



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 16 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**VINCENT KIPKURUI KOECH.....1<sup>ST</sup> ACCUSED**  
**DENNIS KIPCHIRCHIR KOECH.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

The Accused, Vincent Kipkurui Koech and Dennis Kipchirchir Koech are both charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, (*Cap. 63, Laws of Kenya*).

The prosecution's case was that, the accused on 11<sup>th</sup> day of February, 2010 at Esageri Trading Centre in Koibatek District within Rift Valley Province murdered Kelvin Kibiwott Ng'etich.

Section 203 of the Penal Code says -

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

Section 206 of the Penal Code states that malice aforethought is established by evidence proving any **one** or **more** of the following circumstances -

(a) *an intention to cause death or grievous harm to any person whether that person is the person actually killed or not,*

- (b) *knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused,*
- (c) *an intent to commit a felony,*
- (d) *an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

It was the submission of Mr. Ombati learned counsel for the accused that the prosecution failed to prove beyond reasonable doubt, the charges against the accused. Counsel submitted that the accused were not at the scene of the offence, that they were arrested at Eldama Ravine Town, and 1<sup>st</sup> accused was taken to a place where his relative was said to be hiding. Counsel submitted that on the way to the relative's place, the 1<sup>st</sup> accused was attacked and his brother was killed by a mob.

Despite identifying one of his brother's killers, as being PW1, this PW1 was neither arrested nor charged, and that he was the only witness who is said to have seen the accused at the scene, his evidence would not be relied upon, as he is a suspect in the murder of the brother of the 1<sup>st</sup> accused.

Of the 2<sup>nd</sup> accused, counsel submitted that the 2<sup>nd</sup> accused was in the house when the offence was allegedly committed, that he was not arrested by the Police, but surrendered himself to the Police for protection, and was instead arrested and charged with the offence of murder.

Counsel for the accused further contended that the incident took place at night and that it was not easy to identify the accused, that PW2 was the only person who heard the deceased cry for help, he heard the name of the accused being mentioned - a name, counsel said, which is common in the area.

Counsel for the accused also submitted that the accused were not seen at the Trading Centre that day, and that this being a criminal case, it must be proved beyond reasonable doubt, and urged the court to find the accused not guilty and accordingly acquit them.

Against these submissions it was Mr. Nyakundi's, learned State Counsel's submission, that there was sufficient evidence to find the accused guilty and convict them, that PW1 was at the scene when the accused attacked the deceased, that there was sufficient lighting at the scene from head lights of a motor vehicle, and PW1 knew the persons before and was close enough to be able to see the accused.

Counsel also submitted that immediately after the scene, the accused fled the scene, that the act of fleeing a scene after committing an offence is not consistent with innocence, that the deceased before he died disclosed to PW1, the people who had attacked him, and that PW1 confirmed that they were the same people he had seen.

State Counsel submitted that although the evidence of PW1 was the evidence of the single witness, Section 143 of the Evidence Act (*Cap. 80, Laws of Kenya*) provides that no number of witnesses is required to prove a fact unless there is a law otherwise. Counsel submitted that no evidence had been adduced that PW1 was a suspect in any case so far. Counsel consequently invited the court to find that there was sufficient evidence, and enter a conviction against the accused.

To establish which of these submissions is consistent with the evidence, and to establish whether there was malice aforethought, the prosecution called seven witnesses, including a Doctor, and it is therefore necessary to examine the evidence of those witnesses before drawing any conclusions on the two rival submissions.

PW1 was a motorbike taxi operator. The scene was Esageri Trading Centre. The time was about 8.00 p.m. He was about to close his business and go home, but a customer who wanted to be taken home called and offered him a soda at the nearby bar. At the same time he was called by Kelvin Kibiwott Ng'etich, a local petrol vendor for motor-bike operators (like PW1), and asked him to take his petrol home. The deceased however told him that he would go to the stage for another operator, and that if he failed to find one he would call him.

It was not to be, for PW1, testified, that the deceased did not reach that stage, for about 5 minutes, one Sirma (PW3), a shop owner called and asked him to go and rescue his friend who was being assaulted about 20 metres away from the Bar. PW1 testified that the Bar had a pressure lamp inside, and he ran to the rescue of his friend. When the persons assaulting his friend saw him, they dispersed in different directions, but he had seen them. They were three in number. He knew them - ***"It was Vincent Kipkurui Koech and one Kiprono who held the deceased, one on each side while Dennis Kipchirchir Koech, (the 2<sup>nd</sup> Accused) was stabbing the deceased with a knife."***

PW1 testified that the deceased ran towards an area of light and fell down three times before he got to him. They rushed him to Esageri Clinic, but found it closed and were advised by a watchman to take him to the District Hospital at Eldama Ravine where he was admitted by a Doctor who shortly informed them that the deceased had succumbed to his wounds to the chest.

