



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 42 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPHAT KIPKOECH KIRWA.....1ST ACCUSED

SAMMY KIPTOO.....2ND ACCUSED

JUDGMENT

1. On the night of 30th September 2003, Hillary Kimisik Malakwen was set ablaze in a fierce bonfire. The fire was lit near the gate of the homestead of Joseph Boit. The next morning, police only recovered some bones from the dying embers. The accused are sons of Boit. A witness, PW3, told the police that on the material night, she saw the deceased at Boit's house; his hands and legs were tied; he was being tortured; and, was accused of bewitching Boit's wife.
2. The Republic 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 30th September 2003 at Kabore Sub-Location, Lolminingai Location in Nandi North District of the Rift Valley Province jointly with others not before court, they murdered Hillary Kimisik Malakwen (hereafter *the deceased*).
3. The accused pleaded *not guilty*. The prosecution lined up six witnesses. The case unfolded as follows. PW1 was Celestine Malakwen. She is the widow of the deceased. She is a teacher. On 30th September 2003, she was returning home from school. When she reached Joseph Boit's home, she saw a crowd of people. She saw her sister-in-law (PW2) being beaten by someone. She stood there for some time. Then one of the daughters of Boit, Emily Chepkoech, came with a stick, beat her and chased her away. PW1 ran towards her house.
4. PW1 found the deceased resting in the bedroom. About ten minutes later, Sammy Kiptoo (2nd accused) came to her house. He asked her whether she had seen her neighbor, Cheruiyot. A few minutes later, the 1st and 2nd accused returned. They were now accompanied by Elias Kipkemboi. They asked for her husband. She feigned ignorance. They never said why they were looking for him. They left once more but returned with two other people, Joseph Boit and Philemon Kirwa.
5. The visitors were sons and other relatives of Joseph Boit. They forced the door open; started beating the deceased; and frog marched him outside. The deceased was only wearing his underwear. When she tried to follow the party, three daughters of Boit, Dorcas Chebet, Emily Chepkoech and Stellan Kipkoech, who were standing outside her gate, chased her back into her compound. She asked James Chepkwony (PW4) to take a trouser to the deceased. Her husband did not return. She did not know what transpired in the night. That is the last time PW1 saw the deceased. She later heard that the deceased was accused of bewitching Boit's wife. The latter was ailing.
6. In the meantime, PW1's sons and brothers-in-law came to her homestead. They tried to go into

- Boit's house but they were repulsed. They reported the matter to the Assistant Chief. The Chief was short of *air time* and did not immediately contact the police. PW1 said that some school children told her there was a fire outside Boit's house. The police arrived at Boit's home the following day at 11.00 a.m. They found some small bones belonging to her husband from the ashes.
7. When cross-examined by counsel for the 1st accused, she said that Boit's home was the 1st accused was arrested her home; she forgot the date. In her statement to the police she had said that the 2nd accused came and asked for Cheruiyot. In that statement she had only mentioned the 1st accused. She answered further that when the 2nd accused first came to her compound, he was not accompanied by the 1st accused. One of the school children who told her about the fire was Cosmas Kirwa. She did not know who lit the bonfire; but she heard noises from afar. Her home was 200 meters from the house of Joseph Boit. She said her family had generally cordial relations with that of Boit. She was emphatic that the 1st accused was one of the people who picked up her husband from her house.
 8. Upon further cross-examination by counsel for the 2nd accused, she said the 2nd accused returned to her house after 20 minutes. He asked for her neighbour Cheruiyot. The second time, the 2nd accused was armed with a knife and some *rungus*. PW1 was in the house with her young daughter Phylis Cheptoo (PW 5). The 2nd accused left. He returned for a third time at 6:00 p.m. and asked for her husband.
 9. PW2, Zipporah Malakwen is a sister-in-law of the deceased. At about 4:00 pm on the material day, she went to Boit's home to see his wife. The latter was sick. Stella, a daughter of Boit, screamed and hit the ground with a *panga*. Another lady emerged and hit her on the thigh with a *rungu*. She went to her parent's home where she spent the night. She did not know what transpired later in the night at Boit's compound. On cross-examination, she said there were many people in Boit's house. She did not see the 1st or 2nd accused.
 10. PW3 was Wilfred Kosgey. On 30th September 2003 at about 8:00 p.m., he heard a scream emanating from Boit's home. He went there. He found the house locked. He knocked. The door was opened. Before he could sit down, he saw someone tied up in the sitting room. It was the deceased. He said the deceased spoke to him asking him to intercede on his behalf. He had been tied with a rope on hands and legs. PW3 did not know who had tied up the deceased. Boit and his children were there, including his three daughters. PW3 spoke with Boit.
 11. PW3 said Boit's daughters kept telling the deceased that he had bewitched their mother. He pleaded with them to forgive the deceased. Boit went outside and came back with some water which he poured on the feet and hands of deceased. The deceased was screaming. PW3 said he stayed in the house for about 10 minutes. He felt uncomfortable and left. He said Boit and the deceased were neighbours and had enjoyed cordial relations. On cross-examination by counsel for the 2nd accused, he said he did not see the 2nd accused. He said there was light from a lamp in Boit's house.
 12. PW4 was James Chepkwony. He was a neighbor of the deceased. On the material day he responded to screams from the deceased's house. He then saw a group of about six people leaving the home of the deceased. He stepped aside. The six included Boit, his son Kiptoo (2nd accused), Elias, Chebet, and a small daughter of Boit. They were pushing the deceased towards Boit's house. The deceased was naked, save for his inner pants. They took the deceased to Boit's house.
 13. PW4 decided to leave. About 10 metres away, he met with PW1 and her daughter. PW1 gave him a trouser to take to the deceased. He followed the group of people holding the deceased. He caught up with them before they reached Boit's gate. PW4 tried to give the deceased his trousers; he placed them on his arm. He said Boit was asking the deceased whether he had bewitched his wife. The 2nd accused was pushing the deceased. The 2nd accused did not have a shirt. The next day, PW4 heard the deceased was killed and his body burnt. He returned to Boit's compound. He saw the fire. I saw a hip in the fire. The fire was on the road next to Boit's home. Boit was feeding the fire with more wood. He saw the 2nd accused around the fire. He did not see the 1st accused. PW4 left the scene when the police arrived.
 14. PW5 was Phyllis Cheptoo. She is a daughter of the deceased. At the material time she was thirteen. She was 25 years when she testified before me. On 30th September 2003 at about 6:00

