



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

Criminal Case 30 of 2004

REPUBLIC:.....PROSECUTOR

VERSUS

JOSEPHAT KIMELI KIBET:.....ACCUSED

JUDGMENT

JOSEPHAT KIMELI KIBET is charged with the murder of **SAMMY KIMELI KOECH** on the 22nd day of May 2004 at Kamariny village in Keiyo district of the Rift Valley Province. That murder is contrary to section 203 as read with section 204 of the Penal Code. The prosecution case is made out of the evidence of eight (8) witnesses.

PW1 is Raymond Kosgei Koech. He is the brother of the deceased. His evidence was that on 22/05/2004 he and the accused went out drinking liquor in the witness's house until 4pm when they parted. The accused came back at 8:00p.m carrying a sachet of liquor. When the accused was asked by the witness to leave he refused. The witness called his brother, the deceased herein, to come and help get the accused out. When the brother arrived the accused stabbed him three times in the chest and he fell down and died. The accused then left the house and when the witness followed him he was also stabbed by the accused who then fled. Many people came and the witness was taken to hospital where he was admitted. On being cross-examined he said that the brother was not armed. He added that the accused got annoyed when the deceased told him to leave the witness to sleep. He said that at that point the accused just attacked the deceased.

Pw2 was Caroline Kemboi and she is the wife of the deceased. Her evidence was that on 22/5/2004 she and her husband heard screams from PW1's house and the deceased rushed there to see what was happening. PW1 and the accused were fighting and so the deceased went to separate them. She knew the accused who is their neighbour. The witness followed her husband to PW1's house. When she arrived the accused was leaving. She found that her husband had been stabbed and he was bleeding and she started screaming and people came. Her husband fell down and died. She had known the accused before the incident and she knew that her husband and accused had no quarrel. On cross-examination she said that earlier that material night the accused had gone to her house and left..

PW3 was Kennedy Chesire a neighbour of both the deceased and the accused. On the material night at about 9pm he heard screams from the house of PW1 and someone was calling him (witness) name. He went to PW1's house only to find the

body of the deceased at the door and a lot of blood. He said that PW1 was injured and the witness and others went to report the matter to the police and the police came and took away the body. He did not find the accused at the house when he first came to the scene but he was told at the scene that the accused had stabbed the deceased.

Luka Koskei Maina was PW4 and his evidence was that on 22/5/2004 at about 9:15pm two young men went to his house seeking assistance to take to hospital two young men who had been stabbed. He got out and found out that one of the young men Samson Kimeli was already dead. He took the second one Raymond (PW1) to Iten District Hospital after first reporting the matter to the police station. After the hospital he went back to the police station from where he was accompanied by police officers to the scene where they collected the body and took it to Iten District Hospital Mortuary.

The evidence of PW5 was that he identified the body of his deceased nephew for purposes of postmortem. He identified the body with his brother Joseph Kiptoo who gave evidence of PW6.

It was the evidence of PW7 Inspector John Kimeto that on 22/05/2004 while at his then work station at Iten police station he received a report that somebody had been killed about 3 kilometers from the station. Accompanied by IP Kisaka, Pc Wambua and in the company of the deceased's relatives they proceeded to the scene where they found a body lying on the ground with a lasso tied around his loin and there was a lot of blood in the house. The body had a stab wound on the left upper shoulder. They collected the body and took it to the Iten District Hospital Mortuary and on 25/05/2004 he attended the post mortem on the body of the deceased at which time he saw two other stab wounds on the armpit. The postmortem was performed by Dr. Bett. He returned to the scene for further investigations. He was later given a flip knife said to have been the killer weapon.

Police Constable Sinyad Abdullahi – PW8 took over the investigations of the case when PW7 was transferred to Kisigitini police station in Lamu. He produced in evidence the postmortem report done by Dr. Bett who could not be traced. The post mortem report showed contusion on the lateral aspect of the eye socket; a stab wound over the left chest measuring 1.5cm wide and 6cm deep a stab wound measuring 2cm wide and 3cm deep over the left shoulder; stab wound measuring 3cm wide and 8cm deep on the posterior aspect of left axilla; cut wound of 8cm on the left upper arm and left sided haemorrhage. The pericardium and the aorta were punctured with the latter punctured where it arises from the heart. The Doctor formed the opinion that the cause of death was cardiorespiratory arrest from massive hemorrhage due to puncture of AORTA due to sharp object stab.

