



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NUMBER 12 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DAUDI MNANGAT NGIRO.....ACCUSED**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. The accused person herein, Daudi Mnangat Ngiro is charged with *murder contrary to section 203 as read with section 204 of the Penal Code*, the particulars of the offence being that on the 1<sup>st</sup> day of November 2017 at KISHAUNET Location in West Pokot Sub-County within West Pokot County, he murdered TUKEI NAPETOT. The accused person appeared for plea on 7<sup>th</sup> November 2017 and denied committing the offence. The prosecution called 8 witnesses in support of the charge against the accused person.

2. The case for the prosecution is that between 7.00am – 8.00am on 1<sup>st</sup> November 2017, the deceased herein was seated outside his house under a tree while some of his children, Enock Kibet, PW1(Enock), Boniface Kiptum, PW2 (Boniface), Grace Chemutai Tukei, PW5 (Grace) and Irene Chepkopus Tukei, PW7 (Irene) were inside the house. While the boys were in the main house, the girls were in the kitchen preparing the morning meal. The accused person who was a neighbour entered the deceased's homestead and went to where the deceased was and engaged the deceased in some brief conversation. The accused person was well known to the deceased's family.

3. The accused person then suddenly attacked the deceased hitting him on the head with a club. The accused person ran away from the scene leaving the deceased writhing in pain and bleeding from the head. Boniface tried to run after him but he (Boniface) fell down. Thereafter many people gathered at the deceased's home before the body was removed to Kapenguria County Referral Hospital Mortuary. Boniface accompanied the deceased's body. None of the family members were aware of any grudge between the deceased and the accused person.

4. According to Jackson Kemei, PW3 (Jackson) he met with the accused person on the fateful morning when the accused person told him that he was out on a mission to beat up one Emmanuel Kapcholo with whom he (accused person) had quarrelled the previous day. Though Jackson tried to dissuade the accused person from carrying out his threat, he still walked on towards what Jackson thought Kapcholo's home, leaving Jackson at the river. While Jackson was still at the river where the accused person had left him, he (Jackson) heard screams from his father's homestead. Jackson is a son to the deceased. Jackson dismissed the suggestion that the accused person and the deceased had quarrelled.

5. Dr. Jotham Mukhola, PW6 (Dr. Mukhola) conducted the post mortem examination on the body of the deceased. This was on 1<sup>st</sup> November 2017 at about 3.30pm at the Kapenguria County Hospital. On external examination, the deceased's clothing was blood stained. The deceased who was about 69 years old was of good nutrition and physique. Dr. Mukhola testified that the deceased had a laceration on the left pinna (left ear) at the sepero posterior aspect and exterior aspects measuring ½cm in length. There was also a cut on the lower and posterior part of the ear, measuring ½cm.

6. On the corresponding part of the head below the ear, there were two lacerations below the other two lacerations with the upper one measuring 1cm in length while the lower one was 3cm in length. There was also another laceration measuring 6cm on the parietal region of the head on the right side.

7. On the nervous system, there was severe left side intracranial haemorrhage. There was also bleeding inside the brain, with the lower part of the brain being pushed through the lower part of the skull.

8. In Dr. Mukhola's opinion, the cause of death was acute intracranial 'haemorrhage due to blunt force trauma.' The dully filled, stamped and signed post mortem report dated 1<sup>st</sup> November 2017 was produced as Pexh. 1.

9. The mental assessment form on the accused person duly filled and signed on 3<sup>rd</sup> November, 2017 was produced as Pexhibit 2. The same showed that the accused person was fit to stand trial. According to Dr. Mukhola, the injuries he saw on the body of the deceased were less than one day old.

10. Number 64353CPL Richard Simiyu of West Pokot County was the investigating officer in this case together with PC Paul Mburu who did not testify. CPL Simiyu testified as PW8. Upon receipt of the information on the incident, CPL Simiyu proceeded to the scene in company of other officers. After visiting the deceased's home CPL Simiyu and his team also visited the accused person's home but did not find him. They then removed the body of the deceased to the Kapenguria County Hospital Mortuary. Later the accused person surrendered himself to the police at Kapenguria Police Station.

