



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO 12 OF 2017**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**CHRISTINE BOIT.....1<sup>ST</sup> ACCUSED**

**KIPKEMOI LOMUKUSE.....2<sup>ND</sup> ACCUSED**

**VICTOR ARGUT.....3<sup>RD</sup> ACCUSED**

**ALFRED BIWOTT.....4<sup>TH</sup> ACCUSED**

**KIPKEMOI SERGON.....5<sup>TH</sup> ACCUSED**

**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, Kepkemoi Boit.
2. The prosecution closed their case after calling six (6) witnesses. All of the prosecution witnesses testified before Muriithi, J.
3. Muriithi, J was transferred from this station (Kabarnet High Court), before the parties filed their written submissions. As a result, I had to explain to the accused of their rights under section 200 (3) as read with section 201 of the Criminal Procedure Code (Cap 75) Laws of Kenya; for I had now to take over their trial. I acquitted the four co-accused at the stage of no case answer. The instant judgement only concerns the 1<sup>st</sup> accused.
4. The accused exercised their right under the foregoing provisions and elected that their trial should continue from where it had reached. Mr Kemboi, counsel for the accused confirmed their position that the trial should start from where it had reached.
5. And since the prosecution had closed their case, Mr. Kemboi filed written submissions in which he urged the court to acquit his client the 1<sup>st</sup> accused.

**The case for the prosecution.**

6. The prosecution called Monica Chekuru Sanko (Pw 1). Pw 1 testified that she heard screams from the deceased, who was his neighbour. The deceased was crying. As a result, she went out. Pw1 then saw one boy running towards her house. The boy did not talk to her. Pw 1 then returned to her house and slept.
7. Furthermore, Pw 1 testified under cross examination that the deceased developed bad habits of stealing from people, his neighbours as well from his family.
8. The prosecution also called Zipporah Kogoti Kimosop (Pw 2). Upon the application of the prosecution, Pw 2 was stood down for reasons that are not recorded and was never recalled thereafter.
9. In addition to the foregoing witnesses, the prosecution called Patrick Kiprop Ezekiel (Pw 3), who was the administration chief. He received a report of a person who was being beaten during that night at 10.00 pm. He went to the scene of beating the next day as his home

was far from the scene of crime.

10. While under cross examination, Pw 3 testified that the deceased had a record of stealing. He also testified that Pw 2 told him that there were eight people who were involved in beating the deceased.

11. Upon arrival at the scene of beating, the next day at 10.00 am, Pw 3 found that the deceased had died. He informed the OCS Kabarnet police station of this incident.

12. The chief found the mother of the deceased at the scene of crime; who was with other people. When the police asked the mother of the deceased as to why the deceased was beaten; the mother replied that the deceased son had broken into the house and had taken shs 2030/=, 1 kg of sugar and 1 kg of groundnuts. He also testified that some of the boys who were beating the deceased were arrested by the police, after being interrogated. Among those boys were the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons, whom were acquitted.

13. It was also the evidence of Pw 3 that Zipporah KogotiKimosop (Pw 2), told him that the mother of the deceased and two boys were involved in the beating of the deceased. Pw 3 further testified that he was not given any specific names of the boys who beat the deceased.

14. Furthermore, it was the evidence of Pw 3 that he did not see who beat the deceased and that the beating incident was reported to him at night at 10.30 pm.

15. The prosecution also called Christopher Ngetich (Pw 4), who was watching TV on 5/2/2013 at 7.00 pm at Sesya centre. Thereafter he went to his home. While en route home he heard screams of a person who was being beaten and several other voices.

16. As a result of what he heard, Pw 4 decided to go and find out what was happening. Pw 4 found the deceased being beaten. Upon asking as to what was going on, Pw 4 was told to mind his own business. As a result, he went away. It was also his evidence that the deceased was being beaten by many people during that night. When Pw 4 asked the mother of the deceased as to what was going on, the mother of the deceased replied him that: *".....I was not concern with the matter that was going on and she asked me to go home."*

17. It was the further evidence of Pw 4 that the following morning, he went to the home of the deceased. Upon arrival Pw 4 found the area chief (3) and the police. The police interrogated Pw 4 and he was then taken to the police station; where he recorded his statement. He also testified that the deceased was his clan cousin.

