



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 1 OF 2009

REPUBLIC PROSECUTOR

VERSUS

MOSES BIWOTT CHIRCHIR ACCUSED

JUDGMENT

The accused Moses Biwott Chirchir was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

It is alleged that on the 21st day of December, 2008 at Kapkutum Village, Simit Sub-Location, Muskut Location in Keiyo District within the Rift Valley Province murdered Reuben Kipyego.

EVIDENCE

In total, the prosecution called eight (8) witnesses. **PW1**, Janet Cherotich, an Assistant Chief from Keiyo South District testified that on 22nd December, 2009 at about 7.20 a.m., he was called by an Administration Police (A.P.) officer by the name Kiptum who informed him that the deceased Reuben Kipyego had been killed at the homestead of Sheila. He went to the scene and confirmed the information. He also informed the deceased's brother, one Mike and his wife.

PW1 testified that the suspected killer was the accused whom he identified in court as Moses Biwott Chirchir.

He stated that police officers moved to the scene at 5.00 p.m. The deceased's body had a cut on the neck.

In cross-examination, PW1 stated that he did not witness the killing of the deceased.

PW2, John Kipkemoi Kiplagat testified that the deceased was his step brother. He stated that on 29th December, 2008 he was informed that the deceased had been slashed with a panga and killed. He received the information in the presence of his brother one Mike Kipyego.

PW3, Mike Kibiego, a Primary School teacher and a brother to the deceased testified that on 22nd December, 2008 he was informed by the Assistant Chief that his brother had been killed. He went to the scene and confirmed that the deceased had been cut on the neck with a machete (panga). He was dead. On 29th December, 2008 he went to the Moi Teaching & Referral Hospital where he identified the deceased's body for purposes of a post mortem. He was in the company of his brother and a police officer amongst others. He stated that the deceased died from a cut on his neck.

PW4, Sheillah Cheruiyot testified that on 21st December, 2008 at about 9.30 p.m., the deceased woke her

up so that he could pay her her wages as he was her employer. It is then that the accused arrived and ordered her to leave the house but she declined. He was holding a knife. He broke into the house. She walked out leaving the accused and the deceased behind. Both the accused and the deceased engaged in an argument which generated into a scuffle. The scuffle extended outside the house. After a while the accused approached PW4 and told her that they had to go to the police station because he had killed the deceased. At the police station, the accused was locked up but she was released.

PW4 further testified that the accused was her former boyfriend. She identified a panga which she said the accused had on the material night. The same was blood stained. She stated that on their way to the police station, the accused took her to his house and raped her.

In cross-examination, PW4 stated that the accused had been her boyfriend since the year 2003. They neither lived nor had children together. Their love relationship had ended although they were still ordinary friends. She said that the deceased was not her lover.

She stated that on the material night, the accused found the deceased seated on her bed as the house had no seats. She said that after the accused entered into the house, he and the deceased went outside. She however did not witness the scuffle between both of them, nor the accused killing the deceased.

She further stated that, on their way to the police station, she consented to going to the accused person's house where they had sex, although the sex was against her wish. She confirmed that she did not tell the police that the sex was secured by force. She denied that the accused went to her house because he heard that there was another man in the house. She stated that she did not know why both the accused and the deceased went to her house.

In re-examination, PW4 stated that the accused's home was about eight (8) kilometres from her house. She said that the deceased had arrived at her house at 7.30 p.m. She said she did not see the deceased being cut but falling down.

PW5, Teriki Cheruiyot stated that at about 7.00 a.m., as she walked along a path, she came across a person who was lying upwards looking dead. He raised alarm. People went to the scene and confirmed that the person was dead. Police later collected the body. He stated that the deceased was called Reuben.

On cross-examination, he stated that he did not know who killed the deceased. He however said that he knew the accused.

