



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL CASE NO.18 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

RICHARD KIPROTICH MUTAL.....ACCUSED

JUDGMENT

1. The Accused Person was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the charge are that on 16/7/2017 at Kabianga Market in Kabianga Division within Kericho County, the Accused Person murdered ERICK KIPKEMOI NGETICH.
3. The Accused Person pleaded not guilty to the charge. The Prosecution called a total of nine (9) witnesses. A summary of the prosecution case is as given below.
4. PW. 1 KIPKOECH TOWETT said on 15/7/2017 at around 11.00 p.m., he was at his place of business at Kabianga where he was running a bar called VIENNA BAR when a friend of his who was an Administration Police (AP) Officer at Kabianga AP Camp went to the bar and requested to be sold drinks while waiting for someone.
5. PW. 1 said the name of his AP friend was JAMES MAIYANE and that he is now deceased. PW.1 directed the late JAMES MAIYANE to a private room in the bar and closed the main bar. PW.1 said he gave his friend company and slept on the table. He was woken up by the arrival of his girlfriend and a bodaboda rider and a watchman from Kabianga and also the Accused Person.
6. PW.1 said a passerby entered the private room and the Accused Person wanted to beat him but PW.1 chased him away. The passerby was armed with a small knife and a metal walking stick (bakora) and he was disarmed by the AP Officer before he left.
7. After the passerby left, a watchman called MAMBET arrived and told the Accused Person that a shop had been broken into and he went with the Accused Person. PW.1 said he heard someone saying "Do not beat me up, I am not a thief" and he heard people running outside.
8. Shortly afterwards the AP friend, his girlfriend and bodaboda rider left and PW.1 also told his employees to close the premises and they left. The following day, PW.1 learnt someone had been killed at Kabianga Market.
9. PW.2, FANCY CHEPKURUI TOWETT who was a bar attendant at VIENNA BAR said on the material day she was at the bar. She was almost closing the bar when an AP by name MAIYANE arrived and she sold him a drink in a private room.
10. PW.2 said the AP Officer called the Accused Person and they said they were waiting for a bodaboda rider who had been sent to bring a girlfriend of the AP Officer. The bodaboda rider arrived with the girlfriend and PW.2 sold them drinks and shortly after that a watchman called MAMBET arrived and told the Accused Person a shop had been broken into and he left with the Accused Person.
11. PW.2 said the AP Officer and his girlfriend left with the bodaboda rider and she closed the bar and she also left with her employer. The following day, she learnt someone had been killed at Kabianga Market.
12. PW.3 DENNIS KIBET KOECH said he operates a bodaboda. He said on the material day while at his home, an AP Officer from Kabianga AP Post called him and instructed him to go to TAPLOTIN and bring a woman standing at the stage. PW.3 went and picked the woman and took her to VIENNA BAR where the AP Officer was waiting.
13. When PW.3 got to the bar, he found the bar owner (PW.1), Chepkurui (PW.2) and the AP Officer and also the Accused Person in a

private room. PW.3 was served with Soda and the woman was served with a beer. Shortly afterwards, someone called the Accused Person. PW.3 said after that he escorted the AP Officer with the woman to the AP Camp at Kabianga and he left. He said the following day, he learnt someone had been killed at Kabianga.

14. PW.4, CHARLES CHERUIYOT KORIR said he operates a shop called CHERUIYOT GENERAL STORES at Kabianga Market. He said on 16/7/2017, he was at his home. The following morning at 5 a.m., he was called by the Chief of Kibingei Location called PETER NGENO and he was told someone had been murdered outside his shop. PW.4 went to the shop and found many people gathered at the shop. He saw a dead body but he did not go near the body since he was afraid. He said the security light at the back of the shop had been broken but the one in front was on.

15. PW.5, WESLEY KIPKOECH RONO was guarding WESTON SUPERMARKET at Kabianga Market. He said at 3 a.m. he went to get warm clothes as it was raining. He passed CHERUIYOT General Stores and he saw the lights at the back had been broken. He heard noises at the bar and when he went to the bar, he found the Accused Person who aimed an arrow at PW.5. PW.5 asked the Accused Person why he was aiming an arrow at him and the Accused Person said he thought PW.5 was the Person who had gone to the bar armed with a knife and a metal bar.

16. PW.5 told the Accused Person the back lights of CHERUIYOT Stores had been broken and they went in search of the person who had gone to the bar. They found a Person sleeping on the floor at the groceries stall and the Accused Person kicked him and the man woke up terrified.

17. PW.5 said the Accused Person started beating the man as the man pleaded with the Accused Person not to beat him and he said he was not a thief. When PW.5 tried to rescue the man, he said the Accused Person became violent and turned on him. He said he saw the Accused shoot the man with an arrow. PW.5 said the following day, he learnt the man had died.

18. PW.6 – JOSPHAT KIPKORIR KIMETTO who was a watchman at FAITH CHURCH and was also guarding MWALIMU NGETICH shop said on the material night at 3 a.m. he met the Accused Person with PW.5 who were in a hurry. They told him they were looking for a person who had gone to the bar armed. PW.6 joined them in the search. He said they found a man sleeping at the groceries shop and the Accused Person woke him and started assaulting him with a sword.

19. PW.6 said the Accused Person shot the man with an arrow and efforts to rescue the man with PW.5 were futile. The following day, he learnt the man was found dead at CHERUIYOT shop.

