



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAKURU**  
**MILIMANI LAW COURTS**  
**Murder Case 118 of 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER KIPKEMBOI RUTTO ALIAS SAITOTI.....ACCUSED**

**JUDGMENT**

Peter Kipkemboi Rutto alias ‘Saitoti’ is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on 1/1/2008, at Kamura area, Timboroa in Koibateck District, Rift Valley Province, with others not before the court, murdered Kamau Kimani Thiongo. The accused denied the offence. The prosecution called a total of 11 witnesses in support of their case while the accused gave a sworn statement in his defence and called one other witness.

**Paul Kiama (PW1)** was a resident of Kamura as of 31/12/07. He is the son of the deceased. Because of the disputed 2007 general elections there was tension amongst the different tribes living in that area. PW1 recalled that the non-Kalenjins were threatened with eviction through leaflets which were thrown or passed around in the area. About 9.00 p.m. he heard shouts from Gilgil village that they should be alert. Because of the warning, all the seven (7) members of PW1’s family spent the night outside their house but nothing happened. On the morning of 1/1/2008, about 11.00 a.m., people armed with arrows, pangas invaded them, they were about 60 people. They were in two groups. One group came from a nearby forest and shouted to them in Kikuyu but they noticed that the Kikuyu ‘language’ they spoke was not proper. One group surrounded them while the other group attacked them. PW1 and some of his neighbours, about 20 of them armed themselves with sticks for defence. By then, his father with other villagers were in the garden trying to communicate with another group of Kikuyus from the opposite village. The people they had tried to repulse attacked his father. PW1 said he saw the first person to throw a panga at his father was one David Kibor. By then he was about 50 metres away from the assailants. The deceased dodged the panga. An arrow was then shot at his father but PW1 did not see the person who fired the arrow. The arrow struck the deceased on the head and he fell down. It is then that PW1 saw Saitoti (accused) emerge from the group to where the deceased fell and attacked him with a panga. The others with Saitoti arrived and surrounded the deceased. He also saw one Ngetich who was behind the group that attacked the father. PW1 said that he had known the accused as a neighbour for over 10

years. The assailants turned onto him, a panga was thrown at him but he managed to protect himself using a shield. PW1 fought back with some sharp sticks and the crowd retreated. It is then he ran back home but found his houses had been set ablaze. He went to join another group. PW1 saw several other people who had been attacked and injured. Jane Wambui who was cut up, was rescued and taken to hospital, Wanderi's mother had an arrow lodged in her heart and she died, while Nyaga was only injured. He did not go near where the deceased had fallen as the raiders were nearby and later he went to take refuge at his sister's house as all his family had left. On the next day, about 5.00 a.m. in company of others, he went back to the place when the deceased fell, found that he had sustained deep cut wounds on the head, back and an arrow was lodged in his head. They went to report to the police station.

The deceased's body was not taken to the mortuary for fear of attacks but on 3/1/2009, the family of deceased was given police security and buried the deceased. The body was exhumed on 29/5/2010, for purposes of most mortem. During post mortem, PW1 saw the arrow still lodged in the deceased's skull. The arrow head was produced in court and it still had threads from the woolen hat that the deceased was wearing at the time of attack. PW1 named Wamae, Njane and Maina as the people who were with the deceased at the time of attack.

**Charles Wamae Jesse (PW2)** was at home in Timboroa Kagea Farm on the 1/1/08, when he heard screams from the forest area. In company of David Maina (PW3) and many others, about 25, they went towards the forest to find out what was happening. They saw raiders from far. The raiders split into two groups. They went into the deceased's farm so that they could see the raiders who were in the valley. He saw one group of the raiders go towards Kamura School as they threatened them. It is then PW2 heard the deceased say "**come to this side**". PW2 said they had left the deceased next to the maize plantation. On looking back where deceased was, he saw people had emerged from the maize plantation. He managed to identify two people from the group that is, Saitoti, the accused, and one Daniel Kibor. He knew the two very well as neighbours. The deceased started to struggle with the raiders and on seeing that, PW2 and his group escaped into the maize plantation. PW2 said that Saitoti, the accused, is one of those who attacked the deceased. On going back to his home, he found his family had left, he hid in the bush till morning and went to Timboroa. He later learned that four people had been killed. Next day, with others, they went back where the deceased fell and found he had been cut on the head and an arrow was lodged in his head.

