



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 36 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

KENNETH KIMUTAI KIGEN.....RESPONDENT

JUDGMENT

1. **KENNETH KIMUTAI KIGEN (the accused)** is charged with murder Contrary to **Section 203** of the **Penal Code** as read with **Section 204** of the **Penal Code**, particulars being that on **23rd April 2015** at around 1900 hours in **CHEMABEI** village, **UPPER KABITO** Sub location, **CHEPSIGOT** location within **ELGEYO MARAKWET** county, he murdered **BRS** (deceased)

The accused denied the offence.

2. The hearing begun before Kimondo (J) on 20.07.2015 but he was transferred from this station after hearing 4 witnesses and I took over the hearing on 24.09.2018.

3. On 23.04.2015 at 7.00pm **GS** was in the company of his late brother **B**, inside their house where they were studying when the accused who was their neighbour came and asked for their father.

The accused then left and went towards their father's farm. PW1 and the deceased followed him – there was some little light and they saw the accused harvesting maize and cabbages therefrom.

The two boys asked him why he was doing that, and accused told them to wait, before throwing stones at them. According to PW1:-

“He was not far – it was 12 metres away. He had left briefly before throwing the stone.”

The stone hit **B** on the head, and he begun bleeding from the head and mouth. PW1 ran homewards screaming, and his father rushed to the scene accompanied by his elder son **A**.

4. On cross examination PW1 explained that they decided to follow the accused because, although there was a different route to his home, which was uphill, he proceeded towards their farm. When they got to the farm, they realized that the accused had cabbages and maize in his hands. Upon seeing them, the accused dropped the crops and told the boys to tell their father. When the boys asked why he was harvesting without permission, the accused responded.

“Sitaki maswali mingi.” [I do not want many questions]

Accused begun leaving.

PW1 explained that the deceased had a De-lite torch, and it was not too dark, so they could see, saying **B** was shining his torch on the maize and cabbages and after the accused fled, they heard him ask

“kumbe bado mko hapo”

[So you are still there], before emerging from the same direction and throwing stones at the pair and one stone hit **B**.

PW1 explained:

“I think he saw B. I had shined a torch on him. After hitting B, Kenneth ran to his house through a short cut... I was running. I was screaming “Kimutai is a thief.”

He also clarified that although it was the rainy season, there was no rain that night, nor were there any stones rolling.

5. 16 year old **AKS** (PW2) was at **TORO** centre (which is 300m from their home) when he heard **G** (PW1) screaming at about 7.00pm. He rushed home and found PW1 crying, and PW1 informed him that their brother (was dead, having been hit by a stone thrown by the accused). PW2 proceeded to the scene using a torch, and found **B** lying dead with an injury at the front and back of the head. PW2 began screaming while calling out the accused’s name, to which the accused responded.

“Kujeni mtaona.”

[Come and you will see]

On cross examination PW2 states that when he got to the scene and found the deceased’s lying dead, he noticed a deep cut. He stated that although their farm was on a steep area, there were no land slides.

6. **CHARLES SIROMBEI** (PW3) – the father of the deceased confirmed that on 23.04.2015 at about 7.20pm, he was on his way home when he heard screams from his children – specifically **G**. He ran home and found **G** crying. **G** told him that the accused had hit **B** with a stone. He took the D-lite the torch from **G** and proceeded to the scene. **B** was already dead.

He reported the matter to the area chief and the accused was arrested. On cross examination he stated that the deceased was bleeding from the nose and mouth.

SGT. BRIGETTE NAFULA (PW5) who was the investigating officer told this court that garden is atop a hill and it had rained a lot, including on that night. She confirmed that the area is prone to landslides but maintained on cross examination that on the date in question there was no landslide, rolling stones or mud slides. She maintained that the accused had thrown a stone at the deceased saying

It is not possible that the child was hit by a rolling stone because deceased said ***“Mawe ndiyo hiyo nimerusha.”***... I rule out the possibility of mudslide or landslide causing a rolling stone because it was not heavy rain.

DR. PATRICK KOSGEI produced the post mortem report on behalf of **DR. AINO SULEIMAN** who had conducted the post mortem which observed that the deceased had a bruise in the right shoulder, and a haematoma on the right side of the neck and right side of the face. There was haemorrhage on the head with a fracture. The cause of death intracranial haemorrhage seconding to head trauma.

7. In his sworn defence the accused confirmed going to the home of PW3 but maintains it was at 5.30pm where he saw PW1 and greeted him. He then proceeded to his home which was uphill, and PW1 followed him. They walked while chatting, then PW1 stopped to pluck vegetable and he joined to help pluck the vegetables before they parted ways.

8. He was woken up at 2.00am by a torch at his door, and police demanding that he accompanies them. He was surprised, saying the family of the deceased were his friends and they had never quarreled what he knows is that the area has a lot of frequent mud slides, and land slides especially during the rainy season. While at the police station he heard a police officer asking

“Is he still alive or has he died and the one said, “He has just died.”

Twenty minutes later police brought the body of the deceased and told him.

“Here is your victim.”

He insists that he had not seen the deceased on the date in question. As far as he is concerned, if the deceased met his death at the garden then it was as a result of stones falling rocks courtesy of a land slide or a mudslide.

9. There is no dispute that the deceased met his death on the date and time in question and that the cause of death was as a result of blunt trauma on the head.

10. Although the defence counsel had indicated she had filed written submission, none were received as at the date of writing this judgment which is 15.02.19.

11. There is also no dispute that the accused was at the home of the deceased’s family and after leaving, he got into their garden. The point of determination is

a) What time was he there

b) Was he stealing the crops from the garden or was he assisting PW1 to “harvest the same.”

c) Was the deceased struck by a stone thrown by the accused, or was he hit by a rolling stone.

I take note that the issue of being in the time at 5.30pm and not 7.30pm, is an afterthought which was never raised during cross examination. That also applies to the claim that he was assisting PW1 to pluck vegetables from the garden. These two limbs are afterthoughts tailored to fit in with the screams described by PW1.

Quite apart from that, even though the garden and the deceased's homes are located at a steep location, there is no evidence that the scene was such that it consisted of a rock hanging over the deceased's head – this is further dented by the fact that logically if the stone was rolling downwards there would have been other injuries on impact to the lower limbs.

PW1 gave a detailed account of what took place and was able to see with the aid of a D-lite.

I am satisfied that accused having been found by the young boys stealing from his friendly neighbours, decided to scare the boys stiff by throwing stones. I do not think if he intended to kill the deceased, as this was a chain reaction towards self preservation.

I hold and find that his actions resulted in an unjustified killing as contemplated by **Section 202 (1)** of the **Penal code** – and so in compliance with **Section 179(2) CPC** the charge is reduced to manslaughter and he is thus convicted of the reduced charge.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20th DAY OF FEBRUARY 2019

H. A. OMONDI

JUDGE