



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE NO.21 OF 2011
REPUBLIC.....PROSECUTOR
VERSUS
MARTIN KIPROTICH MAIGUT.....ACCUSED

JUDGEMENT

1. The Accused Martin Kiprotich Maigut is faced with the offence of murder of one Simon Satia Rongai on the 27th August, 2011. The particulars thereof are that on the said date at Bondeni village he murdered the deceased.

2. The prosecution called a total of 13 witnesses in a bid to prove the case against the accused.

3. In brief the prosecution case is that the accused, the deceased and several other people were drinking chang'aa at a drinking den when the accused picked a quarrel with his drinking mates including the deceased. When quarrelling with the deceased the accused threatened him and told him to tell his father that the accused will demolish his father's house. The accused was then chased he left for his house but after a short while returned armed with a panga, which made people run away including the deceased who was drunk.

Later PW6 saw two people fighting, on approaching the scene one person ran away while another fell. On nearing she recognized the one who fell to be the deceased. She got milk to assist him, in the process the deceased wife and others came, the deceased was later pronounced dead. The evidence from the Prosecution may be summarized as follows.

4. **PW1** heard the deceased on the material night complaining about someone having removed sticks from his house later he was called to assist take the deceased to hospital.

5. **PW2** the deceased's wife she was called after the husband had been assaulted.

6. **PW3** and the deceased witnessed the accused fighting and they separated them, the accused thereafter left. The witness did not see the deceased and accused fight.

7. **PW4** – He was also at the drinking den and witness the accused fight with one Linus, later they were separated and accused left to his home. The witness left and on the way home he met the accused holding a panga, he asked the accused to return home but the accused declined.

8. **PW5** only went to the scene of crime, he found the deceased lying there.

9. PW6 stated that at about 7p.m. on the night of 27th August, 2011 she went to buy milk, it was a little dark, on the way back she saw two people fighting. The one beating the other ran as she stopped to see. The other fell and she decided to check on him. She recognized the one who fell to have been the deceased. Two people joined her, one of the 2 persons went for the deceased wife. She went to call the village elder.

10. PW7 together with a friend coming from Bondeni market on 27/8/2011 at 7p.m., met a lady carrying a cup of milk meant to be fed to a person lying ahead who was identified to them as Satia Rongai (deceased), who looked like he had been beaten. They went to the scene. The deceased was not breathing well.

11. PW8 on 27/8/2011 on his way home while riding his motorcycle at about 7p.m. he came across many people asking for help to take Rongai to hospital. He dropped a passenger he had and took the deceased to hospital, he ran out of petrol on the way and asked a colleague to assist. On arrival at the hospital the deceased was pronounced dead.

12. PW9 on 27/8/2011 on his way home he met PW8 carrying a sick person who was Rongai. PW8 asked him to assist and he took the deceased to the hospital, who was pronounced dead on arrival.

13. PW10 a brother to the deceased who confirmed that on 27/8/2011 at 3p.m. his brother visited him. His wife sold chang'aa and several people were present drinking including accused and the deceased. That the accused and one Linus had a disagreement and the accused was kicked out of the house where they were sitted. The witness and the deceased had separated the two. The accused who was angered turned wild when they over powered him. He left but returned after 15 – 20 minutes armed with a panga and without a shirt or jacket, the accused father, his brother and those around held him. He turned to the deceased and the two quarreled. The accused told the deceased that he was going to demolish the deceased house and wanted the deceased to stop construction. They were separated and both left. Later he learnt that the deceased had been beaten. The deceased had bought land from the accused's father and when the deceased started building a problem arose.

14. PW11 on 27th August, 2011 he was at the drinking den with several other people including the accused and the deceased. The accused and his brother picked a quarrel with him when they were separated. The accused left and returned armed with a panga when the witness was advised to leave. The following day he learnt of the deceased death. People blamed the accused for the death. When the accused returned on the night of 27th he came back naked and carrying a panga.

