



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL CASE NO. 38 OF 2010**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**SIMON TABUT .....ACCUSED**

**JUDGMENT**

The accused, Simon Tabut alias Arap Teta 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 15th day of May, 2011 at Kiminda sub-location within Nandi County murdered Simon Kipruto.

**THE EVIDENCE**

The prosecution called a total of eleven (11) witnesses. Their evidence was entirely heard by Hon. Azangalala, J. (as he then was). Hon. Justice A. Mshila, thereafter took over the conduct of the trial. She found that the prosecution had established a prima facie case and made a ruling that the accused had a case to answer. I then took over the trial at defence hearing.

I summarize the evidence as follows:-

**PW1**, Haron Kipng'etich Kemboy testified that on the the material day, that is on 15th May, 2011 at about 6.00 a.m., he was with the deceased Simion Kipruto in the house when the accused joined them. The accused interrogated the deceased as to why he was alleging that the accused had stolen a mobile phone. A fight ensued and he separated them. Both PW1 and the accused left for their daily duties while the deceased remained behind sitting on the bed. The mother of the deceased later made enquiry from PW1 as to why the deceased had prolonged his sleep. PW1 sent one Kipkemboy Nicholas to check on the deceased and reported that he was still a sleep. PW1 and one Johnathan Songok went to the house to check on the deceased and discovered that he was dead.

**PW2**, Eliud Kimeli Rotich testified that on 12th May, 2011 he went at Meso Center at Rugut's home to collect his phone. He then went at PW1's and the deceased's home the next day and they informed him that the phone was lost. Later on they informed him that the phone had been found. He went and picked it.

**PW3**, Philip Cheruiyot testified that on the material date, he heard some screams while on the farm. He later met the accused on the way who informed him that he had beaten the deceased. He went at the scene

where he found many people and the deceased lay dead in the house.

**PW4**, Kipkurut Arap Keino testified that on the 15th May, 2011 at 6.00 a.m., the accused joined him where he was herding cattle and pointed out to him that the deceased was a bad person. On the way back home, they were attacked by a mob of people which was baying for the accused's blood. The accused took cover in Ibrahim Rugut's (son to PW4) house. Members of public broke into the said house and assaulted the accused and left him for the dead.

**PW5**, Ezekiel Kiplagat Chepsiro, the Assistant Chief of Meswa Sub-location testified that on the 15th May, 2011, he received a call and was informed that the deceased had been killed. He went to the scene and confirmed the same. Meanwhile, the accused had locked himself in the house to take cover from mob justice. He calmed the mob who assaulted the accused. Later on, the police arrived and rescued the accused and took away the deceased's body to Kapsabet District Hospital Mortuary. He later recorded a statement at the Kapsabet Police Station.

**PW6**, Priscilla Meto, the Chief of Kiminda Location testified that she was telephoned by one Grace Gogo who informed her that a son of Rafael Chepkosgei had been killed by a worker of John Keino. She went to the scene and informed the OCS, Kapsabet of the death and the assault on the accused.

**PW7**, No. 521913 PC Richard Shikami testified that on the 15th May, 2011 in the company of DCIO Nandi North and the OCS went to Kapkorwa Village in Kiminda Location where they had been directed by PW6. They found the deceased dead on the bed and the accused lying in a pool of blood in the neighbouring estate. They later carried both the accused to Kapsabet District Hospital where he was admitted and the deceased body to the mortuary. The accused was in the home of Ibrahim Rugut.

PW7 also witnessed the post mortem exercise.

**PW8**, Rael Jepkosgei mother to the deceased, testified that on the 15th May, 2011, she was informed by Haron Kipng'etich that her son had died without being sick. She went to the home of John where her son was working and found him on the bed dead. On observing the body, she noticed injuries on the face. At that time the accused had locked himself in the house of John's son. The public broke into the house and assaulted him. That is when he confessed to having killed the deceased.

PW8 also testified that both the accused and the deceased worked for one person, that is John.

**PW9**, Dr. Kiplagat Kipruto, a medical officer at Kericho, did the postmortem on the body of the deceased on 17th May, 2011. It had bruises on the forehead and had bled. There was also bleeding between the brain and the skull. He formed the opinion that the cause of death was severe head injury with intracranial heamorrhage leading to cardiopulmonary arrest. He produced the post mortem form as an exhibit.

**PW10**, Ibrahim Rugut testified that on the material date he heard some screams. On the way to where the screams were coming from, he met the accused who took cover in his Kitchen house and locked himself inside. The crowd followed him baying for his blood. The crowd alleged that the accused had killed another person known by the nickname as Chumo. He later learned that the person killed was Simeon. He rang the D.C for security. The crowd managed to break into the accused's hide out and assaulted him. The police came and took him to Kapsabet Police Station.

**PW11**, No. 233646, IP Geoffrey Waigwa Machoma, the Investigating Officer (I.O) testified that on 15th May, 2011 at mid-day he was informed of the killing at Kimanda Location. In company of DCIO, OCS and others went to Kakorio Village to investigate the alleged murder. They went to a house where the deceased lay dead on a bed. On examining the body, they noted that blood was oozing from the mouth. The left side of the head was swollen. 50 meters away in a homestead of Mr. Rugut, the accused had been beaten by a mob and left for dead. He had a deep open cut wound on the head. There were stones and pieces of timber thrown all over. He interrogated the members of the family who gave an account of the incident. He asked them to accompany him to the police station. They took the body to the Kapsabet

District Hospital Mortuary while the accused was admitted in the same hospital.

