



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL CASE NO.14 OF 2015

(Formerly Kericho High Court Criminal Case No.11 of 2013)

REPUBLIC

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PROSECUTION

VRS

BILLY KIPLANGAT

.....

ACCUSED

JUDGMENT

1. **BILLY KIPLANGAT** hereinafter referred to as the accused is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars are that the accused on the 16th day of February 2013 at Birirbei Trading Centre within Bomet County, murdered Philip Cheruiyot Korir.
2. The accused pleaded not guilty and the case proceeded to full hearing. The prosecution called six (6) witnesses while the accused gave a sworn defence and called one witness.
3. The prosecution case is that this incident took place outside Kipsis Bar of Birirbei Centre on 16th February 2013 around 10.00 p.m. The accused and the deceased had been drinking in the said bar. PW1, **Matthew Kirui** a bar attendant testified that on this date, the accused and deceased who were among the day's customers were seated at one table. Both were taking alcohol.
4. They sat 5 – 6 metres from the counter where PW1 worked. As PW1 collected plastics from the table where the two sat, he saw the accused kicking the deceased's legs. He asked them to stop any squabbles that they had, and the accused stopped, kicking the deceased's legs.
5. PW4, **Vincent Kibet Sang** had been at a barber's shop at Birirbei Centre on 16th February 2013 at 10.00 p.m. As he left the barber's shop he found the accused and deceased struggling outside the said shop. They were 5 metres from the shop. He was able to see them as there was security light on the long building. The barber's shop and the bar were on the same building.
6. The accused was pulling and dragging the deceased saying they should go home but the deceased refused. He saw the accused go behind the deceased. He caught him, lifted him and threw him on the ground. The deceased hit his head on the ground. Thereafter, the accused moved aside. The landlord (PW2) was called by Alfred the barber.
7. The deceased lay unconscious on the ground. There was no visible injury but the deceased appeared injured. PW2, **Henry Cheruiyot Koros** the bar owner was in his bar when he remembered something he had forgotten in his shop. He left for the shop and that is when he saw the deceased lying

on his back outside his bar. The deceased was chewing his mouth. He moved closer to him. The accused stood 3 metres away from the deceased. One (Alfred) explained to him what had happened. PW4 was also there.

8. He organized for transport and the deceased was taken to hospital. He later succumbed to the injuries. PW3, **Dr. Ben Kiplangat Korir** produced the post mortem report on behalf of Dr. Macharia who conducted the post mortem. The report shows that the deceased had no visible injuries. On internal examination, the following were found:

- **Bleeding over the cervical spine (neck region).**
- **The cervical spine cord was injured (neck region).**
- **The cause of death was cervical spine injury due to blunt force trauma (EXB1).**

9. He explained that the spine on the neck region is the cervical spine (C1 – C7). That C4 – C5 is around the middle area. He further explained that a big force would be the one causing the internal injuries, but would not always cause external injuries. That in the present case, there was an area of internal bleeding. Internal bleeding causes death he said.

10. That the area around C4 – C5 is a very important nerve which helps in breathing. If injured, it would cause serious repercussions. In re-examination, he said the spinal cord is part of the nervous system, and when the nervous system is affected, it causes paralysis. However, when the neck region is affected it causes death.

11. PW5, **Richard Kipnetich Korir**, is a brother to the deceased. He attended the post mortem on the body of the deceased. PW6, **Eric Odhiambo Onyango**, is the Investigating Officer. He visited the scene after recording witness statements. He found the scene to be 4 metres from Kipsis bar. Besides Kipsis bar, there was a barbershop and a shop on the same building with a playground behind the building.

12. After the incident the accused disappeared and was brought to the police station on 28th February 2013 by his father as the villagers wanted to lynch him. The mental assessment report showed he was fit to stand trial (EXB2).

13. When placed on his defence, the accused elected to make a sworn statement and called one witness (DW1). He denied the charge. He testified that on 16th February, 2013 at 9.00 p.m, he went to Kipsis bar which is near his home. He found about thirty (30) people present, and he knew majority of them. He mentioned Charles Korir (deceased's brother), Jeremiah Chelude, Charles Kenduiywa, Korir (Administration Police) as being some of them.

14. He settled down after greetings and ordered for a drink. The deceased came to where he was and greeted him and promised to buy him a drink which he did not. After half an hour he went out to relieve himself. However before he was out, a scuffle ensued inside the bar between deceased, his brother and other customers who were complaining that the deceased was disturbing them.

