



**REPUBLIC OF KENYA**

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

**HCCR NO. 5 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DAVID KIPLANGAT TONU.....ACCUSED**

**JUDGMENT**

1. On the morning of 24<sup>th</sup> January 2011, the deceased, Edwin Kiprotich Langat, was found lying dead by the roadside near Cheptenye Boys School in Sosiot Township. He had multiple cut wounds on the neck, one on the right side of the neck measuring involving the scalp bones and the great vessels. His right ear was almost severed, and he also had cut wounds on the left side of the neck.

2. The prosecution case was that it was the accused, David Kiplangat Tonui, who had caused the death of the deceased. He had been seen by an eye witness fighting with and then cutting the deceased.

3. The accused was therefore charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information against him charged that on the 24<sup>th</sup> day of January 2011 at Cheptenya Village in Sosiot Township in Kericho within the Rift Valley Province, he murdered Edwin Kiprotich Langat.

4. The case started before Ong'udi J on 6<sup>th</sup> July 2015. 6 witnesses testified before she was transferred to Nairobi. Upon compliance with section 200 of the Criminal Procedure Code, the accused initially elected to have the matter start *de novo*, and the prosecution availed all the witnesses who had testified, However, the accused later changed his mind and decided to start from where the matter had reached.

5. Robert Kipyegon Kones (PW1) was a cook at Cheptenye Boys High School. On 24<sup>th</sup> January 2011, at about 3.00 a.m., he was on duty. He went to the kitchen and found it locked, then went to the gate where he found two watchmen on duty. These were Andrew Tanui and David Tanui. He asked them for the kitchen keys, which David Tanui gave him and he went to the kitchen and started preparing porridge for students. David Tanui later came for the keys, and he gave them to him.

6. At 6.30 a.m., he went to get firewood from the room next to the gate. He met Willy Koskei the watchman, near the gate. He started putting firewood on a wheelbarrow. While he was doing this, a primary school boy came looking for the watchman, and he told the boy that the watchman had gone to switch off the lights. The boy said that there was a man outside the gate who had been cut.

7. PW1 had gone with the boy to the place where the person was. He saw that the person, the deceased in this case, had a cut on the head near the ears. He was lying on his stomach. PW1 had checked him and identified him as one of the watchmen at the school called Kiprotich. He had ran back to the school compound and gone to the house of Erick Chememe and informed him about what he had seen. Chemene had called a fellow teacher and they had gone to the scene. PW1 had then taken firewood to the kitchen. He did not know who had cut the deceased.

8. B K (PW2) aged 15, was a student at *[particulars withheld]*. He had previously been at *[particulars withheld]*. On 24<sup>th</sup> January 2011, as he was going to school at 6.30 a.m., he was walking behind a man whom he did not know. He then saw a person come from Cheptenye Boys, whom he knew as Baba Jeruto. When the man he had been following and Baba Jeruto met, they fought, and then Baba Jeruto cut this other man. When PW2 saw Baba Jeruto cut the other man, he retreated and hid near Cheptenye Primary. When the accused left, PW2 ran and first went to Mercy's (PW5) home and told her about the person who had been cut near the school. He also told her that it was Baba Jeruto who had cut someone, then he went to school.

9. Willy Kipkemoi Koskei (PW3) was a security guard at Cheptenye High School. On 24<sup>th</sup> November 2011, at about 6.00 a.m., he was at the school compound putting off security lights. He was informed by Mr. Bett (PW1) that a person had been killed. He accompanied PW1 to the scene where they found the person who had been killed, who was a person who worked with them at the school. The person had injuries on his head. PW3 and Bett had informed the school administration. They did not know who had killed the deceased.

10. PW3 had relieved the accused at 6.10 a.m., having reported to work at 6.00 a.m., and the accused had gone home. The accused had left before the deceased, who used to report to work at 6.00 a.m., had arrived. PW3 had not heard any commotion outside the gate. He had been informed by PW1 that he had been told by a pupil that someone had been killed at the gate.

