



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL CASE NUMBER 2 OF 2016

(Formerly Kitale High Court Criminal Case Number 22 of 2014)

REPUBLIC.....PROSECUTION

VERSUS

BONIFACE CHEREN CHEPUS.....ACCUSED

JUDGEMENT

BONIFACE CHEREN CHEPUS is charged with the offence of **Murder, contrary to section 203 as read with section 204 of the Penal Code.**

The particulars of this offence are that on the night of 1st and 2nd day of April, 2014 at Amon village in Psigirio Sub-Location, within West Pokot County, the accused unlawfully murdered Thomas Lokipuna.

The prosecution case is that on 1st of April, 2014 PW-1 in this case was sent by her mother, the PW-2 in this case to go for milk from a neighbour. The accused who's a neighbour and a friend to her father who is the deceased (Victim) in this case had just returned home from a posho mill. PW-3 was in the accused's home and had already prepared vegetables. As PW-1 was getting home with the milk at about 7.00pm, she saw her father at the gate to their home. The accused called him to his house. The deceased went to where he was, next to his house door. The deceased complained that the accused was saying he'll kill him. The accused got into the house and emerged armed with a metal bar. The accused hit the deceased with it on the head. He then dropped the heavy metal bar. PW-1 after witnessing that rushed and called her mother who is PW-2 in this case. PW-2 rushed to Cheren's house compound and found the deceased there, injured. She screamed attracting neighbours to the scene. They lifted the deceased and noted he was bleeding through nostrils and the top of the head. Among those who visited the scene are PW-4, PW-5 and PW-7. They got a motorcycle to rush the deceased to the hospital but it could not manage as he was unable to support himself. A vehicle was got. PW-7 locked the accused in his house to prevent him from escaping. As they were going to Kapenguria County Referral Hospital from Murkwijit, the deceased passed on near Kapenguria Boy's School. He was taken to the Hospital Mortuary.

PW-6 and PW-8, both Kenya Police Reservists visited the scene and arrested the accused. They also recovered the heavy metal bar. They took the accused to Murkwijit AP's camp. PW-10 re-arrested the accused and had the postmortem done on 4.4.2015 by PW-9. PW-5 identified the body before the postmortem. The doctor noted that the head had a fracture of the frontal bone and the right parietal bone into 3 separate pieces. The injury had penetrated to a point of exposing the brain. He was of the opinion that the deceased died as a result of increased intracranial pressure leading to cardiopulmonary failure, due to blunt head trauma as a result of assault.

He thus filled the postmortem report. The accused was then charged with the present offence. The investigating officer produced the recovered metal bar, some photographs taken on the deceased's body and the postmortem report as exhibits.

The accused gave unsworn testimony in his defence and called no witness. His case is that on 1.4.2014 he was with PW-3 at their place of work. They worked till 4.00pm. They were paid 500/-. The accused went to posho mill to buy maize and have it milled to flour. PW-3 went home ahead of him. The accused on his way home passed through a chang'aa den and took chang'aa beer worth 50/-. He got home at 7:17pm and did not find PW-3. He looked for something he could light to enable him see. As he did so he heard a sound of someone approaching from the road. The person got to accused's homestead. He said, "Today that person will know who I am." He got to the accused's house door and knocked on it using a club. The accused said he was nearby and was headed there. Before the accused got to him the deceased asked him what he had told Jackson. The accused said in four days he had not met Jackson. The deceased doubted it. The accused told him to wait for PW-3 to confirm it. The accused took the Unga from where he had kept it. The deceased held it and hurled it over the gate. He struck the accused with a club on the left shoulder. The two fought. The accused's shirt lost all the buttons in the alleged fight. The accused escaped into his house and pushed the door back to lock himself therein. The deceased however pushed the door and prevented him from locking it. They struggled with the door for a while. The deceased told the accused that if he locks himself therein he'll torch him in the house. The deceased was a smoker and was carrying a matchbox. The accused decided to escape outside. He released the door. He was tripped and fell down, outside the door. He, (the deceased) got a metal bar from under the door and attacked the accused with it. The accused rose and held it. They grappled for its possession. The deceased freed one hand and punched the accused on the ear. The

