



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

HIGH COURT CRIMINAL NO. 26 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ELIJAH CHEPKWONY KIBET.....ACCUSED

JUDGMENT

1. Elijah Kibet Chepkwony, the accused in this matter, faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 16th day of June 2013 at Makitem village in Bureti District within Kericho County, he murdered Gilbert Kipngeno Bett.

2. The prosecution case was presented through the evidence of 8 witnesses. The trial commenced before Justice Ong'udi, who took the evidence of 5 witnesses. When I took over the conduct of the matter, the accused, through his Counsel, Mr. Ngeno, initially asked for the matter to start *de novo*. He then elected to recall three witnesses, PW1, PW2 and PW3. However, when the state availed these witnesses, the accused personally informed the court that he had not understood his Advocate's request that the matter starts afresh, and that he wished to have the case proceed from where it had reached. I therefore took the evidence of the remaining three prosecution witnesses.

3. Reuben Kipkoech Boiyon (PW1) was at home on 16th June 2013 at 4.00 p.m. He then left for the place where the deceased, Gilbert, had bought a shamba. He found that the deceased had just left the shamba and was at Samuel Chepkwony's shamba carrying maize stalks. Samuel Chepkwony was a brother of the accused. The deceased placed the maize stalks down and entered Chepkwony's house to ask for water. PW1 then sat with the deceased on Samuel Chepkwony's farm and talked for about two hours. As he and the deceased were parting, they heard someone slashing stocks (sic). The deceased said he would go to find out who it was, as it was on the boundary. PW1 waited for the deceased, then he saw the accused leave hurriedly while armed with a panga, and the deceased followed him. The accused went to where PW1 stood and the deceased reached him and held him by the shirt collar. PW1 heard the deceased ask the accused why he was destroying the fence, while the accused kept saying "I will cut you."

4. PW1 tried to separate the accused and the deceased, but in vain. One Cosmas (PW4) then arrived and pushed the three of them, PW1, the accused and the deceased, and they fell down.

5. According to PW1, the accused and the deceased rose and started chasing each other. PW1 asked the deceased to leave. As they were speaking, a child came and informed them that the accused was returning while armed. As PW1 turned to run away, he saw the accused 8 metres away from him and the deceased. The accused threw an arrow which passed between PW1 and the deceased, and the deceased ran towards the accused while raising his hands. The accused and the deceased started struggling again, and PW1 tried unsuccessfully to separate them. The deceased was punching the accused continuously on the head, then he stopped and told PW1 "**You know Chepkwony has stabbed me?**" PW1 then saw blood on the deceased's shirt.

6. According to PW1, the accused was armed with a bow and arrows, as well as a slasher. The bow had a string made of skin, while the slasher was short and had a handle wrapped with a black rubber. He identified both the bow and the slasher, which were produced in evidence as exhibit 1 and 2 respectively.

7. In cross-examination, PW1 stated that the confrontation between the deceased and the accused happened on land belonging to Samuel Chepkwony (PW3), a brother of the accused. Samuel Chepkwony had sold land to the deceased. The deceased had gone to find out who was cutting the fence, then PW1 saw the accused and the deceased coming back, the accused being chased by the deceased. At that point, according to PW1, the accused had a slasher only.

8. After struggling with the deceased, the accused had ran to his house, which was 200 metres away, and returned after a few minutes. PW1 stated that he did not see the accused stab the deceased. The accused had shot at the deceased, but the arrow missed its target. PW1 saw blood on the deceased's shirt, and he believed that the deceased had been stabbed. After the deceased was stabbed, PW1 ran off to his home, which was about a kilometre away. He heard screams as he was running away. He confirmed in re-examination that he did not witness the accused stab the deceased, and that the deceased had no weapon.

