



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CRIMINAL CASE NO.11 OF 2012**

REPUBLIC.....PROSECUTION

VERSUS

JOHN KIPKORIR MUTAI.....ACCUSED

**J U D G M E N T**

1. **Joseph Kipkorir Mutai** herein referred to as the accused stands charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal code**. The particulars being that the accused on 2nd day of March 2012 at Kapatangwet village in Kembu Location of Bomet District within Rift Valley Province murdered **Philip Kiplangat Towett**.
2. The accused pleaded not guilty to the charge and the case proceeded to full hearing with the prosecution calling a total of seven (7) witnesses.
3. PW1 **Samwel Kibet Langat** testified that he is a cousin to the accused person. He further stated that on 2nd March 2012 him and the accused had met at a drinking place at Kaptebengwet Centre and they started drinking at 1.00pm upto 3.00pm when they went to the Shopping Centre to take soup together. Thereafter they left the centre for home. His home is about 1km from the centre. The time was around 7.00pm, and it was not dark. About 100m from the centre they met the deceased.
4. PW1 greeted the deceased and so did the accused. The accused and deceased shook hands but the former held onto the latter's hand. The accused removed a club and hit the deceased twice on the head with a bolt thudded rungu (EXB2). The deceased fell down and the accused ran away. In cross-examination he denied there being any argument before the deceased was hit. He was categorical that they were not very drunk and that he had been together with the accused on that day continuously from 1.00pm to the time of incident.
5. PW2 **Boniface Kiplangat Too** was in his shop at Kaptemengwet Centre on 2nd March 2012 at 6.00pm. Between 6.00pm -8.00pm he heard screams from a distance. He closed his shop and went in the direction of the screams. He found a crowd around the deceased who was lying down and bleeding from a wound on the head. He assisted in taking him to hospital. PW3 **Stanley Kiprotich Ngetich** also assisted in taking the deceased to the hospital after being attracted to the scene by a crowd that had gathered.

6. PW4 **Moses Kipkirui Sitonik** a brother of the deceased was informed of the injury to the deceased on 2nd March 2012 at 8.00pm through a phone call. He went to the scene and found the deceased had been taken to Longisa Hospital. He went to Longisa and found him but he was transferred to Tenwek Mission Hospital. He died two days later while undergoing treatment. He identified the deceased's body for purposes of postmortem. He also stated in cross-examination that PW1 had informed him that it was their neighbour who is the accused who had hit the deceased.
7. PW5 **David Kiplangat Kibeney** the Chief of Chemanel Location received a call from PW4 on 4th March 2012 at 11.00am informing him of the injury to the deceased and of his treatment at Tenwek Hospital and on the same day at 8.00pm he again called and informed him of the deceased's death. He further told him it was the accused who had hit the deceased.
8. PW5 woke up early the next day and went to the accused's home as he was a resident of his location. He arrested the accused and took him to Kembu AP Post, then to Kapkimolwa Police Station.
9. PW6 **Vincent Kamusinga** a medical doctor produced the postmortem report on behalf of Dr. Tonui. The findings were:

- **A cut wound on the forehead measuring approximately 18cm extending to the temporal region.**
- **The dura matter covering the brain was exposed.**
- **The left side of the skull was exposed**
- **The brain tissue was oozing from the dura matter.**

Dr. Tonui concluded that the cause of death was a severe head injury caused by a sharp object, or blunt object depending on the force used.

10. PW7 (**Inspector Newton Gideon Mjomba**) received the accused from PW5 and his assistant, with a report of an assault which resulted in the death of the deceased. He took over the investigations after the Investigating Officer passed away, but he confirmed that he had visited the scene together with the late Investigating Officer and participated in the investigations.

11. He produced several exhibits namely:

- **Bolt thudded rungu.**
- **Blood stained green trouser belonging to the deceased EXB3.**
- **Green vest covered with blood EXB4.**
- **Blood stained shirt worn by the deceased EXB5.**
- **Blood stained lessa EXB6.**
- **Baby shawl EXB7.**

He further stated that all these exhibits were recovered and brought to them by the Chief. They were not taken to the government chemist for examination.

12. The accused in his defence elected to make an unsworn statement with no witness to call. He denied the charge. He stated that on 2nd March 2012 he was doing farm work, upto 5.00pm when

he went to rest. At 9.00pm his brother passed through his house and told him how he had heard of somebody who had been killed not far from them.

13. The next morning he went to do his work. At 8.00am the Chief and his assistant came and asked him to accompany them for purposes of recording a statement concerning the person who had died. He was taken to the Police Station. The deceased's brother came and he was placed in the cells. He was later charged with this offence. He further stated that he had colluded with PW1 who had promised to punish him one day hence the fabricated evidence. They had colluded at a drinking place, he said.

14. Mr. Orayo for the accused orally submitted that the key witness was PW1 whose evidence the court should consider against that of the accused who raised an alibi. He submitted that the prosecution had failed to prove its case to the required standard.

15. This is now the case before the court for determination. This Court took over the hearing of this matter under **Section 200** of the **Criminal Procedure Code** when the accused had already been placed on his defence, by my brother Mutava, J. I therefore only took the defence of the accused person.

