeded to his home.

14. While on the way he met four people namely the deceased, the accused, Pw 1 and Kiplagat Kipkulei; the latter is the brother of the accused. Pw 2 was able to see all the four persons, because it was not very dark. He was close to all of them that he was able to see them clearly. As they were standing there the accused and the deceased were quarrelling. The accused then told the deceased not to be proud as his daughter, because she was a prostitute. The deceased then went towards Pw 2 and after he passed Pw 2, the deceased suddenly collapsed.

15. Pw 2 continued to testify that Kiplagat Kipkulei (the brother of accused) said that the accused had hit the deceased. When Pw 2 first saw the accused, the accused had stones in both hands. Pw 1 who had a torch flashed it at the deceased's head and chest. Pw 2 examined the deceased, but he did not see any blood on him.

16. Pw 2 further testified that the accused was still very annoyed. The accused threatened to harm Pw 2, if Pw 2 got involved in this matter. Pw 2 feared as he noticed that those people were drunk.

17. Pw 2 continued to testify that the following day, he met the accused. He told the accused that what he was about to do the previous day was dangerous. Pw 2 continued to tell the accused that if they continued drinking, they will end up doing bad things. The accused then told him that he had just seen the deceased and that he gave the deceased shs 100/= for use in going to Kabarnet hospital. Later Pw 2 learned that the deceased had died.

18. Stephen Kipmaron Kipkulei (Pw 3), testified that the deceased was a brother of the accused and that he did not see the accused stone the deceased. In cross examination, Pw 3 testified that the deceased and accused did not have any disagreements.

19. The prosecution called No. 73742 PC Paul Kiptoo (Pw 4); who was the investigating officer. It was the evidence of Pw 4 that while he was at the police station, he received a report from the father of the deceased that his son, the deceased had died in hospital, while undergoing treatment. He was told by the father of the deceased, that the deceased was hit by the accused.

20. Pw 4 further testified that he recorded statements from witnesses and that on 9/10/2012 he went to the hospital for the postmortem. With the consent of the defence advocate, Pw 4 produced the report of the mental assessment of the accused as exhibit Pexh1.

21. Furthermore, on 26/11/2012 Pw 4 went to Bartolimo Secondary school and arrested the accused.

22. Pw 4 visited the scene of crime. There he saw few stones scattered all over.

23. Finally, the prosecution called Dr. Mwangi Oscar (Pw 5), who on behalf of Dr. Pukose, produced the report of the postmortem in respect of the body of the deceased as exhibit Pexh No 2. The findings of Dr. Pukose were as follows. The deceased was aged 39 years. There was an old scar on the occipital area of the head. There was also old blood on both nostrils. In respect of the head, there was a scalp haematoma on the occipital region and a linear occipital fracture on the skull. And in respect of the spinal column, there was haematoma of the brain into the spinal column in the lower part of the brain.

24. And in respect of the nervous system, there was cerebral massive haematoma and occipital extradural haematoma.

25. The cause of death was severe head injury with intracerebral and extra dural haematoma secondary to a blunt object.

#### **The case for the defence.**

26. The accused made an unsworn statement and called no witnesses. He testified after he elected to have his trial to proceed from where it had reached in terms of section 200 (3) as read with section 201 (2) of the Criminal Procedure Code.

27. He testified that he was 17 years old as at 28/9/2012 and that he had been expelled from school for lack of school fees. His father gave him school fees to go and bank. On the way at 2.30 pm he met the accused, who was very drunk. He testified that the deceased was his cousin. The deceased then asked him for money. The deceased then got hold of his right arm. The accused managed to free himself from the grip of the deceased.

28. The accused proceeded and met Joseph Kulei on the way. He explained Joseph Kulei what had happened. Joseph Kulei told the accused that he was going to talk to the deceased. The accused proceeded to school. The accused then rang his father and told him what had happened between him and the deceased. His father told him that the deceased had injuries and had been taken to Kabarnet district hospital. The accused arrived at school and met the school principal.

29. The principal told accused that he had talked to his father. His father and the principal had agreed that the accused leaves school. The accused then left school for his sister's home; where he stayed until the start of examinations. He then went back to school and sat for examinations. Before he cleared from school he was arrested by police and taken to Kabarnet police station.

