



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 81 OF 2011

REPUBLIC.....STATE

VERSUS

DAVID KIPKOSGEI KOECH.....ACCUSED

JUDGEMENT

The accused **DAVID KIPKOSGEI KOECH** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

“On the 6th day of November, 2011 at Kewangoi Village in Sigoro Sub-location, Koibatek District within Baringo County murdered SHADRACK CHEPSEBA”

The accused pleaded ‘**Not Guilty**’ to the charge and his trial commenced on 31/3/2014 before Hon. Justice Anyara Emukule (Retired). The Honourable Judge heard the evidence of the first four (4) witnesses after which he was transferred to Mombasa High Court. I then took over the trial and heard the remaining three (3) witnesses. A total of seven (7) witnesses testified in this case.

PW1 BRIAN KIPKURUI KOECH was a minor aged 14 years. He told the court that the deceased was his grandfather. On 6/11/2011 the accused (who was a son to the deceased) got involved in an argument with his father **PW1** then says the accused picked up a wooden frame and hit the deceased three times. The deceased fell down. **PW1** shouted for help and ran to hide himself in the shamba.

PW2 LYDIA JEPKEMOI BETT was a daughter in law to the deceased. She told the court that on the material day at about 11.00am the deceased instructed her to milk his cows and to go and sell the milk. **PW2** did as directed. As she was doing her chores she heard deceased quarrelling with the accused who was his son.

Upon her return to the homestead **PW2** found the deceased lying on the ground bleeding from his head.

PW3 FREDICK CHEPSEBA was a neighbour to the deceased. He stated that on 6/11/2011 he heard screams coming from the home of the deceased. He rushed there and found the deceased lying on the ground. The accused was holding a wooden frame. **PW3** joined **PW2** and they tried to rouse the deceased by giving him water to drink. **PW5 CHRISTOPHER CHEPSEBA** a son to the deceased also came to the home. Eventually **PW3** and **PW5** got a vehicle to take the deceased to hospital in Eldama Ravine. However the deceased succumbed to his injuries and died. The matter was reported to police and the accused was arrested and charged. At the close of the prosecution case the accused was found to have a

case to answer and was placed onto his defence. He opted to make an unsworn statement in which he denied having hit the deceased with a wooden frame thereby causing his death.

This court must now analyze the evidence on record to determine whether the charge of murder has been proved beyond reasonable doubt. The offence of murder is defined by Section 203 of the Penal Code Cap 63, Laws of Kenya as follows

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

The prosecution has a duty to prove through evidence the following ingredients of the offence of murder

1. Proof of the fact as well as the cause of death of the deceased
2. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused
3. Proof that said unlawful act or omission was committed with malice aforethought.

In this case the fact of the deceased's death is not in any doubt. **PW1**, **PW2**, **PW3** and **PW5** have all testified that they found the deceased lying on the ground bleeding. **PW3** and **PW5** attended the autopsy and identified the body to the doctor. All these witnesses were relatives of the deceased who knew him very well and they identify him as '**Shadrack Chepseba**'.

PW6 DR. VINCENT MAGERO a medical officer based at the Mercy Mission Hospital in Eldama Ravine testified regarding the cause of death. He told the court that on 14/11/2011 he conducted an autopsy on the body of the deceased. **PW6** stated that he noted bruises on the frontal region of the deceased's head and internally he observed a fractured 7th right side rib as well as blood in the periodontal cavity. **PW6** opined that the cause of death was "**Cardio-respiratory arrest caused by internal bleeding**". The doctor filled and signed the post mortem report which he produced before the court as an exhibit **P.exb 2**.

Having established the fact and cause of death the prosecution is required to go a step further and tender evidence to prove that it was the accused who by some unlawful act or omission cause the death of the deceased.

The only eyewitnesses to the incident was **PW1** the young 14 year old grandson of the deceased. **PW1** testified that on the material date he was at home with the deceased and the accused. **PW1** stated that the deceased was quarrelling with the accused telling the latter not to come to his homestead again and telling accused not to bring '**bhangi**' (cannabis sativa) to his home. The child then states that he saw the accused take up a wooden frame and hit the deceased three times with it. The deceased fell down and **PW1** ran to hide in the shamba.

PW1 though a minor gave clear and concise evidence. He remained unshaken under cross-examination by defence counsel. The incident occurred at 11.00am in broad daylight and visibility was good. **PW1** identified the accused whom he knew very well as his uncle. **PW1** also positively identified the wooden frame which the accused used to hit the deceased. This frame was produced as an exhibit during the trial **Pexb 1**.

The evidence of **PW1** was corroborated by **PW2** who told the court that on the material day as she was going about her chores she heard the boy scream. She rushed to the homestead to check. **PW2** says she found the deceased lying on the ground bleeding from the head and the accused was standing beside him holding a frame made of cypress wood.

