



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL CASE NO.18 OF 2010

REPUBLIC.....PROSECUTION

VERSUS

BERNARD KIPCHIRCHIR RONO.....ACCUSED

JUDGMENT

1. **Bernard Kipchirchir Rono** (*accused*) faces a charge of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

The particulars are that the accused on the 3rd day of November, 2010 at about 11.30pm at Kabianga Trading Centre Kericho District of the Rift Valley Province, murdered **ALLAN KORIR**.

2. The accused pleaded not guilty and the case proceeded to full hearing with the prosecution calling thirteen (13) witnesses.
3. PW1 **Betty Chepkurui** was a nurse at Kabianga Nursing Home where the deceased was first taken for treatment on 4th November, 2010 at around 1.00am. She observed deep fresh bleeding cuts on the scalp and that the patient was unconscious. She cleaned the wound and stitched it. She then gave him antibiotics and referred him to Kericho District Hospital. She also produced a prescription document (EXB1).
4. PW2 **Grace Tonui** is the deceased's mother. She was informed of her son's injury and was also taken to the Health Centre. She found when he had been stitched on the scalp (back & top of the head). The deceased died on his way to Eldoret Referral Hospital, for further treatment.
5. PW3 **Jefferson Koech** a brother to the deceased received a report from a watchman in relation to his injured brother (the deceased). He immediately went to the scene together with his wife. He observed injuries at the back and top of the deceased's head. He found him lying unconscious outside Kwenet bar. They took the deceased to Kabianga Health Centre, where he was attended to by PW1.
6. PW4 **Cosmas Kipchirchir Ruto** was a watchman at Kwenet Bar, Kabianga Market. He stated that on 3rd November, 2010 at about 11.00pm he was on duty at the said bar. At 11.00am (*which I believe is an error*) he was at the back room with Kalatas Mutai (bar owner), Benjamin Sang, Ben Rotich and Paul Langat talking. While there they heard somebody running along the corridor, of the bar leading to where they were.
7. He checked and saw it was the accused. The corridor was lit. The accused was carrying stones in

both his hands. The witness (PW4) flashed his torch at him and asked him why he carried stones. His reply was that he had killed Allan just near Kwenet Bar.

8. They went to the place he had mentioned and they found the deceased person. He was bleeding from the back and top of his head. He was lying on his back, and was still breathing. PW4 went to the house of PW3 and informed him of what had happened. He assisted PW3 ferry the deceased to Kabianga Health Centre.

In cross-examination he stated that the deceased did not enter Kwenet bar on that day.

9. PW5 **Geoffrey Kipyegon Bore** testified that on 4th November, 2010 at 3.00am he was asleep in his house at the poshomill where he worked. A watchman from Kabianga Market woke him up and took away a motorbike belonging to the accused. He did not know who had brought the motorbike there. The watchman was with a Bernard who is not the accused.
10. PW6 **Fancy Chepkoech** a girlfriend of the accused stated that on 3rd November, 2010 at 11.00pm she was with the accused at the Riverside Bar. They were taking alcohol. The bar owner was present. The accused had a discussion with the deceased who was her former boyfriend.
11. The deceased had told the accused that the latter was provoking him, by saying that when young the deceased used to be in trouble with the police. The deceased then walked out of the bar. PW6 and the accused left after a little while. The witness went to her house while the accused took the bar owner home on his motorbike.
12. In cross-examination PW6 admitted to having recorded two statements with the police. One was on 3rd November, 2010 and the other was on 13th June, 2011 the day before she testified. She admitted that in the earlier statement she stated that the deceased joked with Bernard Kipkurui the bar owner. It is in the latter statement that she mentioned that the deceased joked with the accused. That in fact the deceased did not quarrel with the accused on that night.
13. PW7 **Ezekiel Kiprop Rono** the then Assistant Chief Kabianga Sub location was in his office on 4th November, 2010 when he received a pen knife from Bernard Rotich who informed him he had recovered it at a scene where two boys had been fighting. He handed it to the police.
14. PW8 **No.217849, Chief Inspector Benard Amugure** received the death report on 4th November, 2010. He visited the scene along one of the streets at Kabianga Market with other officers. The scene had been disturbed as it had heavily rained. He did not see any blood stains at the scene or on the knife.
15. PW9 **No.73135 Cpl Winrose Chebet Bise** was instructed by the D.C.I.O Kericho to arrest the accused, his sister and another. The accused was alleged to have run to his sister's house after fighting with the deceased. She called the OCS Sosiot in whose jurisdiction the offence was committed.
16. PW10 **Francis Sadera** a Clinical Officer working with the G.K. Prisons Health Centre Kericho on 18th November, 2010 took a blood sample from the accused who was in the remand prison at Kericho. He had been requested to do so by the OCS Sosiot police station.
17. PW11 **No.77197 Ag. Inspector David Kili** of Scenes of Crime Kericho took photos of the body of the deceased at Siloam Hospital Mortuary. He produced the photos plus the certificate as EXB3a-e. He captured the injuries on the body of the deceased, in the photos.
18. PW12 **Dr. Kibet Peter Shikuku** who performed the post mortem found the cause of death to be severe haemorrhage secondary to scalp trauma from a sharp object (EXB4). He further found the following on the body of the deceased;

