



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
CRIMINAL/MURDER CASE NUMBER 6 OF 2016

REPUBLIC PROSECUTION

VERSUS

KEVIN KIPTOO BARABARA ACCUSED

JUDGEMENT

KEVIN KIPTOO BARABARA is charged with the offence of Murder, contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are that on the 6th day of October, 2010 at Kipkorianya village, Kapenguria Division, within West Pokot County, the accused jointly with others not before court murdered JKK.

The prosecution called a total of ten (10) witnesses. Their case is briefly that Kevin Kiptoo Barabara, hereinafter referred to as the accused, was working as a Kenya Police Reservist (KPR). He is a brother to one AC, the PW-6 in this case. This girl was a student at [Particulars Withheld] Academy in West Pokot in form 3. She was a girlfriend to JKK, the deceased in this case. The deceased was also a student at [Particulars Withheld] in form 4. The two had been lovers since May, 2010. JB, the father to PW-6 knew of the relationship. He informed (PW-1) the mother to the deceased about it in an effort to end it. However the two students continued with the love relationship. PW-6 used to visit the deceased in his room and at times was spending the night there.

On 28.9.2010 PW-6 left her parents' home for the room of her boyfriend, the deceased. They stayed together since then till 6.10.2010. PW-6 parents were concerned about her disappearance and were looking for her.

On 6.10.2010 at about 10pm PW-4 who is a (KPR) was called by JB. JB reported to him that his daughter had disappeared and he had traced her in the home of Nathan. JB indicated that he was in company of Kevin (the accused) who is a (KPR). PW-4 called another KPR (PW-5) and instructed him to go to home of Nathan Kibet to assist. He did as requested.

On the said material night, at about 10.00pm, PW-1 was in her house with her daughter J (PW-3). The deceased had taken supper and returned to his room which was in a different compound. PW-1 heard people screaming. She went outside to find out what was happening and the screams went dead. She then heard someone get out of the deceased's house. She requested her daughter Joan (PW-3) to accompany her to the deceased's house. Joan woke up the rest of children and they all ran towards the deceased's house. While near they heard another scream of which PW-1 recognized to be of the deceased. Upon arrival, they found the house locked. PW-1 requested those inside to open but they refused. She screamed prompting them to open. It was a one roomed house. The only source of light present there was a mobile phone light. PW-1 saw the deceased lying down. She asked JB who was

present, what they had done to the deceased. Others present is the accused herein, and a KPR known as Nicholas. The three were beating PW-6 and JB alleged that the deceased was messing PW-6. PW-1 pleaded with them not to hurt the girl. The girl was tied with a rope. PW-1 told PW-3 to go for a lantern lamp of which she did. Before it was availed PW-6 managed to escape from the deceased's home. The deceased at that moment fell unconscious from the chair. PW-2, a neighbour got to the scene as well as PW-8. They took the deceased outside the house. They made effort to resuscitate him. PW-1 noted that he had an injury on the head. He gained consciousness and spoke. He alleged that the accused hit him on the head. According to PW-2 he said,

“Kevin milele sitakuacha kwa kunipiga kichwa” This may be translated as follows: *“Kevin, I won't let you go scot free, for hitting me on the head.”*

JB asked for a taxi from PW-9. They got into it and went to Kapenguria Police Station. JB reported that the deceased was defiling his daughter but upon deliberation agreed that the issue could be deliberated on by the area chief given that the deceased and PW-6 were both schooling. The deceased was taken to Kapenguria District Hospital where he was treated and discharged. The issue was taken before the area chief (PW-7) who never had time to deliberate on it as the deceased was a candidate in form 4 and about to sit for his KCSE exams. The deceased suffered a swollen head and neck. He got fairly well and sat for his exams though was complaining of headache. Later on unspecified date he lost memory and was taken to Kapenguria District Hospital. He passed on, on 16.1.2011 while undergoing treatment.

The post-mortem was conducted by Dr. Ojuka on 21.1.2011. The Dr. opined that the deceased died as a result of severe duodenum ulcer bleed. Duodenal ulcer possible causing is ulcer – post trauma ulcer.

The accused was then arrested and charged with the offence carried in the charge sheet. The accused in his sworn defence stated that he is a Kenya Police Reservist.

On 6.10.2011 at 8.30pm he was called by his boss Sgt Michael Kibor (PW-4), and told to assist one JB whose daughter had gone missing for two weeks and had been traced in the house of the deceased. He requested for help and was told Philip Tanui, also a (KPR) will be called to extend a helping hand in arrest of the deceased. The girl's father was to lead them to where the girl was. They proceeded there the three of them. The door to the home was open and there was a lamp therein. They knocked and entered. The girl was behind a curtain, in bed. The deceased was told he was on the wrong for having a school girl who was under 18 years of age. He was told he will be taken to the police station. The deceased kept quiet. He then held the lamp and threw it at accused and those in company. It hit the wall, broke into pieces and went off. The girl's father used his mobile phone to light the place. The deceased was arrested. The girl however sneaked out and escaped. They were helped with a vehicle and took the deceased to the police station. They booked the report in the OB. Their role ended and went home. After about 4 or 3 months the accused was arrested by some young men at Kalbo's centre. They alleged he had killed the deceased. He denied the allegation. He was taken to Kaibo's AP's camp and later to Kapenguria Police Station. He was later charged.

