



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 109 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**AMOS KIPROTICH LAGAT.....ACCUSED PERSON**

**JUDGMENT**

1. The Accused Person herein, Amos Kiprotich Lagat (“Accused Person”) is charged with murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. He is accused of unlawfully killing Kipkemboi Kipyego Alias Barnaba Kipkemboi Yegon on the 30th day of October, 2013 at Kimakaskoi village in Koibatek District within Baringo County.

2. The Accused person plead ‘Not guilty’ and the case proceeded to full hearing. The Prosecution’s case was presided over partly by Justice H. Omondi who took the evidence of four Prosecution witnesses. Before the conclusion of the Prosecution case, the Learned Judge was transferred out of the station and case was taken over by Justice Maureen Odero who heard the last prosecution witness. She returned a verdict that the Accused Person had a case to answer in her ruling dated 15th March 2018.

3. By the time the matter came up for Defence hearing, the Hon. Justice Maureen Odero had been transferred to a different station and it fell upon me to complete the trial. After complying with the provisions of Section 200(3) of the Criminal Procedure Code and informing the Accused Person of his options on defence, the Accused Person elected to give a sworn statement. He had no witnesses to call.

4. The Prosecution called a total of five witnesses

5. CK, aged 14 years and a daughter to the Deceased testified as PW1. She informed the court that she knew the Accused person and had known him for five years. She informed the court that the Accused was her neighbour. She testified that on 30/10/2013 she did not go to school because she had a headache. That on the said date, a cow belonging to the Accused came to their compound while her father was going round their shamba “looking at the maize.” Thereafter, the Accused Person emerged and the Deceased asked Amos why he was taking out the cow, to which Amos replied “So that it can eat your crops.”

6. C testified that the Deceased had a stick which he wanted to use hit the Accused Person. The Accused Person, said C, held the stick and hit her father, who then fell down. The Accused person, then, used the stick to drive away the cow before using the same stick to hit her father on the teeth. C further testified that the Deceased thereafter told her that the Accused Person had hurt his head and that he was going to the Area Chief to report the incident. The Deceased then left and when her mother came, she told her about the incident. That in the evening, her father complained about his head hurting a lot and died the following morning.

7. Florence Chepkemoi Kemboi, the wife to the Deceased testified as PW2. She testified that on 30/10/2013 at about 3:30 p.m. She was at home when she left briefly to tether the cows. That on return, she met the Deceased who told her that the Accused Person had assaulted him using a stick. She testified that the Deceased had informed her that he had hit the Accused Person with a stick and that the Accused Person had snatched the same to hit him with it.

8. Florence testified that the Deceased returned home at 7.00 p.m after he said he had gone to the Chief to report and that when he complained of a headache. He went to sleep after dinner. He was still complaining of a headache the next morning. On the night of 3rd November, 2013, the Deceased became ill and could neither get up nor eat.

9. Florence testified that on 04/11/2013 at 6.a.m, she went to inform the Deceased’s brother about the Deceased’s condition.

That they carried the Deceased in a wheelbarrow and took him to the hospital. On the next day she learnt that he had died.

10. Vincent Kiptarus Yegon, a brother to the Deceased and neighbour to the Accused Person testified as PW3. He testified that on 2/11/2013 at 9.p.m, his younger sister Marse, informed him that the Deceased was sick, having a headache. He further testified that on 4/11/2013 at

6.00 a.m. his sister-in-law (PW2) came to his home and informed him that the Deceased's condition had become worse. He rushed to the Deceased's house and found that he could neither walk nor recognize anyone. That they quickly dressed him, put him on a wheelbarrow, which they got from the Accused's father. They rushed him to Eldama Ravine District Hospital where he was admitted. Later on, they were advised to Nakuru PGH which they did. Unfortunately, the Deceased died the following day as he was still being treated. Vincent told the Court that he later on went to the hospital mortuary to identify the Deceased's body during post-mortem.

11. The post-mortem was done by Dr. Titus Ngulungu, a pathologist at Nakuru PGH. He testified as PW4. He testified that on 11/11/2013, he performed a postmortem on the body of the Deceased on request from Koibatek Police Station. The body was identified by Vincent Kiprotich Yegon and Luke Langat. He had been told that the Deceased had been hit by a blunt object and he was required to ascertain the cause of death.

12. Dr. Ngulungu testified that the body had signs of injury and in a decerebrate posture (i.e brain not functioning well). It had cyanosis (i.e bone colony of nails an indication of lack of oxygen before death. There had been a medical intervention before death through IV intravenous access. He testified that injury involved something in the scrotal area. Internally, there were bruises on the right side of the scalp measuring 2cm by 2cm. The doctor testified that when he opened the skull, there was darkening of tissue on the right side with fluid containing blood plasma and clots which indented the brain resulting in interacted pressure on the brain and this was seen on the contra-lateral side of the brain. That the scrotal swelling had hydrocele which was not due to any trauma but other disease causes. There was a right sided subdural hematoma which causes intracranial pressure due to blunt force trauma to the head. According to Dr. Ngulungu, this meant that the Deceased was probably hit on the head which ruptured his artery, resulting in bleeding and increased pressure to the brain. He produced the post-mortem examination report as Exhibit 1 and noted that as a result of his examination he concluded that the cause of death was massive subdural hematoma causing raised intra-cranial pressure due to blunt head trauma.

