



REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL CASE NO.6 OF 2012

REPUBLIC **PROSECUTION**

VRS

NIXON KIPRONO KIGEN **1ST ACCUSED**

GEOFFREY KIBET NG'ENO **2ND ACCUSED**

JUDGMENT

1. **NIXON KIPRONO KIGEN** and **GEOFFREY KIBET NG'ENO** referred to as the 1st accused and 2nd accused respectively are charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**.

The particulars as in the information are that the 1st accused and 2nd accused on 4th day of February 2012 at Koilsir Village in Kericho District within the Rift Valley Province, jointly murdered Samson Kimutai Ngeny.

2. Eight witnesses were called by the prosecution to support their case. Both accused persons gave unsworn statements of defence.

3. It is the prosecution case that on 4th September 2011, PW3, **Juliana Rono** was selling alcohol (chang'aa) in her house and there were some customers there. The deceased was spotted coming to the venue with a panga. He was asked to hand over the panga but he did not. Two of PW3's customers threw stones at him but none hit him.

4. He took off running in a different direction towards the valley pursued by two of the customers. The deceased was never seen again until the time his body was spotted on the banks of River Sondu on 9th September 2011 and retrieved on 10th September 2011.

5. A post mortem was conducted on 14th September 2011 and the cause of death was found to be cardipulmonary arrest secondary to massive internal haemorrhage, secondary fracture of ribs and head injury (EXB1).

6. The 1st and 2nd accused were arrested alongside a 3rd suspect who was acquitted under section 306 (2) of the Criminal Procedure Code.

7. In their defence, the 1st and 2nd accused denied any involvement in the murder.

Mr. Maengwe for both 1st and 2nd accused submitted that the prosecution had relied on a defective charge sheet. That the key suspects Charles Rono and Robert Kigen were not arrested and charged. Further that the prosecution failed to connect the 1st and 2nd accused with the murder.

8. I would wish to first address the issue of the alleged defective charge sheet. The charge sheet indicates that the offence was committed on 4th February 2012. However, the evidence adduced shows that it occurred on 4th September 2011. The post mortem (EXB1) was conducted on 14th September 2011. The record further shows that the accused were first arraigned in court on 13th February 2012.

9. I have no problem with the wrong dates on the charge sheet which appear to have been on typing error. The accused persons were not in anyway prejudiced because all the witnesses referred to the date of 4th September 2011 and not 4th February 2012 as the date of incident.

10. The 1st and 2nd accused are facing a charge of murder which is defined under section 203 of the Penal Code as:

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

11. The issue of death is not in dispute. The cause of death has also been confirmed through the post mortem produced herein as EXB1.

12. The next issue for determination is the act of killing (*actus reus*). The issue is whether the 1st and 2nd accused were involved in the killing of the deceased. There is no eye witness to the killing of the deceased herein. What is before this court is pure circumstantial evidence.

13. It was stated in the Case of **Sawe V R [2003] 364** as follows:

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.”

See also **Mwangi & Anor V R [2004] 2 KLR 32**.

14. The court has a duty to scrutinize the chain created by the evidence on record to be satisfied that the chain is not broken or weakened by any other evidence. I will now proceed to analyse this evidence.

The key witnesses in this case are PW1, **Geoffrey Cheruiyot Bii**, PW2, **Jackson Kiprotich** and PW3, **Juliana Rono**. PW1 stated that on this day, he was with the 2nd accused and Robert Kigen taking alcohol at the house of PW3.

15. While there, Charles Rono told them he had seen somebody coming with a panga. He turned and saw the deceased approaching them with a panga. He requested him to hand over the panga. Before he could do so, he saw Charles Rono and the 2nd accused throwing stones at the deceased. None of the stones hit him.

16. The deceased then took another route followed by the 2nd accused and Charles Rono towards the valley. He did not see the deceased alive again.

17. PW3, **Juliana Rono** in whose house these customers of hers were, said she had finished selling alcohol when this incident occurred. The persons she was with were: The deceased, Robert Kigen,

Geoffrey Bii, Stephen Kirong and others.

Further that the 1st accused, 2nd accused and the one acquitted were not in her house that day.

18. She further stated that she saw the deceased running along the nearby road while armed with a panga. Geoffrey Cheruyoit Bii approached him but he ran away.

19. This evidence of PW3 contradicts the evidence of PW1, who claims to have been at PW3's house and at the scene. PW1 stated that he saw the 2nd accused and Charles Rono chase the deceased towards the valley while PW3 stated that she was not with the 1st and 2nd accused at her house and they were not at the scene. At the same time, PW3 said she saw the 2nd accused try to snatch the panga the deceased had. She also saw Geoffrey(not clear which Geoffrey) and 1st accused going to the nearby shops.

20. PW3 substantially contradicted herself in her evidence in chief and in cross examination.

She further stated this at page 42 of the hand written proceedings;

“I am aware Samson had quarreled with Robert Kigen. I believe Samson was running towards where Robert was to assault him. I do not know what happened to Samson wherever he ran to”

In re examination at page 43, she said;

“I did not see Charles Rono, Geoffrey Ng'eno and Robert Kigen follow Samson.”

21. It remains unclear what PW3 saw and who she actually saw chasing or following Samson the deceased.

PW3 is the kind of witness the Court of Appeal referred to in the Case of **Kiilu & Anor V R [2005] 1 KLR 174** when it said:

“4. The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”

22. I find PW3 to be untrustworthy and unreliable. PW2, **Jackson Kiprotich** told the court that on 4th September 2011 he was at Kaptatuge next to a river. He saw the 1st accused and 2nd accused next to the river. Shortly thereafter he saw a body floating. He followed the body which was going down stream. The 2nd accused tried to retrieve the body but the 1st accused stopped him saying he could be swept away by water. He left them at the river.

23. PW2 said he informed his grandfather Daniel Nyokaa of what he had seen at the river. The grandfather allegedly reported to the area chief.

24. It could have assisted this court to know what PW2 reported to the grandfather and what the grandfather in turn told the area chief. PW2's grandfather and the area chief were not called as witnesses.

25. Further more the report that was given to the village elders was of a missing person. Had it been true that PW2 saw the body on 4th September, 2011 and told his grandfather who then reported to the area chief, those searching would have gone straight to the river and also had 1st accused and 2nd accused arrested.

26. The record shows that the report of drowning was made at the Sondu Police Station on 9th September 2011. The body was retrieved on 10th September 2011. It was not until 3rd and 4th night of February 2012 that the accused persons were arrested. Why did it take five (5) months before the arrest of the culprits if at all they were known?

27. The evidence by the witnesses (PW1 and PW3) does not even show at what time the alcohol consumers were at the house of PW3. PW2 has also not stated what time he was at the river on 4th September 2011. There is an unbroken chain between these two times. It is not clear why people like Richard Kigen and Charles Rono who have been adversely mentioned by witnesses were not arrested and charged.

29. The accused persons have denied any involvement in the death of the deceased. It was the duty of the prosecution to prove its case beyond reasonable doubt, by placing them at the *locus quo*.

30. Upon re-evaluating the evidence on record in its totality, I find the prosecution case against both 1st and 2nd accused persons not proved beyond reasonable doubt. For my part, I find both of them not guilty and acquit them under section 322 (1) of the Criminal Procedure Code.

Signed, dated and delivered this 15th day of March 2016.

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H. I. ONG'UDI

JUDGE

In the presence of:

Mr. Lopokoyit for State

Mr. Omondi for Mr. Maengwe for accused

Both accused present and Mr. Kenei as Court Assistant.