**PW3, David Maina Waweru** recalled that at about noon on 1/11/2008, in company of PW2, they went towards the forest where there were noises. They went by the deceased's home from where they saw a group of people climb up on the fence of the forest. Some of the raiders were armed with pangas. The deceased called them to go back and he noticed that people had emerged from their rear. One Daniel Kibor threw a panga at the deceased. PW3 said he was with Wamae and the deceased. PW3 dodged the panga. He then saw the deceased fall down and Saitoti arrived there while armed with a panga and hit the deceased once. PW3 managed to escape into the maize plantation with each person going their own way. At his home, he found the family had left and he went to Timboroa. Next day, they regrouped to pick up people who had been injured and took them to hospital. PW3 was present when the deceased's body was exhumed and he saw the arrow that was still lodged in the skull.

**PW4, Ruth Kerigo Thiongo**, was the wife of the deceased. She recalled that trouble started on 31/12/2007, when they heard shouts that they should not sleep. Next morning about 8.00 a.m., she heard noises coming from the direction of the forest but she was not able to see what the people making noise were armed with. The group split into two, when they reached her home she saw 4 boys jump over the fence and ran towards her and her children. She saw her husband going towards them as there was no maize in her farm. She ran towards her neighbour's farm where there was maize and escaped to Timboroa. She did not see her husband. On the second day, she told PW1 to go and look for the father. They went to the farm where they found the deceased had died with an arrow lodged in his head and a report was made to the police. She buried the deceased on 3/1/2008, and others who had been killed under police guard. PW4 was present on 29/5/2010, when the body of the deceased was exhumed and she saw the arrow was still lodged in his skull and was removed by the doctor who performed post mortem.

**PW5, Kimani Thiongo**, a son to the deceased was staying in Elburgon as of 1/1/2008, when he was informed of their home having been set ablaze and that the father had been killed on his farm. He

managed to get home on 3/1/2008, and found the deceased was injured on the back of his head, an arrow lodged in his head and the home had been burnt and cows driven away. PW5 was present when the deceased's body was exhumed. He identified the body and an arrow that was found lodged in the deceased's skull which still had wool from the hat that the deceased wore on the fateful day.

**PW6, a resident of Timboroa** recalled the 1/1/2008, when violence broke out in Kamura Farm by the Kalenjin community burning the houses belonging to the Kikuyu community. The deceased was found to be missing and the next day he was in the group of men who went in search of the deceased whose body they found in his farm, having been cut on the forehead and an arrow lodged in the head. He also attended the burial on 3/1/2008, under police security. He helped exhume the deceased's body for purposes of post mortem on 28/5/2010. He saw the arrow was still lodged in the skull and wool from the woolen hat the deceased wore stuck on the arrow.

**PW7, PC Wilson Mwangangi** of Timboroa Police Station, was instructed to go and arrest the accused person for involvement in post election violence. He arrested him at Timboroa shopping centre on 1/11/08. The accused was later taken by DCIO Koibatek and charged for the offence of murder.

**Sergeant James Mwaura, PW8**, of Koibatek District Criminal Investigation Officer, was on 12/6/09, handed a police file in relation to this matter to record statements from witnesses. An application for exhumation was made to court which was granted and on 29/5/2010, he traveled to Timboroa area, to the home of the deceased in company of a police Doctor (PW9) and police officers from Timboroa for purposes of exhuming the deceased's body for purposes of post mortem. The body was exhumed and on the skull, the doctor removed an arrow head which was photographed. He took into his possession the photographs and produced it as PEx.4.

