



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 37 OF 2009**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**SIMEON KIPCHOGE ROTICH.....ACCUSED**

**JUDGMENT**

**1. SIMEON KIPCHOGE ROTICH** faces a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** that on 22<sup>nd</sup> June, 2009 at around 8.00pm at **KAPKOLE** Location in **NANDI SOUTH** within **RIFT VALLEY** province, he murdered **DAVID KIPKURUI KOGO** (Deceased).

He denied the charge and prosecution called a total of 7 witnesses in support of their case.

**2. PRISCAH MAGUT** (PW1) lived in **KIPKUTI** village but in different houses with the accused whom she described as her nephew (being that her husband and the accused's father are brothers). It was her evidence that her nephew (**DAVID KIPKURUI**) who was her sister's son and who lived with her) left the house in the morning of 22.06.2009 for his business as he used to trade in milk. In the evening about 8.00pm as she was preparing supper, she heard screams coming from her neighbour **MARY**'s house who lived 11 metres from her. "Hurry with a lamp somebody has killed Kipkurui."

**3.** PW1 rushed to the scene in company of her son **AMOS** and found **MARY** still screaming while **KIPKURUI** lay down near the door to **MARY**'s kitchen. They had carried a lantern and noticed that the deceased's neck had been cut and he was bleeding profusely. They covered the deceased using a blanket and rushed him to **KAPKULE** dispensary. She learnt the next day that **KIPKURUI** had died.

**4.** On cross examination she confirmed that it was a dark night and she did not see the accused cutting the deceased."

On re-examination she stated:

***"I know or suspect it is the accused who killed KIPKURUI because on the material day he was drunk and (heard him threaten to kill Kipkurui if he did not pay him his money."***

**5. MARY LAGAT** (PW6) was inside her kitchen with her young children on the said date when she heard a person screaming:-

"Grandmother help me." She did not recognize the voice, but rushed out of the house. It was dark and she did not see anything. She found someone who identified himself as **KIPKURUI** and he told her that **SAMUEL KIPCHOGE** had cut him. On cross examination she stated, it was dark and she did not see the accused that night nor could she tell whether it was the accused who had injured the deceased. The deceased just said Samuel Kipchoge had cut him but PW6 could not verify that information.

**6. WILSON KIPCHOGE** (PW5) was inside a kiosk within **KIPKUTI** village on 22.4.2009 when at about 8.00pm when he heard screams coming from the direction of his house. He rushed towards the direction of the screams to see what was happening and found a crowd of people gathered. On close scrutiny he saw **DAVID KIPKURUI** lying down outside **MARY**'s house from a cut wound on his neck.

The deceased was not speaking, so PW5 and others got a vehicle which rushed **KIPKURUI** to hospital but he succumbed.

**7. CHARLES BOR** (PW2) the retired chief of **KAPKOLE** Location heard noise about ½km away from his house on 23.06.2009 at about 7.30am. He proceeded to the place the noise was emanating from and found people gathered in a group. Upon inquiring he learnt that one **DAVID KIPKURUI** had been murdered the previous evening. The people appeared agitated so PW2 relayed the

information to the Area Chief, one **FESTUS KITUR** the chief (PW3) confirmed receiving the information, and proceeding to the deceased's home where mourners gave him the name **SIMEON KIPCHOGE ROTICH** as the person suspected to have murdered the deceased. He eventually learnt from **KOBUJOY** Police station that the suspect had surrendered to the police station the previous day on a similar report. When the suspect was removed from the cells, PW3 confirmed he was the same person who had been mentioned to him.

8. The accused led the chief and police to the scene which was inside **MARY's** compound to look for the murder weapon but as they approached, the people who were gathered there became wild and wanted to attack him, so they retreated.

9. **WILSON Arap KEMEI** (PW4) and **WESLEY KIPCHOGE** (PW5) who live within the neighbourhood were part of the team who arranged for a motor vehicle to rush the deceased to hospital, although PW4 noted that as they were placing the deceased into the motor vehicle, he had already died, and that he had a deep cut on the neck.

10. On cross examination PW4 confirmed that the accused and deceased were his neighbours but he was not aware of any strained relations between them.