11. According to CPL Simiyu, the accused person admitted to having committed the offence using a club which he later threw away, but when a search was conducted at the place the accused person indicated he had thrown it, the club was recovered. The same was produced as Pexh 3. CPL Simiyu attended the post mortem examination which was conducted by Dr. Mukhola of Kapenguria County Referral Hospital on 1<sup>st</sup> November, 2017. The accused person was also taken for mental assessment during which it was confirmed he was fit to stand trial. During cross examination, CPL Simiyu denied a suggestion that the deceased might have fallen. He also reiterated his earlier testimony that the accused person himself told him that he had killed the deceased because he believed deceased was a witch and that he did so using a club, Pexh 3.

### **The Defence Case**

12. At the close of the prosecution case the accused person was found to have a case to answer and put on his defence. He elected to give unsworn evidence. He denied killing the deceased but gave the following account: On the fateful morning he was together with the deceased's son by the name Leo. They walked together to the river but he left Leo at the river as he (accused person) went to the canteen to buy sugar. When he did not find the canteen operator, he walked up to the deceased's gate and exchanged some pleasantries with the deceased. He enquired from the deceased whether he had seen the lady of the canteen but the deceased told him he had not.

13. As the accused person and the deceased conversed, the accused person heard a voice from inside the deceased's house and out came the deceased's two sons who were quarrelling. The elder of the two sons, Tum had a stick and tried to hit his younger brother Enock who had taken cover behind the deceased. Enock then ran towards where the accused person was whereupon the accused person advised Enock to run away.

14. The accused person also went away but when he got home he heard screams from the deceased's home. Shortly thereafter, the deceased's two sons went after him. The two sons of the deceased were armed with a panga and a rungu (club) respectively. They warned him that they would kill him on allegations that he (accused person) had beaten their father. Sensing death, the accused person ran away and went to report the threats on his life to the police at Kapenguria Police Station.

15. When he got to the police station he found the deceased's daughter already at the station and she informed the police that he was the one. He was arrested and subsequently charged with the murder of the deceased. He stated he had no grudge with the deceased. The accused person did not call any witnesses.

### **Submissions**

16. At the close of the defence case, neither the defence nor prosecution made any submissions.

### **Issues for determination**

17. From an analysis of the evidence on record as well as the law the following are the issues for determination:-

- a. Death and cause of death of the deceased
- b. Whether the deceased's death was caused by an unlawful act or omission on the part of the accused person, and if so,
- c. Whether in killing the deceased, the accused person had the necessary malice aforethought.

### **Analysis and Determination**

18. From the testimonies of all the witnesses, both the prosecution and the defence, the alleged attack on the deceased took place between 7.00 and 8.00am on 1<sup>st</sup> November, 2017. It is also a fact that the incident took place at the home of the deceased. The only point of departure between the prosecution's case and the defence case is whether it is the accused person herein who killed the deceased. I now proceed to analyze the issues.

#### **a. Whether the deceased died and what the cause of his death was**

19. All the prosecution witnesses testified that after the attack on the deceased, he died almost instantly. Enock, Boniface, Grace and Irene all told the court that on that fateful morning, the deceased was seated outside his house, when a person walked into the compound and after

exchanging some pleasantries with the deceased, the person hit the deceased three times on the head with a club. The deceased was seen by Grace holding his hand while bleeding from the nose and mouth. Soon thereafter the deceased fell down and died. His body was removed to the Kapenguria County Referral Hospital and on the same date, namely 1<sup>st</sup> November, 2017, a post mortem examination was conducted by Dr. Mukhola of Kapenguria County Referral Hospital. This was after Andrew Lapetot, PW4 (Andrew) a brother to the deceased identified the body to Dr. Mukhola.

20. Dr. Mukhola confirmed that the deceased had indeed died from lacerations and cuts on the left ear at the superior and exterior aspects, and also on the lower and posterior part of the left ear. Dr. Mukhola also testified of two other lacerations on the corresponding part of the head below the other lacerations. There was also another laceration measuring 6cm on the parietal region of the head on the right side. Dr. Mukhola also testified that there was severe left side intracranial haemorrhage with bleeding inside the brain.