13. The final witness was Oliver Naboniwe, a Police Constable No. 9350, the Investigating Officer in the case. He testified as PW5. He testified that he was previously deployed at Koibatek DCI and that on 08/11/2013, he was instructed by the OCS to investigate the case of murder that had been booked at Eldama Ravine Police Station. He narrated that his investigations showed that the Deceased and the Accused Person engaged in a scuffle over the Accused Person's cow grazing on the Deceased's *shamba*; and that the Deceased attempted to hit the Accused Person with a stick but the latter snatched the stick and used it to attack the Deceased. PC Naboniwe said that he recorded statements from witnesses including C who was an eye witness and recommended that the Accused Person be charged with the offence of murder.

14. The Accused Person elected to give a sworn statement. He testified that on 02/12/2020. He testified that on the material day, he was heading home after grazing his cows when the Deceased told him that his Cows (the Accused Person's) had grazed on his land. He said that the Deceased ran to the road where the Accused Person was and tried to beat up the Accused Person using a cane he had in his hand. The Accused Person testified that the Deceased was very drunk and that as he tried to beat the Accused Person, he lost his balance and fell. He further said that when the Deceased fell on the ground, the Deceased's daughter (Chepkurui) came and pleaded with him not to hurt her father. He said he left the Deceased on the ground and went to his home.

15. The Accused Person said that he went home, milked his cows and then went to the Centre in the evening. As he walked to the Centre, he said that he met the Deceased and he asked for forgiveness and they walked together to the Centre and the Accused Person went to play pool. That the Deceased even tried to borrow Kshs 20/- to buy cigarettes from him.

16. The Accused Person claims that both he and the Deceased went home in good terms. After about one month, claimed the Accused Person, the Deceased became sick and the Accused Person visited him at his house and helped get a vehicle to take him to hospital. It was while at the hospital that the Deceased died. The Accused Person insisted that he was in good terms with the Deceased; and that they were good neighbours. He was, he insisted, heavily involved in the burial arrangements.

It was only after the burial that the Area Chief informed him that the Deceased's family had reported the matter at the police station. He maintained that he did not hit the Deceased at all.

17. Defense Counsel filed submissions on 25/1/2021. He contends that the stick, which was the murder weapon was never produced and no description as to the size of the stick was offered for the court to satisfy itself on whether it could inflict the injury sustained. The Defence relied on the decisions in two cases to make the argument that the failure to produce the murder weapon is fatal in a murder case. The two cases are: ***Mutua Mutisya v Republic (2008) eKLR*** and ***Ramanlal Trambaklal Bhatt v Republic (1957) E.A.***

18. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

19. To successfully obtain guilty verdict in murder charge, the Prosecution therefore is required to tender sufficient proof of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

20. On the other hand, malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

d. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not.

e. 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.

f. Intent to commit a felony.

g. 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.

21. From my analysis of the evidence given at trial rehearsed above, it is quite clear that the first elements of the offence of murder is well established: There was the death of the Deceased which is not disputed. It was also not disputed that the Deceased died of a massive subdural hematoma caused by a blunt head trauma.

22. The only question is whether the injury was caused by the Accused Person as alleged by the Prosecution; and if so, whether the Accused Person had the requisite mens rea (malice aforethought) in causing it.

23. As I understand it, the defence theory is two-pronged. The first is factual: the Accused Person denies hitting the Deceased and causing the injury. He accepts the narration of C except where she says that he snatched the cane from the Deceased and then used it to hit the Deceased. The Accused Person says, instead, that the Deceased was drunk and that he lost balance when he tried to hit the Accused Person and fell on the ground all on his own.

25. The legal prong of the defence strategy is that the Accused Person cannot be deemed to have caused the death of the Deceased in the absence of the weapon which was allegedly used to cause the death.

25. On the factual contestation, the case turns on the credibility of the two witnesses: C for the Prosecution and the Accused Person for the Defence. After due analysis, I have found the narration by C about what happened on the evening of 30/10/2013 to be more believable. I have concluded so for at least three reasons:

a. First, C gave her narrative in a straight-forward manner and effortlessly included sufficient detail and specificity in her narrative.

b. Second, C account was internally and externally consistent and coherent. It gave a coherent account about what happened and when it happened. Moreover, it cohered with and was consistent with the narrative by PW2.

c. Third, C was honest in describing the Deceased, her own father, as the aggressor: she forthrightly explained that it was the Deceased who first tried to hit the Accused Person before the Accused Person snatched the cane and used it to assault the Deceased.

d. Fourth, in any event, conversely, I found the Accused Person's narrative implausible: he claimed that the Deceased only fell ill about a month after the incident yet the Deceased died on 05/11/2013 and a post-mortem conducted on 11/11/2013. At the same time, the Accused Person did not contest that the incident happened on 30/10/2013.