9. PW2, Wesley Kiplangat Kerich, a watchman at Chemosit estate and resident of Kaninjeiwet, was at home when he heard screams at about 6.30 p.m. on 16th June 2013. He went outside and saw the accused and the deceased struggling. He ran to the scene and saw blood on the shirt of the deceased. They tried to separate the two, and the deceased fell down. The deceased then called PW2 by name, then was quiet. PW2 left the deceased with one Cosmas (PW4) and Reuben (PW1) as he rushed to work. PW2 stated that he saw some arrows at the scene, two arrow blades which had no sticks, and only one had a stick. He identified one blade (arrow) produced in evidence as being like one of those he saw at the scene.

10. His testimony in cross-examination was that he had heard screams from his home, which was about 200 metres from the accused's home. He had found the accused, Reuben (PW1), Cosmas (PW4), and Samuel Chepkwony (PW3). The accused and the deceased were holding each other, and the deceased was already bleeding. The deceased had called his name after he fell down. The accused was arrested by people who had arrived at the scene, while the accused's brother, Samuel Chepkwony, had snatched the arrow from the accused's hand.

11. PW3, Samuel Arap Chepkwony, a brother of the accused, was asleep at his home on 16th June 2013 at 6.00 p.m. when he heard noises outside. He found the accused standing while the deceased was lying down. There were other people at the scene, including Wesley (PW2) and Cosmas (PW4). He also found arrows where the accused was standing. PW3 stated that he took the two arrows and a bow, and went to hide them. He identified the bow and arrows that he had taken from the scene. They had learnt the next day that the bow and arrows belonged to his brother, the accused.

12. PW3 stated in cross-examination that his home was 10 metres from the scene. He had taken the weapons as he did not want them used to kill another person. He had learnt later that the accused had wanted to use the weapons to kill the deceased. One of the arrows at the scene had blood. According to PW3, the accused used the bow and arrows only on Sundays to get animals from the bush.

13. Cosmas Rono (PW4) was in the house of Samuel Chepkwony on 16th June 2013 at 6.00 p.m. He heard noise from someone shouting "leave me, leave me." He identified the voice as that of the accused. When he went outside, he found the deceased holding the accused's shirt. He went to where they were and tried to separate them, but they were too strong for him. Reuben Boiyon (PW1) was also present, trying to separate the accused and the deceased. In the process of trying to separate them, all four, the deceased, the accused, PW1 and PW4 fell down. The accused, who had a panga in his hand, was the first to stand up. He told PW4 to leave so he could cut the deceased, but PW4 told him to leave.

14. The accused ran to his house, and the deceased chased after him but did not reach him, so the deceased returned to where PW4 and Reuben (PW1) were. The deceased then walked towards the accused's house, but PW1 prevailed on him to turn back, and he did. As they were walking back, PW4 heard girls screaming "there he is there he is" and PW4 ran away. A short time later, a person came running saying someone had been injured. He went back to the scene and found PW2 and others holding the deceased, who was lying down and had blood on his shirt.

15. It was his evidence in cross-examination that the accused and the deceased had quarreled over a fence. There was a drinking den nearby, and both the accused and the deceased were drunk. He had been present when the accused and the deceased first fought, but did not witness the second fight.. The accused had a panga in one hand which he brandished, wanting to cut the deceased.

16. David Kurgat, PW5, was the father of the deceased. He was at his home on 16th June 2013 at 6.00 p.m. when he heard screams from the neighbourhood near the accused's house. One of his children, Hellen Chebet, came home and informed him that the deceased had been killed. Hellen and one Festus Rono went to the scene, and Festus returned and confirmed that the deceased had been killed. PW5 sent them to a person who had a vehicle so that the deceased could be assisted, and he was taken to Litein Mission Hospital where they were informed that he had died. They then passed through the police station to report the incident, and while there, PW5 saw the accused arrive.

17. The following day, they had found a bow and 2 arrows, one of which had blood on it. The bow and arrow were recovered from PW3's house and were taken to the police station. PW5 identified the bow and arrows (exhibits 1 and 3) as the ones recovered from PW3's house.