DW2 a pathologist at Moi Teaching and Referral Hospital in Eldoret was called as a defence witness. His evidence is that the post-mortem report shows the deceased died on 16.1.2011. Duodenal ulcers is the erosion on the wall of duodenum. Its cause is excess secretion of acid in the stomach. Head trauma can cause ulcer but only immediately after the head trauma and not several days after. He could not see clear connection between the alleged head trauma and the excessive bleeding from duodenal ulcer which was the cause of death to the deceased several months after the said head trauma.

The last defence witness was a former principal to a school where the deceased was a student between 7.2.2006 and 3rd term of the year 2007. His evidence is that the deceased was known to have ulcer problems and was not taking 'Githeri' (beans and maize meal) in school. He however had not availed a medical report to the said effect.

Looking at both the prosecution and the defence case, there are two issues which emerge clearly for determination.

1. Is whether the accused injured the deceased on the head during his arrest on 6.10.2010.

2. Whether the said head injury caused duodenal ulcers which led to the death of the deceased on 16.1.2011.

In determining the first issue I have weighed carefully the evidence of the witnesses who were at the scene where the deceased was allegedly assaulted by the accused person. There witnesses are PW-1, PW-2, PW-3, PW-5, PW-6, PW-8 and PW-10. None of these witnesses saw the accused or any other person present assaulting the deceased. What the police relied on to arrest and charge the accused is what was allegedly stated by the deceased on 6.10.2010. According to PW-1 the deceased said that he was injured on the head and the back. This witness did not however disclose whether the deceased stated the person who injured him. PW-2 however stated that the deceased stated that Kevin hit him on the head. He allegedly said in Swahili, "*Kevin milele sitakuacha kwa kunipiga kichwa*". In English I take it to mean, "*Kevin I will never let you go scot-free for hitting me on the head*". PW-3 who is a sister to the deceased stated that the deceased after regaining consciousness stated that Kevin had injured him on the head. The other witness who alleged to have heard deceased say some words is PW-8. The witness said the deceased claimed he had been assaulted and hit on the head. PW-5, PW-6 and PW-10 did not however allege to have heard the deceased make the said claim. Though PW-1 and PW-8 agrees in their evidence that the deceased claimed to have been hit on the head but never disclosed by who, while PW-2 and PW-3 claimed he disclosed it was by Kevin, if I am to take the latter evidence as the correct one, it will only have probative value in this case if it amounts to a dying declaration; otherwise it is hearsay evidence of which is inadmissible as evidence.

A dying declaration is considered as evidence in a trial where:-

1. The maker is dead

2. The trial relates to the maker's murder or manslaughter

3. The statement relates to the cause of death

4. The maker was a competent witness

5. The declaration was made "*under a settled hopelessness of death.*"

In the case of *Chogo versus Republic 1985 KLR 1, the Court of Appeal* considered what qualifies to be a dying declaration. It stated as follows:-

"The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the matter is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."

When the deceased, Joseph Kipkurui Kibet alleged that he was hit on the head by Kevin, the accused person in this case, he was not "***under a settled hopelessness of death.***" He was not expecting to die out of the alleged injury. Actually the statement that, "*Kevin milele sitakuacha kwa kunipiga kichwa,*" shows that he expected to live and make the accused pay for the alleged assault. As such his statement do not amount to a dying declaration. It is hearsay which is not admissible as evidence.

On the second issue for determination I have weighed that the post-mortem report filled by Dr. Daniel Ojuka reveals the cause of death to the deceased as severe duodenum ulcer bleed. He added that duodenal ulcer possible causing is ulcer – post trauma ulcer. The defence to counteract the evidence called two witnesses. One was a principal of Boma Boys High School in Kitale where the deceased had schooled between the year 2006 and 2007. He alleged the deceased was known to suffer from ulcers and

never used to eat Githeri in school. The other witness was a pathologist at Moi Teaching and Referral Hospital in Eldoret. He stated that head trauma can cause ulcers but that is immediately after the head trauma and not several days after. He could not therefore see clear connection between the alleged head trauma and the bleeding ulcer which killed the deceased about 3 to 4 months after.

The evidence by these two defence witnesses – DW2 and DW3, raises reasonable doubts as to whether the bleeding ulcer that killed the deceased resulted from the head injury sustained on 6.120.2010.

The effect of the foregoing considerations is that there is no reliable evidence that the accused assaulted the deceased by hitting him on the head on 6.10.2010, and that the head injury that resulted caused the deceased duodenal ulcers which led t to his death 16.1.2011. As such he deserves an acquittal for the offence charged with and is accordingly acquitted of it under Section 169(3) of the CPC. He is set at liberty unless otherwise lawfully held.

S. M. GITHINJI

JUDGE

Judgment read and signed in the open court this 27th day of October, 2016 in the presence of:-

Mr. Mark Nabuyumbu for the state

Mr. Ingosi who is holding their brief for Mr. Bororio and Mr. Bungei who were for the accused.

S. M. GITHINJI

JUDGE

27/10/2016