18. Pw 4 further testified that he asked the mother of the deceased (now the 1<sup>st</sup> accused) as to what was going on during that time. The mother of the deceased told him that he (Pw 4) was not involved. He further testified that as at that time the mother of the deceased was carrying a lamp; when he asked her as to what was going on. Pw 4 was unable to identify the persons who were involved; since it was a dark night. Finally, he testified that he does not know why the accused were arrested.

19. The prosecution also called No. 60289 P.C. Julius Kariithi (Pw 5). Pw 5 was the investigating officer. On the instructions of the OCS Kabarnet police station, he proceeded to the scene of crime on 6/2/2013. He testified that the allegations against the accused were that the 1<sup>st</sup> accused alleged that her deceased son had stolen from her shs 2000/= and sugar.

20. Pw 5 further testified that the 1<sup>st</sup> accused called the age mates of the deceased and directed them to go and look for the deceased at Sesya. The four accused being age mates of the deceased proceeded to do so. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused found the deceased and brought him back home. They then beat him to produce the money he had stolen. They then locked him in the house on 5/2/2013; since he failed to produce the money. Those accused told the deceased that they were going but would return on 6/2/2013 to further discipline him.

21. Furthermore, Pw 5 testified that he took the body of the deceased to Kabarnet hospital mortuary in that morning. Pw 5 re-arrested two suspects who had come to the scene of crime to continue disciplining the deceased. These two suspects were with the chief during that morning.

22. Finally, the prosecution called the doctor who performed the postmortem examination on the body of the deceased on 8/2/2013. The evidence of the post mortem examination was given by Dr. Mwangi Oscar (Pw 6) on behalf of Dr. Alice Gichemi. The findings of the doctor were as follows. The deceased was a male aged 20 years. There was a bruise on the left temporal region measuring 2 x 4 cm globular in shape located 1 cm above the ear. There was another bruise on the parietal area measuring 4 x 3 cm. The other systems of the body were normal except the following. The pericardial sac had minimum serious fluid. There was bleeding in the sub-dural layer. As a result of the examination, the doctor concluded that the cause of death was due to head trauma with sub-dural haematoma secondary to blunt trauma on the parietal region.

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

23. Mr. Mong'are, the prosecution counsel intended to file written submissions, but I informed him that the prosecution has no right to do so in view of the provisions of section 310 as read with section 161 of the Criminal Procedure Code, because the prosecution right to submit is only conferred upon the Director of Public Prosecutions.

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

24. The 1<sup>st</sup> accused elected to give sworn evidence and called one witness in her defence.

25. Before Solomon Boit Argut (Dw1), who is the husband of the 1<sup>st</sup> accused, testified, the prosecution objected to his evidence being taken

first. The reason for objecting is that the 1<sup>st</sup> accused should have testified first, to be followed by that of her husband (Dw1). I overruled the objection in the interests of justice since the husband, who is a cripple had been in court most of the morning in a wheel chair waiting to testify.

26. Dw1 testified as follows. The 1<sup>st</sup> accused is his wife and the deceased was their son. On the material night Dw1 and the 1<sup>st</sup> accused were in their house. He heard people passing outside their house. These people were making noise. The deceased was also in his house fighting with people. The 1<sup>st</sup> accused went out to find out what was happening. When Dw1 rang the chief (Komen) those people escaped.

27. Dw1 continued to testify that the deceased used to steal people's properties and had been arrested twice by the chief and then released. Although the 1<sup>st</sup> accused had a lamp, she did not have a torch. She did not see those people who were young people.

28. Those people arrived in his home and said that they were looking for the deceased, whose house was 200 metres away. They were looking for him for stealing goods from a shop.