PW1 also testified that the deceased informed him it was Kiprono, Kipkurui and Ngetich who attacked him, but was unable to answer when PW1 asked him what the dispute was. PW1 also testified that heard, Kiprono, (*one of the deceased's attackers*) had been killed, but did not know the circumstances of his killing.

When cross-examined by Mr. Obati counsel for the accused, PW1 testified that though it was dark, there was lighting from a passing motor vehicle, and reiterated his evidence in-chief that the deceased also told him that it was the accused who had attacked him, and disagreed with counsel's suggestion that he had a grudge against the accused, who he had seen clearly from the light of a passing vehicle, and that he also knew them.

PW2 testified that he had closed this shop at about 8.50 p.m., and saw a large crowd of people about 20 metres away and found the deceased lying on the ground, bleeding profusely from the left side chest, and asking for help. He assisted in rushing the deceased to the Esageri Health Centre, but found its doors closed, and rushed the deceased to the District Hospital at Eldama Ravine, where he was admitted, but was pronounced dead shortly after admission.

PW3 confirmed that it is he who alerted PW1 of the commotion which he at first thought was a pair of donkeys nosing each other, but only to discover from a fleeting light of a passing motor bike that it was the deceased who was being lifted to a vehicle.

This witness testified that he knew the accused he had seen them during the day.

PW4 helped take the deceased to Esageri Health Centre but found it closed, and rushed him to the District Hospital at Eldama Ravine where the deceased was admitted, but died at the Emergency Treatment Room. He saw blood oozing from the left hand side of the chest. He knew one of the attackers Kiprono and had heard that he was killed, but did not know how or by whom. He also added in cross-examination that he did not know who killed the deceased.

PW5 was Doctor Noah Oloo Kamidigo, a Consultant Pathologist who conducted a post mortem on the body of the deceased on 12.02.2010. The Doctor found that the deceased had suffered multiple blisters on the skin which easily peeled off, the deceased had penetrating wound on the anterior aspect of the chest - 3 cm to the left from the left edge of the sternum, multiple deep bruises over both knees and wrists, two deep bruises and 12 cm in diameter over the forehead, and had marked pallor of the mucus membranes.

On the respiratory system, the postmortem established penetrating wound 2 x 2 cm through the spaces between left 5<sup>th</sup> & 6<sup>th</sup> ribs stained with altered blood clots.

On the cardio-vascular system, PW5 found a penetrating wound through the left and right ventricles just 3 cm above the apex of the heart with massive haemothorax.

The Doctor concluded that the deceased died of hypo-volaemic shock due to massive haemothorax from penetrating wound involving both ventricles of the heart due to sharp force penetrating wound of the chest.

PW6 identified the body of the deceased for purposes of the post-mortem.

PW7, was the investigating officer. He wrapped up the evidence of the other prosecution witnesses, commencing from PW1 & PW2, how the deceased was assaulted, rushed to Eldama Ravine District Hospital, his death, and report by members of the public, his visit to the site of the murder, receipt of information from the Chief of Lembus Location and his Assistant Chief, that the suspects had fled to an area called Kabiyet, being pursued by members of the public, who had caught up with one of the suspects called Kiprono was assaulted badly and although he rescued him, Kiprono succumbed to his injuries and died. The first accused was arrested at Kabiyet, in the home of a relative, was saved from mob lynching by his and other officers firing in the air. The 1<sup>st</sup> accused was treated of his injuries at Eldama Ravine Hospital, and discharged into Police Custody. Fearful of his life the 2<sup>nd</sup> accused surrendered himself to the Police on 14.02.2010 and was arrested and later charged together. They had sought refuge about 15 km away from the scene of the crime.

### **ANALYSIS OF THE EVIDENCE**

I think the evidence is clear. This was a case of pre-meditated murder. The deceased was going to the stage to find a motor-bike rider to take him. He had just asked PW1 whether he could take him home but changed his mind and said he would go to the stage, to look for a motor-bike taxi operator to take him home, and if failed to find one, he would call PW1. PW2 saw him dash by his shop with a jerrican of petrol. No sooner had the deceased gone than PW2 heard a commotion which he mistook for the nosing of donkeys, but realized it was the deceased in mortal danger. He called PW1, who rushed to the scene, only to find that the accused, and their brother had done their deed, two of them, had held the deceased on each side, while the brother Kiprono, did the actual stabbing of the deceased. They would have ensured

that the deceased collapsed in their hands but for the appearance of PW1 who interrupted them, and they fled in a different direction, but not before PW1 had clearly seen them from the flashing light of a passing vehicle, not much perhaps, and not too long, but sufficient for PW1 to notice and observe and see that the attackers of the deceased were persons he knew, and saw them very well.

It was however late, the accused and their brother Kiprono had done fatal blows to the deceased, the injuries described by PW5, (*Dr. Noah Oloo Kamidigo*), that they were clearly intended to cause such grievous harm that would only result in death, and resulted in the death of the deceased.