11. The Principal of Cheptenye Boys High School, Bernard Kipkorir Orwasa (PW4) was at his house on 24<sup>th</sup> January 2011 at 7.00 a.m. One of the watchmen (Willy, PW3) had called him and informed him that one of the workers at the school had been killed near the school. He had gone to the scene and found the deceased, Edwin Kiprotich, who lay in a pool of blood and was dead. The deceased had worked in the school's sanitary block. PW4 did not know who had killed the deceased, who had deep cuts on the head.

12. Mercy Chepngeno Too (PW5) was at home on 24<sup>th</sup> January 2011 at 7.00 a.m. when her nephew Brian (PW2) had reported to her that he had found Baba Jeruto cutting another person. She had asked him who had been cut and he had said he did not know. She had called a relative at Cheptenye who had said he had not heard anything. She had asked Brian who Baba Jeruto was and from their conversation deduced that he was talking about the accused, David Kiplangat Tanui. She knew the accused well as he was a security guard at Cheptenye Boys.

13. PW6, Daniel Kiplangat Keter, a manual labourer from Cheptenye, was a nephew of the deceased. He had identified the deceased, who had an injury on the neck, at Siloam Mortuary for post mortem.

14. PW7, Dr. Georgina Lasoi, had presented the medical evidence with respect to the death of the deceased. The post mortem report had been prepared by Dr. Chepngetich Risper who had performed the post mortem on the body of the deceased on 29<sup>th</sup> January 2011 at Siloam Hospital. The report indicated that the deceased, who was of the apparent age of 34 years, had multiple cut wounds on the neck. He had a cut wound on the right side of the neck measuring 18x6x4 cm involving the scalp bones and the great vessels. The right ear was dislocated. He also had cut wounds on the left side of the neck. In the cardiovascular system, the heart was normal but empty, meaning that the blood had all flowed out. The doctor formed the opinion that the cause of death was cardio-pulmonary arrest that was secondary to hypovolemic shock caused by the multiple fractures and cut wounds that involved the major blood vessels around the neck. The post mortem report was produced as exhibit 1.

15. PW8, No. 88157 Police Constable James Rina, had been at the report office at Kericho Police Station on 25<sup>th</sup> January 2011. Two people, David Tanui from Cheptenye, Sosiot area and Stanley Rop, from the same place, had gone to the station. They reported that they had come from Cheptenye and that David Tanui had come to surrender himself as he was afraid of being attacked by members of the public. He stated that the members of the public suspected that he had committed a murder in Cheptenye. PW8 had called the OCS and informed him, and the OCS had directed him to place David Tanui in the cells. He identified the person who had surrendered himself as the accused.

16. PW9, No. 81042 PC Constantine Ruto had been based in the investigation department at the Sosiot Police Station in 2011. On 24<sup>th</sup> January 2011, at around 7.00 a.m., he was at the station when the Principal of Cheptenye Boys, Mr. Orwasa came and reported that one of his workers, Edwin Kiprotich had been killed and the body was outside the school gate. He had gone to the scene with the OCS, Inspector Keli. At the scene, they had found the body of the deceased, which had about 3 cut wounds on the neck. They had called scene of crimes officers from Kericho who had come and photographed the body, then they had moved the body to Kericho Siloam Mortuary. A post mortem had been performed on the body of the deceased at the said Mortuary.

17. When placed on his defence, the accused elected to give a sworn statement. He did not call any witnesses. He stated that on the 24<sup>th</sup> of January 2011, he was working as a watchman at a school. He was at the main gate, and worked till 3.00 a.m. Robert Bett (PW1), who was on duty in the kitchen had come to him to collect the kitchen key, and had brought back the key to the accused at around 4.00 a.m. The accused remained on duty till 6.05 a.m. when his colleague, Willy Kosgei (PW2) took over.

