



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 23 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RAINOS KIPTOO CHIRCHIR.....ACCUSED**

**J U D G M E N T**

1. **Reinos Kiptoo Chirchir**, the Accused, is charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap 63) Laws of Kenya**. Particulars of the offence are that on the **16<sup>th</sup> day of November, 2010** at **Mbusyani Administration Police Camp, Mbusyani Sub-location, Chuluni District** within **Kitui County** he murdered **Kiteme Musyoka** (Deceased).

2. Facts of the case are that on the **16<sup>th</sup> day of November, 2010**, the Deceased was drinking alcohol in company of the Accused, an Administration Police Officer based at **Mbusyani Administration Police (AP) Camp**. After imbibing alcohol for about four (4) hours a quarrel erupted between them, ultimately the Accused arrested the Deceased and took him to the AP Camp. The following morning family members of the Deceased went to the AP Camp and found him having sustained injuries. They were allowed to take him to hospital. However, he succumbed to injuries sustained. The matter was reported to the police who carried out investigations that culminated into the Accused being charged.

3. When put on his defence, the Accused stated that on the **15<sup>th</sup> November, 2010** he got a telephone call from the Area Chief, **Mr. Maluki** who reported a case of theft at **Mbusyani Shopping Centre**. His colleagues were away. He therefore went to the shopping centre alone. As he patrolled the area, he heard noise emanating from **Baghdad Bar**. He went to the bar and found a person who was chaotic. He was making noise while walking around the bar. He drank a soda. In the meantime the person continued disturbing people. He would move from table to table drinking people's beer. Noting that it was about **10.15 p.m.** he advised the bar attendant to close down the bar. He left the bar before it was closed and went back to the camp. Fifteen minutes later he heard a lot of noise emanating from **Mbusyani Trading Centre**. He responded by going there only to find two (2) people struggling. One of them ran away leaving behind the Deceased a person he did not know. He arrested him for the offence of creating a disturbance and escorted him to the AP Camp where he placed him in cells which were made of concrete blocks, an iron sheet roof and a wooden door. The Deceased continued making noise and banging the door asking him to open and release him. In his drunken stupor he continued hitting the cell door. Thereafter he stopped making noise.

4. The following day at **6.30 a.m.** a person who identified himself as the uncle of the Deceased sought to see him. When he opened the cell he found the Deceased lying on the floor. The injury he had sustained on the heel prior to his arrest was still bleeding. He warned him and released him. His uncle took him away on a motor cycle.

5. Thereafter he returned and informed them that he was not in a good state. They went to the dispensary and found him dead. The police took over investigations. He was arrested and charged. He denied having committed the offence.

6. Submissions were filed by the defence that I have taken into consideration.

7. The Accused herein faces a charge of murder. To prove the case the Prosecution is duty bound to prove:

- The fact of death.
- That the act/omission that resulted into the death of the Deceased was caused by the Accused.
- It was with malice aforethought.

8. PW3 **Kamuli Mwanza**, a cousin of the Deceased found him unconscious. They made an effort of taking him to hospital but he died before being examined. PW4, **Mumo Nzungo** a cousin of the Deceased identified his body to Doctors who conducted the autopsy. The

postmortem was conducted by **Dr. Mutuku** (PW1) and witnessed by **Dr. S. K. Muli** and **J. M. Matu**. The time of death of the Deceased was estimated as **7.30 a.m.** on the **16<sup>th</sup>** day of **November, 2010**. This was proof of the fact of death of the Deceased.

9. This therefore brings us to the 2<sup>nd</sup> and 3<sup>rd</sup> issues raised. It is not in doubt that the Accused was the last person seen with the Deceased. PW2 **Scholastica Taabu** the bar attendant cum waitress served both the Accused and Deceased with drinks. According to her testimony, the Accused ordered a drink for the Deceased. They drank until **10.40 p.m.** when she requested them to leave the bar. When they went outside they argued. The Accused wanted to handcuff the Deceased but he was resisting. She closed the bar and left them outside. She was not in a position to tell what happened thereafter.

10. PW3 **Kamuli Mwanza** a cousin of the Deceased stated that he went with him to the bar. They met the Accused who was a friend to the Deceased. The Accused and Deceased moved to a table where they sat and drunk alcohol. After a while they disagreed and quarreled. Thereafter when he went out he found the Accused having dressed up uniform. He handcuffed the Deceased and took him away. He followed them to the AP Camp and heard the Deceased screaming as if he was being beaten. He rushed home to inform the Deceased's mother. He relayed the information through their employee. The following morning they went to the camp and found the Deceased unconscious and injured. He was bleeding from the legs. He died prior to being treated.

11. PW4 **No. 87083704 Corporal Mumo Nzongo** found the Deceased injured and unconscious inside the cells.

12. PW7 **Muuku Mbuti** was at the **Baghdad Bar** where he saw the Accused and Deceased. He could not hear what they were discussing but all over a sudden he heard the Accused say:

***“Wait until I come back.”***

After a short while he returned having worn his Administration Police uniform. He pulled him outside and they went towards AP Camp.

13. Evidence adduced by Prosecution witnesses sought to prove the fact that at the point of being taken to the Administration Camp, the Deceased had no injury.

14. A postmortem conducted to determine the cause of death of the Deceased established that the body had external injuries namely: small punctuate bruises on the right leg; bruises on the forehead; diffuse tissue injury with haematoma on the right side extending from the right sterno-clavicular joint to the right sterno-clavoid Mastoid Muscle; Anterior triangle of the neck on the right side; some tissue damage on the left with haematoma.

