



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO.49 OF 2008

REPUBLIC.....PROSOECUTOR
VERSUS

JAMES KIBET CHANGWONY.....ACCUSED

JUDGMENT

The accused person, **James Kibet Changwony** is charged that on 27th February, 2008 at Lawina Settlement Scheme in Njoro he murdered **Robert Kipngetch** (the deceased).

The facts leading to these charges may briefly be stated as follows:

The deceased had gone to take some *changaa* and *busaa* at the home of David and Emily Chepkwony on the material day. In the course of drinking, the deceased lost his mobile phone which was recovered, after a search, from the *Mzee* Chebogel. The deceased hit *Mzee* Chebogel and the latter left with the accused. Shortly they returned with *Mzee* Chebogel’s son, Kibiwott who was armed with a *panga*.

A fight ensued between the deceased and Kibiwott. As the two struggled, it was the evidence of **David Kipkemoi Tanui (P.W.1)** and his wife, **Emily Chemgetich Chepkwony (P.W.2)** that the accused picked a piece of wood and struck the deceased on the head twice and on the leg. The deceased, as a result of that attack fell down and those who were drinking in the home left in different directions as David and Emily took the deceased to their house.They made a report to the police. When they returned from the police station, the deceased was dead. The police arrested the accused person hence these charges.

The postmortem examination on the body of the deceased revealed that he suffered injury to the right temporal region, a depressed skull fracture on the right temporal region with bleeding on the brain. According to the doctor, the deceased died as a result of severe blunt head injury.

Giving his unsworn defence, the accused confirmed that on the 27th February, 2008, he had gone to drink *changaa* at the home of Emily Chemgetich. While drinking, he was joined by *Mzee* Chebogel. The accused further confirmed that *Mzee* Chebogel was found with the deceased person’s phone and the two (the deceased and *Mzee* Chebogel) fought over the phone but were separated. As *Mzee* Chebogel was leaving, he met his son, Kibiwott and they returned. A fresh fighting broke out between *Mzee* Chebogel and his son on the one side and the deceased on the other side. The accused maintained that he did not attack the deceased.

That presents the question, whether the eye witnesses properly identified the deceased person’s attacker and whether it was the accused person. It is, however, common ground that the accused person was present when the deceased fought with *Mzee* Chemogel and his son, Kibiwott. The incident occurred,

according to the witnesses at about 6p.m. The accused person and the witnesses were not strangers to each other, the accused being known to **P.W.1 David Kipkemoi Tanui** for 1 year prior to the incident and also to **Emily Chemgetich Chepkwnony**.

David Kipkemoi Tanui was emphatic that the attack was only 20m from where he was. Both David and his wife Emily were unanimous that the fight was initially between the deceased and Kibiwott and that the accused person joined in. They were also in agreement that the accused person armed himself with a piece of wood used for pounding maize in a sack with which he hit the deceased; that he hit the deceased two times on the head and once on the leg.

Kibiwott is said to have hit the deceased on the chest with his fist. Apart from the graphic account of the events by the two witnesses, the finding of the doctor as to the cause of death and the nature of injuries sustained, confirm the account.

The evidence clearly displaces the accused person's defence that he did not attack the deceased. Having come to the conclusion that it is the accused who caused the fatal injuries on the deceased, the next question is whether he did so with malice aforethought. In other words, did the accused person intend to cause death of or to do grievous harm to the deceased; did he know that by hitting the deceased in the manner he did would probably cause death of or grievous harm to the deceased?

It was confirmed that prior to this day, the deceased and the accused person were friends; that they had no differences. There is also evidence that the group, including the accused person had been drinking *changaa*.

Section 13(1) of the **Penal Code** provides that:

“13(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.”

But **section 13(4)** then goes on to state:

“13 (4). Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”

I reiterate the question as to whether the accused person, having consumed *chang'aa*, was capable of forming any specific intention to kill. Taking into consideration the fact that the deceased was a friend to the accused person; that they had not disagreed; that the accused was not personally aggrieved by the deceased person's attack on *Mzee Chemogel*, the only conclusion I come to is that the accused was inebriated by *chang'aa* to the extent that he was incapable of forming the intent to kill or do grievous harm to the deceased.

For those reasons, I find that the offence disclosed is that of manslaughter contrary to **section 202** of the **Penal Code**. He is accordingly convicted.

Dated, Signed and Delivered at Nakuru this 24th day of November, 2011.

W. OUKO
JUDGE