



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Case 94 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL KIPYETON.....ACCUSED

JUDGMENT

By an information dated 16/10/2007, Daniel Kipyegon Toroitich 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 are that on 24/9/2007, at Elburgon, in Molo District of the Rift Valley Province, he murdered Moses Kiboi. He denied the offence. The prosecution called a total of seven witnesses while the accused made a sworn statement in his defence and did not call any witness.

This case was partly heard by J. Koome who took the evidence of the first four witnesses. Directions were taken before J. Maraga on 2/7/2009, that the case proceed from where J. Koome stopped and it is where I took over.

Monica Chepokorei Cherem (PW1), is the mother of the deceased. She was a friend to the accused person. PW1 testified that on 23/9/2007, she was at her home at about 4.00 p.m. when the accused went to her house with his two brothers, Erick and Kiprop, and they asked her for Kshs.1,000/- to enable them to go to their home to attend their mother's funeral. She denied having money. The accused went away and returned to her house with a jerrican of water demanding to be given Kshs.1,000/- and was armed with a panga. He tried to attack PW1 but a person by name Gitenga intervened and the accused chased him as he hit him. PW1 was selling chang'aa in her house and had some customers in the house whom accused also chased away. PW1 sent one of her children to report to the village elder. Accused entered PW1's house, took clothes to go and burn. PW1 escaped with her children into the forest only to return 1.00 a.m. Next morning, PW1 sent her children to return some of accused's property to his house which were in her house as he had demanded for them. Later on, the accused went to PW1's house and called the children to his house. She later heard the children screaming. She went to accused's house with her uncle whom she had sent for, and by the time she reached where the deceased was, he had been cut on the neck.

Beatrice Chepng'eno (PW2), is the daughter of PW1 and therefore a sister to the deceased. She was present when the accused demanded money from her mother and when he was not given, he threatened to cut PW1 and even the children. The accused then asked that his items which were in PW1's house be returned to his house but accused caused a disturbance by chasing PW1 and the children and a person by name Gitenga came to their rescue but the accused tried to cut him with a panga and he retreated. Accused went to his house but returned at 7.00 p.m., and chased them. PW2 and her siblings returned to the house after accused had slept. Next day, PW1 told her children to return accused's items to his house, and PW2 went with her two brothers, Moses (deceased Dominic). They did not find accused in the house, and they opened the house and kept the items inside but accused appeared suddenly, armed with a panga

and ordered them to open the house so that he could see what they had brought. The accused locked up PW2 and the two boys in the bedroom. Moses jumped through the window and ran off and accused gave chase. PW2 followed them as accused chased the deceased towards the shamba and on reaching where the deceased was, PW2 found the accused had already cut the deceased on the neck. Joseph Kimaiyo Rono (PW3), a village elder at Marishoni area recalled that on 24/9/2007, about 7.00 a.m. PW1's child reported to him that the accused had disturbed them the whole night. PW3 went to PW1's house about 8.00 a.m., found her crying and he went to accused's house which was about 100 metres away. PW3 said accused ran after the deceased, cut him and PW3 tried to chase the accused but did not catch him.

PW4, John Kiptagat, the father of the deceased identified the body of the deceased for purposes of post mortem on 5/10/2007, at Elburgon mortuary. PW5, PC Douglas Cheptimin Cheronu who was then based at Elburgon Police Station, Nyakiambi Police Post received a report on 1/10/2007, that a person wanted by Elburgon Police Station had been cited. In company of PC Omar Shaffi, he went where accused was, arrested him and took him to Elburgon Police Station.

Post mortem was conducted by Dr. Caroline Mwololo (PW6), of Elburgon Sub-District Hospital. She found the deceased to be aged 12 years, and formed the opinion that the cause of death was severe haemorrhage due to severing of the neck muscles and trauma to the spinal cord.

PW7, chief Inspector Mary Gakuu who was then based at Elburgon received a report of the murder on 24/9/2007 about 10.00 a.m. She went to the scene and found the deceased's body about 150 metres from accused's house and noted the injury to the left side of the neck and left lower joint.

