



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL CASE NO. 70 OF 2011**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**JAPHET KIPLAGAT TOROREI ..... ACCUSED**

**JUDGMENT**

1. *Japhet Kiplagat Tororei*, the accused herein is charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on the 7<sup>th</sup> day of September 2011 at Kapkatet trading centre in Nandi North District, Nandi County of the Rift Valley province, the accused murdered *Stephen Kiprono Nyango*.
2. The accused pleaded not guilty. The prosecution called a total of eight witnesses. The trial opened before Hon. Lady Justice Mshila on 8<sup>th</sup> October, 2012. She heard the first four witnesses before she was transferred to another station. This court took over the proceedings on 15<sup>th</sup> October, 2014 under **Section 200(3)** as read with **Section 201** of the **Criminal Procedure Code**. The accused after understanding his rights under the aforesaid provision elected to have the trial continue before me from where Hon. Mshilla J had stopped. I thereafter heard the rest of the evidence in this case.
3. The case for the prosecution according to the evidence of PW1 *Henry Kimutai Kosgey* is that on 17<sup>th</sup> September 2011 at 6 p.m, four people were watching a football match in his video hall at Kapkatet Trading Centre. They were *Japhet Kiplagat* the accused, *Stephen Kiprono* the deceased, *Felix Kiprotich* and *Evans Kipkoris*. PW1 recalled that he left the four watching the football match as he went to charge his phone in nearby premises. While there, he heard shouts from his video hall claiming that someone had been stabbed. He then saw the accused running away armed with a knife. He gave chase but gave it up when the accused entered an SDA church. Other people continued with the chase. He went back to the video hall. He found that *Stephen* (hereinafter the deceased) had been removed from the hall. He noted that he was bleeding in the abdomen and he was not talking.
4. PW3 *Julius Kiplagat Rugut* recalled that at the material time, he was in the SDA Kapkatet church praying with other worshippers. On hearing screams, he went outside the church. He saw the accused running towards the church being chased by some people. He was not armed with any weapon. He went to where the accused had come from. He found the deceased lying on the ground. He had been stabbed. His intestines were out. He organized to have the deceased taken to the Moi Teaching and Referral Hospital where he succumbed to his injury on the same day at 8 p.m while undergoing treatment.

5. PW6 *Aspel Koech Tanui* is among the persons who were chasing the accused. According to his evidence, on 17<sup>th</sup> September, 2011 at around 3 p.m he was playing cards together with four other people behind some shops at Kapkatet trading centre. He heard screams coming from the front side of the shops. Fearing that the police had raided the trading centre and they were likely to be arrested, they scattered in different directions but on his part, he went to the front side of the shops to see what was happening.
6. On arrival he found the deceased lying next to the door of a video shop. He asked the deceased what was wrong. The deceased did not answer but people present told him that it is the accused who had stabbed him with a knife. At that time he saw the accused running away. Together with other people they chased the accused upto a maize plantation. They did not arrest him as they got scared when they saw that he was armed with a knife.
7. PW7 Chief Inspector *Stanley Mwaura* was the investigating officer. He testified that on 18<sup>th</sup> September, 2011 at 7.30 a.m, he received a telephone call from the assistant chief of Kabasaga sub location who reported that on the previous day, a Nandi male adult had been stabbed at Kapkatet trading centre and that he had died while undergoing treatment. He immediately proceeded to the trading centre. He was led to the scene of crime by the area chief.
8. The scene of crime was a room which was being used as a video shop. There was blood on the floor and there was a bench therein which was heavily blood stained. He recovered in the room a blood stained greyish cap which PW1 claimed belonged to the deceased (exhibit 3). He also cut a piece of the blood stained bench which he produced as exhibit 4.

In the course of his investigations, he proceeded to the mortuary and took possession of the trouser the deceased was wearing (exhibit 5). He arrested the accused on 9<sup>th</sup> October, 2011 at Enoosaen with the help of members of the public including the chief of Kapkatet location one *Mr. Philemon Songok*. He took the accused's blood sample. He also took possession of his grey trouser which had a stain suspected to be a blood stain. He produced the trouser as exhibit 6. He forwarded all the aforesaid exhibits together with blood samples taken from the deceased and the accused to the government chemist for a DNA analysis.

