



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**HIGH COURT CRIMINAL CASE NO. 26 OF 2016**

**REPUBLIC.....PROSECUTOR**

**=VERSUS=**

**BENJAMIN KIPLANGAT CHERUIYOT.....ACCUSED**

**JUDGEMENT**

The Accused herein is charged with the offence of Murder C/S S.203 as read with S.204 of the Penal Code.

The particulars are that on the 10<sup>th</sup> day of October 2016 at Kimaech village of Kiptenden Location in Konoin Sub County within Bomet County murdered COLLINS TUWEI. The prosecution in this case called ten witnesses in support of their case.

**Facts**

Caroline Cherotich (PW1) was on the 10<sup>th</sup> day of October 2016 asleep in her room, when she was called by her neighbour one Sharon Cherotich who informed her that somebody was kicking her door. She went to open and was confronted by a man who got hold of her pullover and pulled her out. The man was armed with a knife. She screamed for help. Her son picked a stone and hit the man on the stomach and ran away.

When the man was hit with a stone. He released her and went for her son. She identified the man as Benjamin (the accused). At a distance of about 20 metres she saw the accused confront Collins Tuwei (the deceased) and stab him with a knife.

Members of public went to the scene and took the victim to hospital at Tenwek where he was pronounced dead. The body was taken to Kapkatet mortuary.

PW1's son Emmanuel Kipkemoi testified to have been asleep with his family when the Accused went and kicked the door to their house and got hold of his mother and slapped her. The Accused was armed with a knife. The witness picked a stone and hit the Accused with it. He let go the witnesses mother and chased Emmanuel who went and hid in an unfinished building. It is his evidence that he saw the Accused confront the Deceased and stab him with a knife upon which the deceased fell down.

Sharon Cherotich (PW3) was at her house when at about 10.00 p.m. She saw the Accused outside PW1's house door. She told Caroline not to open as the Accused was armed with a knife. Caroline opened the door and screamed. A lady by the name of Betty called her and told to her to go and help separate people who were fighting. When she went outside she found Collins lying on the ground unconscious. Members of public arrived and the victim was taken to hospital.

Dr. Mutai (PW8) examined the body of the Deceased and formed the opinion that the cause of death was cardio-respiratory arrest secondary to massive blood loss and severe chest injury following stab wound on the right chest wall.

**Analysis and the law**

The accused is charged with the offence of murder C/S 203 as read to S.204 of the penal code.

Murder is defined under section 203 of the penal code thus:- "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder".

S.206 defines malice aforethought thus:- Malice aforethought shall be deemed to be established by evidence proving any one or more of the

following circumstances”

- a. An intention to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not.
- b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not or by a wish that it may not be caused;
- c. An intent to commit a felony
- d. ....

In the present case the murder incident took place at night. PW1, PW2, PW3 testified that the incident took place at 10.00p.m.

### **Identification**

PW1 told the court that she peeped through a fence and saw the Accused meet the deceased and stab him with a knife. She told the court that the distance was about 20 metres away. During cross-examination by counsel for defence Mr. Koske, she admitted that she did not see the Accused stab the deceased. She further told the court that there are tea bushes at the rear of their house and a Mauritius tree fence at the nearby kiosk and hotel.

PW2 testified to have seen the Accused attack the Deceased when he had gone into hiding in a nearby kiosk. He also told the court that there was moonlight.

PW3 Sharon was the first to allegedly see the Accused who was kicking the PW1's door and she is the one who shouted to her and informed her that there was a man knocking the door. She told the court that she had seen the Accused when she put on the torch on her phone.

She further testified to have been called by a lady named Betty who told her that there were people fighting outside and requested her to go and separate them. When she went outside she found Collins lying unconscious on the ground. Members of public organized for transport and he was taken to hospital for transport and he was taken to hospital.

Under cross-examination she told the court that when she heard movements from outside she went to check and by use of a torch she saw that it was the Accused. He had tried to hide his face by wearing a red cap. She did not see the face clearly but she identified him by the clothes he was wearing. She further testified that she did not see the Accused stab the Deceased but she heard them quarrelling.

It is instructive to note that this incident took place at night in an area which was not lit. The incident did not take place near a house but on a road said to have been around 20 metres from where PW1, PW2 and PW3 were. Their houses did not have security lights. The only source of light was moonlight. There is evidence that there was fence made of Mauritian bushes. PW1 allegedly saw the Accused stab the Deceased by peeping through that fence.

PW3 had alleged that it is a lady by the name of Betty who informed her that there were people fighting outside and requested her to go and separate them. This Betty who was an eye witness was not called as a witness in this case. In this case the prosecution has not clearly established the nexus between the Deceased and prosecution witnesses No. 1, 2 and 3 whom the accused visited in their houses before meeting the victim whom he fatally stabbed.

Upon a careful evaluation of the situational analysis at the time of the attack I find that it could not afford a fair opportunity for positive identification of the attacker. There was very poor lighting if at all. The distance from where PW1, PW2 and PW3 were to the scene was fairly substantial denying them the opportunity to see the attacker. Further there were obtrusive elements like the bush fence and tea bushes at the scene. No other evidence at the scene was taken for further analysis.

I do find that there was no proper and positive identification of the attacker in this case. This case has not been proved beyond reasonable doubt. The Accused is found not guilty of the offence of murder C/S 203 of the Penal Code and is acquitted of the offence charged. He is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this 29<sup>th</sup> day of January 2018 in the presence of learned counsel for the prosecution Mr. Barasa learned counsel for the defence Mr. Koech holding brief Koske Court assistant Mr. Rotich.

**M. MU YA**

**JUDGE**

**29/1/2018**