29. The 1<sup>st</sup> accused (Dw 2) testified as follows. She is a farmer and a resident of Sesya. She grows maize and rears livestock.

30. Furthermore, she testified that her deceased son started stealing after being circumcised. He also had stolen at Sesya centre. Before this incident the deceased had stolen ground nuts. She also testified that the deceased had been arrested and released twice at Eldoret and Kabarnet for stealing.

31. On 5/2/2013 at 5.00 pm about twenty people went to their home. She wanted to go out but her husband (Dw1) refused to allow her to go out. She further testified that she followed those people and she hid in a bush. She then saw them beat the deceased in his house. Those people were saying that whenever the deceased was arrested she used to have him released from custody. She then screamed and rang the assistant chief (Komen). Komen then told her that he was going to ring the police. Those people then escaped.

32. Dw2 continued to testify that she went to check the deceased. The deceased told her he had pain in the head and in the arm. The deceased also told her to await till morning when she would take him to hospital.

33. In the morning Dw2 went to see the deceased. She found him lying down and was not responding. She then returned to the house and told her husband (Dw1) that the deceased was dead. They rang the assistant chief William Komen who informed the police. The police arrived in their home at 12.00 noon. They took the body of the deceased to Kabarnet referral hospital.

34. In cross examination, Dw2 testified that the people who beat the deceased were Kiprop, John, Kemboi and David. She denied that the deceased stole her sugar and cash money in the sum of shs 200/-. She further denied hiring people to beat the deceased. She also testified that those who beat the deceased alleged that the deceased had stolen from many people.

35. Finally, Dw2 admitted in re-examination that when Christopher Ng'etich went to their home following the screams from that home, Dw 2 told him to go away and to mind his business.

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

36. Mr. Kemboi, counsel for the accused has submitted that based upon the evidence, the prosecution failed to prove their case beyond reasonable doubt. The said submission is based on the following.

37. Counsel has submitted that the prosecution had to prove the following constituent elements of the offence of murder.

1. The death of the deceased.
2. The death of the deceased was unlawful.
3. That the accused had malice aforethought.
4. That the accused was positively identified as the one who caused or participated in the killing of the deceased.

38. Counsel further submitted based on the evidence of Monica Chepkurui Saniako (Pw 1) that the deceased was killed by a mob and was unable to identify any one among the accused as the person who killed the deceased person. He also submitted that the deceased had bad habits of stealing both from his family and other people. Counsel further submitted that Zipporah Kogoti Kimsop (Pw 2) was stood down after being sworn and did not testify.

39. Additionally, counsel has submitted that the area chief namely Patrick Kiprop Ezekiel (Pw 3) tasked his area assistant chief to go and find out what was happening in the home of the 1<sup>st</sup> accused. Pw 3 visited the home of the 1<sup>st</sup> accused and found the latter there at her home. Pw 3 did not testify as to who killed the deceased. Most of his evidence consists of inadmissible hearsay evidence.

40. In respect of Christopher Ng'etich (Pw 4), counsel submitted that although he went to the scene of crime in answer to the screams of the deceased, he did not identify the persons beating the deceased as it was dark. He also did not see any accused beating the deceased.

41. Counsel further submitted that Charles Kirithi (Pw 5) claimed that the deceased was beaten by boys of his age; who had been called by

his mother to discipline the deceased. He claimed that the source of his information was Pw2 and the father of the deceased.

42. Counsel further submitted that the alleged assault weapon was not produced in court as an exhibit.

43. Counsel also submitted that although Dr. Mwangi Oscar (Pw 6) found the cause of death to be due to head trauma, the age of the injury was not ascertained.

44. Counsel has submitted based on the evidence and his submissions that the prosecution has failed to prove the case against the 1<sup>st</sup> accused beyond reasonable doubt. He has therefore urged the court to acquit her.

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

45. I have considered the entire evidence produced in court and the submissions of the defence. As a result, I find that the following are the issues for determination.