PW11 also produced a medical examination report (P.3 form) which indicated that the accused had been examined and found fit to stand trial.

The accused gave a sworn statement of defence. He stated that he worked for Arap Keino as a herdsman. The deceased, Simion Kipruto also worked for Arap Keino as a casual labourer. Whereas he lived in the home of his employer, the deceased lived at Kipkwen Village and went to work on a daily basis.

He stated that on 15th May, 2011 he woke up and milked the cows as usual and then delivered the milk to the dairy. He returned from the dairy at 11.00 a.m. After breakfast he prepared to go to herd the cows.

He denied he saw the deceased on the material. He denied he went to the house of Haron Ngetich as he was sleeping with the deceased. He recalled that PW2 testified that his phone was taken by Haron.

The accused stated that no one said he stole the phone except the deceased and Haron who claimed he knew about it. The accused further stated that when he entered into the hut he found Simion (deceased) sleeping and he did not know what the problem was with him. He said he shared the room with Haron and Simion (deceased). He stated that on that day he spent the night elsewhere and only returned to the hut much later. He stated that members of the public attacked him after he told them what had happened.

He denied killing the deceased.

### **EVALUATION OF EVIDENCE**

In **PATRICK BULUMA ONDILO -VS- REPUBLIC (2013) @ KLR, C.A. (KISUMU) NO. 650 OF 2020, ONYANGO OTIENO, AZANGALALA & KANTAI JJA**, stated that:-

***“For the offence of murder to be proved there are three essential elements which the prosecution must prove beyond reasonable doubt to secure a conviction. These are:***

- (i) the death of the deceased and the cause thereof***
- (ii) that the accused committed the unlawful act and such act caused the death of the deceased; and***
- (iii) that the accused had the malice aforethought.”***

As to the death of the deceased, the same was confirmed by PW3, 5, 6, 7, 8 and 11 who visited the scene and found the body lying in a house. PW9, Dr. Kiplagat Kipruto thereafter performed the post mortem and concluded that the death was caused by severe head injury. All these witnesses also confirmed that the dead person was Simion Kipruto.

As to who caused the death of the deceased, the only evidence that links the accused to it was that of PW1 Haron Kipngetich. He witnessed both the accused and deceased fighting. The accused appeared not happy with rumours that were going round that he had stolen PW2's phone. Upon asking the deceased why he was spreading the rumours, a fight broke out.

An excerpt of PW1's evidence on cross-examination is as follows;

***“I saw the fight between the accused and the deceased. It took about one minute and I separated them. I slept and the accused followed me. The phone was of Eliud Kimeli. I and the deceased had collected the phone from charging. The deceased carried it. The phone got lost that day but was later found. When I separated them none fell down. We were known to each other. When I left to go and make breakfast the deceased was sitting on the bed. ....The accused came specifically to ask about***

***the phone. None of the people were armed.***

***The accused and the deceased fought with their hands.”***

No other witness attested to what transpired between the accused and the deceased. The only other person, though, who had a clue of what may have transpired was PW3. According to him he heard screams and as he walked towards where the screams were coming from, he met with the accused who told him that he had beaten the deceased. He then went to the deceased employer's home where he found the deceased already dead. His testimony was as follows:-

***“I was on the farm. I heard screams. I went where the screams came from, as I did I met the accused. He was walking as he looked behind. He said he had beaten the deceased. I asked that we go back. He said he would wait for his employer John Kaino. We went to where Kaino was. He said that we go to the scene. We proceeded to the scene and found many people. In the house the deceased body lay. The house was of the workers”.***

In cross-examination PW3 said he did not know when the assault had taken place.

PW4 on the other hand testified that he was only told by the accused that the deceased was a bad person. The two were then attacked by members of the public although they concentrated on the accused. It appeared that at that time PW4 had no clue of what had transpired. He learnt thereafter that the deceased was dead.

From the key evidence of PW1, it appears that after the accused and the deceased fought and were separated by PW1, both PW1 and the accused left the deceased in the house. The deceased was never to leave the house alive.

PW1, unfortunately, was very economical with the information he gave to the court. He did not for instance state who started the fight between the two. He did not also state who between the two appeared to be beating the other. Moreover, he also did not state in what state he left the deceased in.

But it is clear though, that after the fight, the accused almost immediately left the house and soon thereafter the deceased died. It is therefore easy to conclude that the deceased died as a result of the fight. This is so because no other person entered into the hut where the fight was which is the hut in which the deceased died after PW1 and the accused left.

This then was a clear case of an unfortunate and unintended death. A fight just spontaneously broke out after a quarrel sparked by the deceased allegedly stating that the accused had stolen PW2's phone. The fight only took about one (1) minute as PW1 intervened promptly. It is then clear that, although the fight eventually led to the death of the deceased, that death was unintended. Hence, the accused did not possess malice aforethought as defined under Section 206 of the Penal Code. The said provision reads:-

***“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. ”***

Although the accused in his defence stated that he only found the deceased sleeping in the hut, that defence is strongly ousted by the prosecution's evidence that he left the hut after fighting with the deceased. Again, he informed PW2 that he had beaten the deceased. His defence in that regard is not truthful and I disregard it.

In the result, I find that the prosecution has only proved the offence of manslaughter under Section 202 as read with Section 205 of the Penal Code. I find the accused guilty of the same and I convict him accordingly.

**DATED and DELIVERED at ELDORET this 23rd day of October, 2014.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:**

**Mr. Marube Advocate for the Accused**

**Mr. Mulati for the State**