



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 42 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

ELIAS CHEPKIENG KIPKEMOI.....ACCUSED

JUDGMENT

1. The lifeless body of Timothy Kibet Kipkemoi (hereafter *the deceased*), was found lying in his father's bedroom. It was in a kneeling position. It had two deep cut wounds on the back of the head. Brain tissue was trickling out.
2. The State brought information to the High Court charging the accused for murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 31st May 2014 at Kaptabuk Village in Kobuso Sub-Location within Elgeyo Marakwet County, he murdered Timothy Kibet Kipkemoi.
3. The accused pleaded *not guilty*. The prosecution called *six* witnesses. PW1 was another son of the accused. He testified that on 31st May 2014 at about 7:00 p.m., he was at Kaptabuk Shopping Center. The accused called him and said he "had killed Kibet". I must point out at the outset that this last statement does *not* amount to a *confession*.
4. PW1 went home. He found the body of the deceased on the floor inside the accused's bedroom. He said the body had injuries on the head. He did not see any weapon in the house or anywhere else. The accused was present. PW1 said the accused did not tell him why he killed the deceased. PW1 screamed. Some neighbours responded. Eventually, the Assistant Chief John Kiplagat (PW5) came. He alerted the police who arrived the following morning and removed the body to the mortuary.
5. Upon cross-examination, he said the deceased was living on the accused's land. The deceased and accused used to quarrel. In his statement to the police PW1 stated that the deceased was unhappy because he "had not been educated as well as the other children". He said the deceased had abandoned school; and, that the complaints he referred to were about trivial matters. He denied that the deceased had demanded a share of his father's land.
6. PW2 was Gladys Chepkosgei. She is the widow of the deceased. They were living in a house 200 meters from that of the accused. At about 6:30 p.m. on the material day, she was milking cows. She took some milk to the house of the accused. That is when she found the body of the deceased in the accused's bedroom. The accused was in the house. There was blood on the floor. She did not see the murder weapon. Upon seeing the blood, she screamed and ran away. Neighbours escorted her to the house of a neighbor, Salome. She spent the night there.
7. Upon cross-examination, she said she enjoyed good relations with the accused. She said they would take food from her father-in-law's (accused's) house; and, milk his cows. She denied that the deceased and accused had disagreements. She last saw the deceased at about 2:00 p.m. in the compound. She said the deceased was drunk.
8. PW3, Chebitok Maiyo, confirmed that she had also seen the deceased earlier at about 6:00 p.m.;

- and, that he was intoxicated. She asked the deceased to return to his house. She later heard the deceased opening a door. She could not tell the direction he took. She then heard a scream at about 6:30 p.m. She went to her father-in-law's (accused's) house. She said she found no one. She then met PW2. They returned to their father-in-law's house. When they opened the door to the bedroom, they found the deceased in a kneeling position. There was blood on the floor. He was dead. On cross-examination, she clarified that the accused was in the house. She said that whenever the deceased was drunk, he would offend the accused.
9. PW4 was Dr. Wilfred Kimosop of Moi Teaching and Referral Hospital. He conducted an autopsy on 4th June 2014 at AIC Kapsowar Mortuary. He found deep cut wounds on the head in the temporal area 15cms long and 5cms deep. There was another cut in the occipital area measuring 20cms long and 6cms deep. Brain tissue had spilled out. Movement of the bones of the head could be deduced as a result of the cuts. The bones of the skull had broken into several pieces. There was severe brain laceration. In his opinion the cause of death was severe brain injury secondary to the deep cuts. He produced the postmortem report (exhibit 1).
 10. PW4 also carried out an examination on the accused on 5th June 2014. The accused had bruises on face and nose which had healed. The accused told him that he had a quarrel with his son; that the son attacked him with a *panga* but he wrestled him and cut him on the head. On cross-examination, he said the bruises were five years old. He formed the opinion that the accused was mentally fit and could stand trial. His opinion was produced as exhibit 2.
 11. PW5, John Kiplagat, was the Assistant Chief of the area. He went to the scene at 7:30 p.m. As I stated earlier, he summoned the police. Due to the rain and difficult terrain, the police could not respond until the following morning. In the meantime, he looked for the accused. He found him in a neighbour's (Ben Kipkurui's) house. The police finally arrested the accused and took away the body to the mortuary.
 12. PW5 also interviewed the accused's wife, Elizabeth. She had been beaten; blood was oozing from her head. She said that the deceased had knocked the door; and, entered into the bedroom of the accused. Elizabeth was also arrested by the police.
 13. Upon cross-examination, PW5 said that he was aware that the deceased and accused used to have disputes. In his statement to the police, he stated that the deceased had been a "nuisance to the father on several occasions." On the first occasion, he had demanded Kshs 1,000 every Friday. On the second occasion, he demanded land from the father. On yet another occasion, the deceased had demanded for food at 2:00a.m; and, had chased away the wife of one of the sons of the accused.
 14. The last witness for the prosecution was Police Constable William Ekiru. He received a report on 1st June 2014. He went to the scene. He found Hillary (PW1) who directed him to his father's (accused's) house. He found the body of deceased lying next to the bed in a pool of blood. It had cuts on the back of the head. Hillary also directed the police officers to the Kitchen where he showed them a *panga* hidden under the table (exhibit 3). Hilary said the *panga* belonged to his father. PW6 said that the wife of the accused, Elizabeth, had been beaten by the public. He took her to hospital. He said she was unconscious. As a result, he was unable to interview her.
 15. The accused was placed on his defence on 12th November 2015. He elected to give sworn evidence. He did not call any witnesses. The accused said-

