



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CORAM: D.S. MAJANJA, J.

CRIMINAL CASE NO. 7 OF 2014

BETWEEN

REPUBLIC.....PROSECUTOR

AND

ELIAS KIPKOECH TUM ALIAS ELLY KIPTUM.....1ST ACCUSED

ZAKAYO KIPLAGAT

TUWEI ALIAS KIPLANGAT ARAP GEORGE.....2ND ACCUSED

ISAAC KIPKERING RUTO.....3RD ACCUSED

PETER KIPKOGHEY ALIAS BROWN.....4TH ACCUSED

JUDGMENT

1. The accused, **ELIAS KIPKOECH TUM (A1)**, **ZAKAYO KIPLAGAT (A2)**, **ISAAC KIPKERING (A3)** and **PETER KIPKOGHEY (A4)** were charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The prosecution alleged that on 14th October, 2013 at Chepkejei Village, Muhoroni District within Kisumu County, the accused persons together with others not before court, murdered one **NAAMAN ABIRA**. After the accused denied the charge, the prosecution called 13 witnesses in support of its case. The accused elected to give sworn testimony in their defence.

2. George Omondi Onuong'a (PW 1) recounted that on the fateful day, he accompanied his employer, Moses Awour Abira (PW 3), to his farm at Chepkejei Village to check on his sugarcane crop. On reaching the farm, they found approximately 200 people armed with bows and arrows. When they asked them why they had released their cows to feed on the sugarcane, the armed men chased them away. PW 1 run away and hid in the *shamba* but since PW 3 was not quick paced, the attackers caught up with him. PW 1 then called for help from PW 3's wife. The deceased, who was PW 3's brother, responded to the distress call. He arrived at the scene in the company of his driver, Jackson Okello Agai (PW 6). Apprehensive that the attackers would overpower them, they went to Chepsweta Police Post to seek help. When they returned to the scene in the company of police officers, the attackers began shooting arrows at them. It was at this point that the deceased was fatally struck by an arrow on the face, jaw, left side of the stomach and the back. PW 3 was also struck with an arrow on the lower back side. PW 1 testified that he identified A4 during the identification parade based on his colour and height. He explained that A4 was close to him and he identified him as one of those who shot an arrow at the deceased.

3. PW 3 confirmed that at about midday on the material day his was with PW 1 visiting his sugarcane farm. They left their vehicle behind and proceeded to walk to the farm. As they were proceeding, they saw about 10 men working on another farm. As they approached, the men stopped working and began following them. He recognised A1 and A2 among them as he had known them for about two years as casual workers who had previously worked for him. PW 3 narrated that the accused confronted them and threatened to harm them. He further recalled that three of the attackers, including A4 being among them, chased PW 1 to the sugarcane plantation. He also testified that A3 had a panga and rungu and assaulted him. PW 1 stated the assailants assaulted him, detained for a while and took his phone and Kshs. 2000/= . He reported the matter to Chepsweta Police Post. While at Chepsweta Police Post, PW 3 was able to contact the deceased. The deceased and his other brother, Albert Abira (PW 4) and PW 1 arrived at the Police Post. The deceased informed them that he had called the police at Chemelil and informed them of the incident. They all decided to go back where PW 3's pick up was, accompanied by two police officers.

4. When PW 3 and his group went back to the scene, he saw the area Police Commander, Chief Inspector Galgalo Wari (PW 8), and other

police officers. As they proceeded to where the police were, he could see a crowd gathering behind the police. They were whistling and calling each other. He met PW 8 and they proceeded to where he had been attacked. As they were moving, the crowd kept growing bigger. He further testified that the accused were present and that A1 and A2 were armed with bows and arrows while A3 and A4 were armed with a 'panga' and a 'rungu'. When they realized that the crowd was swelling, they decided to walk away, but before they could, they were attacked with bows and arrows. PW 3 was struck with an arrow in his lower back, while the deceased was struck below the chin, on the neck, the lower abdomen, back and below shoulder. He recalled that the accused were among the people who attacked them. PW 1 testified that the police officer told them to go away while they remained with the deceased who was bleeding heavily. PW 1 and PW 6 managed to drive away from the area and seek medical attention. He attempted to go back to the scene to try and rescue the deceased but was blocked from going to the area by police officers. He was informed later that the deceased had passed away. PW 3 was later called to Ahero Police Station to attend an identification parade on 6th November 2013, he identified A2 whom he referred to as *Brown* and on 12th January 2014, he also attended another parade where he identified A1 whom he referred to as *Ruto*.