18. PW5 had attended the post mortem of his son, and had identified the body. His son had an injury in the stomach. According to PW5, he and the accused used to live well. The accused had cut the fence of the land that the deceased had bought from Samuel Chepkwony (PW3). PW5 confirmed in cross-examination that he had not witnessed the fight between the deceased and the accused. Prior to that, they had been living well, but the accused had destroyed the fence of the land that the deceased had bought, leaving the land open for cows to pass through.

19. Dr. Gilbert Langat (PW6), a medical officer at the Kericho District Hospital, presented the post mortem report prepared by Dr. Bernard Maritim following the post mortem conducted on the deceased at the AIC Litein Mission Hospital on 17th June 2013. The report indicated that the deceased, aged 35, had severe pallor noted on the membranes and conjunctiva, and the body was whitish as a result of bleeding. He had a deep sharp cut at the left hypochondrium, the upper left part of the abdomen, which extended deep and ruptured the spleen. The cause of death, according to the post mortem report, was massive internal haemorrhage secondary to rupture of the spleen. The cause of the cut was not indicated in the report. The post mortem report was produced as exhibit 4.

20. The investigating officer, No. 78538 PC Felix Wabomba (PW7) received a report of a murder on 16th June 2013 and was instructed by the DCIO to take up the matter. His investigations revealed that the deceased had been on his farm with PW1 (Reuben Boiyon) and had heard something being cut. He had left PW1 and gone to find out what was being cut. An argument had arisen between the deceased and the accused which degenerated into a fight.

21. PW1 had heard the commotion and had gone to intervene. He had tried to separate the accused and the deceased and when they were separated, the accused had gone back to his house and returned while armed with a bow and arrows. He had shot an arrow and missed his target, and the deceased had run towards the accused to try to disarm him. He had, however, been stabbed by the accused in the left abdomen using an arrow. The deceased had been rushed to AIC Litein Hospital where he was pronounced dead, while the accused had presented himself to the police and was arrested.

22. In the morning of the following day, the 17th of June 2013, while PW7 was in the office, the father of the deceased (PW5) had gone to the office and handed over to him a bow, a slasher and two arrows, one of which had blood stains. PW7 had recorded the statements of witnesses, then had proceeded to AIC Litein Hospital for the post mortem on the deceased. He had requested the doctor to lift blood samples of the deceased to be taken to the Government Chemist for analysis as one of the arrows had blood stains. PW7 had also requested for blood samples from the accused and the deceased to be taken for analysis.

23. PW7 had gone back to the station and interrogated the accused, who had a shirt with blood stains. He had sent the sky blue shirt with blood stains to the Government Chemist together with other exhibits included in an exhibit memo. These were the blood samples of the accused and the deceased, the blue shirt belonging to the deceased, and an arrow which had blood stains.

24. The Government Analyst, Henry Kiptoo Sang (PW8), produced a report dated 4th May 2015 relating to the analysis of samples and items received for analysis in connection with this case. They had received on 20th September 2013 an arrow head (marked 'X'); a blue shirt belonging to the accused (marked 'S'); a blood sample of the accused (marked 'A'); and a blood sample of the deceased (marked 'D').

25. His analysis of the items had established that the arrow head was slightly stained with human blood while the shirt was moderately stained with human blood. The DNA profiles generated from the blood stains on the arrow head (item X) matched those from the blood sample marked 'D', that of the deceased. No DNA profile was generated from the shirt, which PW8 attributed to decomposition due to the manner of storage. The report was produced in evidence as exhibit 7.

26. When placed on his defence, the accused elected to give a sworn statement and call no witnesses. He stated that on 16th June 2013, which was a Sunday, he had woken up early in the morning and gone hunting. He had passed by the house of Samuel Chepkwony (PW3) at 8.00 a.m. He used to go to Jamji Estate forest to hunt every Sunday. He had returned from hunting at 6.00 p.m. As he was nearing Samuel Chepkwony's house which is 150 metres from his house, while carrying an arrow, a slasher and a bow, he was held by a Mauritius thorn which was overgrowing the path. He started removing the Mauritius thorn from his clothes and the deceased spotted him and ran towards where he was.