p.m she was at home cooking. She saw Josphat (1st accused) through the window. Her father was asleep in a bedroom next to the kitchen. She knew the 1st accused. He saw him peep into her father's bedroom through a window. The 1st accused then left. He later returned with the 2nd accused and Elias. She said the 2nd accused was carrying a whip. Elias came into the kitchen and asked her to put on the lamp. She lit the lamp and gave it to him. She said the visitors seemed angry. She left them in the house. She saw a group of people coming towards the house. She left for Zipporah's place (PW2). She said her mother (PW1) was screaming. The next morning, she saw smoke billowing from Boit's home. She went there. Police had then arrived. She said her father had been killed and his body burnt.

15. The last prosecution witness was PW6, Police Superintendent David Ruto. He was the investigating officer. at the material time, he was Officer Commanding Station, Kapsabet Police. On 1st October 2003 at 7:00 a.m. he was heading to the station. The Assistant Chief called him and informed him about the incident. He proceeded to the scene. He found a glowing fire. The body burnt beyond recognition. The fire was scattered. After making enquiries from PW1 and other relatives of the deceased, he arrested Boit, his daughter and two other relatives. They were charged in a separate murder trial (HCCR 96 of 2003) at the High Court. Two of them were acquitted. Three sons and a daughter disappeared from the area. The two sons (the 1st and 2nd accused herein) were arrested later and charged.
16. Upon cross-examination, he said the fire was outside the gate of Mr Boit. Scenes of Crime Officer took photographs at the scene. He did collect the ashes. As a result no postmortem examination was carried out.
17. When the 1st accused was placed on his defence, he elected to make an *unsworn statement*. His full statement was as follows-

“On 29th September 2003 I woke up; I did work in the household. At 2:00 p.m. I took the cows to my grandmother's place in Kapkaggon. I stayed there until 6:30 p.m. I slept at my grandmother's place. I woke up at 5.00 a.m. the next morning. I went to the shamba. That was the 30th September 2003. At 9:00 a.m., some school children told me that someone had been burnt in our house. I decided to go back home. On the way two vehicles passed me on the road. I went to our house. I found the two vehicles there and many people. I was told Hillary had been burnt. Police poured water on the ashes and collected some bones and went. On 12th September 2007 I was arrested by the police and a village elder. I was taken to the police station Kapsabet. I stayed in custody for six days. I wrote a statement. I was charged with this offence”

18. The 2nd accused also made an *unsworn statement*. The following was his entire statement-

“On 29th September 2003, I left Kapore heading to Kesses. I needed to consult a doctor as my mother was sick. I was told to wait for the doctor. I waited until 3.00 p.m. I left together with the doctor. We went home. I found many people who had come to see my mother. I took the doctor to her. I then escorted him out. I returned to bathe. As I headed back to the house I saw people entering our home. When I got there I found my sisters and other neighbours at the deceased's house.

“After some time, the deceased was frog marched from the house. People wanted to beat him. I prevented them from attacking him. Some people said deceased should be taken to my house to share milk with my mother; if he had bewitched her, sharing the milk would cure her.