15. While still outside, he saw the deceased come there. He started rolling on the ground saying he was feeling pain in the stomach and back. He assisted him by massaging him. A few minutes later, PW4 appeared and the accused called him to see what was happening. PW4 retorted that the deceased was a drunkard.

16. He sent PW4 to call Charles Korir who came and said that was the deceased's behaviour. PW2 also came after locking the shop. They carried the deceased for about 20 metres from the bar. They suspected he had a problem and so looked for a vehicle which took him to Kapkatet Hospital. He did not go with them.

17. The next day, PW2 told him that the deceased was improving. Three days later Charles Korir came to their home and informed the accused's father that him and deceased had been drinking together. The deceased died nine (9) days later. After his burial the assistant chief informed the accused's father that he (accused) was required at the Police Station. Both of them went and he was arrested. He denied fighting with the deceased nor seeing any injury on him, but he admitted having been drunk.

18. In cross examination, he said the deceased was drunk and he had found him (accused) in the bar, misbehaving. He also said he used to be an army officer but left due to an injury on his leg. He denied doing what PW4 had told the court saying it was an impossibility.

19. DW1, **Jeremiah Chelule**, a teacher at Kaplong Girls High School, stated that both the accused and deceased are his neighbours. On 16th February 2013 evening (7.00 p.m) he was at Kiriripe alias Kipsis bar. He met several people there. They were taking alcohol but he was taking soda. The deceased who was also in the said bar was drunk and not stable. He kept on asking the bar attendant for his shop things. Daniel Korir (Omokachi) is the deceased's brother who was also drunk.

20. According to him, at one point the accused left the bar and went outside. Thereafter the deceased was pushed outside. It is later that PW1 was called and he saw people leave one by one. He too went and found the deceased lying down, rolling down and speaking in a weak voice. PW2 called for a motor vehicle to take him to hospital. The accused was also present, when this was happening.

21. In cross-examination, he stated it was the accused who left first, followed by the deceased. He did not know what happened between them, as he did not follow immediately. According to him, the deceased died three (3) days after this incident, which is not true.

22. Mr. Miruka for the accused submitted that the evidence and the circumstances of this case do not support the charge of murder. That there was no intention established and the evidence of PW1 – PW3 is contradictory. He doubted the findings by the Doctor (PW3). Further he wondered why the deceased who communicated with the witnesses did not link the accused to the injuries. He asked the court to consider the accused's defence and acquit him.

23. M/s Kiptoo for the State submitted that the State had proved its case beyond reasonable doubt. She relied on the evidence adduced by the witnesses and the exhibits produced. She further submitted that the injury suffered by the deceased was caused by the accused in a tricky way. This is now the case before court for determination.

24. The accused is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 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.”

In a case of murder the three issues to be proved are:

- **The fact of death.**
- **The act of killing (*actus reus*)**
- **The intention to kill/malice aforethought (*mens rea*).**

25. PW5 a brother to the deceased identified the body for the post-mortem. The post mortem report produced by PW3 confirms the death of the deceased (EXB1). The report shows the injuries suffered by the deceased and the cause of death.

26. I now move to determine whether the accused is the person who killed the deceased. The undisputed facts are as follows:

- The accused and deceased were among those who were taking alcohol at Kipsis bar on the night of

16th February, 2013.

- PW1, PW2 and PW4 were also present at the bar.
- The deceased was rushed to the hospital that night by PW2, PW4 among others as he was unwell.
- The deceased died on 23rd February 2013 from the injuries suffered, that night of 16th February, 2013.

Both accused and deceased were drunk that night.

27. From the Investigating Officer's evidence, Kipsis bar is housed on the same building with a shop and barber shop. PW1 was the bar attendant in Kipsis bar that night. He stated that the accused and deceased were seated on one table each with his mug of beer. As he passed by collecting plastics, he saw the accused kicking the deceased on the legs. He even warned them over that and their squabbles. They stopped and PW1 went about his business.

28. There is evidence that at one point the accused went outside. He was then followed by the deceased. DW1 did not follow them outside to be able to see what transpired between them.

29. PW4 who was not in the bar with the accused and deceased and who may be referred to as an independent witness was coming from the barber's shop. With the help of the security light on the building, he states that he witnessed the following (at page 61 – 62 of the handwritten proceedings:)

“The accused was pulling and dragging the deceased saying they go home, but the deceased refused. The accused then went behind him, caught him, lifted him and threw him on the ground hitting his head on the ground. The accused then moved aside.”

