



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 15 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

EDWIN KIPCHIRCHIR LAGATACCUSED

JUDGMENT

EDWIN KIPCHIRCHIR LAGAT is charged with the offence of Murder, contrary to *Section 203* as read with *Section 204* of the *Penal Code*.

The particulars of this offence are that on the 20th day of January, 2013 at Kaptobongen Sub location, Nandi County, the accused murdered *Jonathan Kiprotich Lelei*.

The prosecution case is that the accused and the deceased in this case are cousins. The accused had allegedly suspected that the deceased had an illicit love affair with his wife. On 21/1/2013 at around 7 p.m the deceased had gone to the accused's home and picked a quarrel with him. The two fought. PW-2 witnessed the alleged fight. The accused was allegedly attacked with a walking stick by the deceased which broke into pieces. The

accused had a knife and stabbed the deceased with it five times on the back. PW-1 rushed to the scene and found the deceased lying on the grass outside the house, injured. A motor cycle was sourced which rushed him to a private hospital where he later died. PW-3 the area assistant chief was called to the scene. He saw a lot of blood on the grass. There was also a blood soaked T-Shirt. He went to the accused's home and recovered a knife. He called the OCS Kapsabet Police station who took over the matter. PW-6 showed the recovered knife to the accused who confirmed it was his.

PW-4 identified the body for post mortem on 23/1/2013 at Kapsabet Mortuary. PW-7 investigated the matter by visiting the scene and drawing a sketch plan. He also collected broken sticks, a vest, T-Shirt and 2 caps. After recording witnesses statements, he took blood samples to Government Chemist. There were photos also taken of the body at the mortuary. He produced all these as exhibits, inclusive of a post mortem report.

The accused's defence is that on 20/1/2013 at about 7.00 p.m he was in his house. He heard screams emanating from his parents' home. He took a torch and headed that way. However, before he arrived the screams went

dead. He decided to go back to the house and sleep. He slept and the following morning was arrested by youths who alleged he had committed a crime. They assaulted him as they took him to Kapsasur AP's camp. He denied commission of the offence.

At this point the court must determine as to whether the offence against the accused is proved by the prosecution beyond reasonable doubt. The issues required of the prosecution to establish beyond reasonable doubt are:-

- (1) The death of the deceased.
- (2) Cause of the said death which must be out of an unlawful act or omission by the accused.
- (3) That the accused was of malice aforethought.

On the issue of the death of the deceased there is no doubt that he died as PW-4 identified the body at the mortuary for post mortem. However, in relation to the cause of the said death, no credible evidence was adduced. The post mortem report was produced by the investigating officer, who is PW-7. He could not adduce evidence in relation to the cause of death and could not be cross examined

adequately on the same. There was need for the doctor who filled it to be called to adduce evidence on it, or another doctor who could answer technical questions relating to the same, on cross examination. Without such happening, the accused would be heavily prejudiced in his defence on a very relevant, technical ingredient of the offence. As per the court proceedings it is therefore not established beyond reasonable doubt as to what caused the death of the deceased person.

As to whether the accused fought the deceased, there is evidence of only one eye witness, the PW-2 in this case. On cross examination she said;

“The deceased was drunk. I saw him hit the accused with a walking stick. It broke into pieces. These are the pieces of the broken walking stick.....I do not know why they were fighting.”

This witness never said that she saw the accused armed with a knife and stabbing at the deceased. Nobody saw that. During her evidence in chief she had said, *“I did not see whether they were armed or they were fighting using their bare hands because it was dark.”* She placed the time of the incident at 7 p.m. She never disclosed the source of light which enabled her see and recognize the two. Recognition by voice is ruled out as she said in her evidence in chief, *“.....I did not hear them say anything.....”* Her admission that she could not see what the two were armed with while fighting as it was dark, casts doubt as to whether she was able to see and recognize the accused. To the extent it’s doubtful whether it is the accused who really killed or murdered the deceased.

Though this is not entirely relevant at this point, it is observed that even if the evidence of PW-2 was to be believed, it reveals a strong case for the accused on the ground of the recognized defence in law of; “self defence.” It is alleged the deceased went to pick a quarrel with the accused at his home while drunk, and did attack him with a walking stick.

Having weighed the foregoing and the accused’s defence where he denies commission of the alleged offence, I do find existence of a reasonable doubt on whether he is the real culprit. I do resolve the said doubt in his favour and is accordingly acquitted of the offence charged with, of murder.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED VIRTUALLY at ELDORET this 30th day of April, 2020.

In the presence of:-

(1) The accused and Mr. Miyienda his advocate

(2) Hellen Githaiga for State

(3) Mr. Gregory - Court assistant