“On the way, I told my father that I had been with my mother in hospital for three months. I told him my mother had cancer and was HIV positive. My father became angry. They took deceased to our home. My father continued to quarrel with me. He said I should not be seen on his land again. I left. It was 8:00 p.m. I went to sleep in a hotel where I used to work. At 7:00 a.m. the next day I returned home. I found a fire burning. I did not see the person being burnt. Police came. They first went to house of deceased and then returned to our home. They took my father away.

“After one week I moved to the next farm. On 14th April 2008 I went to the shamba. The Assistant Chief and two people came and arrested me. They explained to me that they were arresting me for this offence. I wrote a statement to police. I was then charged”.

19. That marked the close of the defence case. The learned counsel agreed to file written submissions.

Those by the learned Prosecution Counsel were filed on 12th May 2016; and, those by the learned counsel for the two accused on 11th May 2016 and 19th May 2016 respectively.

20. I have considered the evidence. I have also paid heed to the written submissions. 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*.

21. 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.”

22. The death of the deceased is beyond question. PW1, PW4 and PW5 all saw a group of people, including the 1st and 2nd accused, frog march the deceased naked from his home into the compound of Boit. The 2nd accused confirmed in his defence that he tried to stop the group *“from attacking [the deceased]. Some people said deceased should be taken to [Boit’s] house to share milk with my mother; if he had bewitched her, sharing the milk would cure her”*.

23. The two accused are sons of Boit. PW3 vividly remembered seeing the deceased tied with a rope on the hands and legs in the sitting room of Boit’s house. PW4 and PW5 saw the fire. PW4 saw a human hip burning in the fire. PW5 saw some bones. The fire was on the road next to Boit’s home. Boit was feeding the fire with more wood. He saw the 2nd accused around the fire. PW6, Police Superintendent Ruto, found a glowing fire at the scene. The body of the deceased was burnt beyond recognition. The fire was scattered. The police took away some bones.

24. Although the body was burnt beyond recognition, some human bones were salvaged from the ashes. The cause of death is thus known. It can be inferred from the set of circumstances that deceased was either killed in Boit’s house or compound; or he was thrown into the fire. He died either before; or, in the raging flames of the bonfire lit outside Joseph Boit’s house on the night of 30th September 2003. That is clear and can be concluded from the uncontroverted evidence of PW1, PW3, PW4, PW5 and PW6.

25. I am alive that in the circumstances, and as well explained by PW6, no postmortem examination was carried out. It would have been futile and unnecessary. In *Ndungu v Republic* [1985] KLR 487 the Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial *unless* the cause of death is *too obvious*. The Court stated at page 493 as follows:-

“Of course there are cases, for example where the deceased person was stabbed through the heart

or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced.”

26. I am satisfied that the deceased died; and, that his death resulted from an *unlawful act*. The key question then is whether the accused, of malice aforethought, killed the deceased. The first primary question relates to identification. PW1 saw Sammy Kiptoo (2nd accused) come to her house and asked her whether she had seen her neighbor Cheruiyot. A few minutes later, the 2nd accused and Josephat Kirwa (1st accused); and, Elias Kipkemboi returned. They asked for her husband. She feigned ignorance. They left once more but returned with two other people, Joseph Boit and Philemon Kirwa. The visitors were sons and other relatives of Joseph Boit. They forced the door open; started beating the deceased; and frog marched him outside.
27. That narrative was supported by PW4 and PW5. PW5 knew the 1st accused. He saw him peep into her father’s bedroom through a window. The 1st accused then left. He later returned with the 2nd accused and Elias. She said the 2nd accused was carrying a whip. Elias then came into the kitchen and asked her to put on the lamp. She lit the lamp and gave it to him. She said the visitors seemed angry.
28. PW1, PW2, PW4 and PW5 were all *neighbours* of the accused. They had known them for years. When they frog marched the deceased from his house it was about 6:00 p.m. It was not dark. This was evidence of recognition; far much stronger than simple identification. See *Kiarie v Republic* [1984] KLR 739, *Maitanyi v Republic* [1986] KLR 198 at 201, *Obwana & Others v Uganda* [2009] 2 EA 333, *Joseph Ngumbao Nzaro v Republic* [1991] 2 KAR 212.
29. I am alive that witnesses can be honest but mistaken. But further corroboration came from none other than the 2nd accused. He confirmed he was at the scene; and, that he tried he tried to stop the group from attacking the deceased. I readily find that the 1st and 2nd accused were in the group that removed the deceased from his house and led him into the compound of their father, Boit. As I have stated, the deceased was last seen alive at 8:00 p.m. in Boit’s house; and, he died the same night. There is absolutely no question of mistaken identity in this case.
30. The next key question is whether the 1st and 2nd accused, of malice aforethought, killed the deceased. There is no direct eye witness account of the killing. But there is very strong circumstantial evidence. 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”

