



REPUBLIC OF KENYA

High Court at Eldoret

Criminal Case 21 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH KIPROTICH MAIYO.....ACCUSED

JUDGEMENT

The Accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that on the 2nd day of February 2006 at Kapkut Village, Kapchotek sub-location in Keiyo District within Rift Valley Province he murdered Kipkorir Kimutai Kiptum. The Accused pleaded not guilty. In support of its case the prosecution called eight witnesses. The court nominated Paul Lagat Kiplagat, Paul Lukor Emoros and David Magori Nyambore as assessors. PW1 was Morris Lokayi. He gave testimony that he lives in Kipchiloi. He is a charcoal burner. He has lived in Kipchiloi for more than six years. He recalled that on 2/2/2006 he was at work in the morning. He was employed by the deceased (Kipkorir Kimutai Kiptum) on the said day to burn charcoal. He worked with Joseph. That the deceased came where they were working at around 9am and told him that they had quarreled with 'Saddam'. They had quarreled because Saddam's cattle had crossed onto his land. 'Saddam' and the deceased were neighbours. The quarrel was at the boundary. The Accused had a panga in his hands. The deceased went to fetch water at about 2pm from the neighbours place. The water was from a well. They had screams from the well as they were working. They asked themselves what was happening. They went to the scene and found some two ladies at the scene. The deceased was dead when they arrived. He has never quarreled with the Accused but he does not know his real name. On cross examination he stated that the Accused went to the well first. He went to where his cattle were. The deceased then went to get water. There the Accused fought with deceased, he cut the deceased who fell on the ground. He stated that even though he did not see with his own eyes the Accused killed the deceased.

PW2 was John Kiplagat Komen. He gave testimony that on 2/2/2006 he was weeding his garden of vegetables. He heard screams on his land. He ran towards the screams. He saw 'Saddam' leave the area, the deceased was on the ground. 'Saddam' is called Joseph Kiprotich Maiyo. He identified the Accused as a person he knows very well. He knew him from 2000. Accused told him that I have killed someone on his (your) land and I am going to report to the police. He went and saw the deceased who had injuries on the head and hand. The head had cuts and he was bleeding. The Accused was about ten metres away from the deceased. He knew the deceased his name was Kimutai Kiptum. When he saw him he was still alive. He asked him what had happened? He said in Tugen that Saddam had killed him. The witness stated that he ran to his house to get a bicycle to go to the police camp. He met some people on the way and he asked them to assist him get a motor vehicle to take deceased to hospital. He got Administration Police Officers and on their way back they met the Accused who was arrested by the Police Officers. He still had the

panga that he had used to cut the deceased. The witness identified the panga in court. He accompanied two police officers to the scene and they found that the deceased was still alive. They waited for a vehicle for about an hour. When the vehicle came the deceased had died. He went to the Assistant Chief, they were referred to police station at Kiptagut. The police came and picked the body. On the next day he went to the station and recorded his statement.

PW3 was Amos Kibichy Kangongo. He stated that on 2/2/2006 he went to see Mr. Kimutai Arap Kiptum. Family name was Chebilliong'. He met him with his two workers Morris and Joseph. The deceased told him that the Accused had quarreled with him when he sought to find out why the Accused's cattle had crossed to his land. That the deceased looked worried. He told him to forget those issues. He had a patient in hospital and I was asking him to look after his animals. It was around 1.30pm. That while on his way he received a phone call from his neighbour's wife that the deceased had been injured. She asked him to save his life by looking for a vehicle. He found a vehicle belonging to his friend William and when they went to the scene the deceased had died. He identified the Accused in court and stated they are neighbours. A road separates them.

PW4 was Willy Kipkorir Komen. He gave testimony that on 2/2/2006 he was on his farm when he received news from children that the deceased had been killed. He proceeded to where the deceased was. The body was in the farm of John. The deceased was still alive. He asked him what had happened. The deceased answered that Saddam had hit him. He had head injuries on the left and right hand and the forehead. He bought some milk. The deceased drunk one cup. He did not finish the second cup. He died. He knew Saddam and identified him in court. He waited at the scene until police officers from Kiptagut police station came and took the body. The next day he recorded his statement.

PW5 was Kiptum Korir. He gave testimony that the deceased was his father. On 2/2/2006 at around 3pm he got information that his father had been killed. He got the information from Amos. He went to Kiptagut police station and was told that Accused had been arrested. He was told that the body had been taken to Moi Teaching and Referral Hospital. He identified the body to the doctor who conducted the post mortem on 9/3/2006.

