



**Republic v Keino (Criminal Case 20 of 2008)
[2019] KEHC 8031 (KLR) (21 February 2019) (Judgment)**

Republic v Cleophas Kipketer Keino [2019] eKLR

Neutral citation: [2019] KEHC 8031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 20 OF 2008
HA OMONDI, J
FEBRUARY 21, 2019**

BETWEEN

REPUBLIC PROSECUTOR

AND

CLEOPHAS KIPKETER KEINO ACCUSED

JUDGMENT

1. Cleophas Kipketer Keino (the accused) faces a charge of murder Contrary Section 203 of the Penal Code as read with Section 204 Penal Code the particulars being that on 28th April 2008 at Kibwareng Location Rift Valley Province, he murdered AK. He faces a 2nd count of a similar nature, that on the said date and place he murdered EK.
He denied the charges.
2. On 20.04.2008, Monica Mutai (PW1) was at her home in Kibwareng location at about 2.00 pm, when the accused who was her neighbour arrived at the home while armed with a panga.
From a short distance, she saw him cutting her son Emmanuel Kibet, and she raised an alarm that the accused was killing.
She dropped the other child (A) whom she was carrying, and ran off. She later learnt that the accused had cut A as well.
3. PW1 explained that a month earlier, she had a disagreement with the accused's wife who claimed that she (accused) was having a love affair with her husband. This allegation incensed PW1 who beat the accused's wife thoroughly. However the matter was later resolved by the village elders. After the fight, the accused went to her home and beat her up. PW1 could not tell why the accused decided to kill two children.



4. Eunice Chepngetich Magut (PW2) was on her way to buy maize at the centre, on 28.4.2008 at about 2.00pm, and she passed by PW1's house and was offered beans to eat. It was then that accused emerged from the maize plantation and cut E. She saw PW1 drop the other child A, and flee with Ruth who had joined them earlier.

5. PW2 asked the accused what he was doing, and noticed that he was biting his lips. He then stepped on K and cut him on the neck. PW2 screamed then ran away to the neighbours.

As neighbours approached the scene, the accused took his panga and ran away after setting PW1's house on fire using dry grass.

6. Ruth Chesang (PW3) confirmed the attack by the accused on the two deceased, saying accused had a panga which bore a rubber handle. PW3 had gone to PW1's house to borrow some money.

7. PW4 (Julius Kiprono Rotich) was at his home in Kimkukoi on the material date and time when he heard screams coming from the direction of PW1's home. As he went towards his father's homestead, he met PW1 who urged him to run and save her children. He went to PW1's home and saw the accused running away while carrying a panga. The children were already dead and PW4 observed that one child had a cut on the side of his neck. He was alerted by other children, that another child lay down in the maize plantation.

He went there and found an older child who had a cut on his shoulder but he was still alive. PW4 carried him to Wareng dispensary from where they were referred to Eldoret. PW4 who is a neighbour to both the accused and PW1 states:

“I know Monica and wife of accused had disagreements. I am not aware of the details...”

8. Both PW1 and all the prosecution witnesses were categorical that accused was not PW1's lover nor did he sire any child with her. Dr. David Chumba (PW6) who examined the two bodies found that EK aged 7 years had an injury on the left shoulder with a fracture on the clavicular. He also had blunt trauma to the abdomen with laceration to the left kidney. The cause of death was acute renal failure due to blunt trauma on the kidney.

9. The body of 3 years old A was identified by Dennis Kipchumba Mutai and post mortem found.

10. The accused in his unsworn evidence maintained that the evidence against him was untrue. It was his evidence that on the date in question, he had breakfast, then left to go and cut grass, then left for a busaa den where he joined Julius Rono for a drink.

He was later joined by Monica (PW1 whom he described as his lover, and 2nd wife).

11. PW1 asked him to pass by her home and he obliged. She appeared angry when he got to her home and she began to quarrel, and soon PW1 and accused were engaged in a fight.

PW1 had a panga, and the accused had held E in his hands. When she aimed the panga at him, both accused and E got injured. So he placed the child on the floor while shouting that PW1 had killed their child.

12. According to the accused, he had inherited PW1 in the year 2004 after her husband's demise and their differences arose because PW1 wanted to have another man. He insisted that all the prosecution witnesses lied against him. He maintained that the younger child was his own biological product.



