



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

HCCR NO.19 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

WELDON KIPLANGAT NGETICH.....ACCUSED

JUDGMENT

1. On the night of 30th April 2014, at about 7.00. p.m., Bernard Kipngetich Langat (PW1), a farmer from Chepkuti, was heading to Jericho Trading Centre, from his home. He heard a man's voice screaming "You are killing me." The voice was coming from the direction in which he was heading. When he reached the place where the scream was coming from, he found an old man lying down. The old man was the one screaming, while a second man was standing, stepping on the old man's ribs, stomach and legs. PW1 was able to see the two men using the light from his phone torch. He testified that the old man was James Kipkemoi Mageso, the deceased, who was his paternal uncle.

2. The person who was stepping on him was the accused, Weldon Kiplangat Ngetich, a neighbour. PW1 testified that he told the accused to stop what he was doing, but he did not. PW1 then called the old man's daughter, Nancy (PW2). Two other people came to the scene, according to PW1, namely Samuel Langat and Peter Mugunya, but the accused had left by the time they came. Nancy, the old man's daughter, also came to the scene. They helped the old man up and took him home.

3. The following morning, the old man started complaining of pain all over the body, and he was found dead in the morning of the following day, the 2nd of May 2014.

4. It is with the murder of this old man, James Kipkemoi Mageso, that the accused is charged. He faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 2nd day of May 2014 at Chepkutung village within Kericho County, he murdered James Kipkemoi Mageso. The accused pleaded not guilty to the offence, and his trial commenced before Honourable Ong'udi J. Pursuant to directions taken under section 200 of the CPC, the accused elected to proceed with the matter before me from where it had reached before Honourable Ong'udi J.

5. When cross-examined by Mr. Koske for the accused, following his examination in chief which is set out in the introductory part of this judgment, PW1 stated that the deceased was drunk, that he used to drink a lot and that is why he was lying down. PW1 stated that he had identified the accused by flashing his phone torch on him, then stopped to ask what he was doing.

6. It was also his testimony that the accused liked violence so he could not engage him much, nor did he raise an alarm. They had taken the deceased to his house after they found him, and he was not taken to hospital the following day. In re-examination, he testified that he found the deceased lying on the ground and could not tell whether he was lying down because of alcohol or of the beating. It was also his testimony that the accused was also drunk.

7. The second prosecution witness was Nancy Chelangat Mageso (PW2), a tea picker and resident of Chepkuti. At about 7.00 p.m. on 30th April 2014, she was weighing tea at the buying centre. She was called by Bernard (PW1) who was going to Jericho and had found her father near the shopping centre, drunk and being beaten. Bernard had told her that it was Weldon Ngetich who was beating her father. She had asked Bernard to wait for her, and she arrived after 20 minutes. She found PW1 and one Peter Mugunya there, and Samuel Langat came to the scene after her. Her father was lying on his back. She had a phone which has a torch, and she noted that he had a scratch on the leg. She called a cousin who came with a motor vehicle and they put him in the vehicle and took him home. He appeared well when they reached home, and he even drunk porridge. He did not tell them what had happened, and all he wanted was to sleep. His condition was not bad then.

8. On the morning of 1st May 2014 morning, he complained of pain in the ribs. They gave him Panadol, but he continued complaining about the pain. PW2 was the first to wake up the following day, 2nd May 2014. She aired clothes then went to check on the deceased, and she found him dead. She screamed and her mother, Rebecca Mageso, came to where the deceased was. The Chief and police were notified, and the deceased's body was taken to the mortuary by the police. PW2 testified that she had not found the accused at the scene where PW1 had allegedly found him beating the deceased.

