



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO. 127 OF 2010**

REPUBLIC.....RESPONDENT

VERSUS

STEPHEN MAIYO KURGAT..... 1<sup>ST</sup> ACCUSED

RAPHEL KIPKURUI TIPI.....2<sup>ND</sup> ACCUSED

PATRICK KIPKOSGEI TIPIS.....3<sup>RD</sup> ACCUSED

LAWRENCE KIMUTAI CHERUI.....4<sup>TH</sup> ACCUSED

JOSHUA KIPROP.....5<sup>TH</sup> ACCUSED

**JUDGMENT**

The five (5) accused persons namely **STEPHEN MAIYO KURGAT** (hereinafter referred to as the 1<sup>st</sup> accused), **RAPHAEL KIPKURUI TIPIS** (hereinafter referred to as the 2<sup>nd</sup> accused), **PATRICK KIPKOSGEI TIPIS** (hereinafter referred to as the 3<sup>rd</sup> accused), **LAWRENCE KIMUTAI CHERUI** (hereinafter referred to as the 4<sup>th</sup> accused) and **JOSHUA KIPROP** (hereinafter referred to as the 5<sup>th</sup> accused) have all jointly been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

*“On the 11<sup>th</sup> day of December, 2010 at Kipsogon village in Mogotio District within the Rift Valley Province jointly with others not before court, murdered MICHAEL KIPTOO SALNGONG”*

The accused persons all entered a plea of ‘**Not Guilty**’ to the charge. Their trial commenced on 30/6/2011 before **Hon. Lady Justice Roseline Wendoh** who recorded the testimony of all ten (10) prosecution witnesses and placed all 5 accused persons onto their defence. Following her transfer to the Meru High Court, **Hon Lady Justice Abigael Mshila** took over the matter and recorded the defence of all the accused persons after which the defence closed their case. She too was then transferred to the Nyeri High court. The file then came before me and I recorded the final submissions made by parties. I then forwarded the file to Hon Justice Mshila at Nyeri High Court in order to enable her prepare the judgement. However the Hon. Judge directed that the file be returned to Nakuru as she was unable to

prepare the judgment citing pressure of work. I have decided therefore to peruse the file and prepare a judgment in order to prevent any further delay of the case given the fact that the case has now been pending for six (6) years.

The brief facts of the case were as follows:

**PW1 BENROSE CHEPCHIRCHIR** told the court that the deceased was her husband. On 11/12/2010 at 7.00pm after taking supper the couple were resting in their home when they heard a commotion from a neighbour's house. The deceased went out to check what the problem was. He returned with a swelling on his head and told his wife that he had been assaulted. Since it was night time the couple went to bed. The condition of the deceased deteriorated during the night and **PW1** called her brother in law **PW4 CHARLES KIBET**. **PW4** came and helped rush the deceased to hospital. The deceased unfortunately died whilst undergoing treatment on 14/12/2010.

**PW6 STEPHEN KIPROTICH LAGAT** told the court that in December 2010 he was hosting in his home a group of about 25 boys including his own son who had been circumcised. **PW6** had built a home for the initiates and was responsible for their care and upkeep whilst they recuperated.

On 11/12/2010 at about 6.30pm a group of youths invaded his compound and began to beat up the circumcised boys. **PW6** tried to stop them but he too was hit on the head and injured.

**PW2 MICHAEL KIMAIYO LANGAT** told the court that his nephew was one of the circumcised boys who was being hosted in the home of **PW6**. On 11/12/2010 at about 7.00pm **PW2** was with the initiates when a group of boys descended on the homestead. They began beating the circumcised boys. **PW2** and others intervened in an attempt to stop them but they too were beaten up.

Following the death of the deceased the matter was reported to the police who took up investigations. The 5 accused persons were all eventually arrested and charged.

Upon completion of the prosecution case all the five accused's were found to have a case to answer and were placed onto their defence. They each denied any involvement in the assault leading to the death of the deceased. This court must now analyze the evidence with a view to determining whether the prosecution have proved the charge of murder beyond reasonable doubt.

The offence of murder is defined as follows by Section 203 of the Penal Code

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

Thus in order to prove the charge of murder the prosecution must tender proof beyond reasonable doubt to establish the following

1. The fact and cause of death of the deceased
2. Proof that the death of the deceased resulted from an unlawful act or omission on the part of the accused persons.
3. Proof that said unlawful act or omission was committed with malice aforethought.

On the fact of the death of the deceased there can be no controversy **PW1** the wife of the deceased confirmed that her husband came home on the material night with a swelling on his head. He was later rushed to hospital by **PW4** his brother where he died whilst undergoing treatment. **PW1** and **PW4** both of whom knew the deceased very well identify him as '**Michael Kiptoo Salngong**'.

Evidence regarding the cause of death was tendered by **PW3 DR. MUGAH KAMIDIGO** a pathologist attached to Valley Hospital. **PW3** told the court that he conducted an autopsy on the body of the

deceased. He noted a stitched wound on the right frontal temporal region – 9 cms in length. The doctor opined that the cause of death was **“intracranial pressure due to massive epidural pressure on the right parieto temporal region of the brain due to blunt force head injury with fractures of the right parieto temporal bones”**. **PW3** filled and signed the post-mortem form which was produced in court as an exhibit **P. exh 1**. This was expert medical evidence which was neither challenged nor controverted by the defence. I therefore find as a fact that the deceased met his untimely death as the result of a blow to the head.

