



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.26 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSES**

**HOSEA KIPCHIRCHIR TANUI.....ACCUSED**

**JUDGEMENT**

1. The accused was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that **on the 10<sup>th</sup> day of April, 2014 at Kerer village, Lelan location in Elgeyo Marakwet County murdered ZAPHANIA KANGOGO CHERUIYOT**.

2. The accused denied the offence and the prosecution called several witnesses to prove its case. Eventually the accused was placed in his defence in which he gave unsworn evidence but did not call any witnesses. Before looking at the merit of this matter it shall be imperative to summarise the evidence as was presented during trial and later look at the submission as presented by the counsels on record.

3. **PW1 JEREMIAH KIPCHUMBA KIMUTAI** testified that on the material night he met the deceased at the local trading centre and he bought him tea. He also informed him that the accused owed him kshs.300. They then left with the deceased and on the way the accused came on a motorcycle and passed them. He followed them and in a short distance he found the accused and the deceased fighting. Suddenly the deceased said that he had been stabbed. He however did not see the accused stabbing the deceased.

4. He said that the accused left and he screamed calling the attention of people who came and took the deceased to the hospital. On cross- examination he said that he did not know what was used to stab him.

5. **PW2 RICHARD KIGEN** testified that he was a teacher by profession and on the material night at around 9.00 p.m they were at a bar called *Small Joint* at Kaptalamwa centre drinking. He said that he took the accused and a lady called Loise using his motorcycle. On the way he saw a motorcycle and the accused told him not to stop as the same belonged to the deceased since they had fought somewhere on the road.

6. He did not stop but the deceased blocked them as they slowed down because of the pot holes. They stopped and the deceased was asking for his money and the lady removed kshs.200 and gave it to the witness but the deceased refused. He then began assaulting the accused and he decided to move his motor bike ahead. The accused and the lady followed him and they left but on the way the accused told him that he had been beaten on the hand and there was blood on his finger. He wanted to have a jab for tetanus and he left him at the hospital. He later learned of the deceased death and went to see him at the hospital.

7. On cross-examination he said that he saw the deceased slap the accused while still on the motorcycle and that he saw the accused bloodied finger.

8. **PW3 LOICE JEROTICH** testified that the accused and the deceased came to her home using a boda boda and they went to Kaptalamwa together. They went as far as Kamosong and the deceased asked for more cash but the accused refused as they had not reached the destination. The accused called the assistant chief who came and picked them and on the way they met the deceased who demanded his kshs.300. He gave him kshs.200 but he declined and insisted that he be given full amount. She said that she did not know what happened but that the deceased was already drunk. She said in cross examination that she did not witness the fight.

9. **PW4 DAVID RUTO** testified that he was at Kaptalamwa centre at around 9pm and he left using a boda boda. On his way he found someone lying down and one was standing. Upon inquiring he was told that they had fought but he did not stop neither did he check what was going on.

10. **PW5 BARNABAS CHERUIYOT CHEBOI** said that he was the Assistant Chief Terer Sub Location. He said that he was called by the accused on the material day to take him to Kamosong but he did not have fuel. They later discovered through one David that the deceased had been found lying down. He went to the scene and found him in pain. He was taken to Kaptalamwa Dispensary but died while undergoing treatment.

10. **PW6 SAMSON CHEBOLEI** was among those drinking at the bar that night. As he left the bar they found the deceased writhing in pain on the road. He was put in a vehicle and taken to the hospital. On cross examination he said that he did not witness the incident.

11. **PW7 JAMES KIPTOO** testified that he knew the accused who was a conductor in one of the matatu vehicles. He said that as he parked his car at around 11.00 p.m that night the accused approached him and requested that he takes him to the police station as he had stabbed someone and that he did not know his fate. That he was afraid of the members of the public. He took him to the police station at Kapcherop.

12. On cross examination he said that he did not see the knife neither did he go to the scene.

13. **PW8 EMILY KIPLAGAT** a nurse at Kaptalamwa Health Centre received the deceased that night when he was brought and upon checking him she found that he had already died. She said that she was brought by the Assistant chief. On cross -examination she said that she saw a stab wound on the chest.