31. See also *Sawe v Republic* [2003] KLR 364. The first compelling piece of circumstantial evidence in this case is this: PW1, PW4 and PW5 all saw the 1st and 2nd accused in the group of people that frog marched the deceased naked from his house into the compound of Boit. When the 2nd accused returned to the house of the deceased he was armed with a knife and some *rungus*.
32. The second important piece of circumstantial evidence is that on the night of 30th September 2003, at about 8:00 p.m., PW3 heard a scream emanating from Boit's home. He went there. He found the house locked. He knocked. The door was opened. Before he could sit down, he saw someone tied up in the sitting room. It was the deceased. He said the deceased spoke to him asking him to intercede on his behalf. He had been tied with a rope on hands and legs. PW3 did not know who had tied up the deceased. Boit and his children were there, including his three daughters.
33. Thirdly, PW4 saw Boit the next morning feeding the fire with more wood; and, he saw the saw the 2nd accused around the fire. PW4, PW5 and PW6 saw human bones in the fire. The deceased was burnt beyond recognition.
34. The two accused were thus among the last people to be seen with the deceased alive. The 2nd accused conceded he was at the *locus in quo* until 8:00 p.m. on the night the deceased was killed; and, that when he returned home the next morning, he found a fire burning. There were human

remains. He said the following-

“As I headed back to the house I saw people entering our home. When I got there I found my sisters and other neighbours at the deceased's house.

“After some time, the deceased was frog marched from the house. People wanted to beat him. I prevented them from attacking him. Some people said deceased should be taken to my house to share milk with my mother; if he had bewitched her, sharing the milk would cure her.

“On the way, I told my father that I had been with my mother in hospital for three months. I told him my mother had cancer and was HIV positive. My father became angry. They took deceased to our home. My father continued to quarrel with me. He said I should not be seen on his land again. I left. It was 8:00 p.m. I went to sleep in a hotel where I used to work. At 7:00 a.m. the next day I returned home. I found a fire burning. I did not see the person being burnt.”

35. When I juxtapose defence of *alibi* against the prosecution evidence, the defence crumbles. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The accused had not given any notice that they would raise it. It was being set up well after the close of the prosecution's case. It was thus open to me to weigh it against the evidence tendered by the prosecution. See Wang'ombe v Republic [1976-80] KLR 1683, Karanja v Republic [1983] KLR 501.
36. The 1st accused was lying that he was away at his grandmother's place. He was seen by not less than three witnesses at the scene: PW1, PW4 and PW5. The 2nd accused claims he left Boit's house at 8:00 p.m. on the material night until the following morning. He cannot exonerate himself as one of the last people to be seen alive with the deceased. The 2nd accused was armed with a knife and some *runqus*. He led the deceased into his father's house. At about the time he says he left, PW3 said the deceased was tied up and being tortured inside the house. Both accused thus acted *in concert* with their father, Boit, and other relatives not before the court to kill the deceased.
37. The fourth and final piece of compelling circumstantial evidence came from PW6: both accused disappeared from the locality of the crime in the year 2003 and were only arrested in the year 2007. It is a further pointer to their guilt.
38. I have reached the conclusion that the entire corpus of *circumstantial* evidence points *irresistibly* and *exclusively* to the guilt of the accused. See R v Kipkering arap Koske & another 16 EACA 135 (1949), Sawe v Republic [2003] KLR 364. The chain of events is *complete*; and, there is *no* hypothesis that exonerates the accused. The homicide was *premeditated*. I find also that the two accused had a clear motive to kill the deceased on allegations he had bewitched their mother. They acted in concert with the other persons not before the court but named by PW1, PW3, PW4, PW5 and PW6. The 2nd accused in his defence was trying to play the good cop by pretending he tried to shield the deceased from attack. I did not believe him at all.
39. I am alive that 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). I have already found that the defence of an *alibi* was discounted and false. Granted those circumstances, the entire line of defence set up by the accused is far-fetched and a red herring. From the totality of the evidence of the PW1, PW2, PW3, PW4, PW5, and PW6 I find that the prosecution *proved* the charge *beyond reasonable doubt*.
40. The upshot is both accused, *of malice aforethought caused the death of Hillary Kimisik Malakwen by an unlawful act*. It must follow as a corollary, that the accused are culpable of murder. I accordingly enter a finding of *guilty*. Both accused are hereby convicted.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 31st day of May 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

1st and 2nd accused.

Mr. Kapele for Mr. Misoi for the 1st accused.

Mr. Kapele for Mr. Alumasa for the 2nd accused.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.