



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL CASE NO. 41 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NELSON KIPKOECH TUITOET.....ACCUSED**

**JUDGMENT**

1. *Nelson Kipkoech Tuitoet*, the accused herein faces a charge of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*. It is alleged that on 20<sup>th</sup> April, 2012 at Kermet village in Keiyo South District within the Rift Valley Province, jointly with another not before the court, the accused murdered *Michael Kipsang Kurui*. He denied the charges.
2. In support of its case, the prosecution called a total of five witnesses. The trial opened before *Hon Grace Ngenye Macharia, J* on 13<sup>th</sup> March, 2013 who heard one witness before she was transferred to another station. I took over the trial on 3<sup>rd</sup> December, 2014.
3. Briefly, the prosecution case is that on 19<sup>th</sup> April, 2012, at around 5 pm, PW3, *Elijah Keino* was at Kapkoyo market selling cabbages and peanuts when he was attracted to a place where a crowd of people had gathered. He proceeded there to find out what was happening. On arrival, he found three people fighting. He knew all of them since one of them was his brother, the deceased herein, and his two neighbours whom he knew as *Kipkoech* and *Sang Rono*. He identified *Kipkoech* as the accused in this case.
4. PW3 recalled that when he found the three men fighting, he separated them. They made peace and went their separate ways. He noted that they were all drunk. However, at around 6.30pm, he heard that the three people were still fighting. He separated them once again and they left. He did not know why they were fighting. PW3 further stated that on the same day at around 7.30pm, he received a call from his brother reporting that the deceased had been assaulted at Kermet village and was badly injured. He proceeded to the village and found the deceased lying besides the road. He had head injuries but he was still alive. He took him to Kimwalel Hospital but he was referred to Moi Teaching and Referral Hospital. While on the way to the hospital, the deceased allegedly told him that he had been assaulted by *Kipkoech* and *Kipsang*. He passed away on the following day while undergoing treatment.
5. PW2 the Assistant Chief of Koimur sub-location stated that on 19<sup>th</sup> April, 2012 at 8pm, he received information that there was a person lying beside the road to Baringo who was badly injured. He was given a description of where the man was lying and he went there. On arrival, he found a person with head injuries with blood oozing from his nose. He took him to Flourspar Hospital. On the following day he received information that the man had passed away. He did not know the injured man nor could he recall his name.
6. On 24<sup>th</sup> April, 2012, the deceased's death was reported to PW4 *PC Jotham Muriithi* at Flourspar Police Patrol base by PW3 and his paternal uncle. According to PW4, PW3 and his uncle reported that the deceased had died after he was assaulted by the accused in this case and one *Kipsang Rono*; that the deceased was hit on the head with stones and stabbed with a knife. The deceased's body was by then lying at the Moi Teaching and Referral Hospital mortuary. PW4 did not recover the stones or knife used in attacking the deceased. In the course of his investigations, he allegedly established that the accused had re-located to Kimochochi village, Bahati Division of Nakuru County. He caused his arrest and arraignment in court on the current charges.
7. According to the evidence of PW5, *Dr Paul Kipkorir Rono*, an autopsy on the body of the deceased was performed by his colleague, *Dr Ndiangui* on 27<sup>th</sup> April, 2012. He testified that he had worked with *Dr Ndiangui* for over eight years and was familiar with his handwriting and signature. He produced in evidence a post mortem report completed by *Dr Ndiangui*.
8. The post mortem report shows that the deceased's body had multiple lacerations and cut wounds on the face and scalp which were sutured. There was blood oozing from the right ear canal; there was a depressed skull fracture and bleeding in the brain. He opined that the cause of death was severe head injury caused by both a sharp and blunt object.
9. At the close of the prosecution's case, I determined that the accused person had a case to answer and I consequently placed him on his defence.

10. In his defence, the accused elected to give an unsworn statement. He did not call any witness. In his statement, he stated that prior to 19<sup>th</sup> April, 2012, he was employed as a casual labourer in Bahati, Nakuru County. On 19<sup>th</sup> April, 2012 he was off duty. He went to a certain bar in Kapkayo village at around 5pm. In the bar, he found the deceased and his brothers, namely, *Kipsang Rono* and *Elijah Kurui* (PW3). The three started fighting over a family dispute. He separated them. He then left the bar and went back to his workplace. He was arrested a month later and charged with the current offence which he knew nothing about. In short, he denied having murdered the deceased and having gone into hiding after the date the deceased was murdered as alleged by the investigating officer (PW4).

11. Both learned counsel for the accused and the state made submissions at the close of the prosecution case. Learned counsel for the accused, *Mr Chepkwony* also made final oral submissions. Learned prosecuting counsel *Ms Kigagi* opted not to make final submissions and relied on the evidence on record.

12. I have carefully evaluated the evidence on record for both parties both at the close of the prosecution case and at the close of the defence case.

13. The offence of murder is created by *section 203* of the *Penal Code*. It provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

14. A reading of this provision reveals that the offence of murder has three key ingredients which must be proved to the required standard of proof. The prosecution must prove beyond reasonable doubt the death of the deceased and the cause of that death; that the accused committed the unlawful act or omission that led to the deceased's death and thirdly, that in committing the unlawful act or omission, the accused had malice aforethought.