20. PW.7, WESLEY ROTICH did the Post Mortem on 20/7/2017 and formed the opinion the case of death was massive internal and External Bleeding caused by Penetrating Chest injuries and deep cut wound on the neck.

21. PW.8 – Chief Inspector Paul Njuguna investigated this case and charged the Accused Person with this offence. He recovered the following Exhibits which were blood stained from the Accused Person's house and forwarded them to the Government analyst for Examination.

- (i) A Somali Sword (marked A1)**
- (ii) Two blood stained arrows (A1 & B1)**
- (iii) Black Jacket (C1)**
- (iv) Black pair of Trousers (D1)**
- (v) Marvin Cap (E1)**
- (vi) Arrow head (G)**
- (vii) Blood samples of the deceased and the Accused (F1 & F2)**

22. PW.9 RICHARD KIMUTAI LANGAT, a Government Analyst attached to Kisumu Government Chemist. He said the sword, Trouser and Jacket (A1, C1 and D1) had blood stain of the deceased but B1 and B2 (the two stained arrow head) had blood stains that did not belong to the deceased or the Accused Person.

23. At the close of the Prosecution case, the Court found that the Accused Person had a case to answer and proceeded to place him on his defence. This court took over the case at this stage and after complying with Section 200 of the CPC proceeded to hear the Accused Person's defence.

24. The Accused Person said on the material night, he was working as a watchman from 6 p.m. to 6 a.m. He said at 9 a.m., he was called by a friend to go and buy food. He was called to a bar at 11 p.m. where someone had a metal bar and a knife.

25. The Accused Person said the person was disarmed by an AP Officer and the weapons were taken to the AP Camp. He said a watchman guarding WESTON SUPERMARKET found a gang of three people putting off lights and he called him.

26. The Accused Person said they raised an alarm and they called another watchman guarding a church. He said two of the gangstars ran

away but one was killed by members of the Public. He called the AP Camp and Police from Sosiot were called. He said statements were taken and two days later Police went to his house and arrested him. He said the weapons produced in Court do not belong to him.

27. The accused submitted that the evidence produce by the prosecution are contradictory and full of discrepancies and as a result the prosecution was unable to prove the charge of murder against him, beyond reasonable doubt. The accused relied on the case of TOBIAS OGADA VERSUS REPUBLIC (2018) eKLR.

28. I have considered the evidence on record together with the submissions filed herein. It is the duty of the prosecution to prove the guilt of the Accused Person. The standard of proof in criminal cases is beyond reasonable doubt.

29. The issue for determination is whether the prosecution proved the offence of murder to the required standard.

30. The Court of Appeal in *Pola & Sothers versus Republic, criminal appeal no. 6 of 2019*, stated as follows: ***“To prove an information of murder, the prosecution has a duty to establish the following elements: i) The death of the deceased and the cause thereof; ii) That the accused caused the death through an unlawful act or omission; and iii) The accused possessed the intention to cause harm or kill (malice aforethought).”***

31. The Prosecution is therefore duty bound to prove the following: -

(i) The death of the deceased.

(ii) That it is the Accused who caused the death of the deceased through an act of commission or omission.

(iii) That the Accused Person acted with malice aforethought.

32. In the current case, PW.5 and PW.6 who were guarding WESTON SUPERMARKET and FAITH CHURCH were witnesses to the incident. The two witnesses said they saw the Accused Person assault the deceased with a sword and they also saw the Accused Person shooting the deceased with an arrow.

33. PW.5 and PW.6 tried to rescue the deceased but the Accused Person refused to heed the pleas of the deceased who said he was not a thief and they said the Accused Person turned on them and wanted to attack them.

34. There is evidence that the deceased died due to the injuries inflicted by the Accused Person. The Accused Person’s defence was that it was members of the public who lynched the deceased.

35. I find that PW.5 and PW.6 were eye witnesses who witnessed the Accused Person assaulting an innocent man. PW.5 and PW.6 failed to rescue the deceased from the Accused Person who was armed with bows and arrows and also a sword.

36. The Government Analyst Who Examined the clothes the Accused Person was wearing and also the weapons which were found in the accused Person’s house found them stained with blood stains belonging to the deceased.

37. I find that the Accused Person’s defense is a mere denial that did not dislodge the prosecution evidence. There is evidence that the Accused Person inflicted injury upon the deceased after hefound himsleeping at the groceries stall.

38. The manner the injuries were inflicted clearly shows that the Accused was reckless and his intention was to cause grievous harm to the deceased.

39. Section 206 of the Penal Code defines malice aforethought as follows: ***–“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.”

40. The Court of Appeal in *Katana versus Republic, criminal appeal no. 19 f 2019*, stated as follows as regards to malice aforethought: ***“In the earlier case of Republic v Tubere s/o Ochen [1945] 12 EACA 63 the predecessor of this Court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.”***

41. The Accused Person wastold by PW.5 and PW.6 to stop assaulting the deceased and he refused and I find that he had malice aforethought. He ought to have taken the deceased to the Police Station but instead he seemed to enjoy assaulting an innocent man. Both mens rea and Actus reus have been proved.

42. I find that the prosecution has established the guilt of the Accused Person to the required standard and I accordingly convict the Accused Person as charged.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 20TH DAY OF DECEMBER, 2021

A. N. ONGERI

JUDGE