



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

**(CORAM: D.S. MAJANJA J.)**

**CRIMINAL CASE NO. 16 OF 2017**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**PETER KIPNGENO RUTOH.....ACCUSED**

**JUDGMENT**

1. **PETER KIPNGENO RUTOH** (“the accused”) is charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. According to the information dated 6<sup>th</sup> July 2017, the accused murdered **GILBERT KIPROTICH ROP alias JEREMIAH ROP** (“the deceased”) on 20<sup>th</sup> June 2017 at Soget Trading Centre in Transmara East Sub-County within Narok County. After denying the charge, the prosecution called 4 witnesses to prove its case while the accused gave an unsworn statement in his defence.

2. Before the 2017 general elections, the political campaigns in Emurua Dikirr Constituency were in full swing. The contest was between the incumbent Johanna Ngeno and David Keter. On 20<sup>th</sup> June 2017, one of the parties had held a rally and in the evening, at about 7.00pm, supporters of both camps converged at Soget Trading Centre.

3. David Kiprono Ng’eno (PW 1) recalled that on that evening, the accused was one of the people who alighted from one of the motorbikes that converged at Soget. The contending groups were shouting, “*Tutabalisha*” and “*Hatutabalisha*”. He was with the deceased in the group that was shouting “*Tutabadilisha*” while the accused was with the ground shouting, “*Hatutabadilisha*”.

4. PW 1 testified that as the accused and deceased were shouting and pushing each other, the deceased, who had a cane, started to beat the accused. One Bernard Bii gave the accused a knife. The accused then raised the knife and stabbed the deceased on the left back. The deceased, who also had a knife, raised his knife and cut the accused on his left shoulder. The deceased started bleeding profusely and stated, “*Amenikata*”. PW 1 recalled that those present tried to arrest the accused but he ran away. When he returned to the scene, the deceased had already been taken to the hospital.

5. Robert Kipng’etich Rop (PW 2) recalled that on the material evening at about 7.00pm, he was at his shop at Soget when the chanting crowd arrived near his shop. He recalled that the accused and the deceased were among that group. When he got out of shop, he heard the accused and deceased shouting at each other and a confrontation ensued. He recalled that the accused’s brother, who he knew as Bernard, and who was in the crowd gave the accused a knife. The accused and deceased moved aside that he saw the accused stab the deceased on the left side. He tried to assist the deceased but he was rebuffed as the deceased wanted to exact his revenge. He left the deceased seated on the ground and followed the accused but did not manage to catch him. When he returned to the centre, the deceased had already been taken to hospital.

6. The Investigating Officer, PC Gregory Malakwen (PW 3), testified that on the material day, he received information from the area Chief that there was a clash between supported of *KANU* and *JUBILEE* parties at Soget and someone had been seriously injured. He rushed to the scene and found that it had been cleared and the deceased taken to the hospital. He later took witness statements and organised for the post mortem on the deceased body. He recalled that the deceased was arrested on 23<sup>rd</sup> June 2017 at Dikirr and brought to Kilgoris.

7. Dr Ronald Kibet (PW 4) produced the post-mortem form prepared by Dr Robert Langat who conducted the autopsy on the deceased’s body on 23<sup>rd</sup> June 2017. According to the post mortem report, the key observation was that there were bruises on the left cheek measuring 1cm X 2cm. There was an open penetrating cut wound on the left side of the back extending below the armpit measuring 15cm X 16cm. Internal examination revealed air and blood on the left side of chest cavity and the lobe of the left lung had been penetrated. Dr Langat concluded that the cause of death was cardio-respiratory arrest due to excessive bleeding following a chest injury.

8. In his unsworn statement, the accused denied that he murdered the deceased. He recalled that he was at Soget on the material day when the deceased came with a sword and demanded that whoever was opposing *David Keter* should move away. The deceased wanted to know

whom he supported but when he refused to say, the deceased cut him on the shoulder with the sword. He fell on the ground and screamed. The crowd supporting *Johanna Ng'eno* arrived and were informed that it was the deceased who cut him. He was taken to hospital and was later informed that the deceased had passed away.

9. The offence of murder is defined in **section 203** of the **Penal Code** as follows, “*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*” The prosecution is therefore required to prove first, the fact of death of the deceased and the cause of that death; second, that the accused committed the unlawful act or omission that led to that death; and third, that the accused committed the unlawful act or omission with malice aforethought.

10. The fact and cause of the deceased's death is not in dispute. Dr Ronald Kibet produced the Post Mortem Form on behalf of Dr Robert Langat. He confirmed that the deceased died following a stab wound on the left side on the back penetrating into the left lung. This is consistent with the testimony of PW 1 and PW 2 who testified that they saw the deceased being stabbed.

11. On the issue whether the accused stabbed the deceased, the prosecution relied on the direct testimony of PW 1 and PW 2 who saw the accused stab the deceased. I find their evidence credible that the accused stabbed the deceased. In his unsworn statement, the accused admits he was at the scene of the incident and was in fact cut by the deceased. Both PW 1 and PW 2 confirm that the deceased had a knife while PW 1 saw the deceased cut the accused after he had been stabbed. In light of this evidence, I reject the suggestion by the accused that the deceased could have been stabbed by someone in the crowd and not him. I also dismiss the suggestion that this could have been a case of mistaken identity as all the parties knew each other as they came from the same locality and they had been together for quite some time. I therefore find and hold that the deceased was stabbed by the accused.

12. The last issue for determination is whether the accused killed the deceased with malice aforethought. On this issue the testimony of PW 1 is decisive on what happened on that day. There were contesting groups from the two political camps shouting at each other, he recalled that the deceased had a cane with which he started to beat the accused and in the course of the melee, the accused was given a knife with which he stabbed the deceased. The deceased also attempted to retaliate but only managed to cut the accused on the shoulder.

13. In summary the incident took place in the heat of the political campaign where a crowd had gathered and were inciting the accused and deceased to fight. In these circumstances, I am unable to say that the accused intended to cause grievous harm or death. In ***Nzuki v Republic [1993] KLR 171***, the Court in substituting the charge of murder against the accused with that of manslaughter observed as follows:

*[T]here was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.*

14. Having come to the conclusion, I substitute the charge against the accused from murder contrary to **section 203** of the **Penal Code** to manslaughter contrary to **section 202** of the **Penal Code**. I find **PETER KIPNGENO RUTOH** the guilty of manslaughter for the unlawful killing on **GILBERT KIPROTICH ROP** alias **JEREMIAH ROP** and convict him accordingly.

**DATED and DELIVERED at KISII this 18<sup>th</sup> day of MARCH 2019.**

**D.S. MAJANJA**

**JUDGE**

Mr Omwega, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.