18. The accused had been on duty that night with Andrew Tanui, who was guarding the classrooms and dormitories while the accused was on duty at the gate. The said Andrew Tanui had left work before him, and the accused had left at 6.

19. The accused stated that he had a business selling vegetables. He had spoken to the person who supplied him with the vegetables and he had been informed that the vegetables had been taken to the canteen where they were usually sent.

20. While in a vehicle to Kapsoit, he received a call from the vegetable supplier, one Phillip Kimutai Sang, telling him not to go to the canteen as there was a large crowd of people looking for Tanui. The said Sang told him that someone had been killed on the road to Cheptenye High School and that the people were mentioning a Tanui but they were not clear whether it was David Tanui, and he told him to hide first as the people were looking for a Tanui. The accused therefore decided not to go to Sosiot where the people were looking for him but to report at Kericho Police Station, which he did. He was arrested and charged with the offence he now faces.

21. The accused confirmed that he knew the deceased as they used to work together. The deceased was a cook and later a janitor. They were friends, and there was no grudge between him and the deceased.

22. He confirmed in cross-examination that he was known as 'Baba Jeruto', and Jeruto was his last born child. PW3 (Willy Kosgei) was his colleague, and had relieved him of his night duty. He also knew the deceased, a cleaner at the school. He was also aware of a school known as [*particulars withheld*] which was about 1 ½ km from Cheptenye Boys. It had been operating at the time the events in this case took place but had since closed.

23. The accused confirmed that he had surrendered himself at the Kericho Police Station. He had gone there with his nephew Stanley Rop. He also confirmed that he knew Mercy Chepngeno Too (PW5), whose sister was married to his brother and who lived near [*particulars withheld*].

24. Before I begin the analysis of the evidence, I must observe that there is some discrepancy in the name in the charge sheet, Tonui, and the name by which all the witnesses and the accused use in reference to him, Tanui. No objection was taken to the use of the name in the charge sheet, and no injustice, in my view, has resulted to the accused.

25. The accused faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The prosecution alleges that he did, with malice aforethought, cause the death of the deceased. The question before me is whether the evidence presented by the prosecution meets the requirements of proof of the guilt of the accused beyond reasonable doubt that the prosecution needs to establish in order to obtain a conviction against the accused.

26. The evidence of Dr. Lasoi who presented the post mortem report was that the cause of death was cardio-pulmonary arrest secondary to hypovolemic shock caused by the multiple fractures and cut wounds that involved the major blood vessels around the neck. There is thus no dispute about the death of the deceased.

27. The question is who caused the death of the deceased, and whether he did so with malice aforethought.

28. There is only one eye witness to the events leading to the death of the deceased. This was PW2, then a 15 year old boy who was going to school at [particulars withheld] on the material day at around 6.00 a.m. He had been walking behind one man, who had met with and started fighting with the accused, whom PW2 referred to as Baba Jeruto. He had seen one of the men, whom he knew as Baba Jeruto, cut the other man with a panga. He had recognised the person whom he had seen cut the other with a panga as 'Baba Jeruto'. The accused confirmed that he was known as 'Baba Jeruto', and had a daughter known as Jeruto. PW2 had hidden himself when he saw 'Baba Jeruto' cutting the deceased, then had ran to his aunt's home and told her about it. Mercy Chepngeno (PW5) confirmed that indeed PW2 had gone to her house and told her what he had seen. He had referred to 'Baba Jeruto', and she had deduced from their conversation that he meant the accused.

29. PW2 had also gone to the gate of Cheptenye Boys and informed the watchman (PW1), Bett that there was a man outside the school who had been cut. He had gone back with PW1 to the scene, and PW1 had confirmed that indeed the deceased had been cut on the neck and was dead.

30. From the prosecution evidence, it is apparent that none of the other prosecution witnesses had seen the accused attack the deceased. They, however, place him at the scene where the deceased was attacked and killed at about the time PW2 said he saw the two men fighting, and 'Baba Jeruto' cutting the other. The accused had left the school when his shift ended at around 6.00 a.m.

