



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 49 OF 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMMY KIPROTICH KIRWA.....1<sup>ST</sup> ACCUSED**

**ALFRED KIPTOGOM MITEI.....2<sup>ND</sup> ACCUSED**

**ALEXANDER KIPROTICH NGETICH.....3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. On the morning of 14<sup>th</sup> February 2009, *Alex Kimaiyo Ngeny* (the deceased) hired a tractor to plough his four acre piece of land. The driver was Mark Biwott Cheruiyot (PW1). He was being assisted by Sammy Kipkurui and Elphas Maiyo (PW5). At some point, the tractor broke down at a corner of the farm. Two people entered the farm and attacked the deceased with a *Maasai* or *Somali* sword.

2. PW1 and PW5 saw the two attackers running away from the scene. The two witnesses did *not* identify the attackers. They said they were at a corner of the farm when the incident happened. PW1 and PW5 ran towards the deceased. He had a deep cut wound on the head and had bled profusely. He was *dead*. They screamed. A neighbour, Rael Ragut, responded. She also started screaming.

3. A bloodstained sword and t-shirt were recovered near the scene of the crime. The accused are relatives of the deceased. The 1<sup>st</sup> accused confessed to the murder to an official of *Neno Evangelistic Church* in Baxton, Mombasa County. As I shall discuss shortly, the “confession” was *inadmissible*.

4. The Republic brought *information* to the High Court charging the three accused persons with *murder* contrary to section 203 as read with section 204 of the Penal Code. The particulars of the *consolidated information* are that on 14<sup>th</sup> February 2009 at Salient Chepkemel village in Nandi North District of the Rift Valley Province, they jointly murdered *Alex Kimaiyo Ngeny*. They pleaded *not guilty*.

5. The prosecution lined up *fourteen* witnesses. The evidence of the first *eight* witnesses was taken by Azangalala J (as he then was). The trial resumed before me on 17<sup>th</sup> September 2014. I explained to the accused their rights under section 200 (3) of the Criminal Procedure Code. They all elected to proceed from where my predecessor had left the matter.

6. PW1 was Mark Biwott Cheruiyot. He testified that at about 8:00 a.m., on the material day, he and Sammy Kipkurui arrived at the deceased’s land. The deceased was alone. They started ploughing. At about noon, they saw two people running towards the road. At that time, PW1, PW5 (Elphas Maiyo) and Kipkurui were repairing the tractor. PW5 said that the chain had broken.

7. The three were about 200 metres from the deceased. They saw him lying in the middle of the land. He had suffered a deep cut on the head. PW5 tried to pursue the two attackers without success. PW1 said he did not know the three accused persons. His evidence was largely confirmed by PW5, Elphas Maiyo.

8. PW6, Samuel Kipkemboi Sawe, is a neighbor to the deceased. He also saw two people running away from the scene. It was at about 3:30 p.m. He went to the scene. He testified that the deceased had visible injuries at the back of the head.

9. PW2 was Esther Jelagat. She is the widow. She said that all the accused are relatives of the deceased. On the material day, the deceased left her at home and went to their *shamba*. She later heard some screams from a neighbor, Rael Rugut. She rushed to the scene. She found the deceased lying down with a gaping injury on the head. She said that brain matter was hanging outside the skull. She screamed attracting more people to the scene. The assistant chief (PW3) summoned the police who took away the body to the morgue.

10. PW2 testified that in April 2008, the accused had threatened to kill the deceased. The threat was issued at her home in the presence of her grandmother, Tamining Chepkwony. She said the three wanted to kill the deceased over some land known as *Plot No. 93 Kapsakwech* which belonged to the deceased. She testified that the accused were opposed to its sale. The deceased had sold the plot to Justice Tanui.