16. The accused faces a charge of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Under **Section 203** Murder is defined as:

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

In such an offence the ingredients which must be established are:

**i. Act of Killing (actus reus)**

**ii. The intention to kill (mens rea).**

17. The witnesses PW1 -PW7 have confirmed that indeed the deceased died. PW4 and his brothers identified the body of the deceased to the doctor (Dr. Tonui) for the purpose of carrying out the post mortem. The post mortem conducted by Dr. Tonui whose report (EXB1) was produced by Dr. Kamusinga (PW6) also confirms that the deceased died.

It has also been established through the postmortem report that the deceased died as a result of a severe head injury (EXB1). This was not a natural death, hence the charge facing the accused person.

18. The 1st issue for determination is whether it is the accused person who killed the deceased.

PW2 & PW3 only assisted in taking the deceased to hospital. They told the court, they did not try to find out what had happened to him. Their evidence does not assist the court in determining whether the accused is the person who killed the deceased. PW5 (the Chief) upon receiving the death report and the name of the culprit acted by arresting the accused.

19. What has caused me concern is the manner the Exhibits No. 2-7 were produced. None of the exhibits and in particular the alleged murder weapon (EXB2) were identified by any witness before their production. PW1 who is alleged to have seen the accused hitting the deceased with a bolt thudded rungu never identified it in court. It is not clear where the rungu (EXB2) was when PW1 was testifying. Even if it was not available then, there is nothing that stopped the prosecution from recalling him to identify it.

20. Further to this PW7 told the court that all these exhibits were brought to the police station after the Chief (PW5) had recorded a statement. There is what the police usually refer to as a “further

statement". If indeed what PW7 said in court is what happened what stopped the police from recording a "further statement" from the Chief (PW5)?

And finally on this point, PW5 in his statement to the police and in his evidence in court did not allude to his having recovered any exhibit which he took to the police station. I therefore find the production of all those exhibits and in particular EXB2 to be of no help in this case.

21. The only other evidence connecting the accused with this offence is the evidence of PW1 **Samwel Kibet Langat**. He is the only witness who is said to have witnessed the incident and as he says he had been walking home with the accused after drinking and taking soup together. Evidence of a single identifying witness must be carefully tested. The Court of Appeal in the case of **Kiilu & Anor. V. R (2005), KLR 174** stated thus of such evidence;

*1. "Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."*

22. The evidence of PW1 is that he had been with the accused on 2nd March 2012 from 1.00pm to the time of incident which was around 7pm. Further he said they were drinking alcohol from 1pm-3pm. They then left the drinking place at 3.00pm for the Shopping Centre. They took soup at 6.30pm. The issue is what PW1 and the accused were doing at the shopping centre from 3pm-6.30pm. They were obviously drinking. Were the two of them sober people by 7.00pm?

23. The evidence of PW1 is very scanty on what happened after the deceased had been hit. There is no evidence that he screamed nor called any person. He did not also report the incident to the administration. It is one Ambrose Malele who called PW4 (the deceased's brother) on that night at 8.00pm and told him of the deceased's injury. How did these people who came to the scene know what had happened? PW1 did not also accompany the deceased to the hospital. Did any of the rescuers meet anyone running away from the scene? None of these questions has been answered by the evidence.

24. The evidence of PW1 which is the evidence of a single identifying witness, when carefully scrutinized leaves many unanswered questions. It would therefore require more evidence to support it. The evidence of the exhibits and their recovery cannot support it, as they were not identified before production.

25. Indeed if its true that the accused and PW1 were hanging around one another from 1.00pm as they drunk and took soup at the drinking den and shopping centre several people should have seen them. Any of their drinking mates who had seen them together at any of the drinking spots and in particular the soup place which according to PW1 was their last place of engagement should have been called to testify. Evidence from such a witness would have given credence to PW1's evidence. No such witness was called.

26. From the entire cross-examination by the defence, the accused's line of defence was that he was never with PW1 on the material day. In his defence he raised an alibi saying he had been on his farm on this day. It was the duty of the prosecution through its evidence to place the accused at the *locus quo*.

27. PW5 (the Chief of Chemanel Location) stated that he interrogated the accused who told him that he had committed the offence. The Chief is not one of the authorised officers who can record a

confession of a suspect. Was the accused ever referred to a Senior Police Officer or a Judicial Officer for purposes of recording a confession as is provided for under the Evidence Act? There is nothing in the evidence adduced before the court to suggest that. So what PW5 told the court in relation to such a confession is not admissible evidence.

28. In criminal cases the prosecution has a duty to prove its case beyond reasonable doubt. The evidence adduced herein on behalf of the prosecution considered alongside the defence its clear the evidence of the prosecution is wanting in so many aspects. The reason is that the case was very poorly investigated. Maybe after the death of P.C Fondo nobody bothered to find out if the late had completed the investigation. PW7 himself an investigator did not do anything besides what the late P.C. Fondo did in March 2012. It is so unfortunate. What this court is left with is PW1's word against that of the accused. That is far below the required standard of proof of "beyond reasonable doubt" in a criminal case.

29. The upshot is that the prosecution case has failed and the accused is acquitted under **Section 322 (1) of the Criminal Procedure Code.**

Accused to be released unless otherwise held under a separate warrant.

**Dated, signed and delivered in open court this 22nd day of January, 2015**

**H.I.ONG'UDI**

**JUDGE**

**In the presence of**

M/s Kivali for State

Mr. Orayo for Accused – absent

Accused - present

Rotich - Court Assistant

Interpretation- English/Kipsigis