30. When all this was happening, PW4 was with the barber (Alfred Kimutai) who did not testify. The prosecution heavily relied on PW4's evidence to prove its case. The defence has stated that the evidence of PW4 should not be relied on because it was not supported by the evidence of the cause of death as stated in the post mortem report (EXB1).

31. PW3 was at pains to explain the findings in the report (EXB1). The doctor stated that the deceased's body had no external injuries, but the deceased suffered an internal injury. This internal injury was on the cervical spinal code. The areas on the cervical spine (neck region) were bleeding.

32. The Concise Oxford English dictionary at page 1383 defines a spine as;

“1. a series of vertebrae extending from the skull to the small of the back, enclosing the spinal cord and providing support for the thorax and abdomen; the back bone;

2. a central feature or main source of strength.”

33. I recall PW4 demonstrating before this court what he saw the accused do to the deceased. From that explanation and demonstration it would be incorrect to interpret the injury as falling of the head only. The body fell on the ground and the head hit the ground.

PW4 explained that the deceased was lifted up and thrown down on the ground and he hit his head on the ground. He did not say he fell with the head on the ground. The evidence is that the deceased never rose up from the ground where he fell.

34. The post mortem report (EXB1) shows that the deceased suffered a spinal injury of C4 – C5. From the definition of a spine, the vertebrae extend from the skull to the back bone. The doctor stressed on the neck region as the area that was most affected. I find this to be consistent with PW4's explanation of what happened to the deceased. There is no inconsistency at all.

35. In his defence, the accused stated that the deceased had come outside where he started rolling on the ground saying how he was feeling pain in the stomach and back. The accused even massaged him. A while later, PW4 appeared and the accused called him to see. That PW4 commented that the deceased was a drunkard. He then went to call the deceased's brother.
36. This to me was material evidence on which PW4 should have been cross-examined by the defence if it was true. He was not cross-examined on it, and I conclude that it is an afterthought.
37. DW1's evidence was that the deceased was pushed outside soon after the accused went outside. He did not follow them until much later when people started moving out. He too says when he went out he found the deceased on the ground; that PW2 was among those present, when he was rolling on the ground.
38. In his evidence PW2 said he found the deceased lying down on his back. From what the doctor found on the condition of his spine, the deceased could not have managed to roll on the ground, as stated by the accused and DW1.
39. The accused has been placed at the scene of incident. He has in his defence admitted that he was at the scene and even massaged the deceased.
40. PW4 explained what he saw the accused do to the deceased. The accused is a former Army Officer. With all techniques acquired, he knows what he did to the deceased. What is clear is that he is the one who caused the injury that caused the deceased's death.
41. It is true that the deceased died a week after the incident. That in itself does not **mean** that he was in a position to speak and tell others who it is that had caused the injuries. There is no evidence that any statement was recorded from him. Had he been in a position to speak and explain how he received the injuries a statement could have been recorded from him, by the police.
42. The next issue for determination is whether the killing was premeditated. Malice aforethought is defined under section 206 of the Penal Code as follows:
- “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;*
43. For the offence of murder, malice aforethought is deemed to be established by evidence showing knowledge that the act or omission causing death or grievous harm will probably cause death or grievous harm to some person whether that person is actually killed or not although such knowledge is accompanied by the indifference whether such death or grievous harm will occur.
44. The evidence before this court shows that the incident occurred around at 10.00 p.m. The deceased and accused had been in the bar taking alcohol from as early at 5.00 p.m. The accused stated in his defence that prior to coming to Kipsis bar he had been elsewhere drinking.
45. There is also evidence that the deceased had been singing, dancing and moving around the place due to his drunken state. He may have caused offence in the process.
46. Considering all this and that the incident occurred outside a bar involving two people who had

been drinking for hours, one cannot rule out intoxication and provocation. There is no evidence as to who started the struggle leading to this incident.

47. In the circumstances, I find malice aforethought not established. What has been proved is the killing which was unlawful.

48. I therefore reduce the charge from Murder to Manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict the accused of the same.

Signed, dated and delivered this 29th day of March, 2016 at Bomet.

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H. I. ONG'UDI

JUDGE

In the presence of:

1. M/s Kiptoo for State
2. Mr. Koech for Mr. Miruka for accused
3. Accused-present
4. S. Chepchock/Ole Shira- court assistant