15. This was evidence of injuries having been sustained after his arrest. In his defence the Accused stated that while at the bar the Deceased was creating disturbance by moving from one table to another drinking other people's beer. He left the bar before it was closed going to the camp as he was on duty and his colleague was unwell. He returned to the bar on hearing a lot of noise and found people outside pulling each other. He flashed the torch and one of them ran away leaving the Deceased whom he arrested, handcuffed and led him to the Administration Police Camp. He locked him inside the cells. As he continued with his work he could hear the Deceased knocking the door making the noise asking him to open the door and let him go. He told him to keep quiet. The Deceased complied and he (Accused) retired to his quarters. He opened the door for him after a gentleman who introduced himself as the uncle went to the Camp at **6.30 a.m.** He stated that the Deceased had an injury at the point of his arrest and he found him still bleeding from the wound at the heel.

16. The Doctor who conducted the postmortem conducted the examination on the body in the presence of other two (2) Doctors. PW10 **Dr. Joshua Matu** represented the family of the Deceased. He concurred with the findings of **Dr. Mutuku**. DW1 **Doctor Muli Simon Kioko** on the other hand who represented the Accused was of a contrary view that I will address later. However, per his findings externally the body had visible injuries. There was haematoma formation over the left temporal scalp region. The right forehead had superficial skin bruise measuring 4 – 6 cm. The right leg had multiple superficial bruises and the left leg had partial skin autolysis left dorsal aspect involving the left ankle joint.

17. On internal examination all the three (3) Doctors were in agreement that the head had haematoma on the left temporal region. All witnesses who testified having seen the Deceased being arrested by the Accused were emphatic that he had no injuries at the point of being arrested. It was not suggested to them that the Deceased had any injuries. The theory of the Deceased having bled from a wound on his heel came up at the point of the Accused defending himself. He went on to state that there were blood stains on the floor of the cells that came from the wound on the heel. The blood was washed/cleaned by the time the Investigating Officer went to the scene.

18. In his evidence the Accused stated that he was the only one at the Camp on the material date. **Senior Corporal Daniel Makau** was on leave. He left the Camp in the morning on the **15<sup>th</sup> November, 2010**. **Felix Matumbi** was unwell and in their quarters within the same compound and on the same building. This was evidence that none of his colleagues came into contact with the Deceased after he was taken to the Camp.

19. Nobody saw the Accused assaulting the Deceased therefore evidence against him is circumstantial in nature. In the case of **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990 (UR)** the Court of Appeal stated principles upon which a conviction can be founded on circumstantial evidence. It had this to state:

***“It is settled law that when a case rests on circumstantial evidence, such evidence must satisfy three tests:***

***(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***

***(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***

***(3) The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

20. The cell in which the Accused held the Deceased was on the same building with the house in which he resided. Injuries sustained revealed that he was tortured. PW3 and PW4 found him unconscious. He was still handcuffed. On being arrested the Deceased walked to the AP Camp. He did not resist arrest. The question begging is who occasioned the injuries he sustained upon his person. The circumstances that prevailed unerringly point at the Accused as the person who must have assaulted him and caused him the injuries that he sustained. There was no-one else who gained entry to the cell and committed the act that resulted into the Deceased sustaining fatal injury.

21. Regarding whether the Accused acted with malice aforethought, in the case of **Nzuki vs. Republic (1993) KLR 171** it was held thus:

***“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:-***

***(i) The intention to cause death.***

***(ii) The intention to cause grievous bodily harm;***

***(iii) Where the Accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to the risk as a result of those acts. It does not matter in such circumstances whether the Accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder (See Hyman vs. Director of Public Prosecution (1975) A C 55.”***

22. Per the findings of PW1 and PW10 who concurred following the examination done on the body of the Deceased the cause of death was cardiorespiratory arrest due to strangulation. DW1 also confirmed a presence of injuries on the neck. It had injuries with haematoma formation on the right sterno cleido mastoid muscle. In the opinion of DW1 the cause of death was undetermined. He failed to reach any conclusion as to the cause of death. The Doctor declined to sign the postmortem form but he did not give any reasons that prompted him not to. Thereafter he came up with his independent report that was not shown to his two (2) colleagues where he failed to form an opinion as to the cause of death. What the Doctor failed to address was the cause of the haemorrhage on the sterno cleido mastoid muscle. Therefore PW1 and PW10 must be believed when they state that it was caused by strangulation. There is no way the Deceased would have strangled himself manually.

23. Per the testimonies of witnesses who were present the Accused disagreed with the Deceased and prior to leaving he uttered some words that amounted to a threat. He later returned to the scene having worn his AP Uniform and arrested the Deceased. Nobody could tell why the Accused disagreed with the Deceased and in his defence he was silent on the issue of the Deceased having provoked him. According to him he arrested the Deceased for creating disturbance and generally misbehaving. However, there was no complaint filed by a Complainant upon which he acted.

24. Therefore evidence on record proves the fact that he left and returned having decided to arrest the Deceased.

25. When carrying out the act of strangling the Deceased, the Accused must have known that the act would render him unconscious. He intentionally exposed the Deceased to sustaining grievous harm. Therefore he acted with malice aforethought.

26. From the foregoing it is apparent that the Accused committed acts that resulted into the death of the Deceased. He is therefore guilty of the offence of murder and accordingly I do convict him.

27. It is so ordered.

**Dated, Signed and Delivered at Kitui this 31<sup>st</sup> day of May, 2017.**

**L. N. MUTENDE**

**JUDGE**