"I am a teacher at Kapsirwo Primary School. Timothy Kibet was my son. I am charged with his murder. On 31st May 2014, I was at home. I went to Kapsirwo. I withdrew some money from the bank. At 5:00 p.m. I left. I bought some meat for the family. I boarded a motorbike. I got home at 6:00 p.m. I placed the meat in the kitchen and went to my bedroom. I rested on my bed. At about 7:00 p.m., I heard some noise. I woke up. I heard the outer door being banged. Someone came in and said 'today is your day'

"He hit the bedroom door. He said "leo ni leo". He broke the bedroom door. He said 'leo ni leo'. I pushed him. He had a panga. When I pushed him, he fell. It was my son. He lives half a kilometre from my home.

"I ran outside. I think he must have fallen on the panga. He was drunk. We had a

disagreement earlier when he had abandoned school. It was in 2012. I did not kill him. All I did was push him in defence. Hillary testified I told him I killed Kibet. He lied. I told him I had pushed Kibet. I did not kill Kibet.”

16. When cross-examined by learned State Counsel, he conceded the *panga* belonged to the homestead. He said he pushed away the deceased in self-defence. He was not sure whether it was the *panga*; or, the deceased who fell first. He denied ever going to the Chief to complain about the conduct of the deceased. The last disagreement he had with deceased was in the year 2012 when he abandoned school.

17. I have considered the evidence; and, the written submissions by the learned counsel for the accused filed on 2nd March 2016. The Republic did not file final submissions.

18. Section 203 of the Penal Code provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*.

19. Malice aforethought is the *mens rea* or the *intention* to kill another person. Section 206 of the Penal Code defines it as follows;

“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.”

20. The first key question in this case relates to identification. The deceased was a son to the accused. PW1 was another son. The accused himself testified that he fought with the deceased in *his* (accused's) bedroom; and, that the *panga* in question belonged to his homestead. Further evidence was provided by the bruises on his face. There is thus *no* doubt whatsoever about the *identification* of the accused as the person who *fought* with the deceased on the material day. See Wamunga v Republic [1989] KLR 424, Republic v Turnbull & others [1976] 3 All ER 549, Obwana & others v Uganda [2009] 2 EA 333.

21. The next two key questions are whether the accused *cut* the deceased with the *panga*; or, whether the accused, in *self-defence*, pushed away the deceased and he fell on the *panga*. I have carefully considered the defence proffered by the accused. According to him, he heard the outer door being banged. Someone hit the bedroom door, entered and said; “leo ni leo”. (*today is the day*). The intruder was the deceased. He had a *panga*. The accused *pushed* him away. The deceased fell.

