



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BOMET
CRIMINAL CASE NO.52 OF 2013

REPUBLIC.....PROSECUTION

VERSUS

WELDON KIPKIRUI TOO.....ACCUSED

JUDGMENT

1. **Weldon Kipkirui Too**, the accused herein is charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars being that the accused “*on the 8th day of November, 2013, at Aonet Village Mugango Location in Bomet County, murdered SHEPHARD CHERUIYOT CHEPKWONY.*”
2. He pleaded not guilty and the case proceeded to full hearing with the prosecution calling ten (10) witnesses while the accused gave an unsworn defence.
3. The Prosecution case is that the accused and deceased were employees of PW4 and PW7 the latter being a Pastor. They had been provided with accommodation by their employers.
4. There is evidence that the deceased had a habit of beating up his wife (PW1) on flimsy excuses. On 7th November, 2013 the deceased had told his wife that somebody had called him saying there was a person who was having an affair with her. At 9.00pm she was resting when the deceased came to their house. He gave her his phone to call the person who had called him.
5. She called the person and asked him who he was and he said he was Weldon. On being asked why he was saying such things about her, Weldon asked her to give the phone to the deceased, which she did. The phone was on the loud voice and she heard Weldon call the deceased “uncircumcised.”
6. The deceased disconnected the call but Weldon who is the accused called back and warned him saying he should not find them there. The deceased said they could not leave as the accused was not the owner of the house.
7. After a while the accused arrived, and ordered them to open the door. PW1 bolted the door but the accused shook it until the deceased told her to open for him. She opened and stood beside the door. The accused asked her if she knew him. She ran and stood outside. She screamed and then heard a person's cry.
8. Their neighbour (PW5) came out as the accused ran round the house. Other people responded and

came. On entering the house they found the deceased on the floor bleeding from the head and ears. Transport was organised and he was taken to Tenwek Hospital, but he succumbed to the injuries.

9. PW5 **Wesley Ngetich** was a neighbour to the deceased. On 7th November, 2013 at 9.00pm he was in his house when he heard somebody awakening the deceased. After a few minutes he heard PW1, shouting and somebody ran past his house. He opened the door and saw the person pass running.

10. He was then told by PW1 that the accused had hit the deceased. He entered the deceased's house and found him on the floor bleeding from the mouth, nose and neck. Him and others took the deceased to Hospital.

11. PW2 **Elijah Chepkwony** and PW3 **Haron K. Kigen** identified the deceased's body for postmortem. PW4 **Lyna Kilel** and PW7 **Wilson Kiptoo Kilei** were the deceased's employers. None of them witnessed the incident.

12. PW6 **Richard Rotich** the Assistant Chief of Mugango also received a report of the incident from PW7. The suspect hailed from the next sub-location, so he informed his counterpart about the incident. PW8 **Richard Kiplangat** the Assistant Chief Gitobe Sub-Location participated in the arrest of the accused.

13. PW9 **Dr. Miriam Wanjala** conducted the postmortem. She testified that the deceased had the following injuries;

(i) Swelling of head and face.

(ii) Cut wound on right side of head with an open skull.

(iii) Cut wound on left ear.

She found the cause of death to be a head injury with bleeding in the brain. The report was produced as EXB1.

14. PW10 No. 78796 P.C Bernard Ng'eno was the Investigating Officer in this matter. He received the report from a group of people led by PW7. He investigated the case and had the accused charged after he had been found fit to stand trial (EXB2). He also found that the accused and deceased were workmates. The cause of the fight was a love affair between the accused and the deceased's wife (PW1).

15. The accused **Weldon Kipkirui Too** in his unsworn statement of defence denied the charge. He stated that on 8th November, 2013 at 6.30pm he was at his work place at Aonet Academy where he worked as a cook. After he had prepared the day's food he left using the path past the workers' houses.

16. He met the deceased who accused him of having an affair with his wife. They started fighting and he snatched the stick the deceased had and hit him with it. He left him there not knowing which part of the body he had hit.

17. The next morning he was called by the Assistant Chief who asked him to meet him at his office but later informed him that they should meet at the Bomet Police Station. He went to the police station and was booked in the cells.

18. Mr. Maengwe in his submissions stated that the prosecution had not proved a case of murder against the accused who should be acquitted. That the evidence of PW1 and PW2 did not support the charge.

19. This is now the case before the court for determination.

20. The accused faces a charge 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.”

21. The ingredients to be proved in a charge of Murder are;

(i) The fact of death.

(ii) The act of killing (*actus reus*.)

(iii) The intention to kill (malice aforethought or *mens rea*.)

22. There is no doubt as to the fact of death. The postmortem report (EXB1) shows the cause of death as a head injury with bleeding in the brain.

23. The next issue to determine is whether its the accused who killed the deceased.

The deceased and accused were both workers to PW4 and PW7. It is the evidence of PW1 who was the deceased's wife that on the night of 7th November, 2013 at 9.00pm there had been a telephone conversation between PW1 and the accused and, between the accused and the deceased. These two conversations were not healthy ones.