accused felt pain, pulled the metal bar hard and got full possession of it. He immediately hit the deceased with it on the head. The deceased fell down. The accused got surprised. He released the metal bar and tried to raise him up. He was not talking and the head was leaning on one side of the shoulder. PW-2 then appeared screaming. Other family members turned up. The accused got scared and ran to his in-law's house. The in-law called KPR men who turned up and arrested him. He was taken to Murkwijit AP's Camp. The accused was drunk and had passed through the house of the deceased saying that deceased had no land there.

This court, at this point, must determine as to whether the offence against the accused person is proved by the prosecution beyond reasonable doubt. For an offence of murder, the ingredients that need be established are:-

1. The fact of death of the deceased.

2. The cause of such death; proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person; and

3. Proof that the said unlawful act or omission was committed with malice afterthought.

In this case there is no dispute about the death of the deceased. The evidence of PW-5, PW-7, PW-9 and PW-10 shows that the deceased died on 1.4.2015 as he was being rushed to Kapenguria County Referral Hospital. Photographs of his dead body were also produced in court as exhibit.

The post-mortem report shows he died out of increased intracranial pressure causing cardiopulmonary failure due to blunt head trauma as a result of assault. The accused himself does not deny that he's the one who caused the death of the deceased by hitting him once on the head with a blunt metal bar. However he says he did it in self-defence, as it's the deceased who had held the metal bar and tried to attack him with it. He managed to grapple with him, takes its possession and hit him on the head once with it. He was even surprised when his victim fell down, and made effort to lift him up. While it's not in dispute that the accused caused the injury which led to death of the deceased, of which I take to be the correct position, the accused's defence is not entirely true. He said as he got to the house PW-3 was not there and he was. He is a prosecution eye-witness as to what happened. The defence did not cross examine him on issues raised of self defence. This witness was a close friend of the accused and could not have lied against him in favour of the deceased. The evidence of PW-1 is also not to the effect that there was a fight and the deceased was hit by the accused person in self-defence. The issue of self defence was an afterthought. It also does not sound possible that the accused who was drunk, while down was able to rise up and hold on a metal bar which the deceased was in possession of, grappled with him till he had it full possession, and hit him with it on the head in self defence. The claimed injuries, allegedly sustained by the accused in the fight were not corroborated. This is just a crafted story by the accused.

"Malice aforethought" of which the defence submitted was not established by the prosecution is defined under **Section 206 of the Penal Code**. It is deemed to be established by evidence proving any one of 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 bodily harm is caused or not, or by a wish that it may not be caused;

c) An intent to commit a felony

d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

The accused person in picking a heavy metal bar and striking the deceased with it very hard on the head to a point of fracturing his frontal bone and the right parietal bone into 3 separate pieces, deep to the point of exposing the brain, knew that such an act would probably have caused the death to the deceased or grievous harm. The commission was therefore with malice aforethought.

I accordingly find the offence of murder proved by the prosecution against him beyond reasonable doubt. He is convicted of the offence under **section 203 as read with section 204 of the Penal Code**.

Judgement read and signed in open court in presence of the accused, Mr. Bororio who is appearing for him, and Madam Kiptoo for the state this 13th day of February 2018.

S. M. GITHINJI

JUDGE

13.2.2018

MADAM KIPTOO:-

I have no previous records. He is a first offender.

MR. BORORIO IN MITIGATION:-

The accused is remorseful. He is a family member and the sole bread winner. He prays for leniency.

COURT

I have considered the circumstances under which the offence was committed, that the convict is a first offender and what is aired by his advocate in mitigation. He will serve 30 years imprisonment. Right of appeal 14 days.

S. M. GITHINJI

JUDGE

13.2.2018