



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 54 OF 2010

REPUBLICPROSECUTOR

VERSUS

JACKSON KIPTUM KIBORACCUSED

JUDGMENT

1. The accused *Jackson Kiptum Kibor* is charged with the offence of Murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*. The particulars thereof allege that on 13th September, 2010 at around 11 p.m at Toror village, Chepsigot location, Keiyo District within the Rift Valley province, the accused murdered *Edwin Kipkorir Kiplagat*.

2. The accused denied having committed the offence as charged. The trial opened before my sister *Hon. Mshila J* on 23rd January, 2012. She heard a total of three witnesses before she went on transfer. This court took over the trial on 9th February 2015. The accused elected under *Section 200 (3)* as read with *Section 201 (2)* of the *Criminal Procedure Code (CPC)* to have the trial continue from where the previous judge had stopped. I then proceeded to hear the remaining three prosecution witnesses and the defence case.

3. It is clear from the foregoing that the prosecution called a total of six witnesses in support of its case. Most of them were relatives of the deceased who did not know the circumstances under which the deceased sustained injuries on the night of 13th September, 2010 which led to his death on the following day. They did not witness the incident in which the injuries were sustained. These were PW1, and PW2, the deceased's brothers and PW3 his mother.

4. PW2 narrated in his evidence that on the morning of 14th September, 2010, he heard screams from the deceased's house and on rushing there, he found the deceased with multiple injuries on the stomach, left side of the chest and on the forehead. The deceased claimed that he had been stabbed by the accused person the previous night when he had gone to collect some omena, tomatoes and fire he had bought and had them kept in the accused's home. He mobilized their neighbours to take the deceased to Iten District Hospital but unfortunately, he died while undergoing treatment.

5. The deceased's death was reported to PW4, the area assistant chief who proceeded to the scene of the crime which was near the accused's house.

Before proceeding to the scene, he called the OCS Tambach police station and the chief's camp and reported the matter.

At the scene, he collected an arrow head while at the accused's house he collected a wet shirt and a full

arrow. The shirt and arrow were produced as exhibit 1 and 2 respectively by the investigating officer PW6 PC *Benard Onditi* who also visited the scene of crime.

6. In his evidence, PW6 recalled that he found the accused herein already under arrest by PW4. He re-arrested him and took him to Tambach police station for further investigations. His investigations revealed that the accused and the deceased were neighbours whose houses were about 100 metres apart; that the deceased and the accused had fought when the deceased went into the accused's house unannounced. In the fight, the deceased sustained the injuries which led to his death. He then organized for a post mortem examination to be performed on the body of the deceased.

7. The post-mortem examination was conducted on 20th September 2010 by PW5 *Dr. Ongeti Connie*. She noted that death had occurred about one week prior to her examination. According to her evidence and the post mortem report which she produced as Exhibit 3, externally, the body had no major injuries except three bruise like marks which were 2 cm superior to the left breast, 1 cm lateral to umbilicus on the right side and on the right side of the head. There were dried blood stains on the anterior chest wall.

Internally, she noted that the lungs had dark coloured blood; the chest muscles were also dark in colour. Everything else was normal.

The doctor formed the opinion that the cause of death was possible poisoning secondary to stab wound by a poisoned arrow.

8. In her evidence on cross examination, PW5 testified that the primary cause of death was poisoning; that any object which was poisonous could have caused the deceased's death not necessarily a poisoned arrow.

9. At the close of the prosecution case, this court determined that the accused had a case to answer and put him on his defence. He elected to give a sworn statement. He did not call any witness.

10. In his sworn statement, the accused testified that he was a neighbour and friend of the deceased; that on 13th September, 2010 at around 11 p.m, he was asleep in his house when somebody broke into his bedroom by pushing the window open. The person refused to identify himself and they started fighting. The man ran out through the window. He took an arrow and gave chase. The man confronted him and they started fighting again. This is when the man who later turned out to be the deceased held him on his private parts. In self defence, he stabbed him with the arrow. He claimed that all along he did not know the person he was fighting with since it was dark. He only got to know it was the deceased when he stabbed him and he identified himself. He then learnt of his death on the following day. It was his evidence that he never intended to kill the deceased.

11. At the close of both the prosecution and the defence case, learned counsel for the accused *Ms Orina* and learned prosecuting counsel *Ms. Mokuu* chose not to make any submissions.