31. The defence argues that the prosecution has failed to prove the charge of murder against the accused person beyond reasonable doubt. Ms. Chelimo pointed out in her submissions that the prosecution had relied on the evidence of only one eye witness who alleged to have seen the accused at the scene of the crime. According to Ms. Chelimo, the evidence of PW2 was quite contradictory and unreliable. She contended that the contradictions could be discerned from the estimations of the distance between PW2 and the accused and the deceased, at one point 20 metres and then 50 metres.

32. Ms. Chelimo further argues that there was contradiction in that the witness said he hid himself, and that it was dark when he saw the accused cut the deceased. Ms. Chelimo further suggests that PW2 was told by police officers to say that he saw the accused cut the deceased.

33. The state's submissions through Mr. Ayodo were that contrary to the defence contention, this was a case of direct evidence where there was a very reliable eye witness. PW2 had stated that on the material day, 24<sup>th</sup> January 2011, between 6 – 6.15 in the morning, he was on his way to school. He was surprised to see someone he knew very well, 'Baba Jeruto' cutting the deceased. He was so terrified that he hid in the bush and saw the accused finish cutting the deceased and ran away. According to the state, the incident took place in the morning and the light was clear as it was daytime. The perpetrator was identified by recognition. Immediately after the accused cut the deceased and ran away, PW2 went to the house of PW5, his aunt, whose house was on his way to school, and informed her what he had seen. The state's position is that the prosecution evidence has established the offence of murder against the accused and he should be found guilty as charged.

34. I have considered the prosecution evidence on record, as well as the sworn statement of the accused in his defence. I have also considered the authorities relied on by the defence with regard to the question of recognition of the accused.

35. It is correct, as submitted by Ms. Chelimo, that the only eye witness in this case was Brian, PW2. He had seen the accused cut the deceased at around 6-00 a.m.-6.15 a.m. while on his way to school. He had recognised him, for he knew him as Baba Jeruto, and according to PW5, who is his aunt and whose sister was married to the accused's brother, Brian and the accused lived in the same compound. Brian had immediately told his aunt about the incident and the perpetrator of the offence. He had also told PW1.

36. Courts in this jurisdiction have held in many decisions that a court can convict even where the only evidence against an accused person is evidence of identification or recognition by a single witness. However, in doing so, it must examine the evidence carefully, and the court should be satisfied that the conditions were favourable for recognition or identification, and free from the possibility of error. This was the position taken in the case of **Wamunga vs R (1989) KLR 424 (CA)** cited by the defence counsel in this case.

37. In its decision in *John Muriithi Nyagah vs Republic* [2014] eKLR, the Court of Appeal said as follows with respect to recognition:

***“26. It is acceptable in law that evidence of recognition is stronger than of identification because recognition of someone known to one is more reliable than identification of a stranger. But in *Wanjohi & 2 Others v. Republic* [1989] KLR 415, this Court held that “recognition is stronger than identification but an honest recognition may yet be mistaken.”***

***27. In the well-known case of *R v. Turnbull and Others* [1976] 3 All ER. 549 which has been referred to many times with approval and adopted by this Court, the Court of Appeal, Criminal Division, in England, warned of specific weaknesses which***

*had appeared in the evidence of identification. In that case, the appellants were jointly convicted after a retrial, of conspiracy to burgle and were both sentenced to three years imprisonment. They disputed the evidence of identification and appealed against conviction and sentence. In his judgment, Lord Widgery. CJ, pointed out*

*“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made...*

*All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger.”*

38. In **Gerald Wathiu Kiragu vs Republic [2016] eKLR** the court expressed the following view:

*“I am aware the identification or recognition of a suspect is an aspect of evidence that the court must consider carefully before coming to any conclusion and in particular consider whether the conditions of identification or recognition were favorable. This point is emphasised in **Wamunga versus Republic (1989) KLR424** where the Court of Appeal, held at page 426 that:-*