15. Malice aforethought is the legal term used to refer to the *mensrea* or intention to kill another person. The circumstances that would establish malice aforethought have been provided in *section 206* of the *Penal Code* as follows:

***“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 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.”***

16. From the above provision, it is clear that malice aforethought is multi-faceted. It can take various forms. It can be express, constructive or inferred from a set of circumstances. There are three main tests to determine the presence of malice aforethought. The first one is the intention to kill or to cause death; the second is the intention to cause grievous bodily harm and thirdly, if there is evidence to show that the accused knew that there was a real risk of death or grievous harm to another person if he engaged in certain acts or omissions but he proceeds to so engage without lawful excuse. See *Nzuki V Republic, [1953] KLR 171*.

17. I have analysed the evidence in this case in its entirety with the above principles in mind. Having done so, I find that the prosecution in this case has proved beyond any doubt the death of the deceased. The key question that this court is called upon to determine is whether the accused jointly with another person not before the court committed any unlawful act or omission with malice aforethought which caused the death of the deceased.

18. From the evidence on record, it is my finding that the prosecution's case is primarily based on circumstantial evidence. It is premised on PW3's claim that since he had seen the accused, the deceased and one *Kipsang* fighting twice on the material date, they must be the ones who subsequently assaulted him occasioning him injuries that led to his death. The prosecution also relies on the claim by PW3 that the deceased told him that evening prior to his death that the accused and *Kipsang* were the ones who had assaulted him.

19. It is trite law that for circumstantial evidence to form the basis of a conviction, it must point irresistibly to the guilt of the accused person as charged. It must be incompatible with his innocence and incapable of any other explanation other than the accused's guilt as charged. The Court of Appeal when pronouncing itself on this principle in *Sawe V Republic, (2003) KLR 364* held as follows:

***“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”***

See also: *Mwangi V Republic [1983] KLR 522*.

20. In this case, the prosecution's claim that the accused and *Kipsang* must be the persons who subsequently assaulted the deceased simply

because they had fought with him twice on the same day is not substantiated by any evidence. PW3 did not claim to have seen the two follow the deceased after he separated them the last time. He testified that each of them went their separate ways. PW3 did not also allege that he saw the accused being armed with any sharp object which could have been the weapon used to inflict some of the injuries noted by the pathologist.

21. It is also important to note that none of the witnesses including PW3 knew what happened to the deceased after he parted company with the accused and *Kipsang*. They did not know how he sustained the fatal injuries. Consequently, no evidence was adduced to link the accused with those injuries. I say so because PW3 in his evidence did not say that he saw any injuries on the deceased after he separated him from the accused and *Kipsang* on the two occasions he found them fighting. It would appear that no injuries or at any rate no serious injury resulted from the fights since according to PW3, after the separation, the deceased just walked away. I therefore find that there is a gap in the prosecution case regarding what happened to the deceased between the time he was last separated from the accused and *Kipsang* and the time he was found lying on a roadside with severe head injuries.

22. This now leaves us with the dying declaration allegedly made to PW3 by the deceased before he died.

Under *Section 33 (a)* of the *Evidence Act*, dying declarations are admissible in evidence as an exception to the rule prohibiting admissibility of hearsay evidence. Statements of admissible facts, oral or written made by a person who is dead are admissible where the cause of his death is in question and those statements relate to the cause of his death or to any of the circumstances of the transaction leading to his death.

23. Notwithstanding *section 33 (a)* of the *Evidence Act*, courts have time and again held that the evidence of a dying declaration must be admitted with a lot of caution firstly because such a declaration is not subjected to the test of cross examination and secondly, it is more often than not made in circumstances that render the deceased's perception questionable. While as the law does not require that a dying declaration must be corroborated by other evidence in order to form the basis of a conviction, the trial court must be satisfied that it is safe to found a conviction on such evidence alone. See *Shadrack Mbaabu Kinyua V Republic, Criminal Appeal No. 163 of 2011 [2013] eKLR*.

24. In this case, PW3 claimed that he was alone with the deceased when he made the dying declaration. Even if the court were to accept that the said dying declaration was indeed made, there is evidence from PW3 that the accused and the deceased had been drunk even prior to the time that he sustained the injuries that ultimately led to his death. Given this fact and the fact that the dying declaration was made after he had sustained severe injuries to his head, it is open to question whether the deceased was in a good frame of mind to see and properly identify his attackers or to appreciate the significance of the statement he was making to PW3.

In view of the foregoing and given that there is no other evidence on record that corroborates the dying declaration, I am unable to place much weight or reliance on it.

25. In the end, I have come to the conclusion that the circumstantial evidence adduced by the prosecution in this case does not point irresistibly to the guilt of the accused as charged. I thus find that the prosecution has failed to prove the charge of murder against the accused beyond any reasonable doubt. It is a cardinal principle of criminal law that whenever doubt arises as to the guilt of an accused person as charged, that doubt must be resolved in favour of an accused. In the premises, I have no alternative but to give the accused the benefit of doubt and enter a finding of not guilty. The accused is accordingly acquitted of the charge of murder. He shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

**DATED** and **SIGNED** at **NAIROBI** this 7<sup>th</sup> day of June, 2018.

**C. W. GITHUA**

**JUDGE**

**DATED** and **DELIVERED** at **ELDORET** this 27<sup>th</sup> day of June, 2018.

**S. M. GITHINJI**

**JUDGE**

**In the presence of:**

*Mr Chepkwony: Advocate for the accused*

*Ms Mokuu: Advocate for the State*

*Mr Joseph: Court Clerk*