REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 42 OF 2011

REPUBLIC..….....PROSECUTOR

VERSUS

JOSPHAT KIPRUTO BETT…....….....ACCUSED

JUDGMENT

1. On the night of 18th June 2011, James Kipruto and his wife retired to bed. He must have stepped outside between the hours of 2:00 and 3:00 in the morning; perhaps to attend to a call of nature or having been disturbed by some noise outside his house. His wife was woken up by some groans from her husband. She went outside; she found her husband lying on the ground; he was bleeding through the mouth. She saw someone running away into the night. She called for help. Her husband was taken to a number of hospitals before he succumbed to his injuries on 23rd June 2011.
2. The State brought information to the High Court charging the accused for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the night of 18th June 2011 at 3:00 a.m. at Chepkemei location within Nandi County, jointly with others not before the court, he murdered James Kipruto alias Japheth. The accused pleaded not guilty. Eight witnesses were called by the prosecution. At the close of their evidence, I found that the State had established a *prima facie* case against the accused under section 306 (2) of the Criminal Procedure Code. The accused elected to give sworn evidence. He did not call any witness.
3. PW1, Christine Chepleting, was the wife to the deceased. She testified that when she found her husband outside, the deceased uttered in Kiswahili "*vijana msiniue, mnisamehe*" ("young men, do not kill me, forgive me"). She had been awoken by his grunts. She said there was moonlight and that she saw the accused running away into the *shamba*. He was ten metres away. She could not tell whether the accused was alone. She said the house of her elder son, Alfred Kipruto, had been broken into and some maize, cups and a thermos stolen. When cross-examined, she said she never witnessed the attack. She was also not sure of the time her husband went outside. She said

"I saw someone running away. I did not see his face. I saw his clothes. At the corner, as he was turning, I saw his face. The accused was not a neighbor. He used to work in the area. He used to make bricks. I used to see him at the site"

4. PW1 was assisted by her brother Joseph and her son Titus (PW5) to take the deceased to Chepkemei Dispensary where he received first aid. At about 5:00 a.m. they were referred to Eldoret, Moi Teaching and Referral Hospital. The deceased was admitted there for four days. He later succumbed to his injuries.
5. PW5 testified that he found the deceased at the gate. He was bleeding from the head, mouth, and

ears. He said the deceased was not talking. He confirmed that his brother's (Alfred Kipruto's) house had been broken into and household goods scattered around the compound.

6. PW2, Nicholas Murrei, was the area Chief. He was alerted of the attack on the deceased. He first went to the dispensary. He said the deceased was bleeding from the head and mouth. In the meantime, he received information from a person called *Timo* that a neighbor to the deceased had locked himself up in his house and refused to open the door unless the Chief was present. PW2 decided to go there. On the way he met a group of people chasing someone. The person disappeared into a maize plantation. He said that that person was the accused. He identified him at the dock. The accused was not arrested that night. In the morning, PW2 went to the scene. He saw bloodstains. He also found a bloodstained *jembe* handle (exhibit 1). Upon cross-examination, he conceded he did not see the person being chased into the plantation.
7. PW7 claimed that PW2 told him that the accused had escaped from his house through a window. He said that on 23rd June 2011, he went to Kipkaren River and learnt that the accused had been there but had left for Kajiado.
8. PW3, Alex Kipkosgey, is a brother of the deceased. On the material night, he was woken up by his wife. He went to the dispensary. He said the deceased had been hit on the head; there was a cut running from the mouth to the ear. He later went to the scene and saw the bloodstained *jembe* handle.
9. PW4, Chief Inspector Stanley Mwaura, was at the material time the officer in charge of Kabiyet Police station. He received information of the murder from the Assistant Chief, Kipkaren. He later learnt from an informer that the suspect was in Kajiado. On 26th June 2011, the area Chief told him the suspect was spotted in Kajiado. He alerted the OCS Kajiado who arrested the accused. PW4 then travelled to Kajiado and re-arrested the suspect, travelled with him back to Kabiyet Police Station.
10. PW8, Police Constable Ali Musa, visited the scene. He was accompanied by two other police officers. He saw some bloodstains. He also recovered the *jembe* handle. He produced it (exhibit 1). He also recorded witness statements.
11. PW6, Dr. Walter Nalianya, carried out the postmortem on the deceased. The body was identified by PW5 and two other persons. The body had a sutured wound on left side of the skull and on the right ear lobe. There was a bruise on the forehead. On dissection, he found a depressed skull fracture, blood on the surface of the brain and a laceration of the right temporal lobe of the brain. He formed the opinion that the cause of death was a severe head injury due to blunt trauma. The State closed its case.
12. The accused gave sworn testimony. He denied committing the offence. He testified that on 17th June 2011 he travelled to Bisil, Kajiado to resume his work. He said on 18th June 2011 (the date of the alleged offence), he was in Kajiado with Julius Biwott, Wilson Kemboi and Nicholas Kiprop. He said he remained in Kajiado for five days. He was then arrested and taken to Kabiyet Police Station. He testified that the police did not explain to him the reason for his arrest. They asked him whether he had been to Kipkaren or beaten up the deceased. He denied it. He said he was beaten while in police custody. He also claimed to have lost Kshs 39,000, a *Nokia* phone and a watch.
13. The accused was thus setting up a defence of *alibi*. He had not given any notice. The prosecution applied to recall two witnesses to rebut the *alibi*. I granted an adjournment for the State to call those witnesses. On 19th March 2015, the trial resumed. The prosecution failed to produce the witnesses. A further adjournment was denied for want of merit and for considered reasons on the record. The learned State Counsel then proceeded to cross examine the accused. The accused conceded he was in Kipkaren area on 17th June 2011, a day before the murder. He disagreed with PW2 who said he had seen him in Kipkaren on 18th June 2011. He said he never recorded a statement with the police. He said he was arrested in Kajiado; and, that the police never explained to him the reasons for his arrest. That marked the close of the defence.
14. Learned counsel for the accused filed submissions dated 1st April 2015. The learned State Counsel filed a detailed reply on 5th May 2015. I have considered all the evidence, the authorities and rival submissions.
15. 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*. In *Republic v Andrew Mueche Omwenga* [2009] eKLR, Maraga J. (as he then was) succinctly dealt with the subject-

