



REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL CASE NO.14 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

FANCY CHEROTICH KIMUTAI.....1ST ACCUSED

ROBERT KIPNGETICH ROTICH.....2ND ACCUSED

GILBERT CHERUIYOT CHEPKWONY.....3RD ACCUSED

JUDGMENT

1. **FANCY CHEROTICH KIMUTAI, ROBERT KIPNGETICH ROTICH and GILBERT CHERUIYOT CHEPKWONY** *hereinafter referred to as 1st, 2nd and 3rd accused respectively* are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the 1st, 2nd and 3rd accused on 24th February, 2011 at Kapsiya Village in Kericho-West District within the Rift Valley Province jointly murdered Hillary Kimutai.

2. All the accused persons denied the charge and the case proceeded to full hearing with the prosecution presenting eight (8) witnesses. All the accused gave unsworn evidence in their defence.

3. The prosecution's evidence is that the 1st accused is the deceased's wife, while the 2nd & 3rd accused are her brothers. That the deceased and 1st accused were brewers and consumers of alcohol. On 24th February, 2011 at 5.00 p.m, **PW1, Mary Yegon** was heading back home from a posho mill when she met 1st accused and the deceased seated by the road side. She heard the deceased requesting the accused to accompany him home.

4. Shortly thereafter, the 2nd and 3rd accused emerged and started fighting the deceased. She saw the 3rd accused hit the deceased with a radio on the head and he started bleeding. She asked them to stop but they did not. She left while screaming. **PW3, Rose Chepkoriri Cheruyoit** was in her canteen on 24th February, 2011 at 5.00 p.m with PW2, who worked in a nearby barber shop.

5. She heard screams at the road side and asked PW2 to rush to the scene and see what was happening. She stood outside her shop which was about 40 metres away and she saw 1st, 2nd and 3rd accused beating the deceased with sticks but PW2 disengaged them and brought the deceased to where she was while the rest fled. She applied first aid on the deceased and while so doing, the 1st accused arrived with a jembe threatening to hit the deceased.

6. The deceased's father (PW5) who had arrived intervened and snatched the jembe from 1st

Accused who started to undress and ran away. PW5 took the deceased home and took him to the hospital. **PW2, Eric Keino** gave similar evidence to that of PW3. **PW7, Lilian Korir** was going to the canteen when she met 1st accused who was screaming and running from the opposite direction. She did not respond when asked why she was screaming.

7. PW7 continued with her journey and met the 2nd and 3rd accused. The 2nd accused had a radio while the 3rd accused had a piece of wood. As they talked she heard the 3rd accused saying:

“You have seen he is injured?”

The 2nd accused responded;

“Yes let me break this radio to confirm that.”

Reaching the canteen, she found the deceased there and blood was being wiped from his head. Present was PW3 and PW5.

8. While there the 1st accused arrived with a jembe threatening to cut the deceased. On seeing this she ran away.

9. **PW8, James Kiili** was the Investigating Officer. He explained the role he played in this matter. By consent of the defence, he produced the post mortem report (EXB4) and the mental assessment reports (EXB 5 a-c). He stated that the 2nd and 3rd accused had surrendered themselves to Sosiot Police Station. The cause of death was head injury and right extradural haematoma. The reports (EXB 5a-c) confirmed that accused persons were fit to stand trial.

10. The 1st accused in her unsworn defence, said the deceased was her husband. On 24th February 2011, the deceased and her were selling alcohol. They used to drink alcohol together and would quarrel. On the material day, at 5.00 p.m the deceased chased her with a panga from their home towards her maiden home. She reached home and screamed.

11. The deceased fell down before the 2nd and 3rd accused came. When they came they found him bleeding and was in pain. They all carried the deceased to his home. The 2nd and 3rd accused went back to their home, while she remained with the deceased who told her he was hungry.

12. They took food together and slept. On 25th February 2011, the deceased was unable to wake up. She informed his father (PW5) and they took him to Kericho District Hospital and later transferred him to Tenwek from where he died on 26th February 2011. PW5 advised her to go and inform the 2nd and 3rd accused to report the death as people could kill them. She did so.

13. The 2nd accused while unsworn stated that on 24th February 2011 at 5.00 p.m, him and the 3rd accused were resting at home when they heard noises from the road. They went to the road and found the 1st accused being chased by her husband who was armed with a panga. They tried to disarm him in vain. He took a stick to shield the panga from reaching the 1st accused. The deceased cut the stick and the panga fell off.

14. He fell down and was hit by a stone. They took him to his house, and the 1st accused also went with them. Thereafter they returned home. On 25th February 2011, they received a report that the deceased had been taken to the hospital by the 1st accused. They learnt on 26th February, 2011 that he had died. They reported at Sosiot Police Station on instructions of PW5, and were arrested and charged.

15. The 3rd accused unsworn, gave similar evidence to that of the 2nd accused. The defence did not

make any submissions. This is the case before court for determination.