11. PW2 testified further that the 2<sup>nd</sup> accused used to live on the land where the deceased was killed. She said that the 1<sup>st</sup> accused disappeared after the incident. He was arrested in Mombasa on 6<sup>th</sup> September 2009. The 3<sup>rd</sup> accused also escaped from the locality. He was arrested on 20<sup>th</sup> August 2011. PW2 strongly suspected that the accused killed the deceased over the land dispute. Upon cross examination, she said the land dispute was between the deceased; Peter Chepkochoi; and, the 2<sup>nd</sup> accused. There was a case in Eldoret court. The dispute was over *Uasin Gishu/ Tapsagaoui/93*.

12. PW7 was Nelson Kipkemboi Maiyo. He is a son of the deceased. He was in Kericho Town when he received news of the murder. He said there was a land case at the *Eldoret High Court Number 19 of 2008*. He said the deceased and the 2<sup>nd</sup> accused were the parties, a fact denied by the 2<sup>nd</sup> accused. He testified that in March 2008, the court restrained the 2<sup>nd</sup> accused from using the land. The land is not the one on which the deceased died. He said the accused persons and *Peter Mitei* came to their home and threatened the deceased.

13. Like I stated, PW3 was the assistant chief. He responded to the screams from PW2. He went to the scene. He summoned the police who took away the body to the mortuary. He was *unaware* of the land dispute between the deceased and the accused.

14. PW4 was Philip Kipkemei, a village elder. At about 3:30 p.m., he was heading towards the direction of the deceased's farm. He met with two people. He did not know them. He heard some screams. PW1 told him that the deceased was killed. PW4 said that the body had injuries on the arm and head.

15. PW8 was Chief Inspector Timothy Chepngabit. He was the scene of crimes officer. He produced eight photographs of the body of the deceased; a blood stained weapon; and, the general landscape. He also played a video recording in court. It was recorded on 12<sup>th</sup> September 2009 at *Neno Evangelism Church* in Mombasa. It was a conversation between a church official and the 1<sup>st</sup> accused.

16. PW8 clarified that he *downloaded* the tape from the church *records* and was *not* there when the alleged confession was made. He did not know the 1<sup>st</sup> accused before then. The court (Azangalala J, as he then was) declined to admit the video recording for offending section 25A (1) of the Evidence Act.

17. PW9 was Tecla Kogo. She is a neighbor of the deceased. She was attracted to the scene by the screams. Later, on her way to the river with her daughter, they saw a red bloodstained t-shirt. It was in her farm. She informed Kiplagat, the assistant chief. She said the home of the deceased was "two farms

away” from where they found the t-shirt. On cross examination, she said she did *not* know the owner of the t-shirt.

18. PW10 was Dr. Chumba. He is a pathologist. On 17<sup>th</sup> February 2009 he carried out the autopsy. The body was identified by Nelson Kimaiyo and Meshack Kibet. It had a cut wound on right side of the head and the occipital area. The cuts were sharp piercing through the skull. In his opinion the deceased died from “*severe sharp head injuries*”. He produced the post mortem form (exhibit 4).

19. PW11 was police inspector Makori. On 13<sup>th</sup> September 2009 at 4:00 p.m., he conducted an identification parade. The suspect was the 1<sup>st</sup> accused. Initially, the suspect stood between the 1<sup>st</sup> and 3<sup>rd</sup> members of the parade. The witness, Joshua, failed to identify the suspect. The suspect changed position and stood between members 4 and 5. A new witness, Philip Kemboi (PW4), identified the 1<sup>st</sup> accused by touching him on the shoulder.

20. PW12 was P. C. Musa. He received information of the murder from the assistant chief, Chepkoilel. He and three other officers proceeded to the scene. The deceased had cuts on the head and hands. About 50 metres from the body, he recovered a bloodstained *maasai* sword. He said it was in the direction taken by suspects. He drew a sketch plan. He took the body to Moi Teaching and Referral Hospital mortuary.

21. PW13 was Joel Matinde. He is a government analyst. He testified that the deceased had blood group type *B*. The *Somali* sword (item K) was stained with human blood group *B*. The red t-shirt and trousers (items P and Q) were slightly stained with human blood group *B*. He concluded that the bloodstains on all the items matched the blood sample of deceased; and, may have resulted from the injuries to the deceased.