Further corroboration is provided by the evidence of **PW4**. This witness told the court that on 6/11/2011 at 11.00am he heard screams from the deceased's home. He rushed to the homestead and found **PW2**

trying to revive the deceased who was lying bleeding on the ground. **PW3** joined in the effort to help revive the deceased by giving him water to drink.

This witness also states that he found the accused standing by holding a piece of wood. Thereafter **PW4** and **PW5** rushed the deceased to hospital where he died whilst undergoing treatment.

Although neither **PW2** nor **PW4** actually witnessed the accused hitting the deceased with the wood, they both testify that upon arrival at the scene they found the deceased lying bleeding on the ground and found the accused standing over him holding a wooden frame. Clearly this was the wooden frame accused had just used to hit his father. Both witnesses identify the wooden frame produced in court as the one which they found the accused holding.

In his defence the accused denies that he hit the deceased. The accused claims that the deceased was drunk and fell to the ground thus injuring himself. Further the accused attempted to challenge the finding by the doctor that the deceased died due to any assault.

On the first aspect of the defence there exists evidence from three (3) prosecution witnesses that it was accused who hit the deceased. All these witnesses place the accused at the scene and confirm having seen him standing over the deceased holding the piece of wood. **PW3 JOHN KIBET** the area chief told the court that it was accused himself who retrieved the wooden frame he had used to hit his father and gave it to **PW3**.

None of these witnesses had a grudge against the accused and none had any reason or motive to tender false evidence against him. I am satisfied that **PW1**, **PW2**, **PW3** and **PW4** were being truthful in their testimony and all remained unshaken under cross examination before court.

Counsel for the accused attempted through her cross-examination of the doctor to cast doubt on the cause of death as stated in the post mortem report. It was suggested that he accused could have died **not** as the result of the assault on his person but due to an infection (illness). However the doctor explained the proximate cause of deceased's death was the fractured 7th right rib which led to laceration of the liver resulting in excessive bleeding. This is consistent with the doctor's finding on the cause of death which was '**cardio respiratory arrestee due to excessive bleeding**'. Therefore even though signs of infection was found in the deceased's body it was **not** the infection that caused his death. I find that the deceased died due to the assault on his person which led to the broken rib. As such I dismiss the accused's defence. I find that the evidence on record proves that it was the accused who assaulted his father (deceased) using the wooden frame and as such caused his death. The actus reus for the offence of murder has been sufficiently proved.

Having proved the '**actus reus**' the prosecution must go further and prove the mens rea for this offence which is '**malice aforethought**'. It must be shown that the accused acted with premeditation and with the intention of killing the deceased.

All the witnesses state that prior to the assault the accused and his father were engaged in an argument **PW1** states that the deceased was quarrelling with accused warning him not to bring bhang (cannabis sativa) into the home. On her part **PW2** stated that she heard the deceased quarrelling with accused telling him that he should be working instead of hanging around the homestead. **PW2** also stated that the deceased often used to tell the accused that he should marry a wife to look after the home. No doubt these were words which caused annoyance to the accused and undoubtedly angered him. The deceased was accusing his son of being lazy and immature.

All the witnesses testify that the deceased was by nature an intemperate and quarrelsome old man. They testify that he had previously killed his other son (the husband of **PW2**) by shooting him with an arrow. The fact that deceased was known to be bad tempered does not provide an excuse for accused to assault him. Just as the fact that the deceased had allegedly previously killed another son of his is not an excuse for the behaviour of the accused. In any event the evidence is that the deceased was tried and acquitted by a court of law for that alleged killing. It cannot therefore be held against him. In any event the person on

trial before this court is the accused and not the deceased.

From the evidence I do find that the accused was provoked into acting as he did. The deceased had been hurling abuses at him and the deceased lashed out with the nearest item he could lay his hands on which was the wooden frame which was lying within the compound and was within easy reach.

The accused did not act out of a premeditated intention to kill his father. He merely reacted to the words of the deceased and lashed out in the heat of the moment. Indeed **PW2** confirms that the accused did not intend to kill the old man. **PW3** the chief also told the court that when he informed accused that his father had died the accused was very shocked.

Section 207 of the Penal Code provides that

“When a person who unlawfully kills another under circumstances which, but for the provisions of this Section, would constitute murder does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool is guilty of manslaughter only”

This is precisely the situation pertaining in this case. The deceased was abusing the accused, who in turn lashed out in anger and hit him with the wooden frame. The accused did not launch an unprovoked attack upon the deceased. As such I find that no malice aforethought is shown to have existed and I convict the accused for the lesser offence of manslaughter.

Dated and Delivered in Nakuru this 24th day of February, 2017.

Mr. Biko holding brief Mrs Mulwa

Mr. Chigiti for State

Maureen A. Odera

Judge