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

#### **Issue 1**

46. I find that none of the prosecution witnesses saw the 1<sup>st</sup> accused assault the deceased. It therefore follows that the evidence against the 1<sup>st</sup> accused is circumstantial in nature.

47. A court is only allowed to convict on circumstantial evidence if it exclusively points to the accused alone or in conjunction with others as the sole perpetrators of the offence charged. Stated differently, the chain of circumstantial evidence must be so complete and unbroken that it only points to the accused as the perpetrator of the offence chain, such that any break in the chain of evidence will result in the acquittal of the accused. See *Republic v Phylis Grace Karimi, High Court at Embu Criminal Case No. 29 of 2015*.

48. In the instant case it is only Christopher Ngetich (Pw 4), who saw the deceased being beaten by many people. When he asked the 1<sup>st</sup> accused as to what was happening; the 1<sup>st</sup> accused told Pw 4 to mind his own business. She also told him to go to his home. Pw 4 knew the 1<sup>st</sup> accused before this incident. The defence evidence of the 1<sup>st</sup> accused is that the deceased was beaten by Kiprop, John, Kemboi and David. It was also her evidence that she had a lamp during that fateful night; but she did not have a torch.

49. In the circumstances I find that the mother of the deceased witnessed her son being beaten. I find that she did not want Pw 4 to intervene in the matter. I find that the 1<sup>st</sup> accused shared a common intention with those who were unlawfully beating her deceased son who was suspected to be a thief. I find that the deceased stole goods both from her family and from other people. In the instant case the deceased was a victim of mob justice.

50. Furthermore, I find that the deceased died of a trauma injury to the head according to Dr. Mwangi Oscar (Pw6) who testified on behalf Dr. Alice Gichemi.

51. Furthermore, I find that the 1<sup>st</sup> accused was positively identified by Christopher Ngetich (Pw 4). The factors favouring identification were as follows. Pw 4 knew the 1<sup>st</sup> accused before this incident. There was a lamp in the possession of the 1<sup>st</sup> accused. There was a short discussion between the 1<sup>st</sup> accused and Pw 4; when the latter asked the former as to what was going happening. In response the 1<sup>st</sup> accused told Pw 4 to mind his own business and to go away.

52. I therefore find no merit in the submission of Mr. Kemboi that the 1<sup>st</sup> accused was not positively identified, which I hereby dismiss.

53. Furthermore, I find the defence evidence to be incredible for the following reasons. First, the evidence of Dw1 contradicts that of the 1<sup>st</sup> accused that she did not go outside their house. Dw1 testified that the accused wife did not go outside their house; while the 1<sup>st</sup> accused herself testified that she went outside their house and hid herself in the bush. I therefore reject the defence evidence for being incredible.

54. In the premises, I find that the 1<sup>st</sup> accused shared a common intention with those who assaulted the deceased and caused his death in terms of section 21 of the Penal Code. She therefore caused the death of the deceased son.

#### **Issue 2**

55. On the evidence I find that the deceased had stolen goods at Sesya centre and had stolen his mother's goods. I find that the deceased was a habitual thief. In the circumstances, I find that the 1<sup>st</sup> accused jointly with other unidentified persons, were entitled to arrest the deceased but not to subject him to mob justice. I therefore find that excessive force was used in arresting the deceased in terms of section 18 of the Penal Code.

56. It therefore follows that the evidence discloses the offence of manslaughter and not murder. I therefore find the 1<sup>st</sup> accused guilty of manslaughter contrary to section 205 of the Penal Code and I convict her accordingly pursuant to the provisions of section 322 (1) of the

Penal Code.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KABARNET THIS 29TH DAY OF SEPTEMBER 2021.**

**J M BWONWONG'A**

**JUDGE**

**IN THE PRESENCE OF:**

**MR SITIENEI AND MR. KEMBOI, COURT ASSISTANTS.**

**MR MONGARE FOR THE REPUBLIC.**

**MR. KIPKULEI HOLDING BRIEF FOR MR. KEMBOI FOR THE ACCUSED.**