24. The deceased had alleged that the deceased had informed him that his wife (PW1) was having an extra marital affair. PW1 had then demanded to know from the accused why he was saying such things about her. The accused is said to have called the deceased “*uncircumcised*” over the phone. He also warned them to leave the house.

25. Within minutes the accused was at the deceased's door. PW1 stated that when he arrived he ordered them to open and he shook the door, until she opened it. PW5, an immediate neighbour to PW1 and the deceased, testified that while in his house on the said date at 9.00pm when he heard somebody awakening the deceased. After a few minutes he heard PW1 shouting, and somebody ran past his house. He opened his door and saw the person pass running. PW1 then told him that the accused had hit the deceased.

26. This narrative shows that PW1, accused, deceased and PW5 knew each other well. The evidence of PW5 confirms that indeed there was a person at the deceased's house knocking the door and waking up the deceased.

27. PW5's house was about one (1) meter from the deceased's. The person must have been shouting for PW5 to have heard. PW5 heard the person run past his house. When he opened his door he saw the person pass while running.

28. This evidence of PW5 has not been displaced. When PW5 inquired from PW1 why she was screaming she told him the accused had hit the deceased.

The conclusion I make from this is that the person who had been knocking hard and shouting at the deceased's door was the accused person.

29. In his defence the accused stated that he was on his way home using the path past the workers' houses. The deceased and PW5 were staying in the workers' houses and so must have been the accused. That on the way he met the deceased who accused him of having an affair with his wife (PW1). That they fought and he struck the deceased with a stick, and left.

30. From both the prosecution and defence evidence it is not in dispute that the accused was at the scene of incident and he is the one who injured the deceased. The injuries he inflicted on the deceased were fatal. He died the next day after the assault.

31. My finding is that it is the accused who killed the deceased person. The next issue for determination is

whether the prosecution has established malice aforethought in the killing by the accused.

32. Malice aforethought is defined under Section 206 of the Penal Code which provides;

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

33. What transpired in the deceased's house prior to the attack is quite telling. The deceased accosted the wife (PW1) with certain information. He gave her his phone to call the person who had called him who happened to be the accused herein. Accused told her to give the deceased the phone. She heard the accused call the deceased "uncircumcised." The deceased disconnected the call, but the accused called him issuing threats.

34. After the threats on phone the accused was at the deceased's house within minutes, breathing fire. It is not clear whether the problem was that the accused was having an affair with PW1 or that he knew the person who was having an affair with PW1. Whatever the case there was tension between the two men i.e accused and deceased.

35. Both of them had lost their cool. The issue rotated around PW1. There is evidence from PW4 and PW5 that PW1 and deceased used to have quarrels and there were times the deceased would beat her up. PW1 herself stated that the deceased had beaten her thrice on suspicion of infidelity.

36. In his defence the accused stated that he was provoked by the deceased who accused him of having an affair with his wife (PW1). He did not however confirm whether the accusation was real or imaginary.

37. The murder weapon was not disclosed nor recovered. PW1 did not mention if the accused came while armed to inflict injury to the deceased. All she has told the Court is what the accused was telling the deceased and not vice versa. The deceased could not have been silent throughout as the accused insulted him, both on phone and at his house.

38. **Section 207** of the **Penal Code** provides for instances where a defence of provocation may be accepted. The section provides;

"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."

39. In the case of **RC V Republic (2005)2 KLR 239** the Court of Appeal in dealing with a defence of provocation stated;

"1. Under section 207 of the Penal Code, an unlawful killing in circumstances which would constitute murder would be reduced to manslaughter, but only if the act which causes death is done

in the heat of passion caused by sudden provocation. It is a question of fact whether the accused in all the circumstances of the particular case, was acting in the heat of passion caused by grave and sudden provocation when the killing was done.”

40. In applying Section 207 of the Penal Code, the Court must consider all the circumstances of the case;- According to the postmortem (EXB1) the deceased had a fracture on the right side of the head with a cut wound behind the left ear. Its not indicated how wide and deep the cut wound was. In his defence the accused said he hit the deceased once with a stick and left. The reason he gives is that he was provoked by the deceased.

41. According to PW1 it took just a few minutes after the heated telephone conversation before the accused arrived at the deceased's house.

Taking into consideration the totality of all the circumstances of this case I find that the accused acted in the heat of the moment when he was accused of having a love affair with the deceased's wife. Even when the deceased disconnected the call he still called him and within minutes landed at his house.

42. Its also not lost to this court that PW1 had been beaten thrice by the deceased on suspicion of infidelity. At the same time PW1 only told the court what were the insults by the accused and to the deceased and not what the deceased told the accused that led to the attack.

43. My finding is that the attack on the deceased was not premeditated. The element of malice aforethought has not been proved.

44. What is clear is that the accused killed the deceased. The killing was unlawful. I therefore reduce the charge of Murder to Manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code** of which I convict the accused accordingly.

DELIVERED, SIGNED AND DATED THIS 15TH DAY OF MARCH, 2016.

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H.I.ONG'UDI

JUDGE

In the presence of;

1. M/s Keli for State.
2. Mr. Maengwe for accused-present.
3. Accused-present in person
4. Kenei- court assistant.