9. In cross-examination, PW2 stated that she had been at the tea buying centre when she had been called by PW1. PW1 had said that he had found the deceased lying down, being beaten and stepped on by the accused. The scene was a footpath beside the road to Jericho. She had found PW1 and Peter at the scene, while Samuel came and joined the three of them. The accused was not at the scene.
10. They had taken the deceased home, and he was talking then. She had seen a scratch on his leg. He was complaining of pain the following day, and he had taken a Panadol. She reiterated that she had been told that he was drunk and had been beaten, but they did not take him to hospital.
11. PW3 was Evans Kipngeno Cheruiyot, a teacher at Cheribo Secondary School. On 3rd May 2014, he was requested by the family of the deceased to go and witness the post mortem on the deceased, who was his uncle. He had identified the body with his other uncle, one Francis Mogisu, a son of the deceased, Edwin Kemei, as well as the daughter of the deceased, Nancy Chelangat. A police officer from Sosiot Police Station was also present. PW3 was present during the post mortem. The post mortem revealed that the deceased had 3 broken ribs on the right side of the body.
12. PW4, No. 78787 P. C. Henry Kabombo attached to Garissa Police Station had been stationed at Sosiot Police Station in May 2014. On 2nd May 2014, he was at the station when he was called by the OCS, Inspector Leonard Osewe, to accompany the OCS and his colleague, P. C George Achola, to Kapsuser. The OCS had received a distress call from the area chief of Kapsuser that a man had died in his house. They had gone to the scene at the house of the deceased at Kapsuser. They had found his body on a bed in his house. They took the body, which had no visible injuries, to Kericho Mortuary.
13. PW4 had gone with the family of the deceased to witness the postmortem on 3rd May 2014. The post mortem showed that the deceased had three broken ribs on the right side. The accused was the suspect in the case, and it appeared from the statements that PW4 and the OCS accepted the allegation that he had beaten the deceased. PW4 did not carry out any other investigations. The accused had been arrested at his home by administration police from Kapsuser and taken to the police station.
14. PW5 was Dr. Kibos Ezekiel. He produced the report prepared by Dr. Edwin Kosgei who had performed the post mortem on the body of the deceased on 3rd May 2014. The deceased was of the apparent age of 62 years. On external examination, he was found to have peripheral cyanosis, two bruises on the right leg, and one bruise on the right hand. The internal examination revealed bilateral haemothorax, meaning an accumulation of blood on both sides of the chest cavity. He had a fracture of the 8th, 9th, and 10th ribs on the right side, and haematoma or blood clots on the anterior chest wall on the right side. He also had massive haemoperitoneum, that is massive accumulation of blood within the abdominal cavity, lacerations on the liver, most likely caused by the fractures of the 7th – 9th ribs which are over the liver, and anterior abdominal wall haematoma.
15. The cause of death, in the opinion of Dr. Kosgei, was the lacerations on the liver leading to massive haemoperitonium and haemothorax. PW5 explained this to mean that the tearing of the liver had resulted in massive blood loss, leading to the death of the deceased.
16. Upon the close of the prosecution case, I found that the prosecution had established a prima facie case to warrant placing the accused on his defence. He elected to give an unsworn statement.
17. He denied beating the deceased or causing his death. He stated that he was at work as usual on 30th April 2014, looking after tea at Chebaon Estate where he had taken the tea and ended his duties at 4.30 p.m. He had parked the vehicle at his employer's compound and headed to his home where he arrived at 5.00 p.m. He did not go anywhere but stayed at home.
18. The following day, the 1st of May 2014, was a holiday, so he did not go to work but did cleaning duties at his compound. He stated that he was shocked when he was informed that he had met the deceased on 30th April 2014, and that he had assaulted him. It was his testimony that the deceased did not reside in the same village as the accused did but resides in a distant village.
19. He further denied that he was a violent man, stating that there is no case of assault pending in any court against him for having assaulted anyone. He further stated that he was shocked when it was testified on 13th April 2015 (by PW1) that he was a violent man. This witness did not tell the court whether there is a pending assault case where he was the accused. He had been arrested on 9th May, 2014 and charged with the offence he now faces, which he denies committing.
20. In his submissions on behalf of the accused, Mr. Koske observed that the prosecution had not proved its case against the accused beyond reasonable doubt. While it had called 5 witnesses in support of its case, it had failed to give credible evidence that proved its case to the required standard.
21. He submitted that the only eye witness was PW1 Bernard Kipngetch Langat. Counsel summarised the evidence of PW1 and observed that the witness had not produced the phone or adduced further evidence to show the strength of light used to identify the accused. He was unable to recognize the accused person when he was cross-examined, and was also not able to describe the clothes the accused was wearing.
22. Counsel further pointed out that the two people that the witness said had come to the scene, Samuel Langat and Peter Mugunya, had not seen the accused at the scene. The three, with the deceased's daughter, had assisted him home, where he had gone to bed. They had not reported the matter to the police until the deceased died in his bed two days later.
23. Counsel further observed that the deceased was able to talk when he was taken home, but he had not been asked about the incident. The defence case was that the identification of the accused by PW1, the only eye witness, was not reliable.
24. I have considered the prosecution evidence in this matter, in which the accused is charged with the offence of murder contrary to section

203 as read with section 204 of the Penal Code.

25. In order to obtain a conviction against the accused, the state must establish the death and the cause of death of the deceased, that the death of the deceased was caused by the person charged with the offence, and that he caused the death of the deceased with malice aforethought.

26. The death and cause of death of the deceased is not, I believe, in dispute. He died as a result of lacerations on the liver leading to massive haemoperitonium and haemothorax, which PW5 explained meant, in layman's terms, that he had tearing of the liver leading to massive blood loss. The doctor attributed the tearing of the liver to the three broken ribs, which he testified are above the liver.

27. The question is who or what caused the broken ribs? The prosecution case is that it was the accused who beat up the deceased and stepped on him. The prosecution alleges that the accused was seen doing this by PW1, who identified the accused by the light of a torch. No one else saw the accused attack the deceased, and aside from the broken ribs, the accused only had a scratch on the leg, according to his daughter, and two bruises on the right leg, according to the doctor who conducted the post mortem. The evidence of the investigating officer was that he had no visible injuries.

28. From the evidence, particularly that of the investigating officer, it appears that this case is based solely on the word of PW1. The investigating officer was informed that the accused had been seen by one witness stepping on the deceased, and had arrested him on the strength of that evidence, without more. The deceased was alive and able to talk on the day of the alleged attack, and on the day after, but no one bothered to find out what had happened to him. The testimony of PW1 was that he was drunk, and could have fallen down because of drunkenness. No effort was made to find out where he had been, and what could have happened to him prior to the encounter with the accused, if indeed it transpired as testified by PW1.

29. The prosecution has a duty to prove its case against the accused beyond reasonable doubt. If there is a doubt in the prosecution case, then it must be resolved in favour of the accused.

30. In this case, the only evidence linking the accused to the death of the deceased was the evidence of PW1. He testified that he saw the accused by the light of his phone torch. He did not raise an alarm when he saw what the accused was allegedly doing. According to PW1, two other people came to the scene, but they did not find the accused, and neither did the deceased's daughter. Notably, no-one thought to ask the deceased what had happened that night, or even the following day when the evidence before me indicates that he was still talking though he was complaining of pain. Sadly, the investigating officer seems to have assumed that he had an open and shut case, and decided not to carry out any investigations.

31. I find that the evidence presented by the prosecution in this case falls far below what is required by law. The prosecution has a duty to prove its case beyond reasonable doubt. In this case, I am not satisfied that this burden has been achieved. I am therefore unable to convict the accused on the basis of the evidence on record, and I therefore acquit him in accordance with section 215 of the Criminal Procedure Code.

Dated, Delivered and Signed at Kericho this 28th day of June 2018.

MUMBI NGUGI

JUDGE