13. After the child had got cut, he ran to his senior wife's home which was not far away. Later he heard claims that he had killed the child. He insisted that they were lovers and difference arose between them because PW1 wanted to have relations with another man.
14. There is no dispute that the two children E and A met their death on the date and time in question following injuries inflicted on them. The issue for determination is who inflicted those injuries.
15. The accused's counsel submitted that PW1 never witnessed how A got injured and merely relied on hearsay, as she had dropped the said child and run away. He urged the court go find that PW1 was not a credible witness as she had denied that the deceased had not fathered the deceased child, yet accused insisted that was his biological child. He contends that what the court ought to take into consideration is that PW1 had differed with the accused and his first wife, so in pursuit of revenge, PW1 decided to falsely accuse him of the murder of her two children. He also doubted that PW2 witnessed the accused cutting A, pointing out that from her evidence, she claimed that A had been dropped inside the house before it was set on fire, something she did not include in her statement to police. Counsel's argument is that this is one inconsistent witness and this court ought not to believe her.
16. The defence counsel further submitted that from PW3's evidence. She indicated that she saw the accused raising a panga and cutting something and she thought he was killing a snake, she as others was inside the maize plantation. However, she heard a child crying on the ground, so she could not have seen the accused killing the child.
17. Counsel also submitted that Julius Kiprono (PW4) never witnessed any of the killings, as he arrived at the scene after the event. It is argued that the accused was not responsible for the deaths, and no reason had been established as to why he would want the children dead, and prosecution failed to establish motive for the killings. In the alternative it is also submitted on a without prejudice basis, that he did not do so intentionally but only upon provocation by PW1, coupled with the fact that he was intoxicated and not in his right senses. This court is urged to find that the defence of intoxication as set out in Section 13(2) and 13 (2) (4) of the Penal Code is available to the accused and he cannot be guilty of the offence. He referred this court to the case of *Karisa Kimunza V R (2007) eKLR* to find that the accused was not capable of forming an intention.
18. The defence counsel further contended that since the murder weapon was not produced, this was fatal to the prosecution case and warrants our acquittal.
19. With the greatest of respect to the defence counsel, it is misplaced to argue that no one witnessed the killing of the children. PW1 saw the accused raise the panga and cut E who was inside the maize plantation. She described the panga as having a rubber for the handle and identified it in court as MFI-1. She however did not witness the killing of the younger child as she had fled from the scene. She explained that E was sired by her late husband Barasa Mutai, while A was sired by another man named Paul Cheruiyot. Why the accused expects to believe otherwise where there is no evidence to the contrary is rather curious.

PW2 who was within PW1 home also saw the accused in the maize plantation saying:-

“The person in the maize plantation – I saw him – when he emerged. When he cut K I didn't see him. When he emerged I saw it was the accused.... He stepped on K and cut him on the neck. I did not take off. It is like I could not move – frozen. I screamed and ran away in the neighbours...”



20. She confirmed this state of officers on an unsworn evidence on cross examination that:

“...I saw him cutting K on the neck with my eyes. I saw him cut the big boy in the maize plantation. When he cut Emmanuel, I asked him what he was doing.”

I fail to comprehend where defence counsel got the claim that PW2 said the child Abel was left inside the burning house and that she could therefore not have seen how he met his death.

21. Ruth Chesang (PW3) likewise described how she saw the accused come from the maize plantation and cut E using a panga which she described as having a rubber handle and she identified it in court as MFI-1.

On cross examination stated:

“ Accused emerged from the maize garden on the right. The maize was flowering. I could see him inside the maize plants... He was not drunk.... I saw accused cut EK.

I am satisfied that the killings at the hands of the accused was observed by the prosecution witnesses who described in detail what happened and the murder weapon. The prosecution witnesses were consistent as to the chain of events.

22. Although the accused claimed to have been PW1’s lover, this was denied by both PW1 and other witnesses.

Indeed it would seem that the accused had never gotten over the fight between PW1 and his wife, and he returned with a vengeance to teach PW1 a lesson.

23. The murder weapon was presented in court and identified by witnesses, the non-production is not fatal in the prosecution case.

24. The defence counsel suggested provocation and intoxication – which were not proved by any iota of evidence. What did the children do to provoke the accused? The claims that this matter is a frame up is defeated by the consistent evidence presented by prosecution witnesses. The accused committed an unlawful act, having armed himself with a panga, and without any lawful excuse or immediate provocation, cut one child, then went for the infant who was left helpless on the ground and literally slaughtered him.

The defence is an after thought intended to create a sob-story which falls flat on its face. The evidence proves the charges against the accused, and his defence is rejected. I return a finding of guilty as charged on both counts.

DELIVERED AND DATED THIS 21ST DAY OF FEBRUARY 2019 AT ELDORET.

H. A. OMONDI

JUDGE

