



REPUBLIC OF KENYA

High Court at Eldoret

Criminal Case 38 of 2006

REPUBLIC.....PROSECUTION

VERSUS

DAVID CHEMUSIAN.....APPELLANT

JUDGMENT

The Accused, **DAVID CHEMUSIAN** was charged with four (X4) counts of 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 the 20th August, 2006 at Kwelkwilo village, Salawa Location in Baringo District within the Rift Valley Province he allegedly murdered **JOSEPH CHEMNYAMIS KIBAGUT** (Deceased in Count 1), **JOSEPHINE KIPROP KABON** (deceased in Count II), **LABAN KIPSISIN CHELAGAT** (Deceased in Count III) and **MAGDALENE TARKOK KIBOS** (Deceased in Count IV)

A plea of “**NOT GUILTY**” had been entered on all of the four (4) counts of murder and the prosecution proceeded to call a total of twenty one (21) witnesses. The prosecution closed its case and the Accused was put on his defence, as it had been found that he had a case to answer. The Accused chose to give unsworn evidence.

This case had been part heard by several judges and this court was seized of the matter at the stage of defence hearing.

A short summary of the evidence adduced by **WILSON KANDIE (PW1)**, **EVERLYNE SIRMA (PW2)**, **JOSEPH CHEBII YATOR (PW4)** and **SALINA KIPYEGON (PW14)** was that on the 20th August, 2006 at a “Busaa Den” at about 3.00 pm, the Accused pushed Mzee Joseph (deceased Count I), who then fell down and the Accused took a big stone and hit Mzee Joseph with it on the head.

Deceased Count II was the wife of Mzee Joseph and the above witnesses testified that they saw the Accused grab the deceased (Kabon) by the hand and push her down and also hit her on the head with a stone.

Some of the witnesses stated they left the scene of crime and some testified they fled from the scene and they all later learnt that the two persons had passed on.

I have chosen not to dwell at length with Counts III and IV because in my view, none of the prosecution witnesses testified that they were at the scene of crime or witnessed the commission of these two (2) murders.

The Accused was put on his defence and he chose to give unsworn statement of defence. It was his defence that on the 20th August, 2006 he had gone to visit his sick father when he got involved in a quarrel with his brother named, **DAVID** over land. The quarrel resulted in a fight. The Accused was later arrested and was charged with four (4) counts of assault and causing actual bodily harm. He stated that he had pleaded guilty to the offence of assault and was convicted in Eldoret Criminal Case No. 5969 of 2006 and was sentenced to a total of six (6) years imprisonment.

The Accused stated that after being imprisoned for fifteen (15) days he was then brought to the Eldoret High Court and made to take a plea for the murder charges, herein.

It was the Accused's defence that he had been incarcerated at Eldoret G.K Prison at the date and time and could not have committed the offences of murder.

In his submissions Counsel for the Accused submitted that the prosecution had failed to prove its case beyond reasonable doubt as there were contradictions in respect of the time the offences occurred and the places where the offences took place. Counsel urged the court to acquit the Accused.

After hearing final submissions from Prosecuting Counsel for the State and submissions from the Counsel for the Accused and also having perused the court record, this court finds the following issues for consideration;

i. Death

ii. identification

iii. actus Reus

iv. Mens Rea – malice aforethought.

On the first issue Doctor Ambrose Rotich (**PW16**) performed a postmortem on Mzee Joseph (deceased Count I) and Kabon (deceased Count II) on the 25th August, 2006.

Before the postmortem was carried out on Mzee Joseph his son **SAMSON KOROR BARGUT (PW11)** identified his body to **PW16**. The body of Kabon was identified to **PW16** by her son **BENJAMIN YATICH KIROP (PW10)**

The evidence of **PW16** was that he examined the body of Mzee Joseph and found that he had sustained a fracture of the upper and lower jaw and the doctor formed an opinion that the cause of death was due to severe head injury.

PW16 also examined the body of Kabon and found that she had multiple fractures of the head and found that the cause of death was due to severe head injuries.

The doctor (**PW16**) produced the postmortem reports to court "**PEXb1**" and "**PEXb2**" and his evidence corroborates that of **PW1, PW2, PW4** and **PW14** who had testified that they saw the Accused hit the deceased persons on the head with big stones.