PW6, Doctor Benson Macharia of Moi Teaching & Referral Hospital and a pathologist conducted the autopsy on the body of the deceased Reuben Kibyego. He found the deceased to have suffered a large gaping wound on the left side of the neck measuring 8 x 6 centimetres. The wound cut the major vessels of the neck, the cervical spine and the cord. He formed the opinion that the cause of the death was due to cervical cord transection with extensive bleeding due to sharp force trauma to the neck. He produced the post mortem form as P. Exhibit 2.

PW7, Administration Police Corporal Kiplagat Kiptum then working at Soi Division, Muskut A. P. Camp testified that on 22nd December, 2008 at about 1.00 a.m. the accused, Moses Chirchir while in company of a woman, one Sheilla Cheruiyot reported to him that he had killed a man called Reuben Kibyego. The accused asked him to take him to a police station so that he could not be killed by the members of public. The accused had travelled 7 Km from Kapchekwa Village. He told him that he had found the deceased with his lover. He had a panga which was wrapped with a cloth on one edge. The cloth was wet. He handed it over to PW7 which the latter produced as P. Exhibit 3.

PW7 testified that he escorted the accused to Kaptagat Police Station. Later the O.C.S. collected the panga from him as he visited the scene. Thereafter, he was accompanied to the scene by other police officers to collect the body. They took it to Moi Teaching & Referral Hospital mortuary.

On cross-examination PW7 stated that he visited the scene in the company of an Inspector of Police

whom he could not recall by name, P.C. Okello of Kaplagat Police Station and A.P.C Nathan Tarus. He however stated that he forgot to indicate in his statement that he had visited the scene.

He stated that Sheila Cheruiyot told him that he was with the deceased when he met his death and that the accused told her that he did not intend to kill the deceased.

PW7 further stated that the accused told him that he had quarreled with the deceased over Sheila Cheruiyot. Sheila was accused's lover but she had later started a love relationship with the deceased.

In re-examination, PW7 stated that the accused told him that Sheila used to be his lover although she lived in her own house.

PW8, P.C. Gregory Muya and co-investigating officer testified that on 22nd December, 2008 at about 8.00 a.m., he was informed by his colleague Inspector David Okello of Kaptagat Police Station that in the night a suspect had surrendered himself to an A. P. Officer at Muskut Chief's Camp. He named the suspect as one Moses Biwott Chirchir. The suspect had killed one Reuben Kibyego using a panga which panga the suspect had also surrendered.

PW8, Inspector Okello, PC. Kenabuya Corporal Lugari visited to the scene. The body lay outside the house of Sheila Cheruiyot. The neck had a deep cut extending from the front to the back. The floor was covered with blood stains. They collected the suspect from Muskut Chief's Camp as well as the murder weapon which he identified in court. He said that he investigated the case alongside Inspector Daniel Were.

In cross-examination, he stated that initially he was not listed as a prosecution witness because it was hoped that Inspector Okello with whom he investigated the case would testify. He recorded his statement on 6th May, 2013.

The accused gave a sworn statement of defence. He denied murdering the deceased. He stated that on 21st November, 2008 he went to Muskut town to attend a circumcision ceremony which was within Kaptum Village. He arrived at the ceremony at 10.00 a.m. He then went to Sheila Cheruiyot's place where Busaa was sold. He drunk two cups of the busaa and set aside another worth Ksh. 60/= which he would drink on his way from the ceremony. He was at the ceremony at 1.00 p.m. which progressed until 11.00 p.m. Thereafter he went to Sheila Cheruiyot's home where he found Sheila with Kiptoo Boit and Reuben Kibiego (deceased). The deceased left after two minutes while Kiptoo Boit left after five minutes.

The accused stated that he left Sheila's home at 12.30 a.m. Thirty (30) metres from her house, he found a person lying down whom he identified as Reuben Kibyego, the deceased. He returned to Sheila's house and informed her. Both of them returned to the scene and confirmed what had happened. They decided to report the matter at Muskut Chief's Camp. They were taken to Kaplagat Police Station where he was beaten up by the Police until he admitted that he assaulted the deceased.