The next crucial question is whether the evidence proves that it was the accused persons who inflicted this fatal blow on the head of the deceased.

**PW1** the wife of the deceased did not witness the incident. She told the court that she remained in her house while the deceased went outside to check what the commotion was all about. **PW1** only stated that deceased told her that **‘the sons of Tipis’** had injured him. **PW1** does not herself seem to know these **‘sons of Tipis’** – she only states that they attended school with her children. **PW1** states in her evidence:

***“I know two sons of Tipis. There is one who is a police officer (Askari) I do not know his name. He was in school with my son in 2006 ....”***

Most importantly **PW1** does not identify any of the accused persons in the dock as the **‘sons of Tipis’**

The eyewitnesses to the incident also testified before the court. **PW2** told the court that the attack was perpetrated by six (6) boys. **PW6** says

***“I know them by appearance, and I knew them to be the sons of Tipis”***

**PW2** says that he saw one called **‘Kiprop Tipis’** beating the circumcised youths. **PW2** said he saw the deceased coming to the homestead but he **did not** see who hit the deceased. In other words **PW2 did not** witness the actual assault on the deceased and therefore

cannot tell who beat him.

It must be remembered that this incident occurred at about 7.00pm. It was dark. No witness has mentioned that there was any lighting at the scene. There was a fracas in the home of **PW6** where the circumcised boys were being hosted. Several people including some of the prosecution witnesses were assaulted. The doctor **PW3** in her evidence stated that the deceased died due to one fatal blow to the head. He did not have multiple injuries. In order to prove their case the prosecution evidence must establish which one out of the five accused persons landed the fatal blow on the head of the deceased.

**PW4** was the brother of the deceased. He was only called by the deceased’s wife after the deceased had been injured **PW4** did not witness the assault and has no idea who hit the deceased. Indeed under cross-examination by defence **PW4** stated

***“My brother (deceased) could not talk. He could not tell me how he got injured....”***

**PW5 SIMON TANUI** was the area chief. He told the court that he received information about the assault and subsequent death of the deceased. Although **PW5** said he knew the persons said to have perpetrated the attack he **did not** identify any of the accused persons as the assailant(s).

**PW6** as stated earlier was hosting the recently circumcised boys in his home. **PW6** stated that it was the five (5) accuseds who caused the fracas and beat him. That may well be so but the 5 accuseds are not in court for assaulting **PW6**, they are charged with the murder of the deceased. **PW6** is not able to identify any of the accused persons as the one who beat the deceased.

**PW7 SAMSON KIMAIYO CHESIMGEI** told the court that a group of boys attacked the initiates at the home of **PW6**. However **PW7** states that it was **‘Stephen Lagat’ PW6** who was assaulted. He did not

witness any attack on the deceased.

For some reason the widow of the deceased **PW1** and his brother **PW4** testified twice in this case, as **PW8** and **PW9** respectively. This was surprising given that no application to recall the two to testify appears to have been made. I can only attribute this as being due to some confusion in keeping records of the witnesses who had testified.

All in all a perusal of the record indicates that no single accused person has been positively identified by any of the eyewitnesses as the one who hit the deceased on the head leading to his death. It may well be that the five accuseds were amongst those who went to the home of **PW6** on the material day and caused a fracas. It may well be that the five accuseds assaulted some of the witnesses who have testified in court. However the court cannot from these facts presume that it was they who killed the deceased. There must be specific evidence to link all or one of the accused persons to the fatal blow inflicted upon the deceased.

All the witnesses mention is that **'sons of Tipis'** beat the deceased. Quite aside from the fact that no evidence has been tendered to prove that any of the accused's is a **'son of Tipis'** it is not stated with clarity which one of the **'sons of Tipis'** beat the deceased.

As stated earlier this incident occurred between 7.00pm and 7.30pm. It is dark. No mention is made of any source of light available at the scene. In fact **PW7** is honest enough to admit in his evidence that

***"I did not know the boys. It was getting dark about 7.00pm. We were outside the house. There were no lights. There was a fire but it was not lit"***

In those circumstances, I highly doubt whether any of the witnesses could have been able to identify the assailants. None of the witnesses who testified in court has positively identified any of the accused persons either as a **'son of Tipis'** or as the one who handed the fatal blow on the deceased.

The evidence against the accused persons is purely that of suspicion. In the case of **SAWE Vs REPUBLIC [2003] KLR** it was held that suspicion alone no matter how strong cannot form the basis for a conviction. The prosecution have failed to prove the **'actus reus'** for the offence of murder against any of the accused persons. A crucial ingredient of the offence of murder has not been satisfactorily proved. For this reason the charge fails. I enter a verdict of **'Not Guilty'** and I hereby acquit each of the five (5) accused persons of this charge. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

**Dated in Nakuru this 26<sup>th</sup> day of September, 2016.**

Mr. Njogu for Accuseds

Mr Chigiti for State

**Maureen Odera**

**Judge**

**26/9/2016**