*“...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 favorable and free from possibility of error before it can safely make it the basis of a conviction.”*

39. Similarly, in **Republic vs C O S & another [2017] eKLR**, the court relied on the decision in **Wamunga vs Republic** cited above to express the duty of the court in a case where the evidence against an accused person is based on recognition as follows:

*“This Court is under a legal duty to weigh the evidence of PW2 who is the only identifying witness with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such evidence on recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested.”*

40. In this case, PW2, B K, had been on the way to school at about 6.00-6.30 a.m. He had been walking behind someone. He had then seen the accused, whom he knew as Baba Jeruto, coming out of Cheptenye Boys. Baba Jeruto and the man whom B had been walking behind had fought, and then Baba Jeruto had cut the man. B had told his aunt, Mercy Chepngeno, about the incident before going to school.

41. The question is whether this evidence of recognition by PW2 is safe and is sufficient to base a conviction on, his being the only evidence that links the accused with the death of the deceased.

42. The murder of the deceased in this case took place in the morning of 24<sup>th</sup> January 2011. The accused had left duty, and was seen to leave by his colleagues. He was seen by PW2 coming out of the school, getting into a fight and then cutting the deceased, whom PW2 did not know. The act of cutting the deceased so terrified the young boy that he first hid, then when the accused went away, emerged from his hiding place and went to tell his aunt, PW5, about the incident. His aunt did not believe him because of his age.

43. From the evidence of PW5, Mercy Chepngeno, her sister, B mother, was married to the accused’s brother. They all lived on the same compound. PW2 knew the accused well. He had seen him come out of the school, meet with the deceased, fight, and then cut the deceased. Quite prudently, PW2 hid when he saw the accused cut the deceased, but reported to an adult immediately thereafter.

44. In my view, the accused was properly recognised by PW2 as the person who cut the deceased. Though Ms. Chelimo challenged the evidence of recognition on the basis that there was some discrepancy on the distance from where the accused was to where PW2 was hiding, I am satisfied that from a distance of 20 or 30 metres, or even 50 metres, it was possible for PW2 to see and recognise someone that he knew well. There was no suggestion that the accused had a grudge with the family of PW2, and no reason was advanced that would colour the evidence of PW2 and make it unreliable. I am therefore satisfied that the prosecution has established that the accused was recognised by PW2, and has proved that it is the accused who cut the deceased on the morning of 24<sup>th</sup> January 2011, as a result of which he met his death.

45. What of the defence of the accused that he had heard while on his way to Kapsoit that people were looking for a Tanui, and that it was not clear whether they were looking for him, or an Andrew Tanui? The evidence of PW2, as I have stated above, was clear that he had seen the accused, Baba Jeruto, fight with and cut the deceased. He was not in doubt about the person he had seen. While there were two security guards at Cheptenye Boys known as Tanui, only one, the accused, had been seen in a confrontation with the deceased that led to the deceased’s death.

46. The final question to consider is whether the accused caused the death of the deceased with malice aforethought as defined in section 206 of the Penal Code. No evidence was led with respect to what the accused used to cut the deceased. However, the post mortem report indicated that the deceased had multiple cut wounds on the neck, involving the bone and blood vessels. It appears that his right ear was severed or nearly severed. He had bled entirely, so that his heart had no blood. The person who wielded the weapon that caused these injuries had no intention that the deceased should live. He had malice aforethought.

47. Having found that the accused was recognised as the person who cut the deceased, and that he had malice aforethought, given the nature of the injuries sustained by the deceased, the court is left with only one conclusion. This is that the accused did, with malice aforethought, cause the death of the deceased.

48. I therefore proceed to convict the accused, David Kiplangat Tanui, of the offence of murder contrary to section 203 as read with section

204 of the Penal Code.

**Dated Delivered and Signed at Kericho this 24<sup>th</sup> day of October 2018**

**MUMBI NGUGI**

**JUDGE**