PW6 was Administration Police Constable No. 93052614 John Kerebei. He gave testimony that on 2/2/2006 while at his station of work he received information from John Kiplagat Komen that someone had been cut. It was Mr. Chebillion. He did not know Chebillion. John said that it was Saddam who cut him. They went with his colleagues together with John to Kipchiloi and John identified Saddam and they arrested him. He had a panga. They found him on the road. He said he was going to the police. He did not resist arrest. He identified the Accused and the panga that had a rubber covering with blood stains. His colleague David Totari escorted him to the Camp. Him and another colleague went to scene of the incident. The deceased was in critical condition. He was breathing. He was bleeding from the head and the hands. He was unconscious. They tried to look for help from neighbours but they did not get any vehicle. The deceased died before help could be summoned. They later contacted Kipkabus police station and the officer promised to send a vehicle. A vehicle came from Kaptagat police station. They took the body and collected the Accused. He later recorded his statement.

PW7 was doctor Joseph Embenei. He gave testimony that he works with Moi Teaching and Referral; Hospital. He assists the hospital in medico-legal reports such as filing P3 forms and to attend court. The P3 form was filled by him. The name of the patient was Joseph Kiprotich Maiyo. He was sent to hospital for assessment as a suspect. He filled the P3 form on 7.02.06. He examined the suspect and made two findings. The suspect had injuries. Painful swelling on the head. 5cm diameter. He also had soft tissue painful right shoulder. He stated that he recognizes the handwriting of Prof. Koslov. He was Chief Pathologist at the Mortuary Services. His contract expired. The name of the deceased was Kipkorir Kimutai Kiptum. Postmortem conducted on 9/2/2006. Body was identified by Samsom Kiptum Korir and Ben Sobiro under escort of PC Evans Kipter. Cause of death was brain hemorrhage following trauma to the head by sharp object which refers to bleeding into the brain. He produced the post mortem report as P Ex. 3.

PW8 was police constable Evans Keter. He gave testimony that he was stationed at Kaptagut police

station on 2/2/2006. A murder report had been made and he was instructed to investigate. He borrowed a police land rover and went with PC Wanyonyi to the scene. The scene was Kapgut village, Kapcheptek sub-location in Nyaru location. At the scene they found the deceased lying on the farm with blood oozing from the face which had dried. He had cuts 3 in number on his forehead. Three fingers of his right hand had been chopped off. He had severe wounds on his hands. They managed to collect information from the public. They got information that the deceased was slashed by a man who was a neighbour called Saddam. He learnt that Saddam had been arrested on his way to Kapgut AP camp. They took the body and passed through Kapgut AP camp to collect the Accused for escort to the police station. They booked the Accused person in the cells and begun investigations. He took the Accused for mental assessment at Moi Teaching and Referral Hospital. He forgot to mention that at Kapgut he was given a panga that the Accused had handed over to the AP's and that he had confessed to using the panga to cut the deceased. The panga was stained with blood. He produced the panga as P Ex 2. He took the panga to the station.

On 9/2/2006 a post mortem was conducted at Moi Teaching referral Hospital. He took blood samples from the deceased body which later on 16/2/2006 he prepared an exhibit memo on the blood and the panga. He submitted the blood sample and the panga to the Government Chemist. He produced the exhibit Memo as P Ex 3. The results from the Government Analyst produced as P Ex 4. Item A was the panga. Item IB was the blood sample. The report was that the panga was slightly stained by human blood group "O" and the blood sample was also a group "O". Summary was that blood stain on panga was matching in group with blood samples from deceased. The blood stains could have come from deceased after injury. He caused the Accused to be charged with the offence of murder. He identified the Accused in court

On cross examination he stated that he found out that the Accused and deceased had differences over grazing land. He did not take samples of Accused person. He did not notice that Accused was injured. He did not see any injuries on Accused. He did not get the panga at the scene it was given to him by an AP. The prosecution closed its case. The Accused was put on his defence and he chose to give a sworn statement.