The accused denied that he fought with the deceased and that he surrendered himself to the police after killing the deceased. He also denied that he raped Sheila on that night. He admitted that Sheila was his girlfriend between the year 2003 and 2007.

In cross-examination, the accused confirmed that Sheila was his girl friend. He stated that the deceased had engaged him to split firewood at Sheila's place. He confirmed that he broke into Sheila house when he knocked on the door and it was not opened. He said that it was not true that he went to the Chief's Camp with a panga.

In re-examination he denied he fought with the deceased outside Sheila's house. He also denied that he went to Sheila's house with a panga. He said he never reported to any police officer that he was assaulted by a police officer.

SUBMISSIONS

Learned Counsel, Mr. Miyienda on behalf of the accused submitted that PW4 gave contradicting evidence particularly with respect as to how the accused accessed into her house. He stated that at one point, PW4 testified that the accused broke into her door but later changed the story in cross-examination when she stated that the door was not broken into.

Mr. Miyienda submitted that the court must take into account that the investigating officer did not testify which heavily weakened the prosecution's case. He urged the court to take into account the accused's defence which exonerated him from blame. He submitted that the evidence of PW7 did not meet the threshold of what would be considered as a confession under Section 25 of the Evidence Act. He urged the court to find for the accused.

Learned State counsel Mr. Mulati on the other hand submitted that the prosecution had proved its case beyond all reasonable doubts. He submitted that the evidence of PW4 placed the accused at the scene of the crime. There was also evidence that PW4 had a relationship with the accused. This relationship resulted into differences between the accused and the deceased culminating into the accused killing the deceased. He submitted that the accused's defence was a mere defence which should be disregarded.

EVALUATION OF EVIDENCE

Among the eight prosecution witnesses who testified, it is only the evidence of PW4 that directly implicated the accused person. She testified that the accused went to her house at about 10.00 p.m. wherein he found the deceased. A quarrel ensued resulting into a scuffle. Apparently, the accused had gone to PW4's house carrying a panga. PW4 was accused person's girlfriend, a fact admitted by both herself and the accused.

It is clear that the accused was angered by the fact of finding the deceased in the house of his girlfriend. As a result, he cut the deceased with the panga he had.

Although the accused denied he went to PW4's house with a panga and that he heard PW4 testify in this respect, that denial was dislodged by his own girlfriend who was categorical that he went into her house while carrying a panga. PW4 did not however disclose what sparked the quarrel between the accused and the deceased but on cross-examination, she said as follows;

“He came late in the night because he was a person known to me. He got annoyed on seeing the deceased in my house. We became three in the house. The deceased and the accused left together and went outside the house. I followed them ...”

This statement erases any doubt that the genesis of the scuffle was the presence of the deceased in PW4's house.

Further, it is also clear that no other person other than the accused joined the deceased and PW4 at the time. It is after the confrontation between the accused and the deceased extended outside PW4's house, that the accused cut the deceased with the panga.

Apparently, it was dark. According to PW4, she did not see the accused cutting the deceased but she saw him falling down. She testified as follows;

“I did not see the deceased being cut with a panga by the accused. I only saw the deceased falling down.”

Besides, after the deceased was cut, the accused himself owned up. He proceeded to where PW4 was and informed her that he had killed the deceased. It is also both PW4 and the accused who proceeded to the police station to make the report. The accused made the report in the presence of PW4. Her evidence was corroborated by PW7 of Muskut AP Camp who also stated that the accused reported to him that he

had killed the deceased. PW8 also confirmed that the report made at Kaptagat Police Station was that the accused had surrendered himself at Muskut AP Camp after killing the deceased. It is also the accused who personally requested PW4 to accompany him to report the incident.

