



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 43 OF 2018**

**REPUBLIC .....STATE**

**VERSUS**

**EZEKIEL KIPYEGON KIPNGOK .....ACCUSED**

**JUDGMENT**

1. The Accused Person (Ezekiel Kipyegon Kipngok) is charged with murder. He is accused of murdering Jane Samba Lokirion (Deceased) contrary to section 203 as read with section 204 of the Penal Code. It is alleged that the offence was committed on the 22<sup>nd</sup> day of March, 2014 at Kimoriot village, Mochongoi Division in Marigat District within Baringo County.

2. The Accused Person pleaded not guilty. The case proceeded to full hearing. The Prosecution case was presided over by the Learned Justice Maureen Odero who took the evidence of the seven Prosecution witnesses. She returned a verdict that the Accused Person had a case to answer.

3. By that time, however, the Learned Judge had been transferred out of the Station and it fell upon me to complete the trial. After complying with the provisions of Section 200(3) of the Criminal Procedure Code and informing the Accused Person of his options on defence, the Accused Person elected to give a sworn statement. He had not witnesses to call.

4. According to the Prosecution witnesses, the Accused Person, who was a neighbour to the Deceased, landed upon her on 23/03/2014 – savagely assaulting her with a stick, fists and a big rock – after an apparent disagreement between the two. None of the witnesses seemed to know the exact motive of the murder – but at least two witnesses saw at least part of the violent assault; and a third found the Accused Person at the scene preparing to flee.

5. The evidence that emerged at the trial was as follows.

6. Lucy Naseyon Letasyo is a neighbour to both the Accused Person and the Deceased. She testified as PW1. She testified that on 22/03/2014, she was at her home when she heard shouts. She rushed out of her house only to see the Accused Person beating up the Deceased using a big stick. This was near the Deceased's home. Lucy testified that she tried to pull the Accused Person away from the Deceased in a bid to stop him from attacking the Deceased. However, the Accused Person turned on her (Deceased) and hit her severally forcing Lucy to run away to save herself. Lucy ran to her house and locked it as she feared that the Accused Person will come looking for her afterwards.

7. Lucy testified that she vividly saw the Accused Person hitting the Deceased with a stick and a big stone – and identified the stick and the stone in Court. She said that she remained locked in her house until the Deceased's son, Simon Elimlim (who testified as PW5) came asking where her mother was and he pointed him in the direction where he had left the Accused Person viciously attacking the Deceased. Before then, however, Lucy says that the Accused Person had stopped by her house to announce at her door: "Nimemaliza and nitajipeleka Police!"

8. Amos Ekano, another neighbour, also heard the commotion. He heard his children shouting and he rushed out of his house to check out what was happening. He saw the Accused Person beating up the Deceased. Noting the savage nature of the attack, Amos picked up a jembe for defence and headed to the scene presumably to rescue the Deceased from the beating. However, on getting to the scene, he found the Accused Person gone and the Deceased lying on the ground. She had a wound on her head. A big stick and a big stone lay by her side – both blood-stained. Amos, who testified as PW2, identified the two items as the ones he found at the scene.

9. Simon Elimlim, the Deceased's son, who is only sixteen (16) years old, received news about the incident from one his relatives, James Lekataiya. The news he got was that his father was being attacked. Simon testified that on receiving the news, he rushed towards the scene. He found the Accused Person at the scene. He testified that on seeing him, the Accused Person immediately attacked him with the self-same stick he had used to attack his mother. They engaged in a brief scuffle as they struggled for the stick. Simon overpowered the Accused

Person who dropped the stick to the ground and fled the scene.

10. It would appear that when the Accused Person fled the scene he went to the Barrer Police Post. Bernard Wamuti, an Administration Police Constable at the Police Post, was asleep there at around 1:00am on that day when the Accused Person went there. He reported that his life was in danger as some villagers were out looking for him to lynch him. APC Wamuti kept the Accused Person in the cells for his safety. The following day, however, the OCS Muchongoi Police Station, came to the Post to collect the Accused Person. That is when the OCS told APC Wamuti that it was suspected that the Accused Person had committed a murder.

11. The OCS who went to collect the Accused Person from the Police Post is Erastus Githuku Kamau. He was the Investigating Officer in the Case. He testified as PW7. He testified about how he received information about the murder from the Area Chief and proceeded to the scene. He got information of what had happened chiefly from Lucy, Amos and Simon but also from other villagers at the scene. He recovered the two murder weapons. He then proceeded to the Police Post to re-arrest the Accused Person. Upon investigations, he recommended the present charges against him be brought.

12. Two formal Prosecution witnesses also testified: James Lekataiya, an in-law to the Deceased, testified as PW4. He had received word about the attack on the Deceased and passed it on to Simon. He also went, together with Simon, to identify the body during the autopsy.