9. The blood samples and the aforesaid exhibits were analysed at the Government Chemist by PW5 *Mr. Lawrence Kinyua Muthri*, a specialist in DNA analysis. After conducting his analysis, PW5 found that the trouser recovered from the accused was not blood stained. The DNA profiles generated from all the other exhibits matched the DNA profiles generated from the blood sample taken from the deceased and none matched the DNA profile generated from the blood sample taken from the accused.
10. PW8 *Dr. David Chombo* is the pathologist who performed a post mortem examination on the body of the deceased on 22<sup>nd</sup> September, 2011. The body was identified by PW2 and PW4. The doctor noted a surgical wound measuring 23cms which had punctured the Aorta at the level of T12/L1 with massive abdominal hemorrhage. He opined that the cause of death was severe bleeding due to penetrating abdominal injury (stab wound). He produced the post mortem report as exhibit 1.
11. That marked the close of the prosecution case. The court found that the state had established a prima facie case against the accused and put him on his defence. In his defence, the accused elected to testify under oath. He did not call any other witness.
12. In denying the offence, the accused testified that on 17<sup>th</sup> September, 2011 between 2 – 3 p.m, he was in a room in a trading centre near his home watching live transmission of a football match together with fifteen other people who included the deceased. When the match was half time, he went outside to smoke. This is when he saw people running away shouting “it is the police; it is the police”. As it was normal for the police to conduct swoops in the trading centre to arrest people engaged in illegal activities like dealing in illicit brews or gambling, he decided to follow those running away to avoid being arrested. He ran all the way to his home. He denied that he was the one who stabbed the deceased with a knife. He also denied that he had a knife that day. He stated that the deceased was his friend and he had no reason to harm him. He claimed that

PW1 and PW6 gave false evidence against him and alleged that he had a long standing grudge with PW6.

13. The accused also denied the investigating officer's claim that he had gone underground after committing the offence. He explained that he was employed as a tractor driver in Enoosaen in Transmara; that he was on leave from 11<sup>th</sup> September, 2011 to 18<sup>th</sup> September, 2011; that he was at Kapkatet village on 17<sup>th</sup> September, 2011 because he was on leave and that he left the village on the following day not because he was hiding to escape arrest but because he had to resume his duties at Enoosaen from where he was arrested two weeks later.

14. At the close of the defence case, learned counsel for the accused *Mr. Kipnyekwei* filed written submissions which he highlighted before me on 20<sup>th</sup> January, 2016. Learned prosecuting counsel *Ms Karanja* opted to make oral submissions.

15. I have considered the evidence adduced in this case in its entirety. I have also considered the written and oral submissions made on behalf of the accused and the state.

16. The offence of Murder is created by **Section 203** of the **Penal Code**. That section provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

17. In order to prove the charge of murder, the prosecution must prove beyond reasonable doubt three key elements of the offence which are the following;

- i. The death of the deceased
- ii. That the deceased's death was caused by the accused person's unlawful act or omission.
- iii. That when committing the unlawful act or omission, the accused person had malice aforethought.

18. Malice aforethought simply put is the intention or mens rea to kill another person. It is defined in **Section 206** of the **Penal Code** as follows;

***“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.***

19. In this case, there is no doubt that the prosecution proved beyond any reasonable doubt the death of the deceased and that the cause of his death was severe bleeding due to a penetrating stab wound on his abdomen. There is however a contradiction between the particulars supporting the offence and the evidence on record regarding the date the deceased met his death.

The particulars allege that the deceased was murdered on 7<sup>th</sup> September, 2011 while as the evidence adduced by both the prosecution and the defence confirm that the deceased was assaulted on 17<sup>th</sup> September, 2011 and succumbed to his injuries on the same date. This contradiction though relevant is in my view not material as to render a fatal blow to the prosecution's case. It appears to have been a typographical error which did not occasion any prejudice to the accused given that he knew all along the date on which he is alleged to have murdered the deceased as can be seen from his defence.

20. The only issue that arises for my determination in this case is whether the accused is the person who murdered the deceased on the fateful day. I would like to start addressing this issue by observing that no direct evidence was adduced by the prosecution to prove that the accused is the culprit who on the material date stabbed the deceased on his abdomen with a knife causing him fatal injuries. I say so because none of the eight witnesses who testified in support of the prosecution case claimed to have seen the accused stab the deceased. PW1, PW3 and PW6 were not in the video hall when the offence was committed and did not therefore see the person who assaulted the deceased. They were at other places but were attracted to the scene by screams. On arrival they found the deceased already injured.