27. The deceased wanted to get hold of the accused, but the accused moved away and the deceased passed. The accused ran to Samuel Chepkwony's house, which was 50 metres away. The deceased, who was his uncle, was not on his land but on Samuel Chepkwony's land. While the accused was outside Samuel Chepkwony's house, the deceased grabbed him, alleging that he had cut the Mauritius thorn. The deceased held his collar and asked why he had cut the Mauritius thorn, then one Boiyon (PW1) came and separated the two and told the deceased that the accused had not cut the thorns. Cosmas Rono also intervened and pushed aside the deceased.

28. After they were separated, the deceased rushed and pulled out a stick and came towards the accused. Cosmas Rono and Boiyon ran in different directions. The accused ran to his home and the deceased followed him and got hold of him and gave him three blows. The accused fell down and many people came and pulled them apart.

29. The accused stated that as they were fighting, he had a bow and arrows in his hands. He did not stab the deceased, but that as they were fighting, they fell down, and he was not sure whether the arrows stabbed the deceased. He did not aim the arrow at him as they had no grudge. He stated that he was seeking forgiveness as it was not his wish to kill the deceased, and it was the deceased who started chasing him.

30. In cross-examination, the accused confirmed that the deceased was a neighbour who had bought land from his brother, Samuel Chepkwony. He denied that he was clearing a live fence belonging to the deceased on the material day, and that he only removed Mauritius thorns. He did not have a quarrel with the deceased over a boundary. He stated that he had a slasher when he first met the deceased, and that he had gone to hunt with bows and arrows, and had these items when he was in a confrontation with the deceased. He did not, however, get to know how the arrow injured the deceased. He denied that he aimed at the deceased as his arrow had no string. He had the arrow in his hand when fighting with the deceased, and does not know whether it was the act of falling that made the arrow pierce the deceased's stomach. The accused confirmed that the bow that was produced in court belonged to him.

31. Learned Counsel for the accused, Mr. Ngeno, submitted at the close of the defence case that the accused had gone hunting, as was his habit. He had a slasher, an arrow and a bow. That the accused also conceded the evidence of PW1, PW2, PW3, and PW4 which gave a picture of two people fighting, and that it was the deceased who started the fight. Mr. Ngeno observed that the evidence of PW4 corroborated the evidence of the accused in his defence that the accused had tried to run away after being separated from the fight with the deceased, but that the deceased followed him using a piece of wood with the intention to hurt the accused.

32. Mr. Ngeno submitted that for a charge of murder to subsist, the elements of murder, *actus reus* and *mens rea* must collide. While the *actus reus* can be implied from the evidence, the *mens rea* had not been shown as the prosecution had not shown a pre-planned intention to murder. His submission was that the prosecution case had not met the threshold for murder, noting that the accused had offered to plead to a lesser offence.

33. The submissions of the state through Learned Prosecution Counsel, Mr. Ayodo, were that the prosecution case was clear. The deceased person had heard his fence being slashed, had gone to check who was slashing the fence, and had found it was the accused. A quarrel had ensued between the accused and the deceased, and the deceased had managed to drive the accused away. The accused went to his house, took his bow and arrows, and went back to attack the deceased. The deceased had ducked and the arrow had missed him and he had tried to disarm the accused. The accused had then stabbed the deceased with the arrow he was intending to aim and shoot at him with.

34. The prosecution submitted that the accused's action of going to his house and taking a weapon which he knew was a killer weapon and going back and aiming at the deceased whom he managed to kill shows his intention. He knew that the weapon would either kill the deceased or cause grievous harm, and this shows the *mens rea*, while the act of stabbing the deceased was the criminal act. The prosecution asked the court to find that it had proved its case against the accused beyond reasonable doubt.

35. Having considered the prosecution case on record, the accused person's sworn statement and the submissions of the parties, I believe that one issue arises for determination. This is whether the accused did, with **malice aforethought**, cause the death of the deceased.