Although the enraged residents of Esageri Trading Centre did not all come to testify (*except PW1 - PW4*) they were so concerned that they sought the whereabouts of the accused and pursued the 1<sup>st</sup> accused to Kabiyet village where he had sought refuge, and were it not for the gallant efforts of PW7, and his colleagues who fired shots into air to disperse the surging and angry mob, it is very likely that the 1<sup>st</sup> accused too would have been the subject instant "**mob justice**" as his brother Kiprono became one, and died as a result thereof. The same fate may well have fallen the 2<sup>nd</sup> accused had he not surrendered himself to the Police at Eldama Ravine.

In their defence, the accused testified that they were not at Esageri Trading Centre at the time of the commission of the alleged crime.

The 1<sup>st</sup> accused testified on oath that he was a matatu driver plying the Eldama Ravine-to-Nakuru Road on the material day until 1.00 p.m. and that after that he went home to sleep until 6.00 a.m. the next day when he went to work as usual until he heard someone call out his name, only to learn that it was the Police who arrested and handcuffed him, and at the same time learned that the Police were also looking for his brother Kiprono.

The 1<sup>st</sup> accused conceded that there was a crowd who attacked them, and alleged that his brother was stabbed by PW1. He acknowledged that he was injured by the crowd. He claimed that the prosecution evidence was all lies, and denied killing any one because he was at Eldama Ravine.

When cross-examined 1<sup>st</sup> accused testified that he was arrested at Eldama Ravine and that it is his brother who was arrested 12km away from the scene of the murder. This was actually a contradiction to the evidence of PW7 who arrested and rescued the 1<sup>st</sup> accused at Kabiyet village some 15 km away from the scene of the crime. He also conceded that, and thus confirmed evidence of PW7 on how he was arrested. The 1<sup>st</sup> accused also contradicted his own evidence that he was in Eldama Ravine on the night of the incident when he had also testified that he had gone home at Esageri Village to sleep until the next morning. He could not have been asleep the whole night, and be at Kabiyet 12 or 15 km away, being pursued by an angry mob from Esageri village.

The 2<sup>nd</sup> accused testified that he was assigned to look after the family herd of cattle on that day and did not get out that day.

This court takes judicial notice of the fact that other than cattle being reared on zero grazing husbandry, most free-range animals would be locked up in their sheds by 6.30 - 7.00 p.m. in the evening because that would be the time also do the evening milking before darkness sets in. It would not therefore be a wonder if the accused herein wandered into Esageri Trading Centre for no other purpose than to find and cause maximum injury to the deceased. The prosecution evidence wholly displaced the evidence of the accused that they were not at the scene of the crime at the time it was committed.

PW1 saw them. It is the evidence of a single witness. But it is no detraction to say that is single witness evidence. For under Section 143 of the Evidence Act (*Cap. 80, Laws of Kenya*) no number of witnesses is required to prove a fact. PW1 knew the accused. There was no evidence of any grudge between him and the accused. The deceased told him that it was the two accused and their brother (*Kiprono*) who had assaulted him. That is a dying declaration, and is admissible under Section 33(4) of the Evidence Act, which says that when the Statement is made by a person as to the cause of his death, or as to any of the circumstances which resulted in his death, in cases in which the cause of that person's death comes into question, such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatsoever may be the nature of the proceedings in which the cause of death comes into question.

In the case of **KIHARA VS. REPUBLIC [1986] KLR 473**, the Court of Appeal held *inter alia* that even though there is no rule that a dying declaration must be corroborated, a court needs to caution itself that in order to obtain a conviction upon a dying declaration, it must be satisfactorily corroborated and particular caution must be exercised as to when the attack took place, the identification of the assailant and the weapon used.

It was also held that before a declaration is relied upon, it has to be shown that death is imminent and directly related to the incident.

In this case, the deceased died a few hours later after telling PW1 that it was the two accused and their brother Kiprono, the subject of "**mob justice**" were the persons who assaulted and caused fatal injuries upon him. PW7 testified that the murder weapon was not recovered. PW5, the doctor testified that the injuries were caused by a sharp object.

Thus, in terms of Section 206 of the Penal Code, there is clear evidence of malice aforethought, both intention to commit the felony of murder, the assault causing grievous harm upon the deceased which resulted in his death, and clear knowledge that the act of stabbing the deceased repeatedly on his chest cavity to the left, would cause the death of the deceased.

I think this is a classic case of malice aforethought, where the vital ingredients of the ***mens rea***, the "**guilty mind**", and "**wicked mind**", the criminal intention to do the act prohibited by law, (*S. 203 of the Penal Code*) are all present.

For those reasons, I find and hold that the accused are guilty of the murder of KELVIN KIBIWOTT NGETICH on 11<sup>th</sup> day of February, 2010, at Esageri Trading Centre in Koibatek District within Rift Valley Province and convict each of the accused.

I call upon each of the accused through their counsel to submit in mitigation before sentence is pronounced on each of them.

**Dated, delivered and signed at Nakuru this 17<sup>th</sup> day of June 2011**

**M. J. ANYARA EMUKULE**

**JUDGE**