21. The persons who may have witnessed the assault on the deceased were for undisclosed reasons not called as prosecution witnesses to tell the court exactly what happened.

According to the evidence of PW1, he had left four people in the hall including the deceased and the accused. The accused in his defence claimed that a total of fifteen people had been watching the football match. From the evidence of PW7, it is clear that the offence was committed inside the hall but thereafter the deceased was taken outside. There is therefore no doubt that the people who had been in the hall at the material time whether they were four as stated by the prosecution or fifteen as stated by the accused witnessed the commission of the offence but none of these people were called as prosecution witnesses.

22. In view of the foregoing, it is my finding that the prosecution's case in this matter rests solely on circumstantial evidence. The law is that for circumstantial evidence to sustain a conviction, it must irresistibly point to the guilt of the accused person as charged. Such evidence must be incompatible with the innocence of the accused and must be incapable of any other explanation other than that of his guilt.

23. In explaining the circumstances in which a court may convict on the basis of circumstantial evidence, the court of Appeal in Mwangi V Republic (1983) KLR 522 stated as follows:-

***“In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. The facts surrounding the first appellant's possession of the property of one of the deceased persons and his posing as the deceased were incompatible with the appellant's innocence and inconsistent with any other rational conclusion”.***

24. Further, in Sawe V Republic (2003) KLR 364, the Court of Appeal addressed the same subject and expressed itself as follows

***“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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused”***

25. In this case, the circumstantial evidence relied on by the prosecution is to the effect that the accused was seen running away from the direction of the video hall soon after the deceased was stabbed with a knife. PW1 and PW6 claimed that they chased after the accused and they both noted that he was armed with a knife. PW3 who also claimed to have seen the accused running away from the scene contradicted the evidence of PW1 and PW6 by stating that he did not see the

accused being armed with any weapon. The knife suspected to have been the murder weapon was not recovered from the accused person.

Though PW6 claimed in his evidence that the people he found at the scene told him that it is the accused who had stabbed the deceased, those people did not testify in support of the prosecution case. That aspect of PW6's evidence was therefore hearsay which is inadmissible in evidence. It is also pertinent to note that the blood samples and exhibits analysed by PW5 did not provide any evidence which linked the accused to the commission of the offence.

26. The accused in his evidence on oath denied that he stabbed the deceased with a knife at the time alleged. He denied that he had a knife on that date. He gave an account of why he was running away from the direction of the video hall. He explained that while he was outside the hall smoking, he saw people running away shouting that the police had raided the trading centre; that he also decided to run away to avoid being arrested in the police swoop. PW6 in his evidence appears to have lend credence to this claim when he testified under cross examination that on hearing screams, he and his friends ran in different directions fearing arrest by the police. This explanation by the accused coupled with the fact that the knife suspected to be the murder weapon was not recovered from him offers a different hypothesis concerning why the accused was running away from the direction of the video hall other than that he was doing so because he had stabbed the deceased.
27. In addition, the accused testified that he had known the deceased prior to the material date and that they had been in good terms; that he did not have any reason to harm him leave alone take his life. The prosecution on the other hand did not adduce any evidence to prove that the accused had expressed or displayed any intention to kill the deceased or cause him grievous harm.
28. As re-iterated in the case of *Sawe V Republic (Supra); Abdalla Bin Wendo & Another V Republic (1953) EACA 166* and *Bhatt V Republic (1957) EA 332*, the legal burden of proof subject to the provisions of **Section 111** of the *Evidence Act* rests on the prosecution throughout the trial. The burden never shifts to an accused person. In this case, I am satisfied that though the evidence on record points to a strong suspicion that the accused may be the person who murdered the deceased by stabbing him with a knife, suspicion alone however strong cannot take the place of evidence.
29. It is thus my finding that the circumstantial evidence adduced by the prosecution in this case fell short of establishing beyond doubt that the accused with malice aforethought caused the death of *Stephen Kiprono Nyango* by an unlawful act or omission. In the premises, I enter a finding of not guilty. The accused is accordingly acquitted.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 20<sup>th</sup> day of April, 2016**

In the presence of:

The accused person

No appearance for the state

Mr. Kipnyekwei counsel for the accused also absent though duly notified.