5. The deceased's wife, Doris Awino Abira (PW 6), testified that on that day, the deceased left her to go and assist PW 3. Later on, she received a call informing her that her husband had died. She proceeded to the scene and thereafter went to the hospital where the body of the deceased had been taken. Photographs of the body of the deceased were taken on 14th October 2013 by a crime scene officer, Pildash Biwott and produced in court by Corporal Antony Agesa (PW 7). Benson Odhiambo Odero (PW 5) identified the body of the deceased on 15th October 2013 before a post-mortem was carried out.

6. The deceased's brother, Albert Abiri Awour (PW 4), testified how he went to assist PW 3 with the deceased after receiving the distress call. They proceeded to Chepsweta Police Post where they found PW 3 and then proceeded to where PW 3's vehicle was accompanied by police officers. After removing the vehicle from the mud, the Commanding Officer who was accompanied by other officers beckoned them to come. He recalled that after they had discussed the matter with the police, they were attacked by a group of about 50 people who emerged from a sugarcane plantation and attacked them with crude weapons. He identified A2 and A4 as some of the attackers who were armed with bows and arrows. He was hit with stones and witnessed the deceased and PW 3 being shot by arrows. PW 4 was asked to attend an identification parade on 6th November 2013 where he identified A4.

7. The deceased's driver, Jackson Okello Agai (PW 6), recounted picking PW 1 and PW 4 on their way to the scene where PW 3 had been attacked. Although he could not identify the attackers from the distance he was, he stated that he saw people attacking them with stones, sticks, bows and arrows, which attack led to the death of the deceased.

8. PW 8, who was at the material time the Commanding Officer of Chemelil Police Post, testified that on 14th October, 2013, he was asked by the area Division Commander to investigate a matter of alleged trespass at Chepkejei Village. On arrival there, he found a gang of about 100 young men armed with bows, arrows, spears and 'rungus'. As he had been in the area for the 3 years prior to the incident, he recognized one of the accused, *Julius Kipkoge alias Brown*. While there he called PW 3 to come and show him where the incident took place. As he was with PW 3 and the deceased, the crowd started moving towards them chanting war songs causing PW 3 and the deceased to retreat towards their vehicle. He recalled that it was another group that was hiding in the sugarcane that attacked PW 3 and the deceased. He recalled that because he was very close, he saw *Julius Kipkoge alias Brown* shooting two arrows at the deceased. When PW 8 realized that the deceased had been struck, he dispersed the crowd by firing gunshots in the air.

9. Chief Inspector Gusto Peter Katiku (PW 9) testified that he conducted an identification parade where the accused were identified by the prosecution witnesses. He testified that A 1 refused to take part in the identification parade. PC Maundo Charles (PW 11) testified that he was instructed by PW 8 to arrest A2. He arrested him from his house. AP Corporal James Kipkemei (PW 13) was directed by the Division Commander to arrest A1, A3 and A4. When investigations were concluded, the accused were charged with the offence of the murder of the deceased.

10. In their sworn testimony, the accused denied that they were at the scene on the material day and that they had ever heard or visited Chepkejei Village. A1 recalled that on the material day, he was in the company of his neighbor Robert Kiprof and his wife and other people cultivating and weeding in a neighbour's sugarcane farm. They worked at the farm until 6.00pm after which he went home. He later on went to meet one Robert Kiprof (DW 6) until 9.00pm. On their part, A2 and A3 testified that on that day they worked together in the *shamba* of their neighbor, one Wilbon Kiptoo (DW 5), from 6.00am to 7.00pm. A4 testified that on the material day, he was attending his aunt's funeral service the whole day. A4's father, David Kipruto Jumba (DW 6) testified that A4 was at the funeral on that day.

11. Counsel for the accused filed written submissions in which he faulted the prosecution case, pointing out that the prosecution had not done proper identification of the accused. He contended that none of the witnesses gave a description of the accused, and did not participate in their arrest. The accused also faulted the identification parades that were carried out for the reason that the law was not complied with and that they were therefore unreliable.

12. In order to establish the offence of murder as prescribed under **section 203** of the *Penal Code*, the prosecution must establish the following four ingredients: the fact of the death of the deceased, 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 persons and proof that the said unlawful act or omission was committed with malice aforethought.