22. If one were to believe the accused, the deceased must have fallen on the *panga* and sustained the fatal injuries. If the deceased was brandishing the *panga*, the accused was *entitled* to defend himself. But the evidence does *not* fully support the version of events narrated by the accused. The deceased was drunk. That fact was confirmed by PW2 and PW3. Although the accused denied it, PW1, PW2 and PW5 (the area Assistant Chief) all confirmed that there was no love lost between the accused and the deceased. They had had a number of disagreements that had come to the attention of the Assistant Chief. The accused confirmed he had a disagreement with the deceased in the year 2012 when he abandoned school.

23. There is then the unchallenged evidence of the pathologist (PW4). He found deep cut wounds on the head in the temporal area 15cms long and 5cms deep. There was another cut in the occipital area measuring 20cms long and 6cms deep. Brain tissue had spilled out. Movement of the bones of the head could be deduced as a result of the cuts. The bones of the skull had fragmented into several pieces. Brain matter was oozing out. There was *massive* intra cerebral haemorrhage. I find that evidence to be *inconsistent* with the claim by the *accused* that the deceased *fell* on the *panga*. That theory *cannot* explain the *multiple* cuts that shattered the skull of the deceased into pieces.
24. I am also fortified by two other aspects of the evidence. First, PW1, PW2 and PW3 all found the deceased in a *kneeling position* with cuts to the head. He was next to the bed of the accused. Secondly, the accused himself admitted he fought with the deceased in his bedroom. They were the only ones in the bedroom. The deceased suffered *multiple* cuts that shattered his skull into pieces. The accused had a clear opportunity to kill him. It amounts to further corroboration. See *Opo v Republic* [1976-80] 1 KLR 1669, *Armstrong Kisuya v Republic*, Eldoret, High Court, Criminal Appeal 88 of 2011 [2016] eKLR.
25. I have reached the inescapable conclusion that the accused *cut* the deceased *twice* with the *panga*; and, that the claim that the deceased fell on a *panga* is a poor deception. The amount of *force* used against the deceased, who was drunk, was *excessive* and would *not* amount to *self-defence* in the circumstances.
26. The accused acted with malice aforethought. Malice aforethought includes the *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*. Cutting the deceased twice with a *panga* shattering his skull was an unlawful act.
27. The legal burden of proof lay throughout with the prosecution. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported). From the totality of the evidence of the six prosecution witnesses, I find that the prosecution proved the charge *beyond reasonable doubt*.
28. It was not clear what role the wife of the accused, Elizabeth, played; or, why she was beaten up by the public. PW6 left the court in a blind spot. But that is not material. Fundamentally, it raises *no* doubt about the culpability of the accused. I say so because the accused conceded that it was only he and the deceased who were in the bedroom at the material time. The entire corpus of *circumstantial* evidence points *irresistibly* and *exclusively* to the culpability of the accused. In *R v Kipkering arap Koske & another* 16 EACA 135 (1949) the court held-
- “In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”*
29. I have also found that the defence set up by the accused is far-fetched and a red herring. His identity was *never* in doubt; he was at the *locus in quo*; he confirmed he fought with the deceased or pushed him off; and, there was *no* credible evidence of provocation or that he acted in *self-defence*. Mental examination by PW4 confirmed the accused had a sound mind. He cut the deceased twice on the head with so much force that his skull bones disintegrated into several pieces. The cuts are consistent with trauma from a *panga*. In a synopsis, there was no legal *justification* for the attack upon the deceased.
30. In the end I am satisfied that the prosecution *proved* beyond reasonable doubt that the accused, of *malice aforethought* caused the death of Timothy Kibet Kipkemoi by an *unlawful act*. It must follow as a corollary, that the accused is culpable of murder. I accordingly enter a finding of *guilty*. The accused is hereby convicted.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 26th day of April 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Mr. Chebii for the accused.

Mr. Ngumbi holding brief for Ms. Mokuu for the Republic.

Mr. J. Kemboi, Court clerk.