13. Dr. Joseph Kaniaru Kinyua testified on behalf of Dr. Githinji who performed the autopsy. He produced the Post-mortem Report. The Report states that the body had numerous bruises and cuts to the face. The right earlobe was lacerated; the left breast was disfigured; and numerous struggle marks on both forearms. The doctor also found a fractured thyroid bone and cricoid cartilage crushed. The trachea and lungs had also collapsed. There were grasp marks around the neck. On examination of the head, the examining doctor found tempero-parietal sub-scalpular haemorrhages bilaterally and massive intra-cranial haemorrhage. The doctor concluded that the cause of death was cardio-respiratory arrest secondary to lung collapse due to strangulation.

14. When put on his defence, the Accused Person delivered a denial. He conceded that he was with the Deceased on 22/03/2014. He testified that he went to her house to buy chang'aa; since the Deceased was a known seller of the illicit brew. The Accused Person told the Court that he consumed chang'aa worth Kshs. 200/- but when asked to pay, he told the Deceased that he would come pay for it later. He said that the Deceased got angry and they exchanged words. To revenge, the Accused Person says he threatened to report to the Police that the Deceased was a chang'aa seller. However, he says he simply went home and slept. He was only woken up by loud noises from the Deceased's house. He attempted to go back to the Deceased's house but he met two people – Simon (PW5) and a Peter – who prevented him from reaching there. Then, a relative, a Mr. Kangok, called him and warned him that villagers had said that he had killed the Deceased. He, therefore, made the decision to go to the Police Post for his safety. He denied any role in killing the Deceased.

15. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

16. To succeed in proving a murder charge, the prosecution, therefore, is required to tender proof beyond reasonable doubt of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

17. The evidence rehashed above is quite clear that the first element of murder – the *actus reus* – was easily established. It is not in dispute that the body of the Deceased – badly bruised – was collected by Chief Inspector Erastus Githuku Kamau (PW7) on 23/03/2014 from the scene in Kimoriot Village. That body was taken to Nyahururu District Hospital Mortuary and an autopsy conducted on it by Dr. Githinji after it was identified by James Lekataiya (PW6) and Simon Elimlim (PW4).

18. The next question for consideration was whether the death of the Deceased was caused by the Accused Person. On this, there was eye witness accounts of two witnesses – Lucy Naseiyan Letasyo and Amos Ekeno – that they saw the Accused Person assaulting the Deceased. Indeed, Lucy managed to reach the scene where the beating was taking place and even tried to stop the assault only for the Accused Person to attack her forcing her to flee. Amos, on the other hand, heard the shouts coming from the Deceased's homestead, went towards it, saw the Accused Person assaulting her, and went back to pick up a jembe to fend off the Accused Person. By the time he went back, he found the Accused Person had fled the scene.

19. In addition to these eye witness accounts, there is the supporting evidence of Simon Elimlim which is consistent with the eyewitness accounts: he found the Accused Person about to leave the scene and they engaged in duel before the Accused Person fled.

20. Two other pieces of evidence are consistent with the account that it was the Accused Person who assaulted the Deceased. First, the two eye witnesses who went to the scene talked about a stick and a stone which the Accused Person used to beat the Deceased. They each identified them in Court. This was consistent with the testimony of the Investigating Officer about what he found at the scene: a blood-stained wooden stick and a blood-stained stone.

21. Second, the Accused Person fled to the Police Post where he surrendered himself. He tried to explain in his defence that he had heard that the villagers were intent on lynching him, but his post-incident conduct betrays the fact that he was, indeed, involved in the murder.

22. While the Prosecution presented straightforward and candid witnesses who gave a compelling account of what they saw and did and which remained unshaken on cross-examination, the Accused Person delivered an improbably story on defence. Although he says he went to the Deceased's house earlier that day to buy chang'aa, he claims that he left after refusing to pay for his tab of Kshs. 200/-. He then went to his house and slept only to be woken up by shouts coming from the Deceased's house. I find the Defence narrative so implausible that there is no inherent possibility that it could be true. While the Defence is not required to demonstrate that its defence theory or narrative is reasonably plausible or probable but it is only required to demonstrate that its version of events or its theory of the case is reasonably possibly true in substance, in this case, the Defence narrative does not meet even this low threshold in order to raise reasonable doubt. The correct test is whether it can be said that the Defence narrative is so improbable that it cannot reasonably possibly be true. (See *S v Shackell (4) SA 1 (SCA)*). In my view, it is not possible to say that the Accused's Person's version of events has any reasonable inherent probability that it is true.

**23. It is, therefore, this Court's considered opinion that all the elements of murder have been established against the Accused Person. Consequently, I find and hold that the Accused Person, Ezekiel Kipyegon Kipngok, is guilty of the murder of Jane Samba Lokirion contrary to section 203 as read together with section 204 of the Penal Code and I hereby convict him accordingly.**

24. Orders accordingly.

**Dated and delivered at Nakuru this 7<sup>th</sup> day of August, 2019**

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**JOEL NGUGI**

**JUDGE**