The Accused in his sworn statement stated that he was aware of the charges. He did not kill the deceased. On 2/2/2006 he was in the house of his brother near Burnt forest. His brother is called Jackson Kipsang Maiyo. The village is called Karungu. He went there on 30th January 2006. He came back on 2/2/2006 at 1pm. He did not reach home when he reached a school called Kapkut Primary school he met with 2 administration policemen. They told him to go with them since something had taken place. They were not specific. He was taken to the office of the Chief. He was placed in the cell until 6pm. At about 6pm they took him in a police landrover. He found a dead body. It was covered in a coat. He was taken to Kaptagut Police station and was told to stay with the corpse. He did not know whose body it was. He was put in cells and was told that he had killed the deceased. On 2/2/2006 he had not met the deceased because he was away as his brother was sick. He saw a panga in court. He did not know the owner of the panga. He did not know anything. He did not quarrel with the deceased. He had no dispute with him. They had been neighbours almost for ten years. The deceased stayed alone. He had chased all his children.

That the deceased was a man of hot temper. He had quarreled with him some time before over cows. It was 2 years before. He did not fight. They have married from same family. They could not fight. He asked the court to acquit him. On cross examination he stated that he did not know PW2. He does not know PW1. He knows PW3 Amos Kibichy Kangongo. But Accused was not at the scene. He did not graze any cows on deceased land. The deceased did not tell him to remove any cows. He was not there. He did not attack the deceased neither did he surrender to the police.

DW2 was David Kipsang' Kendagor. He gave testimony that he is brother to the Accused. That the Accused made him get his job. On 30th January 2006 he was sick and was told to go and rest. He sent for his brother. He came and stayed with him from 30.1.2006 to 2/2/2006. He told him he was going back and he gave him shs. 100/= . He left at about 10am. He stayed for about 3 days. He then received news that his brother had been arrested on his way to the house. The defence closed its case.

Counsel for the defence submitted that the prosecution had not proved its case beyond reasonable doubt.

That none of the 8 witnesses saw the alleged offence. Postmortem report referred to weapon used as blunt object. That a panga could not be a blunt object. That no murder weapon had been produced. The prosecution case was contradictory and that the Accused was entitled to benefit of doubt.

Counsel for the State submitted that the prosecution had established the case beyond reasonable doubt. The case was based on circumstantial evidence and a dying declaration given to PW1, PW2 and PW3 by the deceased. The Accused surrendered the murder weapon to AP who arrested him. The totality of the evidence shows that the Accused had malice afore thought. Malice aforethought will be inferred from the many injuries inflicted on the deceased. The intention was to kill.

I have considered the evidence on record and the submissions of both counsels for the state and counsel for Accused. The law as I know is that it is the duty of the prosecution to prove its case beyond reasonable doubt and this burden does not shift whether the defence has an alibi or not. The Accused has put forward the defence of alibi to counter the case of the prosecution. Prosecution witnesses starting with PW1 established that the deceased had a quarrel in the morning of 2/2/2006 with the Accused. It was over cows of Accused trespassing on the land of the deceased. The deceased expressed his fears to Morris and Joseph. The testimony of PW1 was that the Accused had a panga.

PW1 was familiar with the rubber because it had a rubber covering. He identified the panga in court. PW2 was in his shamba tending to his vegetables when he had a scream. He moved towards the direction of the scream and saw the Accused walking away. The Accused informed him that he had killed someone on PW2's land and that he was going to report to the police. PW2 arrived at the scene and found that the deceased was still alive. The deceased informed him that the Accused had wounded him. PW2 fetched his bicycle to go and report to the AP camp on the way he met some people and asked them to fetch a vehicle to ferry the deceased to hospital. He went to the AP Camp and came back with AP officers. They found the Accused walking. He identified the Accused and he was arrested. He stated that he was going to report a murder. He had a panga stained with blood.

PW3 also stated that the deceased had expressed to him his fears about the quarrel that he had with the Accused. He had gone to the deceased at around 1pm. He had requested the deceased to look after his animals as he was going to hospital. He received a call from his wife that the deceased had been injured and that he should look for a vehicle. PW4 stated that he received news that deceased was injured he went to John's farm and found that the deceased was still alive. He asked him what had happened. The deceased informed him that Saddam had hit him. He bought milk and the deceased only took one cup and could not finish the second one. PW6 confirmed that they met the Accused on the road. They arrested him. He did not resist. He said he was going to police. He had a panga stained with blood. One AP took the Accused into custody.