30. Thereafter, he was charged in court in Eldoret High Court and was taken to the juvenile prison. Thereafter the accused was released on bail.

31. The accused further testified that he was not with the deceased on 28/10/2012 at 7.00 pm as alleged by Joseph Kulei (Pw 2). The accused also testified that he did not drink chang'aa as alleged by Joseph Kulei. He finally testified that he never had any dispute with the deceased.

#### **The submissions of the defence.**

32. Mr. Chepkilot, counsel for the accused submitted that the prosecution did not prove the ingredients of the offence of murder; that is the *mens rea* (the intention to cause murder) and the *actus reus* (the act or omission that causes murder).

33. Counsel further submitted that the stone which was alleged to have been used to hit the deceased was not produced as an exhibit in court. He also submitted that it was a dark night and therefore the accused was not positively identified. He further submitted that it was impossible to tell if the injuries were caused by being hit or by falling down.

34. Counsel for the accused further submitted that the accused had good relationship with the deceased and therefore the accused did not have an intention to harm the deceased.

35. Counsel therefore submitted that the prosecution had failed to prove the offence beyond reasonable doubt. He therefore urged the court to acquit the accused of murder.

#### **The submissions of the prosecution**

36. The prosecution did not file any written submissions as law prevents them from doing so. The prosecution is only allowed to file written submissions where the prosecution is conducted by the Director of Public Prosecutions in person. See section 309 as read with section 161 of the Criminal Procedure Code.

#### **Issues for determination.**

37. I have considered the entire evidence and the submissions of the defence in the light of the applicable law. As a result, I find the following to be the issues for determination.

- 1) Whether the accused caused the death of the deceased.
- 2) Whether the evidence discloses murder or manslaughter.

38. I find as credible the evidence of Kenneth Kimuren (Pw 1) that he saw the accused hit the deceased with a stone in the head. I also find that as a result of being hit, the deceased fell and became unconsciousness. With the assistance of Pw 1, the deceased was taken to his home. As at that time Pw 1 and Pw 2 did dare assist the deceased; since they feared the accused who was known to be wild.

39. Furthermore, I find as credible the evidence of Pw 1 and Joseph Kulei (Pw 2) that the following morning the accused gave the deceased shs 100/= to enable him go for treatment at Kabarnet hospital.

40. I also find that both the accused and the deceased were drinking chang'aa at that material date and time. I further find that the deceased and accused were brothers and did not have any disagreement. I further find that the drinking of chang'aa by the accused was voluntary and was not induced.

41. Pw 1 and Pw 2 were able to positively identify the accused as they knew each other before and they were close to him in terms of distance. They also had been together that evening and that it was not very dark. Pw 1 and Pw 2 had no reason to testify falsely against the accused.

42. I find that the cause of death was severe head injury with intracerebral and extra dural haematoma secondary to a blunt object, which is consistent with the use of the stone by the accused in hitting the deceased. This is clear from the evidence of Dr. Pukose, whose report of the postmortem was put in evidence as exhibit Pexh2 by Dr. Mwangi Oscar (Pw 5).

43. The defence of the accused is that of an alibi. I find that the accused was positively identified as being at the scene of crime. I therefore find the alibi defence of the accused has been disproved.

44. I further find that the accused fatally hit the deceased with a stone; which Pw 1 identified in court; although it was not produced in court as an exhibit.

45. I therefore find that the accused caused the death of the deceased.

#### **Issue 2**

46. I find that the accused knew what that he was doing was wrong as he hit the deceased with a stone in the head. Furthermore, he voluntarily drank the chang'aa and was not insane at the material time. I therefore find that the defence of intoxication in terms of section 13

(2) of the Penal Code is not open to him.

47. The upshot of the foregoing is that the evidence discloses murder and not manslaughter. In the premises the accused is guilty of murder contrary to section 203 as read with section 204 of the Penal Code and hereby convict him accordingly.

Judgement dated, signed and delivered in open court at Kabarnet this 30<sup>th</sup> day of April 2021.

**J M BWONWONG'A**

**JUDGE**

**In the presence of:**

Mr Sitienei, the Court Assistant

Mr Abwajo for the Republic

Mr. Chepkilot for the accused.