**Dr. Titus Ngulungu (PW9)** of Provincial General Hospital, Nakuru, was requested to go and carry out a post mortem on the body of Kimani Thiongo on 29/5/2010. It was exhumed, identified by PW1 and PW3. He reconstructed the Skelton except the small bones which were not identifiable. On examination, most of the parts were decomposed. He found it to be a skeleton of a male, it had a linear fracture that ran horizontally from the left frontal eminence of the occipt, it meet with another fracture where the bone was missing 250cm long. He found a metal arrow head which had penetrated the parietal area. He formed the opinion that the cause of death was severe head injury due to a penetrating wound to the head which injured the brain. PW9, produced the post mortem report as PEx.2. The accused was examined by Dr. Machani of Eldama Ravine and found to be fit to stand trial. The P3 is PEx.3.

**Chief Inspector Sambu Wafula (PW10)** of Provincial CID accompanied the doctor (PW9) to the scene and took three photographs of the deceased's remains which he produced as PEx.4.

**Chief Inspector of police, Joseph Ondoro testified as PW11.** He was one of the officers selected by the Commissioner of Police to investigate post election violence cases as to who the perpetrators were. Their base was Timboroa Police Station where he recorded several statements from witnesses. He recalled that there was insecurity in the area and people had fled from their homes. He received a report from the deceased's wife (PW4) on the death of the deceased after an attack by members of the Kalenjin community. He visited the home of the deceased and opened a murder file. During his investigations, the name of Saitoti the son of Mama Chesang featured. He also interviewed PW1 and when peace returned to the area he handed over the matter to CID Ravine. He learned that the suspect had been arrested.

When called upon to defend himself, the accused admitted that he hails from Kamura. He was at home on 31/2/2007, when results of elections were announced and there were rumours that the Kalenjin had burned houses belonging to the Kikuyus. Their Kikuyu neighbours warned them of the rumour. The accused's grandmother on hearing of the rumours decided that the family should shift to Tinnet. Since it was late, they left home, slept in the bush till they arrived Tinnet next day where they remained till May 2008. They received a call that they should not return to Kamura since their houses had been burnt. He admitted that the deceased was a neighbour but was not aware that they had been killed and they had not

disagreed before.

**Tablet Koo Kipleitich (DW2)** recalled that she is a resident of Kamura and on 31/12/07, she fled to Tinnet with her family, who included her son, the accused. They escaped in the night to Tinnet where they remained for 3 months. She knew the deceased as a good neighbour and they had never disagreed. Her houses were burnt during that period. She denied that accused ever left Tinnet.

Having considered both the prosecution and defence cases, there is no doubt that the accused person, the deceased and PW1, PW2, PW3, PW4 and PW5 were neighbours in Kamura. They are not strangers to one another. The prosecution witnesses PW1, PW2, PW3 and PW4 knew the accused by the name **“Saitoti”**. The accused admitted in cross examination that he knew PW1, PW2 and PW3 well. The deceased was their good neighbour according to accused’s mother (grandmother), DW2 and they had never disagreed.

The deceased was killed during the infamous post election violence which hit this country after the December 2007, General Elections. The disputed results were the result of the violence that broke out in many parts of the country. All prosecution witnesses testified to having seen the violence, burning of houses and a lot of tension. In the Kamura area where the deceased resided the tension was between the Kalenjin community and the Kikuyu Community. DW2 told the court that her houses were also burnt.

PW1, PW2, PW3 and PW4 who were at Kamura farm on the 1/1/08 told the court that they were attacked by a large group of people. PW1 said that he saw about 60 raiders before they split into two groups and surrounded them. PW2 and PW3 did not give an estimate of the number of raiders but said they were many. The attack was mounted during broad daylight at about 11.00 a.m. The crucial question here is whether the witnesses were able to identify any of the raiders.

The witnesses who were present near where the deceased was attacked were PW1, PW2 and PW3. PW2 and PW3 were closer to the deceased than PW1 who said he was about 50 metres away. According to PW1, he was able to identify about three people from the group of raiders, Daniel Kibor who was the first to throw a panga which his father dodged, then an arrow head was shot at the deceased as a result of which he fell. PW1 did not see the one who shot the arrow. When the father fell is when he saw **‘Saitoti’**, the accused, rush to where the deceased was, armed with a panga but did not see exactly what the accused did. He said that the accused is a neighbour and they went to school together. It means he is a person he knew very well. PW1 also told the court that one Ngetich son of Koros was also among the raiders. PW1 said he was in a valley while the raiders were on a higher ground and was about 50 metres away and he could see them well.

PW2 said he had left the deceased standing next to the maize garden and when few metres away, he heard the deceased call him back that the raiders were on that side. He saw people emerge from the maize while he was in the potato garden. PW2 said he saw the accused and Kibor in the group of raiders that attacked the deceased and started to struggle with him and he fell. He realized they were surrounded and he escaped into the maize plantation. Unlike PW1, PW2 did not state what the accused and Daniel Kibor did.

PW3 said he was with Wamae and the deceased at the time of attack. He saw Daniel Kibor throw a panga at them and it narrowly missed him. He saw the deceased suddenly fall down. Upon falling is when Saitoti emerged with a panga and hit the deceased with it. It is then he made his escape. According to PW1, PW2 and PW3, it is PW2 and PW3 who had been closer to the deceased. PW3 confirmed that they were close to each other, about 10 metres from the deceased, and he narrowly escaped the panga that was thrown at them.

From an evaluation of the evidence of the three witnesses, this court is satisfied that the time being 11.00 a.m. to 12.00 noon, they were able to see and identify the accused person very well, being a person they have lived with in Kamura for a long time and there being nothing to hinder their view. The incident occurred in the deceased farm where PW2 and PW4 said there was no maize planted, unlike the neighbouring plots. There is totally no reason why the above witnesses would have picked on the accused

and framed him as being one of the raiders. I have considered the accused's defence and evidence of DW2, it comes as an afterthought. There was no disclosure from the accused or during cross examination that they would raise an alibi that they were away from their home on 31/12/2007. I reject it as untrue. Although PW1 and PW3 also named Daniel Kibor, as having been one of the raiders, the court was not told why he was not arrested. PW1 also named one Ngetich as being one of the raiders but the investigating officers never told the court why these people were not investigated or charged.

None of the witnesses saw who actually shot the arrow head that hit the deceased and was found lodged in the deceased's head. All the witnesses, PW1 to PW6 saw the arrow even at the time the deceased was buried. After exhumation, it is PW9, Dr. Ngulungu who removed the arrow from the deceased's skull in the presence of all the prosecution witnesses. Post mortem was not done before burial because the situation was volatile and the body could not have been taken to hospital. The arrow that was found lodged in the deceased's skull was produced in evidence (PEX.1). The Doctor found that the cause of death was due to severe head injury due to penetrating wound to the brain. The likely weapon is the arrow that was found lodged in the skull. Photographs (PEX.4) taken at the exhumation do show where the injury to the skull was.

Was malice aforethought proved? As earlier noted, the incident occurred during the post election violence. PW1 to PW5 recounted to the court how the group that attacked first assembled near the forest, they were armed and set out in two groups and surrounded them. Houses and property were also destroyed. It is something that was premeditated and properly executed. It is not only the deceased who died on that day. PW1 to PW4 named others who were injured or died. It does not matter whether the accused actually injured the deceased. He was in the group that attacked the deceased with the intention of doing grievous harm to him and they did fatally injure him. The raiders set out to execute a common purpose. PW1 to PW3 said they saw accused approach the deceased with a panga. He may have caused the cut on the deceased's forehead but even if he did not cut the deceased, he was part of a group that set out to execute an unlawful purpose, which was attacking another community, with the other raiders, a death occurred which was a probable consequence of the execution of that purpose for which the raiders set out. I find that the accused was an accomplice to the murder of the deceased.

In the end, I am satisfied beyond any doubt that the accused was part of a group of people who attacked and murdered the deceased due to ethnic differences in Kamura area, arising from the disputed results of the 2007 General Elections. I find him guilty as charged and accordingly convict him under **Section 322** of the **Criminal Procedure Code**.

**DATED and DELIVERED this 12<sup>th</sup> day of June, 2012.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr. Bosire holding brief for Mr. Nyagaka for the accused

Mr. Nyakundi for the State  
Kennedy – Court Clerk