PW6 proceeded to scene and when they arrived at the scene the deceased was still alive though in critical condition. They could not get a vehicle to ferry him to hospital immediately. By the time help arrived the deceased had succumbed. He called Kipkabus police station and the officer promised to send a vehicle. A vehicle came from Kaptagat police station. They took the body and collected the Accused from the AP camp. PW8 confirmed that a murder report was made at Kaptagat police station. He was instructed to investigate. He borrowed land rover and went to the crime scene. He picked the body and collected the Accused from the AP camp and took him to the police station where he booked him in the cells. The body was taken to Moi Referral and Teaching Hospital. He then commenced his investigations. He took Accused for mental assessment and accompanied the body for post mortem. A post mortem was conducted and produced as P Ex. 3. The body was identified by PW5. PW8 took the panga from the AP and obtained sample of blood from the deceased. He prepared an exhibit memo form and forwarded the panga and blood sample of deceased to the Government Analyst. A report was obtained showing that the blood group of the sample was similar to the blood group of stains on the panga. The report was produced as P Ex. 4. PW7 produced the P3 form and the post mortem report.

Before court can convict based on circumstantial evidence, it must be convinced that the evidence is of such a nature that it is cogent enough and it irresistibly points towards the guilt of the Accused and that the circumstances surrounding the alleged offence cannot be explained on any other hypothesis other than

the guilt of the Accused. Has the prosecution established such a case? With respect to counsel for the Accused I am satisfied that the prosecution has discharged its burden of proof beyond reasonable doubt. To start with the sworn statement of the Accused was a convenient lie. An after thought at best.

During trial his counsel was conducting the defence in cross examination on the basis that there was a quarrel between the deceased and the Accused. I do not believe that the Accused was not present at the scene of crime for the following reason. Medical examination report produced in evidence as P Ex 2 shows that the doctor examined the Accused and found that he had suffered some injuries. What is more relevant is the medical history that the Accused gave to the doctor. I reproduce it in full:

“2. General medical history (including details relevant to offence)

This old man gives a flowing history of how his cow has severally strayed into his neighbours vegetable farm and this last time round, the neighbour picked up a quarrel but he asked for forgiveness, then a second neighbor attacked him with a panga and a metal bar. He tried to slash him severally but he blocked with the stick he was using to control the cow. When the attacker threw the metal bar, he disarmed him and picked the panga and then using it slashed him, on the head, he fell down and he recalls slashing him again and taking his cows and going to his compound and then to the police whom he met on the way having been informed by the first neighbor. He surrendered to them. They were both drunk. Had been drinking together.”

The history was given by the Accused to the medical doctor. PW7. It was put in evidence. The Accuser's counsel did not object to the medical history. The history provides perfect corroboration of the evidence of the prosecution coming from the Accused himself. DW2 was indebted to the Accused and did not pass as an impartial witness. He stated to the court what the Accused wanted him to state. Taking into account the testimony of the prosecution witnesses DW2 lied about the whereabouts of the Accused. In order to benefit from the benefit of doubt, the doubt raised must be reasonable.

It can only be reasonable if it is truthful. There was no contradiction in the prosecution case as alleged by counsel for Accused. The “blunt” object he is referring to is not appearing in the post mortem report but in P Ex 2. It was Accused who was hit by blunt object. Cause of death for the deceased was stated to be “several chopping wounds on the head with cut of underlying bones of the skull and brain. Bilateral subdural and subarachnoid haemorrhages superficial wound on the chest. Defence wounds on both hands, mainly on the left one.’

Motive for the attack could be inferred from the fact that the deceased was living alone and had grazing land. The deceased was preventing the Accused from accessing the grazing land. The Accused must have thought that by eliminating the deceased he would have unfettered access. According to his narration in P Ex 2 the question of his cows straying was a frequent thing. The nature of injuries were inconsistent with an act without thinking but a calculated move to achieve a desired goal, death or grievous harm. The state of mind of PW2 is clear from the evidence of PW2 and himself of what he told the doctor. He had killed someone and was going to make a report to police.

For these reasons, I find that prosecution has discharged its burden beyond reasonable doubt and I find the Accused is guilty as charged and he is so convicted as charged.

I would have proceeded to sentence him but the law and practice has changed, the court of appeal has directed that a murder convict is now entitled to be given an opportunity to mitigate the circumstances of the offence or crime before sentence. Under the new direction and the provisions of constitution, death sentence is not the only available sentence to the court.

As a result, I leave the aspect of mitigation and sentence to the court that delivers the judgement. Orders accordingly.

It is so ordered.

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF AUGUST 2012

M. K. IBRAHIM
JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF OCTOBER 2012

ABIGAIL MSHILA
JUDGE

In the presence of: