



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 123 OF 2014

REPUBLICSTATE

VERSUS

DALMUS KIYAPIACCUSED

JUDGMENT

The accused **DALMUS KIYAPI** 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 10th day of December, 2014 at about 11.00pm at Lenget area in Rongai District within Nakuru County murdered SAMMY EYPAN”

The accused pleaded ‘**Not Guilty**’ to the charge. The prosecution called a total of six (6) witnesses in support of the case.

PW1 PASTOR DAVID KIMETTO told the court that on 10/12/2014 he was officiating a youth retreat at the Pentecostal Church in Lenget. Several youths were in attendance. The sessions went until 10.00pm after which the youth went to sleep at Lenget High School.

At 10.30pm **PW1** received a call from his wife informing him that a fight had occurred in the church compound. He rushed back to the scene and found the deceased lying on the ground with a bruise on his head. **PW1** was informed that the deceased had been hit by accused. The pastor arranged for the deceased to be taken to hospital. He then went with others to search for the accused at his home. The accused was apprehended and taken to police station. The deceased died while undergoing treatment. The accused was then arraigned in court and charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence in which he denied having murdered the deceased. This court must now analyse the evidence on record with a view to determining whether the charge of murder has been proved beyond reasonable doubt as required in law.

Section 203 of the penal code defines the offence of murder as follows.

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

Therefore in order to prove the charge of murder the following ingredients must be proved beyond

reasonable doubt.

- (i) Proof of the fact as well as the cause of death of the deceased
- (ii) Proof that the deceased met his death due to unlawful act or omission on the part of the accused
- (iii) Proof that said unlawful act or omission was committed with malice aforethought

Regarding the fact of the deceased death there can be no doubt. **PW1** stated that he found the deceased lying injured in the church compound. **PW3 ROBERT EYAPAN** was the father of the deceased. He told the court that he received news of the incident and rushed to Rongai Hospital where his son had been taken. **PW3** told the court that his son was declared dead upon arrival at the hospital at Provincial General Hospital Nakuru. **PW1, PW3** and the other prosecution witnesses who knew the deceased well identify him as ‘**Sammy Eypan**’.

Evidence regarding the cause of death was tendered by **PW2 TITUS NGULUNGU**, the Government Analyst who conducted the autopsy on the body of the deceased. **PW2** stated that upon examining the body of the deceased he noted a large haematoma on the left side of the head, a inner fracture across the left side of the head and an epidermal haematoma which was pushing the brain causing intracranial pressure. **PW2** opined that the cause of the death was ‘**head injury attended by epidural haematoma and skull fracture due to a simple fracture caused by blunt force trauma to the left side of the head**’. **PW2** filled and signed the post-mortem report which he produced as an exhibit in the case **P. exh 1**, therefore it is clear that the deceased died due to blunt force trauma to his head.

The third and actual question is whether it was the accused who caused the fatal injury to the head of the deceased.

PW1 did not witness the events leading up to the incident. He stated that he was only called by his wife and informed that some youth were fighting.

PW1 rushed back to the church compound where he found the deceased lying on the ground having already been injured. **PW1** states that he was merely informed that it was ‘**Kiyapi**’ who had assaulted the deceased. **PW1** admits that he did not even know who this ‘**Kiyapi**’ was.

PW4 JORAN EKWANJ told the court that the deceased was his brother **PW4** was also attending the youth church retreat he told the court that he saw the accused hit the deceased with a stick on the left side of the head after which the deceased fell down. The accused then ran away. **PW4** told the court that although the incident occurred at 10.30pm and it was night he was able to see due to the lights at the church. **PW4** in his evidence stated that

“There were lights at the church. Bulbs had been placed outside”.

Given this statement by **PW4** it is very odd that **PW1** had earlier informed the court that it was dark at the scene and he was forced to use his torch to see the deceased and to see what injuries he had. **PW1** made no mention of the lights outside the church compound.

PW4 who denied having seen the accused hit the deceased on the head with a stick later contradicted himself on this point. Under cross examination by defence counsel **PW4** says

“Accused took a stick and hit my brother. I did not witness this. I did not see the stick I do not know where the stick came from. It is accused who had the stick....”

In his evidence in chief **PW4** implied that the accused simply hit the deceased for no apparent reason. However under cross-examination **PW4** admits that the two were involved in a fight. **PW4** states under cross-examination that

“They were fighting and pushing each other....”