- Scalp wound (linear Laceration)
- Wound on left side of the head (y-shaped.)
- Bruises on the left shoulder (below the ear)
- Pneumonic changes
- Bleeding into the skull
- Fracture on the front side of the skull
- There was bleeding into the brain

19. In cross-examination he said the cause of death in this case was pneumonia, due to lack of oxygen as a result of loss of a lot of blood.

20. PW13 **No.54034 P.C Kipkurui Rono** was the investigating officer in this matter. He took possession of a pair of jeans (EXB6) White and Blue T-shirt (EXB7&8) from the deceased at the time of postmortem. He also collected some soil from the scene and had them taken for analysis vide an exhibit memo (EXB10).

21. He also produced a report (EXB11) from the Government Chemist dated 12th September, 2013 which confirmed two things.

(i) That the blood on the jeans trouser, t-shirts matched that of the deceased.

(ii) The blood on the knife did not generate a D.N.A profile.

22. When placed on his defence the accused elected to make a sworn statement without calling any witnesses. He testified that on 3rd November, 2010 he was at home doing his Motorbike business which he closed at 8.00pm, and went to Riverside bar for a drink. In the bar was PW6, bar owner (Kipkurui), the deceased and others. The deceased left with his friends at 10.30pm while he left the bar at 12 midnight taking the bar owner home on his motorbike. He went back to Kabianga where he left his motorbike and walked home.

23. The next morning he heard rumours that he was suspected of killing someone at a bar. He decided to go to his sister's house to inform her of what happened. He then took himself to the Kericho Police Station in the company of his sister. He was arrested and placed in cells.

24. It was his further evidence that the witnesses lied to the court. That the knife produced was not his. He denied knowing PW4 nor being in possession of stones on the said night. He also mentioned that he had recorded a statement with the police but basically denied the contents of the statement.

25. Mr. Miruka for the accused person made oral submissions saying that the evidence of PW4 which the prosecution relied on did not satisfy **Section 25 and 33 of the Evidence Act**. That it left many unanswered questions. He further submitted that PW4 did not identify the accused person. He also submitted that the evidence of PW1 and PW11 was inconsistent, as PW1, had testified that the deceased had a minor injury. Finally, he submitted that there were people who ought to have been called as witnesses but were not.

26. In response M/s Munyolo submitted that there was no inconsistency in the evidence of PW1 and PW11 as PW1 had indicated that the deceased had a head injury and he was referred to Kericho District Hospital. She further submitted that PW4 recognized Bernard Rono the accused person.