21. In Dr. Mukhola's opinion the cause of death was acute intracranial haemorrhage due to blunt force trauma. The post mortem report dated 1<sup>st</sup> November, 2017 was produced as Pexh. 1 in support of the fact and cause of death. There is therefore no doubt that the prosecution has proved both the fact and cause of the deceased's death beyond any reasonable doubt.

**b. Whether the deceased's death was caused by an unlawful act or omission on the part of the accused person.**

22. From the evidence of Enock, Boniface, Grace and Irene, the accused person herein entered their compound and found the deceased seated outside. The two had a conversation and then all hell broke loose. Enock stated that when he heard the conversation going on between his father and the accused person herein, he decided to go outside to see who it was that was talking to his father. When he went outside, he saw the accused person hit the deceased on the head with a club. The accused then chased Enock away, as Grace and Irene screamed.

23. On his part, Boniface stated that as he was gathering his clothes for laundry, he saw the accused person enter their compound. The accused went to where the deceased was sitting under a tree and after some brief conversation, the accused person who was well known to him (Boniface) hit the deceased on the head using a club and then ran away. Although Boniface had talked of a stick instead of a club in the statement to the police he was sure that it was the accused person who hit the deceased on the head with a club after which he (accused) ran away.

24. Irene stated that on 1<sup>st</sup> November, 2017 at about 7.00am, she was in the kitchen when she heard her father talking with someone. She became curious about the person who could have been talking to her father because she had left him alone. On going outside, she saw the accused person talking with the deceased. She had known the accused person for over a year. Irene also stated that after the deceased asked the accused person how they were doing at home the accused person who was armed with a rungu hit the deceased four times on both sides of the head and at the back. On seeing what was happening Irene rushed to assist the deceased who had fallen down, but the accused person chased her away together with Enock, Boniface and Grace. She and her other family members screamed.

25. There is therefore no doubt in my mind that it was the accused person who attacked the deceased on that fateful morning for reasons which CPL Simiyu said were associated with the accused person's belief that the deceased was a witch. I have also carefully compared Irene's description of how and where the accused hit the deceased on the head and I find that her testimony is corroborated by the medical evidence given by Dr. Mukhola as to the injuries sustained by the deceased. I therefore make a finding that the acts of the accused person, of hitting the deceased on the head several times with a club, which acts were completely unprovoked and unlawful are the ones that led to the death of the deceased. I find and hold that the prosecution evidence on this issue is watertight and has not been shaken in any way by the defence given by the accused person who only tried to distort the true events that unfolded on that morning.

**c. Whether in attacking the deceased the accused had malice aforethought**

26. Section 206 of the Penal Code defines malice aforethought in the following terms:-

***206. 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.***

27. From the wording of the above provisions the prosecution needs to prove only one of the circumstances named above to establish malice aforethought. I am satisfied that in the instant case, the prosecution has proved beyond reasonable doubt that the accused person herein acted with malice aforethought. Jackson told the court that on the morning in question, he met with the accused at the home of Limareng, a neighbour, when the accused person told him that he was going to beat up one Emmanuel Kapcholo with whom he had quarrelled the previous day. Jackson tried to dissuade the accused person from beating up his target. The two then walked together from Limareng's home to the river where they parted company. Jackson said the accused was armed with a half arm length club as they parted company. The accused person did not contradict or rebut this piece of evidence by Jackson, who only a short while after parting company with the accused

person, heard screams from their home and on rushing there he found his father the deceased lying on the ground with bleeding from the sides and top of the head. Enock, Boniface, Grace and Irene also all testified to the fact that it was the accused person who hit the deceased on the head with a club.

28. There is therefore no doubt in my mind that on that morning the accused person had formed the intention to cause the death of or to do grievous harm to a person, namely Emmanuel Kapcholio. Although the accused person mentioned Emmanuel Kapcholio his intention was to divert Jackson's attention so that Jackson could not follow him up to deceased's home because his (accused's) mission would have failed. I also find and hold that by arming himself in the manner he did, the accused person intended to commit a felony, namely causing grievous harm or even death to somebody. For the above reasons, I am satisfied that the prosecution has proved beyond reasonable doubt that the accused person herein acted with malice aforethought in killing the deceased.