22. PW14 was P. C. Atte. His material evidence was that he re-arrested the 3<sup>rd</sup> accused on the night of 20<sup>th</sup> August 2011. PW14 was then based at Turbo Police Station. He was with his colleague P. C. Duncan Maha. The 3<sup>rd</sup> accused had been arrested by the public on an allegation of murder.

23. That marked the close of the prosecution’s case. When the accused were placed on their defence, they all protested their innocence. They all raised the defence of *alibi*. They all called witnesses to confirm it.

24. The 1<sup>st</sup> accused testified that on the material date, he was in *Chemelil*. He was helping his uncle to transport milk. The uncle is David Sanga (DW2). He said he stayed there from 2008 to 2009. He denied that he had any land dispute with the deceased. DW2 confirmed that on 14<sup>th</sup> February 2009, he was with the 1<sup>st</sup> accused. The accused was using DW2’s motorbike to transport milk. Upon cross examination, he could not tell the distance between Chemelil and Chepkemel (the *locus in quo*). He also admitted that he was not with the 1<sup>st</sup> accused throughout the day.

25. The 2<sup>nd</sup> accused (DW3) said that on the material date, he was at Cheplaskei, Tapsagoi location. He said the scene of murder was 5 or 4 kilometers away. He denied that he had any land dispute with the deceased; or, issued threats against the deceased. He said the dispute over land was between the deceased and one *Peter Mitei*.

26. DW4 Milka Boit was the wife of the 2<sup>nd</sup> accused. She testified that on the material date, she was at home with the accused and their daughter, Aska. She said the accused was irrigating their farm with a worker, Douglas Michika (DW5). DW5 said they were together from 8.00 a.m. to 6.00 p.m.

27. The 3<sup>rd</sup> accused (DW6) said that on 14<sup>th</sup> February 2009 he was at Maili Nne, Uasin Gishu. He had gone there to buy maize. He said it was 6 kilometers away from the scene of the murder. In cross examination, he conceded that he was arrested in the year 2011. He denied that he escaped from the locality. That marked the close of the defence case.

28. All the parties have filed written submissions. Those by the learned Prosecution Counsel were filed on

30<sup>th</sup> March 2017. Those by the learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were also filed on 30<sup>th</sup> March 2017 together with a list of authorities.

29. Section 203 of the Penal Code provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

30. From the evidence, there is absolutely *no* doubt about the death of the deceased. PW1, PW2, PW3, PW5, PW9 and PW12 all saw the dead body. It had *sharp* cut wounds *piercing* through the skull. According to the *pathologist*, (PW10) the deceased died from “*severe sharp head injuries*”. From the injuries described by all those witnesses, I entertain *no* doubt that the cause of death was *unlawful*. The only live question now is whether the accused, *of malice aforethought*, killed the deceased.

31. From the evidence, it is clear that the *eye witness* did not see any of the accused attack the deceased. At that time, PW1 (Mark Biwott), PW5 (Elphas Maiyo) and Kipkurui were repairing the tractor at a corner of the land. The three were about 200 metres from where the deceased was. They saw the deceased lying in the middle of the land. They all saw *two* people running away from the land towards the road. PW5 gave chase. He did not catch up with them.

32. As I stated earlier, the *admission* of guilt by the 1<sup>st</sup> accused made to an official of *Neno Evangelistic Church* in Baxton, Mombasa County was *inadmissible*. The member of the congregation who heard the “*confession*” was *not* called to testify. The recording by PW8 offended sections 25A (1) and 26 of the Evidence Act. The law can be an ass. Here is a recorded confession in which the 1<sup>st</sup> accused admits to butchering the deceased. But the law itself has set tight safeguards against admission of such incriminating evidence. These proceedings are not a Roman inquisition. It demonstrates the wide gulf between the *truth* and the *law of evidence*.