36. This is because the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 of the Penal Code provides as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

37. ‘Malice aforethought’ is defined at section 206 of the Penal Code in the following terms:

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.

38. The deceased died from a stab wound to the stomach caused by an arrow. It is conceded by the defence that the wound was caused by an arrow belonging to the accused. The prosecution case is that the accused deliberately used the arrow to stab the deceased, while the accused states that he was holding the arrow as he fought with the deceased, that he does not know what happened, and that perhaps the deceased was pierced by the arrow in the stomach when he and the accused, in the course of their fight, fell down.

39. An examination of the prosecution evidence shows the following. The deceased had bought land from PW3, a brother of the accused. On the material day, he had been on the land, and had spent time with PW2, Reuben Boiyon. At about 6.00 p.m., they had heard someone cutting the fence on the boundary to the land the deceased had bought, and upon the deceased checking, had found that it was the accused.

40. The evidence of PW1 and PW4 was that the deceased and the accused had fought. The accused had, at that point, a panga, with which he was threatening to slash the deceased. The two had been separated by PW1 and PW4, and the accused had left for his house. The deceased had made as though to follow him, but had been prevailed upon not to by PW1.

41. The evidence of PW1 and PW4 further shows that the accused had gone to his house, then had returned while armed. PW1 had heard girls screaming that the accused was returning while armed with a bow and arrows. He had seen the accused aim an arrow at the deceased, but miss. PW1 had seen the deceased ran towards the accused, arms raised. The two had again started fighting, the deceased beating the accused on the head. He had then stopped, and told PW1 that the accused had stabbed him.

42. This evidence from at least two witnesses shows that contrary to the accused's defence, he did not have his bow and arrows with him at the time he was confronted by the deceased while cutting the deceased's fence. He had only a panga. After the two had been separated by PW1 and PW4, he had gone back to his house and returned with the bow and arrows, with which he shot at the deceased.

43. Perhaps the deceased was trying to disarm him when he got hold of him, but it would appear that the accused used the arrow, which he stated he was holding in his hand, to stab the deceased. While the accused states that perhaps the deceased was pierced by the arrow when the two were fighting and fell down, there is no evidence that during the second fight between the accused and the deceased, the two of them fell down. The evidence of PW1 and PW2 was that the two were on their feet, then the deceased said that the accused had stabbed him and PW1 and PW2 saw blood on his shirt, then the deceased fell down. PW3, the accused's brother, found the accused on his feet, while the deceased was lying down. PW3 took the arrows from his brother, the accused, and hid them, to avoid their being “used to kill another person.”

44. The evidence on record indicates that the accused deliberately went back to his house to get a bow and arrow with which to attack the deceased after the two had been separated by PW1 and PW4. He had clearly formed the intention to kill or cause serious injury to the deceased. Contrary to the submission by Mr. Ngeno that the deceased was armed with a stick, the evidence before the court is that the deceased was not armed, and he therefore did not constitute any threat to the accused. He had already been prevailed upon by PW1 not to follow the accused, and his act of going towards the accused, who was then armed with a bow and arrows, was probably to disarm him.

45. In the circumstances, I am satisfied that the accused did, with malice aforethought, cause the death of the deceased. He had started the conflict by cutting the deceased's fence. While the deceased had held him by the collar, intent on fighting him, the two of them had been separated by their neighbours, PW1 and PW4, who were present. The deceased had been prevailed upon not to follow the deceased to his home. All would have been well had the accused not decided to go and get arms, his bow and arrows, and come back to attack the deceased. Unable to shoot him with the bow and arrows, having aimed and missed, he had used the arrow to stab the deceased when the deceased got close and engaged him in a fight with his fists, thereby causing the death of the deceased.

46. I accordingly find the accused guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code, and I convict him as provided under section 215 of the Penal Code.

Dated Delivered and Signed at Kericho this 23rd day of November 2018

MUMBI NGUGI

JUDGE

In the presence of:

Nelson Kenei- Court Assistant

Ms. Keli- for the Director of Public Prosecutions

Mr. Ngeno-for the accused.