### **Conclusion**

29. From the above analysis, I find and hold that Daudi Mnangat Ngiro is guilty of murdering Tukei Napetot on 1<sup>st</sup> November, 2017 and I convict him of the offence of murder under **section 322(1) of the Criminal Procedure Code**.

30. It is so ordered.

Judgment delivered, dated and signed in open court at Kapenguria on this 31<sup>st</sup> day of October, 2018.

**RUTH N. SITATI**

**JUDGE**

### **In the Presence of:**

M/S Kiptoo for the state/prosecutor

M/S Bartilol for Changorok for the accused

Juma – Court Assistant

**31.10.2018**

Before me: Ruth N. Sitati, Lady Justice

Court Assistant – Mr. Juma

M/S Kiptoo – present for state

M/S Bartilol holding brief for Mr. Changorok

Accused – present in court

Language – Kiswahili

### **COURT**

Judgment delivered, dated and signed in open court hence at Kapenguria today.

**RUTH N. SITATI**

**JUDGE**

**31.10.2018**

### **MISS KIPTOO**

The accused may be treated as a first offender.

**RUTH N. SITATI**

**JUDGE**

**31.10.2018**

## **MISS BARTILOL IN MITIGATION**

The accused person is remorseful. He has lost a neighbor whom he did not intend to kill. He is a first offender. Accused is married and has 4 minor children. His family depends wholly on him. Accused is the sole breadwinner. We pray for leniency.

## **COURT**

Though the accused is a first offender and has expressed his remorse for this offence, the court finds that as a much younger man than the deceased, he acted irresponsibly. He is informed that every action has consequences and until the Supreme Court judgment in ***Francis Kariokor Muruatetu versus Republic [2017]eKLR***, the only sentence available was one of death. Since the said judgment, this court has discretion to give some other sentence, dependent on the circumstances of each case.

In this regard, and before passing sentence, the court would like to benefit from a pre-sentence report by the Probation Department. It is therefore ordered as follows:-

1. The DR shall immediately call for and avail a pre-sentence report on the accused
2. Mention on 28.11.2018 for sentencing.
3. Accused remanded in custody.

**RUTH N. SITATI**

**JUDGE**

**31.10.2018**

**28.11.2018**

Before me: Ruth N. Sitati, Lady Justice

M/S Kiptoo – present for state

Court Assistant – Mr. Juma

Accused – present in court

M/S Bartilol holding brief for Mr. Changorok

In attendance Mr. Daniel Pseret for J. Maina – Probation Officer

**MISS BARTILOL**

The mention is for sentence.

**RUTH N. SITATI**

**JUDGE**

**28.11.2018**

**MR. PSERET**

The report is ready. We filed it yesterday.

**RUTH N. SITATI**

**JUDGE**

**28.11.2018**

**COURT**

File placed aside to enable defence counsel peruse the probation officer report

**RUTH N. SITATI**

**JUDGE**

**28.11.2018**

**LATER AT 10.45AM SAME DAY**

Coram as before

Appearances as before

**MR. BARTIOL**

I have gone through the pre-sentence report. The court may proceed to pass sentence.

**RUTH N. SITATI**

**JUDGE**

**28.11.2018**

**COURT**

The court has carefully read through the pre-sentence report and notes that the accused killed the deceased in cold blood, on suspicion that the deceased was a witch. The accused and his whole family are not remorseful and are in fact happy that the deceased was killed. The actions of the accused were not only unlawful but they were unconstitutional. The court also notes from the said report that the accused has been a very difficult person from when he was a very young boy. It is also clear from the report that the community is against the accused person being given a non-custodial sentence.

Before the *Francis K. Muruatetu & another versus Republic case [2017]eKLR* by the Supreme Court, the only sentence available for the offence of murder was death. But in view of the Supreme Court decision, this court can mete out any other sentence as it deems appropriate.

Accordingly, I sentence the accused person herein to life imprisonment. Right of appeal within 14 days.

Orders accordingly.

**RUTH N. SITATI**

**JUDGE**

**28.11.2018**