26. In the end, therefore, I accepted the eye-witness account of C as the credible narration of what happened on 30/10/2013. It establishes that the Deceased attempted to hit the Accused Person with a cane and the Accused Person snatched the cane from him and used it to hit the Deceased several times. This narrative is also consistent with the cause of death established by Dr. Ngulungu.

27. Differently put, I have come to the reasoned conclusion that the version of events as told by the Accused is so improbable that it cannot reasonably possibly be true. (See *S v Shackell SA 1 (SCA)*). While the Defence is not required to demonstrate that its defence theory or narrative is reasonably plausible or probable and while the test is not whether its version is improbable but if it can be said to be so improbable that it cannot reasonably possibly be true, in the instant case, it is not possible to say that the Defence version of events has reasonable inherent probability that it is true. All considered, I conclude that the Defence's version is highly improbable. In reaching this conclusion, I have not only weighed the Defence evidence against that offered by the Prosecution in totality but I have also keenly considered the legal theory the Defence has offered to impugn the Prosecution narrative: that the failure to produce the weapon (stick) which the Accused Person allegedly used to hit the Deceased fatally vitiates the Prosecution theory.

28. The answer to that argument is that there is simply no legal requirement that the murder weapon be found and produced at trial for a murder charge to be sustained. Our Courts have unmistakably said as much.

29. The Court of Appeal, faced with the same question in the case of *Karani v. Republic (2010) 1 KLR 73* pronounced itself thus:-

The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.

30. In the more recent case of *David Mwangi Monica v Republic [2020] eKLR*, the Court of Appeal addressed the issue of failure to produce the murder weapon as follows:

A perusal of the proceedings of the trial court as appears in the record, shows that circumstances leading to the deceased's death

were explained in detail by both the prosecution witnesses and the accused person in his defence. Despite disparities, it is common ground that the appellant was stabbed with a knife. PW9, the Government Pathologist who examined the deceased's body, confirmed that the cause of death was a penetrating 6 cm long stab wound on the left upper abdomen. Therefore, from the evidence tendered there is no doubt it was a knife that was used to inflict the fatal injury on the deceased and as such failure to recover and produce that knife as an exhibit was not fatal to the prosecution case.

32. Indeed, in the *Mutua Mutisya case* cited by the Defence, the Court merely stated that the production of the murder weapon was desirable and not mandatory and that each case must be assessed on its own facts. Similarly, in this case, there is no doubt that the weapon used was a stick as confirmed by both PW1 and the Accused in his sworn statement. PW4 confirmed that the Deceased died as a result of being hit on the head, which is consistent with PW 1's testimony on how the Deceased sustained injuries to his head. The failure to produce the said stick is therefore not fatal to the prosecution's case.

32. Having concluded that the Prosecution narrative credibly established beyond reasonable doubt that it is the Accused Person who caused the Death of the Deceased, the question that remains is whether the Accused Person had malice aforethought.

33. From the facts analysed above, it seems clear to me that there was no element of premeditation. The only eye witness to the incident, C, was categorical that it was the Deceased who first attacked the Accused Person. C could not have been more straight-forward in her narration: the Deceased violently tried to attack the Accused Person. The Accused Person snatched the cane with which the Deceased had tried to attack him and used it to assault the Deceased.

34. It seems clear that this attack happened in the midst of the physical duel and in the heat of anger and passion. The Accused Person acted in the throes of an emotional state and in the absence of premeditation or contemporaneous commission of another felony. He also acted in self-defence since he was under attack by the Deceased.

35. However, it is clear that the Accused Person responded with excessive force. There is no evidence at all that the Accused Person faced imminent death or risk of serious injury and there has been no suggestion or evidence that the Accused Person held an honest even if mistaken belief that it was only by repelling the Deceased by repeatedly hitting him on the head that he would have preserved his life.

36. Consequently, even though the Deceased was the unlawful aggressor, it was unjustifiable for the Accused Person to respond with deadly force. The Defence of self-defence, though suggested by the circumstances, is "imperfect" in this case since the Accused did not hold a reasonable belief that it was necessary for him to repel the attack with deadly force to avert an imminent infliction of death or serious bodily harm to himself.

37. In the end, therefore, my conclusion is that in the absence of the third element of premeditation, the offence of murder is not established against the Accused Person. Instead, the Prosecution has established all the elements for the lesser but cognate offence of manslaughter: the unlawful killing of a human being. Consequently, this Court finds the Accused Person guilty of the lesser but cognate offence of manslaughter contrary to section 202 as read together section 205 of the Penal Code and is so convicted.

38. Orders accordingly.

**DATED AND DELIVERED IN NAKURU THIS 22<sup>ND</sup> DAY OF APRIL, 2021**

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**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.