27. This is now the case before court for determination. The accused stands charged with the offence of Murder contrary to **Section 203**, as read with **Section 204** of the **Penal Code**. Murder is defined under **Section 203** as follows;

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

Further, **Section 206** of the **Penal Code** defines malice aforethought 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;

28. From the evidence adduced herein, it is clear that no witness testified as to the actual killing of the deceased. What is before the court are pieces of evidence which when put together would lead this court to some conclusion. In analysing this evidence, this court will then determine whether a nexus has been made to connect the accused with the offence or not.

29. In other words the evidence before this court is purely that of a circumstantial nature. In a case dependent on circumstantial evidence in order to justify 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 guilt. In the case of **SAWE V R (2003) KLR 364** the Court of appeal stated:

1. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

2. The burden of proving facts which justify the drawing of this inference from the facts of the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

See also **Nzivo V R (2005) I KLR 699;**

30. The fact of death has not been disputed. A postmortem report (EXB4) confirms it. PW2, PW3, PW4, & PW11 confirmed to this court that when they saw the deceased he had cut wounds on the head, and back. PW1 who was the first health officer to see the deceased said he had fresh cut wounds on the scalp and he was unconscious. He could not respond to external stimuli. This witness did not at anytime say that the injury suffered by the deceased was minor as submitted by Mr. Miruka for the accused. A minor injury could not have resulted in the unconsciousness of the deceased.

31. PW12 (*Dr. Kibet*) who performed the postmortem found the cause of death to have been **“Severe haemorrhage secondary to scalp trauma from a sharp object.”** (EXB4) I therefore find that the fact and cause of death have been established. The next issue to determine is whether the accused is the person who killed the deceased or if he was connected with the killing of the deceased.

- 32.PW2, PW3, PW5, PW7, PW8 and PW10 did not witness anything that may have contributed to the death of the deceased person. They came onto the scene after the fact of the assault and when the deceased was unconscious and unable to talk.
- 33.PW5 released a motorbike parked near the Posho Mill which he guarded. He released it to a watchman(*whose name he could not remember*) plus a Bernard who was not the accused. This was on 4th November, 2010 at 3a.m. He identified this motorbike as belonging to the accused but he had no idea as to how the motor bike came to be there.
- 34.PW6 a girlfriend of the accused was a former girlfriend of the deceased. Her evidence was that on the night of 3rd November, 2010 the accused, deceased, herself and others were at Riverside bar. At first she said the accused and deceased quarreled. She later changed her story in cross-examination and stated that infact she had written two witness statements. One was dated 3rd November 2010 and she wrote a second one of 13th June,2011. And that it was in her statement of 13th June, 2011 that she mentioned the deceased and the accused otherwise the one for 3rd November, 2010 had no such information.
- 35.The record also shows that the State Counsel did not re-examine the witness to clear the record as to what (*if any*) had transpired between the accused and the deceased. For example, what were the alleged jokes between the deceased and the accused and/or between the accused and Bernard Kipkirui (*the bar owner*)?
- 36.The evidence of this witness cannot therefore be relied on without corroboration as she has a vested interest in this matter, the accused being her boyfriend while the deceased was her ex-boyfriend.
- 37.It is stated that the accused person surrendered himself to Kericho Police Station. The accused admits having surrendered himself to the said police station. He explains the reason for the surrender to be that he had heard rumours that he was connected with the death of the deceased and people wanted to lynch him.
- 38.He therefore went to his sister's place to explain to her what had happened and together they went to the police station and he was arrested.
- 39.PW9 (*73135 Cpl Winrose Chebet*) arrested the accused person after he allegedly confessed to her a few things over the death of the deceased. This witness did not present the accused person to an officer qualified to take confessions under **Section 29** of the **Evidence Act**. Whatever she told the court in respect of what the accused told her cannot therefore be admissible as evidence against the accused person.
- 40.The remaining and crucial evidence is that of PW4 (*Cosmas Kipchirchir Ruto*). It was his evidence that indeed he saw the accused person on this night carrying stones in both his hands and running along the corridor which was lit. He then flashed at the accused who told them he had killed the deceased. They went and confirmed that the said deceased was lying down bleeding.
- 41.This witness, a watchman at Kwenet bar stated that the time of incident was at 11p.m of 3rd November, 2010.