13. The fact of the death of the deceased is not in dispute. The evidence of PW 1, PW 2, PW 3, PW 4, PW 6 and PW 8 is consistent that the deceased was one of the people who had responded to a call for help by PW 1 when they were attacked by a group of people who were armed. While the question of the cause of death has not been raised, it is incumbent on the prosecution to prove the fact and cause of death. In this case, the prosecution did not produce the post-mortem report to ascertain the cause of death. Absence of a post-mortem showing the cause of death of a person does not of itself vitiate the prosecution case. In *Ndungu v Republic [1985] KLR 492*, the court observed that:

Of course there are cases for example where the deceased was stabbed through the heart or where the head is crushed, where the case of the death is so obvious that the absence of a post mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting

evidence of the case [sic] of the death in the circumstances relied on by the prosecution.

14. In this case, the evidence of the prosecution is that the deceased died after being struck with arrows. The deceased had gone to assist PW 1 and PW 3 who had been ambushed by the assailants. He had responded to the call by PW 6 and together with PW 1 they had sought support from the police with PW 4. It is when they went back that they were ambushed and the deceased was struck with arrows. PW 1 testified that the deceased was shot with arrows on the face near the jaw, the left side of the stomach and the back. He stated that he removed 3 arrows from the deceased. These arrows were identified and produced in evidence. It appears that the deceased died at the scene since according to PW 1, PW 3 was taken to hospital while the body of the deceased was taken to the mortuary and positively identified by PW 5 at the hospital before the post mortem was done. In this case therefore, the absence of a post-mortem report was not fatal to the prosecution case and I find that the fact and cause of death of the deceased sufficiently proved and that the deceased died as a result of injuries inflicted by the arrows.

15. The resolution of this case turns on the issue of identification, whether the accused were properly identified as part of the group of persons who assaulted the deceased thereby causing his death. The prosecution in proving its case largely relied on the evidence of recognition. It also called in aid evidence of identification parades to lend credence to the visual identification of the accused made by the prosecution witnesses. Although the incident took place during the day, in the late afternoon and early evening, the circumstances of the case involving a large number of people calls for caution in order to avoid the dangers of mistaken identity. The following dictum of the Court of Appeal in **Wamunga v Republic [1989] KLR 426** is no less apposite in this case:

It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

16. In order that I proceed with this delicate task, I will outline the critical testimony from the identifying witnesses. The testimony of PW 1 was that he saw many people and at the identification parade, he identified A4 who he described as tall and brown and one of those who shot an arrow. In cross-examination, he stated that he did not say or record in his statement that he saw someone shooting an arrow or that identified any person who shot an arrow. He also admitted that he did not know any of the assailants. At the identification parade he identified A4.

17. PW 3 was the key identification witness who stated that he recognised A1 and A2 as being among the people who accosted him when he arrived at his farm. He also identified A1 and A3 as among the people who surrounded and assaulted him before he proceeded to the police post. After leaving the police post, he identified A1, A2, A3 and A4 as part of the group that surrounded them. He referred to A2 as *Brown*. He stated that all the accused attacked them with bows and arrows. At the identification parade of 6th November 2013, he identified A2 as *Brown* and on 12th January 2014, he identified A1 as *Ruto*. In cross-examination, PW 3 admitted that he did not mention any of the accused's name in the statement or even state that he could identify them if he saw them. He stated that he mentioned their names after the identification parade.

18. PW 4, who accompanied the deceased to rescue PW 3, met the group of assailants as they proceeded to the scene after leaving the police post. When they were attacked as they proceeded to their vehicle after meeting the Commanding Officer, he stated he was able to identify A2 and A4. At the identification parade held on 6th November 2013, he identified A4. In cross-examination, he admitted that in his statement, he did not say that he knew any of the assailants or that he could identify them if he saw them. He also admitted that he had seen the assailants before.

19. PW 8 stated that he was able to identify A4 positively as he knew him from the area. He also stated that he had been to A4's home several times to look for him. When the investigation diary for 14th October 2013 was put to him in cross-examination, he stated that he only mentioned two names as part of the gang but did not mention A4. He also did not record the fact that he had gone to look for A4 who is a person he had clearly identified and seen shooting the deceased with an arrow.

20. PW 9 conducted the first parade with four witnesses: PW 1, PW 3, PW 4 and PW 6. They all identified A4. During the parade conducted on 12th January 2014 with PW 1, PW3 and PW6, PW 3 identified A3 but PW 1 and PW 6 were unable to identify him. Another parade was scheduled for the 1st accused with three witnesses but he declined to participate. A fourth parade was conducted with one witness, PW 6, but he was unable to identify the suspect.