33. The entire case for the prosecution is thus built upon *circumstantial evidence*. In *R v Kipkering arap Koske & another* (1949) 16 EACA 135 the court held-

*“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”*

34. The first key question relates to *identification*. I have already stated that PW1 (Mark Biwott), PW5 (Elphas Maiyo), and Kipkurui did *not* all identify the *two people* who were running away from the scene. PW4, Philip Kipkemei met with *two people* on the road immediately after the murder. He did *not* know them. There is thus *no* direct evidence of identification of all or any of the three accused persons.

35. I am alive of the *police identification parade*. It was carried out on 13<sup>th</sup> September 2009; *months* after the murder. One witness, Joshua, *failed* to identify the suspect. The suspect changed position and stood between members 4 and 5. A new witness, Philip Kemboi (PW4), identified the 1<sup>st</sup> accused by touching him on the shoulder. Considering that PW4 did *not* identify or give a useful description of the suspects *at the scene* on the *material day*, the probative value of the identification parade is worthless.

36. PW2 on the other hand did *not* witness the attack. She was drawn to the scene by the screams. True, she knew the accused persons. They were relatives. She identified them at the *dock*. It carried little weight. See *Maitanyi v Republic* [1986] KLR 198. See also *Njoroge v Republic* [1987] KLR 19, *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549. I am in the end *not* satisfied that the accused were *positively* identified.

37. There was a clear  *motive* to kill the deceased. There was an underlying land dispute. There was a

court case involving the 2<sup>nd</sup> accused. It related to a different property known as *Uasin Gishu/Tapsagaoui/93*. I am also satisfied from the evidence of the widow (PW2) and the son of the deceased (PW7) that the accused had made threats to kill the deceased. Two of the accused persons relocated from the *locus in quo*. There are thus *strong suspicions* that all or some of the accused had a hand in the death. But they remain just that. I have held that the “*confession*” by the 1<sup>st</sup> accused is *inadmissible*. But his *conscience* will continue to haunt and torment him.

38. Taken on their own, the *suspicions* and *conduct* of the accused are *insufficient* to prove *murder*. There is no *concrete* evidence, beyond reasonable doubt, that the accused perpetrated this heinous crime. The accused may have lied; they might have held some cards close to their chests; or, even concealed some vital information. But our criminal justice system places the *burden of proof* firmly upon the shoulders of the prosecution. See *R v Kipkering arap Koske & another* (1949) 16 EACA 135, *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.

39. Furthermore, each of the accused set up an *alibi*. True, the *alibi* was being set up well after the close of the prosecution’s case. But it did *not* shift the burden of proof to the accused. See *Republic v Johnson* [1961] 3 ALL E.R. 969, *Saidi Mwakawanga v Republic* [1963] E. A. 6. Granted the law, I have to weigh the *alibi* by each of the accused and their witnesses against other evidence on record. See *Wang’ombe v Republic* [1976-80] KLR 1683, *Karanja v Republic* [1983] KLR 501, *Republic v Ahmed Bin Abdul Hafid* (1934) 1 EACA 76.

40. Considering the *dearth* of evidence *positively* identifying *any* of the accused persons; and, the *alibi* set up by them, I am afraid there is *doubt* whether the accused were the *two* persons seen escaping from the scene. Furthermore, the bloodstained *Maasai* or *Somali* sword and t-shirt were *not* submitted to chemical analysis *linking* them to any of the accused persons.

41. In the end, there is no admissible evidence, to the required *standard of proof* incriminating the accused. In short, there is no *direct* or *compelling circumstantial* evidence pointing *exclusively* to the accused. I *cannot* then say that *all* the elements of the charge of *murder* have been laid out; or, at any rate that the accused *killed* the deceased with *malice aforethought*.

42. I accordingly enter a finding of *not guilty*. All the accused are hereby *acquitted*.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 29<sup>th</sup> day of May 2017.

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused.

Mr. Mitei for the 1<sup>st</sup> and 2<sup>nd</sup> accused.

Mr. Miyiinda for the 3<sup>rd</sup> accused.

Mr. Mwinamo watching brief for the family of the deceased.

Mr. Muchiri holding brief for Ms. Kagehi for the Republic.

Mr. J. Kemboi, Court Clerk.