



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Coram: F.A. Ochieng J

CRIMINAL APPEAL NO. 53 OF 2009

REPUBLIC.....PROSECUTOR

- VERSUS -

JOSEPH KOMEN SUTER.....ACCUSED

JUDGMENT

1. The accused person, **JOSEPH KOMEN SUTER** was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence, as set out in the Information, were that the accused murdered **JOSEPH KIPKILTERET** on 23rd September 2009, at Saito Village in Kapngetuny Location of Uasin Gishu District.
2. The prosecution called six witnesses, whilst the accused person did not call any other witness apart from himself.
3. **PW1, SAMUEL CHELIMO** testified that both the accused and the deceased were his employees. He had employed them to work on a piece of land, where they cut down trees and made charcoal therefrom.
4. PW1 testified that the two men lived inside one house, which was on the piece of land where they worked.
5. On the morning of 24th September 2009, PW1 visited the house where the accused lived with the deceased. He found the accused drinking tea. However, PW1 did not initially see the deceased.
6. PW1 walked around the piece of land, and then returned to the house. At that moment PW1 did not see the accused. He therefore peeped into the house, where he saw the deceased lying down on the floor.
7. PW1 called out to other people and the said people went to the house, where they found the deceased lying down, dead.
8. PW1 reported the incident at the Administration Police Camp. Thereafter, the Administration Police Officers visited the house and verified that the deceased was dead.
9. Whilst PW1 was still at the AP Camp, the accused arrived and told the officers that he had killed somebody.
10. During cross-examination PW1 said that he did not know how the deceased met his death. But the witness was sure that the only 2 people who lived inside the house where the body was recovered from, were the accused and the deceased.
11. **PW2, FRANCIS KOSKEI**, hailed from Saito Village, where he worked as a farm-hand.
12. On 24th September 2009, at about 3.00 p.m PW2 was at the river, where he had taken the cattle to drink water. Whilst at the river, some of the other herdsmen said that someone had been killed.
13. After the cattle had had water to drink, PW2 accompanied the other herders up to the house which PW2 knew to be the residence of the accused and the deceased.
14. Having verified that the deceased was dead, PW2 decided to report the incident at the AP Post at

- Kapsowar.
15. Whilst on his way to the AP Post, PW2 met the accused who told him that he had “*finished the job*”.
 16. According to PW2, the accused wished to go to Ainapkoi to get his Identity Card. But PW2 persuaded him to go to the AP Camp, to report the incident.
 17. The accused agreed, and he went with PW2 to the AP Camp, where the accused reported to the Administration Police Officers that he had killed someone.
 18. When PW2 was being cross-examined he said that the accused identified the name of the person he had killed as JOSEPH.
 19. But he also conceded that he had been given that name by one of the other herders, before he (PW2) talked to the accused.
 20. **PW3, INSPECTOR ISAACK GAWAWA BARISA**, was the Police Officer in-charge of the Ainapkoi Police Post at the material time.
 21. The Chief of Kapngetuny sent a message to PW3, about the murder. The Chief also told him that the accused had voluntarily surrendered himself at the Chief’s Camp. At the time when the accused had taken himself to the Chief’s Camp, the body of the deceased was still at the scene of crime.
 22. When PW3 went to the house where the body was, he detected the smell of alcohol. And when PW3 entered the house, he recovered a 5 litre jerry-can which still had some remains of alcohol.
 23. It was the evidence of PW3 that the accused told him that he fought with the deceased after the two of them had drunk the “busaa” which the deceased had brought back to the house.
 24. The reason for the fight is that the deceased had used the sum of Kshs. 200/- which the accused had given him, for use to buy food. The money is what the deceased used to buy the “busaa”.
 25. Whilst PW3 was at the house where the body of the deceased was recovered, he noted that there had been signs of a struggle. Therefore, he concluded that there had been a fight.
 26. **PW4, DR. MACHARIA BENSON**, is a pathologist. He conducted the autopsy on the body of the deceased.
 27. The body had a stab wound on the chest, from which intestines were protruding. There was also a slash wound on the left arm.
 28. Internally, there were 2 litres of blood in the abdominal cavity. The liver, too, had been wounded.
 29. Following the autopsy, the doctor concluded that the cause of death was shock due to excessive bleeding due to a penetrating stab wound.
 30. During cross-examination, the doctor explained that the stab wound, which was on the upper part of the abdomen, could have been caused by a sharp object such as a knife.
 31. **PW5, SUTER KIBOWEN LING’ATUM**, was a brother to the father of the deceased. He is one of the persons who identified the body of the deceased, for the purposes of post-mortem examination.
 32. **PW6, PC MARIUS KEYA**, accompanied PW3 to the scene of crime. The two police officers were led to the scene by an Assistant Chief.
 33. Whilst at the scene PW6 saw a container which had “busaa”.
 34. Later, when PW6 was escorting the accused to the Ainapkoi Police Station, the accused told him that when the deceased returned home, he did not have the “unga” which the accused had sent him to buy.
 35. The accused also told PW6 that it was the deceased who started fighting him.
 36. After PW6 testified, the prosecution closed its case.
 37. Thereafter, when the accused was put to his defence, he gave an unsworn testimony.
 38. He began by informing the court that he was 70 years old.
 39. The accused basically corroborated the evidence which the prosecution had placed before the court. He confirmed having given Kshs. 200/- to the deceased, for use in buying food. But the deceased went and bought alcohol.
 40. The deceased returned to their house, carrying some of the alcohol he had bought. Because the deceased did not bring back any food, the accused complained that he would sleep hungry. At that point, the deceased beat the accused.