15. PW12 He witnessed the post mortem. He was among those who took the deceased to hospital.

16. PW13 was Cpl. Simon Wasora of Kopsiro police Station. On 27/8/2011 4 people took the news of the deceased death. He informed his O.C.S. and together with 4 other police Officers and a police driver they left for Kopsiro health centre where they saw the deceased body which had no visible injuries save a swelling on the right side of his ear. Later they left for the scene a foot path between the deceased father's land and that of the deceased. They later went to the accused house but did not find him as the people present had named him as the assailant. In their investigation they learnt that both the accused and the deceased had been drinking when an altercation arose over a piece of land with the accused saying that the deceased cannot continue to stay where he bought land from accused father; the accused left returning with a panga people ran away including the deceased. Later a lady saw two people fighting. That they arrested several people who were drinking with the deceased for interrogation and it came out that the deceased and the accused had quarreled. The accused could not be found on the material day. The following day the accused was arrested by a crowd that wanted to lynch him. They received a call from the village elder, and went to the place where they found the accused had been beaten alongside his father who is said to have sold land to the deceased without informing his sons. The father was taken to Webuye hospital where he later died.

The witness said that they established that there was an issue of land between the deceased and sons of Manyororo accused being one of them.

17. **PW13 was Dr. Edward Vilembwa** who produced a post mortem form of the deceased which indicated there was a swelling on the right anterior neck and a bruise 1cm X 1cm on the right frontal area.

Internally there was extra – dural haematoma 5cm X 5cm above the right frontal region.

Cause of death was given to be cardio – pulmonary due to the head injury with extra dural haematoma due to a blunt force to the head skull from physical assault.

18. After the close of the Prosecution case the accused was placed on his defence. He gave an unsworn statement denying that he had assaulted the deceased though he admitted being at the drinking den, he stated further that it is his brother Leonard who quarreled with the deceased, when he tried to separate the two and thereafter left. Maintained that he had not quarreled with anyone and that it is the next day when he learnt of the deceased death. He was at his home the day he received the news and he did not know who killed the deceased.

19. In a Criminal case the Prosecution is under a duty to prove the guilt of an accused beyond all reasonable doubt. This duty squarely lies on them.

20. And in a charge of murder 3 ingredients ought to be proved I). The fact of murder II). That the death of the deceased occurred due to an act or omission of an accused III). That the act or omission was actuated by malice aforethought.

21. The evidence leading to proof of a case may be either by direct or indirect / circumstantial evidence and from the Prosecution witnesses it is clear that no one witnessed the accused giving that fatal blow to the deceased as PW6 who witness the fight that lead to the death of the deceased was not able to recognize the assailant due to poor visibility. The Prosecution has drawn an inference from what transpired at the chang'aa den where the accused started a quarrel with the deceased who had bought a piece of land from the accused's father which did not go well with the accused. The accused gave a threat to the deceased that he would not build on the land. There is also the testimony of PW1 that on the material night on his way home he had heard the deceased complain that someone had interfered with his house. It is also the evidence of several witnesses that the accused had left the drinking den and returned carrying a panga which was taken from him. Several people left including the deceased who was minutes later found seriously injured having been assaulted.

22. In order to rely on circumstantial evidence, the facts should be such that when pieced together they give no other inference other than to point to the accused person as the one guilty of the offence.

In the case of **Kipkering Arap Koskei & Another Vs Republic** the Court was of the view that in order to justify a conviction on circumstantial evidence, the inference of guilt, the exculpatory facts must be in compatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt.

23. In the current case I am of the opinion that the Prosecution succeeded in relying on circumstantial evidence as there is no other inference to be drawn other than that the accused person who was enraged and who picked a quarrel with the deceased, threatened the deceased, left and returned armed with a panga, but was over powered, is the one who went and interfered with the deceased house as he had threatened, is also the one who fought with the deceased and in the process gave him a fatal blow that led to his death. I do not believe the evidence by the accused who was indeed contradicted by his own brother. The accused's testimony is a mere denial which does not dislodge the Prosecution case.

24. I however take cognizant that all the other witnesses, the accused and the deceased had been in a drinking den since 5p.m., the incident occurred at around 8p.m. They were all drunk when the quarrel ensued not only with the deceased but several other people. It is not clear whether on return the accused arrived at the deceased or another person, what is obvious is that they met on the path and quarreled leading to a fight. Consequently in my view the third ingredient of the offence of murder was not proved, though I am satisfied that the accused is the one who assaulted the deceased and therefore find him guilty

of the lesser offence of manslaughter and convict him accordingly.

DATED and DELIVERED at BUNGOMA this 19th day of October, 2017

ALI-ARONI

JUDGE