11. PW5 on the other hand upon cross examination stated:

*“Before that date I had heard the accused at the dock Simeon Kipchoge Rotich saying that he was going to kill Kipkurui. This was about two weeks prior to the material date. There was a difference between them concerning sale of a cow by the deceased to the accused but I am not sure about it. I heard accused just saying aloud that he was going to kill Kipkurui.”*

12. On cross examination he stated that the accused had even reported to the Assistant Chief that the accused was planning to kill him over some money related to sale of a cow.

13. A post mortem was conducted on the body of the deceased and Doctor **OTIENO AYANGA KENNEDY** (PW7) who presented the post mortem report on behalf of Doctor **KAZIMOTO** told the court that the deceased had a deep cut wound on the left side of the neck and involved the major vessels in the neck area. There was also a superficial cut wound on the right mid fore arm. The cause of death was hypovolemic shock secondary to severe bleeding following deep cut wounds.

14. In his sworn defence, the accused stated that on 22.06.2009 he left his home very early in the morning for **CHEMASE** area which is at the border of **NANDI** and **NYANZA**, to buy and sell cattle. He returned home, had his meal and went to sleep because he was exhausted. The next day in the morning, he had an order for cattle to be delivered at another market known as **KIPKORING**, and he left his Home, then on his way back, he heard screams and as he got near his home, he noticed that his houses were on fire, and rushed there.

15. However on his way, he met a lady whose name he cannot recall, and who told him:

*“Do not get to your home, try and save your life tension is high.”*

So he rushed to the police station to report the arson – instead he was detained, and eventually charged in court with the murder of the deceased.

The accused confirmed to this court that he knew the deceased as he was a broker in the cattle trade, and they used to work together. He denied having, any problems with the deceased, saying he did not know how he met his death.

16. On cross examination he confirmed that on 22.06.2009 he returned to his home at 7.30pm. He denied being in the deceased's company on that date whether during the day or at night saying that in any event **MARY** claimed the deceased told him he had been assaulted by **KIPCHOGE wa KIHARA** yet he is **SIMEON KIPCHOGE KIPNGETICH**. It was his evidence that when he saw his houses being burnt, he thought he had perhaps bought a stolen cow and the villagers had learnt about it hence the torching.

17. The accused maintained that to-date, he has never known why police detained him yet he had gone to seek help from them.

18. **MR MITEI** on behalf of the appellant submitted that the prosecution's evidence was basically circumstantial as no one witnessed the killing and none of the witness's evidence placed the accused at the scene.

Counsel poked holes at PW6's credibility saying she referred to **KIPCHOGE wa KIHARA** whom she could not place a finger to. He urged this court to find that the evidence was scanty and the investigation failed to testify in court so as to shed light on some issues. Further, that even the alleged murder weapon was not linked to the accused.

19. Miss **ODUOR** on behalf of the State, made no submissions.

20. Indeed no one witnessed how the deceased met his death, nor was evidence adduced to prove that the purported/alleged murder weapon belonged to the accused.

The prosecution's case is pregeed to the alleged dying declaration made to PW6 that he had been assaulted by one **SAMUEL**

**KIPCHOGE.** Further is the claims by PW1 and PW5 who claimed that at some point in his life, the accused had threatened to kill the deceased over some money/cattle issue.

21. Although both accused and his counsel say **MARY** made reference to **KIPCHOGE** wa **KIHARA**, that detail is not included in PW6's evidence.

Although PW1 and PW5 claim to have heard accused vowing that he would kill the deceased, it is not disclosed what these utterances were made, what time were they made – why was the accused in relation to the moot when he made the declaration.

Indeed there are far too many gaps left so that it would be unsafe to rely on the circumstantial evidence presented.

22. Accused is said to have gone and surrendered himself at the police station on account of deceased's death – yet no evidence was presented to confirm that, and it remains moot whether accused surrendered to police or whether he was arrested when he went to make a report that his home had been set ablaze.

23. I am consequently in agreement with defence counsel and I hold and find that the evidence presented is too weak to sustain the charge and I return a finding of **Not Guilty** contrary to **Section 306 (1)** of the **Criminal Procedure Code**.

The accused shall be set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at ELDORET this 26th day of September 2018.**

**H. A. OMONDI**

**JUDGE**