PW6 also indicated that on 3rd November, 2010 at 11p.m she was at Riverside bar with the accused, deceased and others. There is no evidence, on record showing how far apart these two bars are.

Secondly, PW4 stated that the corridor was lit. If indeed it was lit why did he have to flash his torch at him to see him? Thirdly, he was in the company of **Kalatas Mutai** (*Bar owner*), **Benjamin Sang**, **Ben Rotich** and **Paul Langat**.

42. According to him all these four(4) others, saw what he says he saw and also heard what he says he heard the accused person say.

I have gone through the evidence and noted that none of these people was called as a witness to support the evidence of PW4. In the bundle of statements in this file is the statement of Bernard Rotich who never testified.

43. PW13 the investigating officer stated that upon receipt of information from the said Bernard Rotich, officers rushed to the scene. The said Bernard Rotich appears to have been a crucial witness who was left out for reasons best known to the prosecution.

44. Another witness left out is Bernard Kipkurui the owner of Riverside bar. He could have confirmed if indeed the accused and deceased had been at his bar that night and what could have transpired between them.

45. If indeed the accused told PW4 and his team that he had injured the deceased, why did the five(5) men not get hold of the accused there and then? There is no evidence that he was violent at that point in time.

46. The recovery of the pen knife (EXB5) at the scene later did not have any connection with the accused. It was not dusted for finger prints as the scene had even interfered with due to the heavy rains.

The rest of the analysis by the Government Chemist just confirmed that the blood on the deceased's blue jeans, white and blue T-shirts (EXB 6, 7, and 8) belonged to the deceased, while the blood stains on the pen knife (EXB5) did not generate any DNA profile. It means it was not established whose blood was on that pen knife.

47. It is clear from the above analysis that PW4 did not see the accused commit the offence. Emphasis is laid on his evidence that he indeed saw the accused carrying stones in both hands and that the accused confessed to him and others that he had killed the deceased.

48. What then comes into focus is the identification of the accused by PW4, a single identifying witness. Although PW4 states that the corridor along which the accused ran was lit he used torch light to see the accused. Why would he use torch light to see if indeed the corridor was lit?

49. What then were the conditions for identification at this hour of the night? In the case of KILU VS R [2005] 1 KLR 174 the Court of Appeal stated thus on identification by a single witness.

“ Subject to certain well known exceptions, it is trite law that a fact may be proved by 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.”

50. In the instant case, there are people who were with PW4 and who could have made very crucial witnesses on this issue of identification. The said persons did not testify. The accused person has denied being at the scene. I find that the evidence on record is not clear on the conditions prevailing at the time of identification.

51. Had the corridor been lit as alleged there could have been no reason for use of the torch. There is no mention of the quality of the torch light. This evidence of PW4 on identification required corroboration.

52.PW4 and PW9 have testified on the verbal confessions to the killing by the accused person. As indicated earlier in this Judgment no confession was taken in compliance with **Section 29** of the **Evidence Act**. Therefore what PW4 and PW9 stated was pure hearsay evidence which the court cannot rely on to convict without other supporting evidence.

53.After analyzing the evidence on record in its totality, I find that the prosecution has failed to prove its case beyond reasonable doubt. The omissions in the prosecution case are so glaring. For my part, I find the accused not guilty and acquit him under **Section 322(1)** of the **Criminal Procedure Code**.

Dated, signed and delivered in open court this 24th day of March, 2015

H.I. ONG'UDI

JUDGE

In the presence of

M/S Kivali for State

Mr. Miruka for accused – present

Accused – present in person

Karanja – Court Assistant

Interpretation – English/Kiswahili