41. The accused pushed the deceased to the wall, from where the deceased fell down.
42. The two men continued struggling until they got outside their house. The accused told this court that he grabbed the deceased and threw him down. The deceased screamed, saying that he had been injured by a tree stump.
43. As it started raining, the accused helped the deceased back into their house.
44. Later, the accused went to sleep. But when he woke up the next morning, the accused found the deceased dead.
45. Thereafter, the accused reported the incident at the AP Camp, and he was arrested.
46. From the evidence presented, there is no doubt that the deceased, JOSEPH KIPKILTERET is dead.
47. The cause of death was excessive bleeding due to a penetrating stab wound. The stab wound could have been caused by a sharp object, such as a knife.
48. The accused confirms having fought with the deceased. The morning after they had the said fight, the deceased was found lying dead.
49. The accused did not escape from the scene. Instead, he voluntarily went to report the incident at the nearest Administration Police Camp. Whilst at the said AP Camp, the accused told the officers that he had killed the deceased.
50. During the trial, the accused person reiterated to this court that he had indeed killed the deceased.
51. He explained that the killing was not a calculated move. He fought with the deceased, first inside their house and later, outside. During the fight, the deceased suffered fatal injuries, but the accused apparently did not realize how serious the said injuries were.
52. Therefore, although the deceased cried out that he was injured when he fell on a tree stump, the accused helped him get back into the house, when it started raining. Thereafter, the accused went to sleep.
53. I find that the whole incident was attributable to the failure by the deceased to buy food, as he had been asked by the accused, to do. Instead, the deceased used the money which the accused had given him, to buy alcohol.

54. When the deceased got back to their house, with the “*busaa*”, the accused complained to him. But the deceased beat him. That is what the accused told this court. And, as there were no other persons at the house where the incident took place, there was no other version as to what exactly happened.
55. Could the accused have spoken an untruth when he asserted that it was the deceased who started the fight?
56. The answer is that whilst it is possible that the accused spoke an untruth, there is no evidence to prove it. If anything, it would appear to be more probable than not, that the accused spoke the truth. I so find because from very early, the accused already told PW6 that it was the deceased who started the fight.
57. Secondly, although the prosecution submitted that there was no evidence that the accused had drunk any alcohol before the fight, Inspector Barisa (PW3) testified that when he was at the scene, the accused told him that both he (the accused) and the deceased had drunk the alcohol.
58. It would therefore appear that the fight started between two men, both of whom had consumed alcohol.
59. Although the deceased was much younger than the accused, he had taken more alcohol by the time he got home. That might explain why the accused, who is over 70 years old, got the better of the deceased, in their fight.
60. I find that there is no proof of any pre-meditation on the part of the accused person.
61. As he had taken alcohol before the fight, and because it was the deceased who started the said fight, I take the position that the accused, who was much older than the deceased, was acting in self-defence, more than as an aggressor.
62. In the result, I find the accused guilty of the offence of Manslaughter contrary to section 202 of the Penal Code. I convict him accordingly.

DATED, SIGNED and DELIVERED at **ELDORET** this 25th day of July 2014.

FRED A. OCHIENG

JUDGE

Judgment read in open court in the presence of

Aseso for Miyienda for Accused

N/a for prosecution

Accused present