14. **PW9 DR. BLUSTUS KAGUNDI** carried out the post-mortem exercise on the deceased body and concluded that the cause of death was cardiopulmonary failure due to haemorrhage caused by stab wound to the heart.

15. As indicated earlier when placed on his defence the accused gave unsworn evidence and stated that he came from Eldoret on the material day and was carried by the deceased in his boda boda together with his wife called Loice. He was left at a place called Kamosong where he later called Barnabas Cheboi to come and pick him. On their way he was chased by the deceased using a motor cycle and as they stopped the deceased slapped the accused and demanded some money from him.

16. He said that the deceased slapped him the second time and he pushed him and he fell down. He left him there and he was called at midnight by the chief who told him to go to the hospital. He went and found that he had died and there were members of the public. He then went to Kapcherop police station.

### **ANALYSIS AND DETERMINATION**

17. The court has heard the parties and their evidence as well as the unsworn evidence by the accused. The ingredients for this offence as defined under Section203 of the Penal Code that must be proved are obvious namely;

*(a) proof of the fact and cause of death of the deceased.*

*(b) proof that the deceased met his /death due to an unlawful act or omission on the part of the accused.*

*(c) proof that the said unlawful act or omission was committed with malice aforethought.*

18. The evidence that was presented concluded that the cause of death was as a result of stabbing of the deceased. The evidence of PW2 in my view was very material in this regard. He testified that he was the one who was carrying the accused aboard his motor cycle when he was stopped by the deceased as he blocked the road.

19. A scuffle ensued between the two over a debt of kshs. 300 which it appears the accused owed the deceased. They fought and as a result the accused stabbed the deceased. That in essence was what took place. As a matter of fact, the accused went and informed pw7 who took him to the police station.

20. The rest of the witnesses gave evidence which bordered on circumstantial although Loice who was with the accused did not want in my view to disclose what had taken place although she had offered to pay the deceased.

21. In as much as the accused carried the blame, this court finds the action by the deceased also provocative in the sense that there was sufficient evidence that he followed the accused and blocked the motor cycle he was on together with Loice his wife. He then as per the evidence of pw2 slapped the accused twice and refused to take the kshs. 200 offered by Loice.

22. As a consequence of the slap the two fought and it resulted in the deceased being stabbed by the accused. Although the object used to stab the deceased was not found it is clear and contrary to the evidence of the accused that nobody else stabbed the deceased. At the same time the conclusion by the doctor clearly showed the cause of death.

23. This guilty conscience made the accused to go as far as seeking protection at the police station, otherwise why would he have bothered to do so if he was innocent. ‘

24. In the premises, I find that the prosecution has discharged its mandate of establishing that indeed the cause of death was as a result of the stab wound occasioned by the accused upon the deceased.

25. As stated earlier, I find the deceased equally blameworthy for the simple reason that he seemed to have started the scuffle when he blocked the boda boda used by the accused on his way home. Apart from blocking him it was the evidence of PW2 that he slapped the accused and a fight ensued.

26. These action by the deceased would perhaps have been avoided if he had accepted the sum of kshs.200 and await the balance later. Nonetheless the action of stabbing him was use of excessive force by the accused. There was no evidence that his finger was injured at all. Neither was there evidence of use of excessive force by the deceased.

27. Taking the totality of the evidence on board I find that this is a case where the proper charge should have been **Manslaughter** and not **Murder**. This court in exercise of its inherent jurisdiction shall proceed, which I hereby do, to reduce the charge to that of **Manslaughter** pursuant to the provision of Section 205 of the Penal Code.

28. The accused is thus found guilty of the charge of Manslaughter and he is convicted over the same.

Orders accordingly.

**Dated, signed and delivered in open court at Kitale this 25<sup>th</sup> day of November, 2019.**

**H. K. CHEMITEI**

**JUDGE**

**25/11/19**

**In the presence of;-**

**Mr. Omooria for the State**

**Mr. Wafula for Mr. Nyamu for the Accused**

**Accused – present**

**Court Assistant – Kirong**

**Judgement read in open court.**