When called upon to defend himself, the accused testified that on 24/9/2007, he left his house to go and work in the farm. He found 4 people in the house and they ran out one by one. The deceased escaped through the window which led to his chicken house and that it is the iron sheet in the house which cut him. The children screamed and he saw a crowd of people and he was choked and ran away.

The accused, PW1 and her children were not strangers to each other. The accused did accept that he had friendship relationship with PW1. It is also clear from the evidence that their houses were not far from each other. They were only about 100 metres apart. PW1 and PW2's evidence are consistent as to what happened on 23/9/2007 till 24/9/2007, when the deceased was murdered. In his defence, the accused steered clear of any of the allegations of threats, harassment of PW1 and her children on 23/9/2007. The offence was committed in broad daylight. PW2 was with the deceased and her other brother. She explained vividly what occurred to them. When they took accused's items back to his house, he appeared and found them. He locked them up in a bedroom and it is then deceased jumped through the window and fled but the accused chased him and caught up with him in the garden and cut him. Accused's explanation that he found 4 people in his house is not tenable. These were the children of PW1 with whom they had been cohabiting. They were not grown up men or women nor were they strangers to him. The accused's explanation on how the deceased was injured does not make sense. He is suggesting that an iron sheets caused the deceased's death but the injuries that the deceased sustained were not consistent with such a fall.

The accused's explanation of how the deceased met his death is an afterthought and untrue. It does not flow in the prosecution case because what he alleges was never put to PW1, PW2 and PW3 when they testified. I believe PW2's evidence who was present when the incident occurred and was one of those whom the accused locked in the house and was present when the incident occurred soon thereafter. When PW3 arrived at the scene, he found the deceased's body was in the garden, about 150 metres from accused's house. PW7 also found the body of the deceased about 150 metres from accused's house but not in the chicken house. PW3 and PW7's evidence corroborates PW2's evidence that the accused chased the deceased into the garden where he fatally assaulted him. The body was not in the chicken house. If the deceased had been cut by the iron sheets in accused's house as alleged by accused, then the body would have been found there. If indeed the deceased entered accused's house without permission, the accused knew the deceased. The deceased was a young boy aged 12 years. It would not have been difficult for the accused to arrest and subdue him. The version by PW2 as to how the deceased met his death is more believable and is corroborated by evidence of the Doctor (PW6) who found an extensive cut wound

10x12 cm from the left angle of the mouth through to the left cheek upto the left ear with partial severing of the left ear lobe and the left the teeth on the left jaw exposed. The doctor also found an extensive cut of the neck extending from the thyroid cartilage upto the occipit (front and back of the head) and all muscles of the neck were severed and a fracture of cervical bones. The injuries inflicted on the deceased were so serious that they could only have meant to end his life or cause serious grievous harm but not by a fall in a chicken house.

This incident occurred early morning of 24/10/2007, and I doubt that the accused could not have been drunk so early. This incident must have been a culmination of what the accused had been doing the previous day of chasing and threatening PW1 with harm while armed with a panga after she refused to give him Kshs.1,000/-. From his actions the accused had formed the intention to injure PW1 and/or her children from the previous day. Malice aforethought does flow from the injuries that accused inflicted on the deceased.

Accused was present and got the injuries that the deceased suffered. He told the court that he was shocked and he ran away. I do not agree with that explanation that shock was the reason why he fled. This was his friend's child. If indeed the deceased had tried to jump and was injured, accused would not have been shocked so as to run away but would have tried to save the boy's life. He ran away not for one day but until he was arrested on 1/10/2007. He escaped from what he had done. His conduct is not consistent with innocence.

In the end, am satisfied beyond any doubt that the totality of the evidence does point at the accused as the person who murdered the deceased. His defence is an afterthought and untrue and I dismiss it. I find the accused guilty of the offence of murder as charged and convict him accordingly.

DATED and DELIVERED this 28th day of September 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Omwega for the State

Ms Wanjiru holding brief for Mrs Ndeda for accused

Kennedy – Court Clerk