12. I have carefully considered all the evidence adduced in this case in its entirety. The accused faces a charge of murder. It is trite law that in a criminal case, the burden of proof rests on the prosecution to prove the charges preferred against an accused person beyond any reasonable doubt.

13. For the prosecution to prove a charge of murder, it must prove beyond doubt three key ingredients of the offence. These are:-

(a) *The death of the deceased*

(b) *That the death was caused by an unlawful act or omission by the accused person.*

(c) *That when committing the unlawful act or omission, the accused had malice aforethought.*

14. Malice aforethought simply put is the intention or mensrea to kill another person. It is defined in

Section 206 of the Penal Code as follows: -

“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.

15. On my evaluation of all the evidence tendered in this case, I find that the prosecution has managed to prove beyond any doubt that the deceased died on 14th September, 2010 but it has completely failed to prove beyond any reasonable doubt that it is the accused person who caused his death with malice aforethought.

16. My above finding is informed by the fact that none of the witnesses who testified in support of the prosecution case claimed to have witnessed the incident in which the deceased sustained fatal injuries. PW2 and PW3 only found the deceased with some injuries on the morning of 14th September, 2010 and the deceased allegedly told them that it was the accused who had stabbed him with an arrow.

17. The accused in his defence admitted to having stabbed the deceased with an arrow in self defence after he fought with him on the night of 13th September 2010 after the deceased broke into his house. His claim that he never intended to kill the deceased who was his friend and neighbour was not controverted by any evidence to the contrary.

18. Though the accused admitted to having stabbed the deceased in self defence, there is an aspect of this case that I found quite disturbing and which caused me considerable anxiety. This is in respect of PW5's evidence. PW5's evidence and the post mortem report clearly reveals that the primary cause of the deceased's death was poisoning. PW5 did not expound on this finding by stating what kind of poisoning caused the deceased's death. She came up with another secondary cause of death which was a stab wound by a poisoned arrow. But in her evidence, she did not say that she found stab wounds on the body of the deceased. She only found three “bruise-like marks on the body's head, near the left breast and on its right side.

19. A stab wound under normal circumstances is expected to be a deep wound or at least a wound. It cannot be described as a bruise because bruises are normally superficial injuries. I found this to be a major contradiction in the doctor's evidence which went unexplained except on the basis of the fact that she formed her opinion about the secondary cause of death from the history given by the deceased's relatives concerning how the deceased allegedly met his death.

20. My analysis of the evidence adduced in this case leads me to the conclusion that although the accused admitted to have stabbed the deceased in self defence, the prosecution failed to prove beyond any doubt that it is the accused's action which actually caused the deceased's death. I say so because apart from the contradictions in PW5's evidence, the prosecution did not avail any forensic evidence to prove that the arrow recovered from the accused's home or the arrow head found at the scene which must have been used in the attack was as a matter of fact poisoned.

21. According to the accused, he left the deceased outside his house at around 11 p.m. His movements

from around 11 p.m to the morning when he was found by PW2 and PW3 in his house with injuries were not accounted for. In the absence of evidence that the arrow used by the accused was poisoned, a possibility exists that the deceased may have died of poisoning caused by other factors other than the accused's unlawful act.

22. As stated earlier, in criminal cases such as the instant one, the burden is always on the prosecution to prove the preferred charges beyond any reasonable doubt. It is not upto an accused person to prove his innocence.

See; ***Bhatt V Republic [1957] E.A 332 at 334, Abdalla Bin Wendo and another V Republic (1953) EACA 166..*** See also *Section111 of the Evidence Act.*

In this case, I find that there is a lingering doubt whether the deceased's death was caused by the accused's act of stabbing him allegedly in self defence or whether he died of poisoning caused by other unrelated events. The law is that whenever a court finds itself in doubt whether or not an accused person committed the offence as alleged, the court must accord the accused person the benefit of that doubt. Consequently, I will give the accused person the benefit of the doubt aforementioned. I thus enter a finding of not guilty and acquit the accused person accordingly.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 31st day of January 2017

In the presence of:

The Accused,

Mr. Siboe holding brief for Ms. Orina for the accused,

Ms. Mutheu for the Republic,

Mr. Lobolia Court Clerk.