PW4 goes on to say

“There was no struggle”

All in all **PW4** gives unclear and contradictory evidence. He does not seem to be sure of what he had seen and shifts his position on several key aspects of his testimony.

PW5 CLINTON CHERUIYOT was also one of the youths who attended the church retreat. **PW5** stated that he only heard shouting from the church compound and when he returned to check he found the deceased lying on the ground. **PW5** did not see who hit the deceased. On the question of light **PW5** states that their Pastor **PW1** had to use a torch to see the deceased. Under cross-examination **PW5** appears to suggest that lighting at the scene was adequate **PW5** says

“The lights in the church were still on. The lights illuminated up to the road. We were between the road and the church. A tree blocked the light from the church”.

PW5 then goes on to say

“I could not see well as there was a crowd”

And finally **PW5** concedes

“I do not know what happened between the accused and the deceased....”

Here again is a witness who is unclear and contradictory. He is unsure of what he saw. He is not sure if the light available was sufficient. I was able to observe the demeanor of this witness as he testified. He was evasive and appeared confused. He did not strike me as an honest witness.

PW6 CORPORAL DAVID RUTO was the investigating officer. **PW6** stated that when he took up the investigation of the matter, the accused was already in the police cells. **PW6** confirms that when he saw the accused he noted that he had some injury on his face, and for this reason **PW6** took accused to hospital for treatment. The fact that the accused had injuries on his person suggests that he had been involved in a fight. In his defence the accused told the court that he and the deceased had been drinking together until 9.30pm. The deceased then suggested that they go for the youth retreat. Upon reaching the church the accused declined to enter. The deceased abused him and a fight ensued. The accused admits that he picked up a stick and hit the deceased with it.

This defence is corroborated by **PW6** the investigating officer who confirms that

“In my statement I have said that it was the deceased who abused and boxed the accused first. That is what happened....”

Thus it appears that this was not an unprovoked attack on the deceased by the accused. The two were engaged in a fight during which the accused hit the deceased with a stick.

PW6 produced an exhibit in court a plastic rungu alleged to have been the weapon which the accused used to hit the deceased. **PW6** claims that it was the Pastor **PW1** who handed him that weapon. Strangely enough **PW1** in his evidence made no mention of having recovered any weapon much less having handed any such weapon to the police.

PW1 did not identify the said rungu at all.

Secondly **PW6** under cross-examination says

“The Pastor showed me where he recovered the rungu. I have not recorded this in my statement”.

If indeed **PW6** had been shown where the rungu was recovered as an experienced investigator he would not have failed to mention this fact in his statement.

Aside from **PW6** no other prosecution witness has made mention of this rungu. No other witness has identified it. It is very suspicious that the other witnesses spoke of a ‘stick’ whereas **PW6** produces what he calls a rungu. The court had a look at the item and noted that it was actually a green plastic pipe. This item appears to have been conjured up by **PW6** out of the blue. Only he knew where it came from. I have a nagging suspicion that this pipe has been planted in the case as an exhibit to better explain the severity of the injuries suffered by the deceased since a stick was unlikely to have caused a fractured skull.

The question of how the deceased sustained the injuries noted by the doctor on the deceased is pertinent. The injuries were undoubtedly severe and only a strong force could have caused such injuries like a fractured skull. The doctor only talked of **“a single blunt object trauma to the left of the head”**

Under cross-examination by defence counsel the doctor admitted that

“Such injury can be sustained due to a fall..... If one is pushed using force such an injury can occur”

The evidence is that the accused and deceased were fighting. The possibility that the deceased could have fallen and hit his head causing the fracture has not been ruled out. There was a clear attempt by the witnesses especially **PW4, PW5** and **PW6** to tailor the evidence in such a manner as to implicate the accused. The prosecution evidence inconsistent, contradictory and lacked cogency. It has not been proved beyond reasonable doubt that it was an act done by the accused which led to the fatal injuries to the deceased. There remains genuine doubt regarding the accused responsibility for the *actus reus* of the offence of murder. This doubt must be settled in favour of the accused. I find that the charge has not been proved to the legally required standard. I therefore acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Nakuru this 24th Day of April 2017.

Ms Chemnetich for accused

Mr Motende for DPP

Maureen A. Odera

Judge