16. The 1st, 2nd and 3rd accused have been jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 of the Penal Code defines murder as follows:

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

From the above definition, I find the ingredients to prove murder to be:

- i. **The fact of death.**
- ii. **Actus reus (the act of killing).**
- iii. **Mens rea (intention to kill/malice aforethought).**

17. There is no dispute concerning the fact of death. The postmortem (EXB4) confirms the cause of death to have been a head injury with right extradural hematoma.

18. The next issue to determine is who killed the deceased and whether the 1st, 2nd and 3rd accused were involved. The evidence shows that the deceased was injured on 14th February 2011 and he died on 26th February 2011. The incident leading to the injury occurred at around 5.00 p.m. It is the prosecution case that it is the three accused persons who inflicted the injury that caused his death. The defence however says the deceased suffered the injury when he fell down and hit himself on a stone.

19. PW1, PW2, PW3, PW6 and PW7 have all stated that they saw the 1st, 2nd and 3rd accused jointly beating the deceased person. The said witnesses are all neighbours to the accused persons and they know them. All the accused persons in their defence placed themselves at the *locus quo* but for different reasons.

20. PW7 met with the 1st accused screaming and running from the scene. When she next met the 2nd and 3rd accused. She overheard them discuss a person they had injured. PW2 and PW3 also stated that when PW2 and others arrived to assist the deceased the accused persons took off.

21. The deceased was brought to PW3's canteen for first aid as he was bleeding from the injury on the head. While there, the 1st accused came with a jembe, lifted it up threatening to hit the deceased with it. Had it not been for the intervention of PW5, the jembe would have landed on him. This is confirmed by the testimony of PW2, PW3 and PW7.

22. In her defence the 1st accused stated that the deceased who was chasing her with a panga fell down before the 2nd and 3rd accused came to rescue her. They found him bleeding and in pain. However, the 2nd and 3rd accused have stated that infact the 2nd accused intervened by shielding the panga using a stick. The deceased cut the stick and the panga fell down. He then fell down and was hit by a stone on the ground.

23. It is therefore clear that the evidence of the accused persons on how the deceased was injured is in itself contradictory. The 1st accused says he fell even before her rescuers arrived, yet her rescuers (2nd and 3rd accused) say they had already engaged in the rescue mission when he fell down in their presence. So which is which? Both versions cannot be correct.

24. This incident occurred during day time and all the eye witnesses have explained what they saw. No single reason has been given as to why all these witnesses would gang up to lie against the accused persons.

25. My finding is that the 1st, 2nd and 3rd accused were seen by the prosecution witnesses jointly

assaulting the deceased with sticks and a radio. The evidence of these witnesses was trustworthy and acceptable by the court. The injuries inflicted on him were fatal.

26. The next issue for determination is that of malice aforethought which is defined under section 206 of the Penal Code as follows:

“206. Malice aforethought shall be deemed to be established by Malice aforethought.

Evidence proving any one or more of the following circumstances -

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

27. Did the accused persons have a common intention to kill or cause grievous harm? The issue of common intention was dealt with by retired Justice Osiemo in **Mohamed & 3 Others v R [2005] 1 KLR 723** where he stated:

“4. Common intention generally implies a pre-arranged plan but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.

5. In order for the doctrine of common intention to apply there must be a pre-arranged plan and both of them must be present at the scene during the killing so that even if one pulls the trigger and shoots dead the victim, both of them are deemed guilty of the murder.”

28. The prosecution witnesses have not explained how this incident started. It was the accused persons' defence that the deceased was chasing the 1st accused with a panga, and she was making noises on the road. The evidence has shown that all the accused persons were beating the deceased. They had a common intention which they developed as they beat him. None stopped the other. They only stopped when they were intercepted. By then the deceased had suffered serious injuries.

29. PW5 who is the father of the deceased explained that the 1st accused and the deceased were brewers of alcohol and also drunkards. He further stated that because of his drinking habits, the deceased used to have frequent quarrels with the 1st accused and would even send her away.

30. PW5 further confirmed that on this material day, 1st, 2nd and 3rd accused and deceased were drinking alcohol on the road near the 1st accused's house. He saw them at 2.00 p.m and they drunk upto evening. Further that, by evening they were very drunk.

31. This evidence by PW5 is very crucial in determining the element of malice aforethought and what may have led to the killing. It is clear from this evidence that all the accused and the deceased were under the influence of alcohol, when this incident occurred.

32. It was held in the Case of **Mugoma & Ano. V R 2003 KLR 382:**

“The burden was on the prosecution to prove malice aforethought and that burden had not been discharged and as such a conviction of murder could not stand.”

33. As I have indicated above, this court was not told how the attack on the deceased started. It is not clear as to who the aggressor was. The prosecution had the burden of proving malice aforethought. This was not done and so the charge of murder cannot stand.

34. What is however clear is that, it is the three accused persons who assaulted the deceased causing him injuries which led to his death. This killing was unlawful. I therefore reduce the charge from murder to manslaughter contrary to section 202 as read with section 205 of the Penal Code, and accordingly convict the 1st, 2nd and 3rd accused persons of the same.

Dated, Delivered and Signed at Kericho this 26th day of February, 2016.

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H. I. ONG'UDI

JUDGE