



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Criminal Case 33 of 2007**

**REPUBLIC.....PROSECUTOR**  
**VERSUS**

**PETER SAINA KOSGEI.....ACCUSED**

**JUDGEMENT**

1. The Accused Peter Saina Kosgei was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

**FACTS:**

2. On the 23rd July, 2007 at around 2.00 p.m. At Kesses Division in Uasin Gishu District of the Rift Valley Province the Accused murdered Christopher Kipkoech Togom.

3. The matter had proceeded before several High Court Judges and this court was seized of the matter at the stage of Defence hearing.

4. The prosecution called a total of nine (9) witness and for the defence only the Accused gave worn evidence.

5. There are three ingredients of murder that the prosecution has a burden to prove.

6. The prosecution must prove death and its cause. It must prove “actus reus” the unlawful act and it must prove the “mens rea” of murder which is malice aforethought.

7. After hearing the evidence of all the prosecution witnesses and that of the Accused this court finds the following issues for determination;

- (a) Death
- (b) Identification
- (c) Actus Reas.
- (d) Mens Rea (malice aforethought)

8. Barnaba Koech (PW6) and Benjamin Tun Kiptoo (PW7) attended the postmortem on the 27th June, 2007 and identified the body of the deceased to the Doctor who carried out the postmortem.

9. Doctor Ombenzi (PW1) a Senior Medical Officer at Moi Teaching and Referral Hospital produced the Postmortem Report under Section 33 of the evidence Act as the maker was unavailable. The Report was marked as “PEXb No. 1”
10. PW1 testified that the cause of death was a blunt head injury with a fracture of the skull. That the same was caused by a blunt object and that the head injury together with bleeding led to the deceased death.
11. From the evidence adduced this court is satisfied that the prosecution has proved death and the cause of death.
12. The evidence of PW3 Bethwell Kipgogoi Tiro, PW4 Stanley Kibisu and PW8 was that the fight was as between the Accused and PW3.
13. PW3 testified that he was a tractor driver and that on 23rd June 2007 the deceased told him to help him remove stones from his shamba. When the stones were being loaded the Accused arrived and hit him (PW3) with a rungu. He inquired why the Accused was beating him, he got no answer. He then ran away.
14. PW4 testified that after ten (10) minutes he returned to the scene and found the deceased lying down dead.
15. PW3 recognized the rungu, which was produced into court and was marked “MF1 P1”.
16. Stanely Kibisu (PW4) a casual farm labourer testified that the deceased asked him to help carry stones from the deceased s shamba. Whilst loading the stones onto the tractor the Accused came from his house and he was armed with a rungu. The Accused attacked the driver of the tractor “PW3”. The witness testified that he ran away. When he went back to the crime scene he saw the body of the deceased lying down with a rungu stuck to his head. He stated that he did not know what had transpired.
17. Simeon Hamisi Micheti testified that the incident occurred on the 23rd June, 2007 at 2.00 p.m. He had accompanied the deceased to load stones which the deceased was going to sell.
18. Whilst loading the stones the Accused emerged and attacked the driver (PW3). At this point he ran away. Upon returning to the scene he found the deceased lying on the ground with a bloody rungu beside him.
19. PW8 Brian Kiplagat testified that he knew the Accused who was their neighbour. He was at home with his father (the deceased) on the 23rd June, 2007 when a tractor came to carry stones. Whilst the stones were being loaded the Accused appeared and the Accused told his father to offload the stones.
20. The Accused started beating PW3 with a rungu. The witness stated he was standing besides his father when the Accused threw the rungu which hit his father. That the Accused had picked up stones but when he got to the deceased and upon realizing that he was dead the Accused ran away.
21. The Accused gave evidence under oath and testified that on the 23rd June, 2007 he heard people loading hard core onto a tractor.
22. That when he inquired why they were loading his stones, the deceased pushed him and that PW3 produced the rungu and tried to hit him (the Accused). That he ducked and instead the rungu struck the deceased.
23. The deceased then fell down and all the others fled from the scene.
24. The Accused stated that he left the deceased bleeding and went home first then later

went to the chief's camp to report the theft of his stones.

25. This court finds the evidence of PW3, PW4, PW5 and PW8 is consistent and corroborative on the ownership of the rungu.

26. The above witnesses testified that the Accused emerged whilst they were loading the stones and he was armed with "the rungu".

27. All the above prosecution witnesses also testified that the Accused had attacked PW3. Their evidence is consistent on this fact and corroborated.

28. The evidence of PW4 and PW5 was that they fled and left the Accused, the Deceased, PW3 and PW8.

29. PW3 testified that he too fled from the scene and left the Accused, the Deceased and PW8.

30. PW8 was the son of the deceased and as a minor. There was controversy as to when his statement was recorded and that it was not amongst the original bundle. Nevertheless the witness was allowed to testify and the statement admitted. A "voire test" was administered and the minor was found to be intelligent and understood the importance of telling the truth.

31. This court has taken into consideration the evidence of PW8 and finds that on the ownership of the rungu his evidence is corroborated by the evidence of PW3, PW4 and PW5.

32. All the evidence adduced by the prosecution witnesses is that the Accused attacked PW3 with a rungu, missed PW3 and the rungu instead struck the deceased on the head. That, one strike was what caused the death of the deceased.

33. The Accused was a person known to the witness PW8 as he was a neighbour therefore identification was by recognition.

34. The evidence of the head injury found on the deceased by the Doctor is consistent with the evidence of PW8. The Doctor stated there as only one strike. This court is satisfied that the evidence of PW8 is corroborated by the evidence of PW1 as to the cause of death.

35. This court finds that the prosecution has proved beyond reasonable doubt that the Accused unlawfully caused the death of the Deceased.

36. On the last issue of "mens rea" malice aforethought is defined in Section 206 of the Penal Code as;

**".....an intention to cause death or knowledge that the act would probably cause death....."**

37. Malice aforethought does not necessarily imply any ill will, spite or hatred towards the person killed.

38. On the issue of mens rea, malice aforethought this court finds that the Accused was angry, when he confronted the Deceased, PW3, PW4 and PW5 because they were allegedly stealing his hardware. He came armed with a dangerous or lethal weapon that he intended to use on PW3, unfortunately the deceased bore the brunt. This court finds that the prosecution has not proved that the Accused had a malicious premeditated design to cause the death of the Deceased.

## **CONCLUSION:**

39. After labouring at length on the issue of murder and manslaughter, this court finds that the evidence on record points to the offence of manslaughter.

40. This court finds that the prosecution has proved its case beyond reasonable doubt that the Accused unlawfully caused the death of the deceased.

41. This court finds **PETER SAINA KOSGEI** guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 and convicts him accordingly.

42. It is so ordered.

Dated and delivered at Eldoret this 23rd day of January 2013

**A.MSHILA**  
**JUDGE**

Coram: Before Hon. A Mshila J  
CC: Oscar

Counsel for the State:.....

Counsel for the Accused:.....

Accused:

Language:

**A.MSHILA**  
**JUDGE**