"What is murder? Before I deal with the definition of murder, it is important to bear in mind the fact that criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or the existence of a state of affairs prohibited by criminal law before conviction can result. Whether a conviction results will depend further on the accused's state of mind at the time; usually intention or recklessness is required. The Latin maxim—actus non facit reum, nisi mens sit rea —"the act itself does not constitute guilt unless done with a guilty mind," encapsulates this principle."

16. 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*. 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."

17. Malice aforethought on the other hand 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."

18. Malice aforethought can take various forms. It can be express, constructive, implied or inferred from a set of circumstances. Where the homicide is committed in furtherance of a felony or when resisting or preventing lawful arrest, notwithstanding the absence of an intention to kill or to cause grievous bodily harm, the accused is deemed to have constructive malice aforethought. See Raphael Mbuvi Kimasi v Republic Court of Appeal at Nyeri, Criminal Appeal 61 of 2013 [2014] eKLR. Generally, there are three main *tests*: the first is the intention to cause *death*; secondly, the intention to cause *grievous bodily harm*; and, thirdly if it is shown that the accused knew that there was a *serious risk* that death or grievous bodily harm could result from his conduct but he proceeds to do so without any lawful excuse. See Nzuki v Republic, [1993] KLR 171, Republic v Andrew Mueche Omwenga [2009] eKLR. While the *motive* can strengthen the prosecution's case, it is not obliged to prove it. See generally Republic v Sharmpal Singh s/o Pritam Singh [1962] EA 13 at page 17.
19. Applying those principles to the evidence in this case, I find as follows. The deceased was attacked on the night of 18th June 2011. He died on 23rd June 2011. As the deceased died before the expiry of one year, the accused is properly charged with murder. The key question then is whether the accused attacked the deceased on 18th June 2011. The subsidiary question is whether the accused was positively identified. PW1 did not witness the attack on the deceased. She was roused from her sleep by the groans or noises from her husband. She said there was moonlight and

that she saw the accused running away into the *shamba*. She saw his face at the corner as he was turning into the *shamba*. He was ten metres away. She could not tell whether the accused was alone.

20. In Wamunga v Republic [1989] KLR 424**,** the Court of Appeal held as follows-

"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."

21. In Republic v Turnbull & others [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In Kiarie v Republic [1984] KLR 739, the Court of Appeal had this to say-

"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."

See also Joseph Ngumbao Nzaro v. Republic [1991] 2 KAR 212, Richard Gathecha Kinyuru & another v Republic Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR, Obwana & Others v Uganda [2009] 2 EA 333.

22. PW1 said there was moonlight. She did not clarify about its *intensity*. The deceased was lying near the gate to her house. At first she said she did not see the face of the accused. She then said she saw his face at the corner, as he was turning to get into the *shamba*. The accused was not her neighbor. But he used to work in the area making bricks. She used to see him at the site. Considering it was at night, and the distance at which she saw the attacker running away or turning into the *shamba*, I *cannot* say conclusively that she *positively* identified the accused.
23. That would leave the evidence of PW2. He claimed that from the headlight of the motorbike, he saw the accused being chased by a group of people. The accused then disappeared into a maize plantation. He was not apprehended that night. None of the people chasing the accused testified or confirmed he had been in his house at Kipkaren area.PW2 had been alerted of the attack on the deceased. He first went to Chepkemei Dispensary. While there he was *told* that the accused had locked himself up in his house and refused to let in the neighbours. PW2 proceeded in that direction. On the way he met a group of people chasing someone. The person disappeared into a maize plantation. It was at night. He said that person was the accused. He identified him at the dock. In Ajode v Republic [2004] 2 KLR 81, the Court of Appeal took a very dim view of dock identification unless preceded by a proper identification parade. In this case, substantial time had passed from the time of the attack to the time PW2 claims to have seen the accused. The chase was taking place away from the *locus in quo*. The person being chased was not apprehended that night. The accused was only arrested on 26th June 2011 in Kajiado.
24. I am thus not satisfied that the identification of the accused by PW1 or PW2 was positive or beyond any reasonable doubt. Furthermore, none of the eight witnesses called by the State *witnessed* the attack on the deceased. No witness saw the accused break into the house of Alfred Kipruto either. There also seems to have been a number of attackers. That is the impression created by the words uttered by the deceased in Kiswahili "*vijana msiniue, mnisamehe*" ("young men do not kill me, forgive me"). PW1 said she was not sure whether the accused was alone. No link was established between the bloodstained *jembe* handle (exhibit 1) and the accused. From the autopsy, it was the likely murder weapon. The pathologist formed an opinion that the cause of death was a blunt trauma to the head.
25. The evidence against the accused is thus largely *circumstantial*. Some of the pieces of the circumstantial evidence are; that the deceased died from injuries sustained in the attack; the evidence of identification by PW1 and PW2; and the allegation that the accused disappeared from the Kipkaren area to Kajiado. The trouble is that no one testified that the accused was in his house at Kipkaren that night. The closest was the evidence of PW7. But it was *hearsay*. PW7 said that PW2 *told* him that the accused had escaped from his house through a window. I say it is hearsay

because PW2 had in turn received that information from a person known as *Timo* who never testified. PW7 said that on 23rd June 2011, he went to Kipkaren River and learnt that the accused had been there but had left for Kajiado. That *may* be so. The accused testified that he left Kipkaren on 17th June 2011.

26. I formed the clear impression that the accused was lying when he said that he was not in Kipkaren on 18th June 2011. He did not call Julius Biwott, Wilson Kemboi or Nicholas Kiprop to confirm that he was with them in Kajiado on 18th June 2011. The defence proffered by the accused does not give an accurate account of his movements between the 17th and 18th June 2011. But his mere presence in Kipkaren would *not* establish the offence of murder. The onus of proving the offence was on the prosecution. On the night the deceased was attacked, no one saw the accused attack him; and PW1 and PW2 did *not* positively identify him.
27. There are strong assumptions and suspicions that the accused was the person who attacked the deceased. PW5 said he suspected the accused because of prior threats to the deceased. There is however *no* room for such *presumptions* in a criminal trial. The court can only convict on strong circumstantial evidence that *must* point *irresistibly* to the accused. The test in a matter of this nature was well stated in *R v Kipkering arap Koske & another* 16 EACA 135 where 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"

28. See also *Kipngetich v Republic* [1985] KLR 392. The ratio in those two cases is this: a court may convict on circumstantial evidence; but the circumstantial evidence *must* point *irresistibly* to the accused to the *exclusion* of all others. In *Sawe v Republic* [2003] KLR 364, the Court of Appeal affirmed that position. At page 375 the following passage appears-

"There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused"

29. Furthermore, subject to section 111 of the Evidence Act, the legal burden of proof rests with the prosecution. See also *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332 at 334, *Abdalla Bin Wendo & another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported). The accused may have lied. There are gaps in his *alibi*. But he was entitled under our Constitution and the Criminal Procedure Code to remain *mute*. He was not under any duty to fill in the gaps for the prosecution.
30. In the end I am not satisfied that the prosecution *proved* beyond reasonable doubt that the accused, *of malice aforethought caused the death of James Kipruto alias Japheth by an unlawful act or omission.* It must follow as a corollary, that the accused is not culpable. I enter a finding of *not* guilty. The accused is hereby acquitted.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of May 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

The accused.

Mr. Miyienda for the accused.

Ms. Karanja for the State.

Mr. Lesinge, Court clerk.