21. The testimony of the witnesses must now be considered alongside the identification established by the identification parade. It has been stated in several decisions of our superior courts that the purpose of an identification parade is to give an opportunity to a witness under controlled and fair conditions to pick out people he is able to identify and for a proper record to be made of that event to remove possible later confusion (see **Samuel Kilonzo Musau v Republic NRB CA Crim. App. No. 153 of 2013 [2014] eKLR** and **Kinyanjui and Others v Republic [1989] KLR 60**). The utility of an identification parade is enhanced by the fact the witness had given a description of the assailant beforehand although our courts have also recognised that there may be circumstance where a witness may be able to identify an assailant without necessarily giving prior description (see **Nathan Kamau Mugwe v Republic NRB CA Crim. App. No. 63 of 2008 [2009] eKLR**). All these factors go towards assessing weighing the evidence of identification in order to determine whether the identification is free from error.

22. Considering the entirety of the evidence in light of this principle, I must first discount the identification of A4 by PW 6. PW 6 participated in all the parades but only identified A4. In his testimony he was clear that he did not identify any of the assailants and when he was called for the identification parade on 6th November 2013 he could not identify anyone. It is not clear therefore why he was able to identify A4 in the parade when he did not know or describe him earlier.

23. PW 1 also identified A4 at the identification parade yet he did not know him previously. The critical part of his testimony was that he

saw A4, a tall and brown man, as one of those who shot an arrow yet in his previous statement he did not say anything about any shooting the deceased with an arrow which is a critical piece of evidence. Likewise, PW 4 took part in one parade in respect of A4. He admitted that he did not know A2 or A4 or even give a description of them in his statement or say that he could identify an assailant if he saw him. For all intents and purposes the identification of A2 and A4 by PW 1 and PW 4 was dock identification.

24. PW 3 participated in three identification parades and identified A3 and A4. It is worth noting that he stated that he knew the accused as casual labourers in the area. Obviously, an identification parade would have been worthless if he knew them. However, in the identification parade of 6th November 2013, PW 3 identified A2 as *Brown* but a reading of the identification parade form shows that the parade was in respect of A4 who was the person identified as *Brown*. He also took part in an identification parade 12th January 2014 where he stated that he identified A1 as *Ruto*. This contradicts the parade form which indicates that A1 declined to participate in the parade. In his testimony, he had mentioned Ruto Peter, Zakayo Kiplagat and Elias Kipkoech thus, reference to the said *Ruto* was an indication of another person other than A1. It is also notable that while PW 3 referred to A2 as *Brown*, it is in fact A4 whose alias is Brown.

25. The evidence of PW 8 was that he knew A4 and saw his shooting the deceased with an arrow twice. Since he was the Commanding Officer, nothing would have been easier than to arrest him at the first opportunity. His testimony is clearly undermined by the fact that he did not record the fact that he went to his home several times to arrest him and his investigation diary only referred to and named two other assailants as part of the gang that attacked the deceased.

26. As I have found, the identification of A1 and A2 by PW 1, PW 3 and PW 4 amounts to dock identification since they were not known to them previously, and neither were they identified in the identification parade. With respect to identification by PW 3, his testimony was contradictory and undermined by the fact that he indicated that he took part in identifying A1 in an identification parade, referring to him by a different name, *Ruto* and yet A1 declined to take part in the parade and on the day that PW3 stated that he identified A1, the identification parade was in fact in respect of A4. He also referred to A2 as *Brown* yet it is A4 who was called Brown.

27. All the evidence of identification I have set out, taken together with the fact that none of the witnesses led the police to the arrest of the accused persons and the circumstances in which the offence was committed, I find the identification of the accused unsafe and insufficient to sustain a conviction. I therefore, find the accused **ELIAS KIPKOECH TUM ALIAS ELLY KIPTUM (A1), ZAKAYO KIPLAGAT TUWEI ALIAS KIPLANGAT ARAP GEORGE (A2), ISAAC KIPKERING RUTO (A3) and PETER KIPKOGHEY ALIAS BROWN (A4)** not guilty of the offence of murder as charged and accordingly acquit them of the murder of **NAAMAN ABIRA**. They are each set free unless otherwise lawfully held under a separate warrant.

SIGNED at KISII

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISUMU this 27th day of September 2018.

F.A.OCHIENG'

JUDGE

Mr R. Onsongo, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.