I find that the prosecution has satisfactorily discharged the burden of proving the cause of death of Mzee Joseph (deceased Count I) and the cause of death of Kabon (deceased Count II)

On the second issue of identification. The location where Mzee Joseph and Kabon met their death was positively identified by **PW1, PW2** and **PW4** and in their testimonies they all stated that they witnessed the incident at a "Busaa Den" in the bush.

The prosecution witnesses **PW1, PW2, PW4** and **PW14** all testified to having seen the Accused person hitting the deceased persons on the head with big stones. The incident occurred in broad daylight

at about 3.00 p.m. and the conditions and circumstances were favourable for positive identification.

I find that the prosecution witnesses **PW1, PW2, PW3** and **PW14** vividly narrated how the offence as committed. The accused person was a person known to all the said witnesses and I am satisfied that the Accused person was properly identified and that the identification was by recognition.

On the next issue of “**Actus Reus**”, the accused was seen by **PW1, PW2 PW4** and **PW14** taking big stones and hitting Mzee Jo seph and Kabon on their heads with the said stones.

I am satisfied that the prosecution has discharged its burden of proving that this unlawful act caused the death of the above mentioned persons.

Lastly on the issue of “**Mens Rea**” Section 203 of the Penal Code states that this a key ingredient to the offence of murder. The Section reads as follows;

“.....Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.....”

The key elements of “**Mens Rea**” are that the act must be done voluntarily and that there must be a foresight of the consequences.

Section 9 (I) of the Penal Code provides that;

“.....a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurs by accident.....”

The Accused person was examined by **DR. PHILIP MBITHI (PW20)** and the Doctor found him to be mental fit.

The prosecution witnesses who were with him at the “Busaa Den” in particular **PW1** stated in evidence that the Accused was not drunk nor was he agitated or annoyed. His evidence was that the Accused sat alone apart from them and did not talk to them. The evidence of **PW5** was that the Accused person was not annoyed nor was he agitated.

The evidence of **PW3 JANE KABON KAGONGO** was that the Accused admitted to her that he had killed two people namely Mzee Joseph and Kabon and that the Accused had attempted to kill her but she was rescued by her children.

PW13 PISTATA CHEPKONGA also testified that the Accused had admitted to her that he had killed Tarkok (deceased Count IV) and Mzee Joseph. The accused had threatened to kill her but she pleaded with him, not to kill her and he released her. These two testimonies go to prove the fact that the Accused had foresight and knowledge of the consequences of his acts.

Malice can further be defined as follows:

“.....an intention to cause the death of a person.....”

I concur with the submissions of Prosecuting Counsel for the State that the severe nature of the injuries inflicted on the deceased persons (Count I and Count II) were intended to cause death and that malice can be inferred therefrom.

I find that the nature of the injuries inflicted to be severe and the same to be sufficient evidence of malice aforethought.

The Accused in his unsworn statement stated that he was incarcerated at the Eldoret G.K Prison when this incident occurred.

The evidence of the prosecution witnesses from **PW1** to **PW15** all corroborate each others testimony, in that all of them testified to having seen the Accused person on that material day. The evidence of **PW1, PW2, PW4** and **PW14** all place the Accused at the scene of crime on that material date.

There is also a material contradiction in the Accused's statement as he confirms having visited his father on 20th August 2006 and got embroiled in a fight with his brother on the same date.

Therefore the issue of the Accused being incarcerated on the 20th August, 2006 is not possible.

From the evidence adduced, I concur with the submissions of Counsel for the Accused that there was no sufficient evidence to show that the Accused was involved in the murder of Deceased Count III and IV, but this court finds that there is overwhelming evidence that shows that Accused murdered Mzee Joseph (deceased Count I) and Kabon (deceased Count II)

CONCLUSION:

I am satisfied that the prosecution has proved beyond reasonable doubt that the Accused murdered **JOSEPH CHEMYAMIS KIBAGUT** and **JOSEPHINE KIPROP KABON**

I find the Accused guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code on Counts I and II and convict him accordingly.

DATED and DELIVERED at Eldoret this 18th day of December 2012.

A.MSHILA
JUDGE