These events squarely place the accused not only at the scene, but also as the sole author of the death of the deceased. I do agree with the prosecution that his defence that he did not kill the deceased was a mere denial that did not dislodge the strong prosecution's evidence against him. His further assertion that he did not hear PW4 testify that he went to her house with a panga and also personally told the police that he killed the deceased was a deviation mechanism. He also denied he told PW7 that he killed the deceased. Unfortunately, PW4 who was his soul mate as a girlfriend did not mince her words in stating that the accused told her that he had killed the deceased. He also told her to accompany her to Muskut AP Camp where he made the report to PW7 in the presence of PW4. Thus, his line of defence cannot bail him out in any way.

The deceased died from a cut wound inflicted on his neck as testified from PW6, Dr. Benson Macharia who conducted the post mortem. So severe was the cut that it severed the deceased's cervical cord. The injuries suffered by the deceased were also confirmed by PW1, 2 and 3 who saw the cut wound on the neck.

I now determine whether the accused was possessed of malice aforethought at the time he killed the deceased.

Malice aforethought is defined under Section 206 of the Penal Code in the following words:-

“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.”

And further given the circumstances under which the deceased met his death, it is also important to address the question as to whether the accused was provoked into committing the heinous act.

Malice aforethought was defined by the Court of Appeal in the case of **RAPHAEL MBUVI KIMASI - VS- REPUBLIC (2014) e KLR, COURT OF APPEAL AT NYERI CRIMINAL APPEAL NO. 61 OF 2013 – Hon. Visram, Gatembu & Odek, JJA** in the following words;

“Our analysis of the facts of this case shows that the conduct of the appellant does not necessarily come within paragraph (b) of Section 206 of the Penal Code as to what constitutes malice aforethought. In the case of Nzuki – vs- Republic, (1993) KLR 171, this court stated that malice aforethought is a term of art and emphasized that:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:-

(i) The intention to cause death;

(ii) *The intention to cause grievous bodily harm;*

(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.(see *Hyman – v- Director of Public Prosecutions*, [1975] AC 55”. In *Nzuki – vs- Republic*, (supra) the inculpatory facts were that Nzuki pulled the deceased out of a bar and fatally stabbed him with a knife. What, however, was unnerving is that there was no evidence as to there having been any exchange of words between Nzuki and the deceased nor was there any indication as to why Nzuki came into the particular bar and straight away pulled the deceased out of it and then stabbed him. The court observed that the prosecution is not obliged to prove motive, but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. (See *R -v- Sharnpal Singh s/o Pritam Singh*, (1962) EA 13 at page 17. The court in substituting Nzuki's charge of murder with manslaughter observed:

“There was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter”.

In *Raphael Mbuvi Kimasi v Republic [2014] eKLR*, *ibid*, the Court of Appeal delivered itself as follows;

“In the case of *Isaak Kimanthi Kanuachobi -vs- R -(Nyeri)* Criminal Appeal No. 96 of 2007 (ur), this Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal Code:

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape, or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See *Republic -v- Stephen Kiprotich Leting & 3 Others* (2009) e KLR HCCC No. 34 of 2008).

In the circumstances of this case, where there was a fight involving the appellant and others in a place of worship leading to another fight where the appellant stabbed the deceased with fatal consequences, we do not think there was malice aforethought at all. The appellant should not have been convicted of murder but should have been convicted of manslaughter.

(See *Juma Onyango Ibrahim – vs- R*, Criminal Appeal No. 312 of 2009 Court of Appeal (Kisumu).”

Being persuaded by the decision in *Juma Onyango Ibrahim -vs- R* (supra) and *Nzuki -vs- Republic*, (supra) we find that the prosecution had not proved malice aforethought on the part of the appellant to the required standard. The totality of the above is that we allow the appeal against the offence of murder and set aside the conviction and sentence of death. We substitute in its place a conviction for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The appellant is sentenced to serve 10 years with effect from 28th August, 2006, when he was first arraigned before court”.

The instant case can be contrasted with the cases of **R – VS- SHARMPAL SIGH s/o PRITAM SINGH, ISAAK KIMANTHI KANUACHOBI -VS- R.** and **JUMA ONYANGO IBRAHIM -VS- R.** cited in **RAPHAEL MBUVI KAMASI -VS- REPUBLIC (Ibid).** The accused herein went to the house of PW4 while armed with a panga. This was an indication that he had prepared himself mentally to do harm or cause grievous harm if things do not go his way. And on entering the house, he asked PW4 to go outside although she declined. This is what PW4 testified;

“The accused in the dock (identified) arrived at that moment and ordered me out of the house. I declined. I feared because he was holding a knife. He threatened to break into the house and he actually did it.”

As soon as the accused entered into the house a quarrel ensued between himself and the deceased which led into a scuffle that extended outside the house where accused cut the deceased. The accused was angry on seeing the deceased inside PW4's house as PW4 was his girlfriend.

The chronology of these events definitely show that the accused had prior information that he would find somebody in his girlfriend's house. He thus prepared himself to do harm to this person by arming himself with a panga. As such it cannot be said that he acted at the spur of the moment. He must have planned and intended to kill whoever was with his girlfriend. Unfortunately, this happened to be the deceased.

Again, it cannot also be said that he was provoked by the accused to react with the force he did. It must be noted that the quarrel preceded the action of killing. This quarrel was prolonged as it took the dual outside the house. All this time, the accused had sufficient time to calm down, recollect himself and retreat against the deceased. Even if any scuffle may have resulted to an injury, the force with which the panga was used definitely indicated that the victim had to die. As PW6 indicated in the post mortem form there was ***“Severing of the canotid vessel and through cervical spine and cord”***. And the conclusion as to the cause of death was ***“Cervical cord transection with extensive heamorrhage due to sharp force trauma to the neck”***.

I do therefore conclude that the accused did not respond to the heat of the passion. Instead, he premeditated the death of the deceased and actuated it by slitting his throat. Had he been provoked, it is my view that he would have attacked the deceased immediately he entered into PW4's house as demonstrated in the case of **NZUKI -VS- REPUBLIC (Supra)**. But instead, the attack followed a prolonged quarrel.

It is important to highlight one minor discrepancy in PW4's evidence. Initially, she indicated that the accused entered her house armed with a knife. But she later identified a panga (P. Exhibit 1) as the weapon the accused was carrying. The said panga was surrendered by the accused himself to PW7 who produced it as an exhibit. The discrepancy is not fundamental and has not in any way affected the substance of this Judgment. It is inconsequential to the finding I have arrived at.

The accused claimed that he was beaten by police officers while he was under police custody. He specifically pointed a finger at an officer called Ali. But on cross-examination, he indicated he never reported this incident at any police station. Whilst I note that the accused has been in prison remand throughout this trial, and he may not have had the advantage of accessing a police station, he failed to bring it to the attention of the court that allegation. I will therefore disregard that assertion as one that was intended to attract the sympathy of the court.

In like manner, I will also treat PW4's assertion that he was raped by the accused on their way to the police station to report the murder with the contempt it deserves. PW4 has never been in custody and had all the opportunity to report any such offence at a police station. She raised it too late in the day with a view to deviating the court's attention that she had a love relationship with the accused, which fact the accused admitted.

It is also not true that the evidence of PW7 was tendered as a confession. The witness statement was limited to what the accused told him when he surrendered himself at Muskut AP Camp. As such, I

overrule learned counsel, Mr. Miyianda that PW7's evidence failed to meet the threshold of a confession as provided by Section 25 of the Evidence Act, Cap 80, Laws of Kenya.

Finally, the fact that one of the investigating officers, Inspector Okello did not testify did not weaken the prosecution's case. PW8, who was one of the investigating officers in his evidence captured all the issues which Inspector Okello would have covered. There is no better material that Inspector Okello would have added.

In the end, I find that the prosecution had discharged its burden by proving this case beyond all reasonable doubts. I find the accused guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and I convict him accordingly.

DATED and DELIVERED at ELDORET this 30th day of July, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Miyianda Advocate for the Accused

Miss Mwaniki for the State