In his defence the accused gave unsworn evidence and called no witnesses. He stated that on 22/05/2004 he and the deceased were drinking at Impala Hill Bar together with the deceased's brothers. They drunk upto 11:30pm when they went home and the deceased went to his house and the accused and the others continued drinking busaa about 20 meters from the deceased's house. After sometime the deceased went to where they were drinking and he (deceased) had a knife. Deceased told them to stop making noise. Deceased and accused struggled/wrestled and accused tried to take away the knife from the deceased. The deceased and his brothers attacked the accused and he continued struggling/wrestling with the deceased and the deceased fell on his knife which pierced him on his left side and he died there and then. Accused went home. He maintained

that he did not kill anyone.

I have very carefully considered all the evidence adduced. PW1 was drinking liquor during the day with the accused and they parted and each one went to their respective ways. At 8:00pm accused went to PW1's house carrying more liquor in sachets. PW1 said he asked accused to leave but he refused and so PW1 went and called the deceased who was his brother to come and help get the accused to leave pw1's house. When the deceased came and asked accused to leave, the accused got annoyed and stabbed the deceased three times on the chest and the deceased died on the spot. PW1 was an eye witness. His evidence on the stabbing of the deceased is cogent. This evidence of stabbing is corroborated by the post mortem report which showed stab wounds on the accused's stomach and chest. PW2's evidence as to how the accused got to the house of PW1 where accused was with PW1 is different from that of PW1. Whereas PW1 said that it was he who went to call the deceased to come and ask accused to leave PW1's house, PW2 said that she and her deceased husband heard screams from PW1's house and the deceased went to find out what was happening. This is a discrepancy. However nothing really turns on it. In my mind it is immaterial what led to the accused coming to PW1's house. Whether he was called by PW1 or he answered to the screams does not add or take away anything material as to how the deceased met his death. The point is that whichever way the deceased got to PW1's house, he got there and it was while there that PW1 saw the accused stab the deceased. With that same knife the accused stabbed PW1 who had to be admitted in hospital. It is true that PW1 is the brother of the deceased. His being a brother of the deceased does not change his evidence. He was himself stabbed by the accused is his evidence. What is material, to my mind, is that his evidence and that of the accused agree on the point that in PW1's house at that point the presence of three people, the accused, PW1 and the deceased is confirmed. It is immaterial who had the knife. Even if I were to accept the accused's version that it was the deceased who had the knife, which I do not accept, it was not shown that the deceased did stab himself severally on the chest/stomach. Accused himself said that the deceased fell on his knife which stabbed him on the side of the chest and he fell down and died there and then. If that were true, what would explain the other stab wounds on the body of the deceased? This shows/proves that the deceased did not just fall on his knife but that he was stabbed on various parts of his upper torso and it is that stabbing that took away his life. That is my finding. The post mortem report showed two deep cuts one of which punctured the aorta resulting to massive bleeding which led to the death of the deceased due to cardiorespiratory arrest from massive hemorrhage due to a puncture of the aorta due to sharp object stab. This agrees with PW1's evidence that deceased was stabbed by the accused with a knife. A knife is a sharp object. I find and I have no doubt in my mind that the evidence of PW1 was credible. He was an eye witness.

The accused's evidence that he and the deceased started struggling/wrestling does not explain why that was so. The accused said the deceased was his friend so then what were they struggling/wrestling about? He does not state that the deceased attacked him first with the knife so that the accused could be said to have acted in self defence. Accused did not name the deceased's other brother who fought him together with the deceased. This must be because there were no other brothers of the deceased present save for PW1 because had there been any such brother then PW1 would not have needed to call the deceased to ask the accused to go home. Additionally PW2 would surely have stated that other brothers of the deceased were present. I find that at the scene of the death of the deceased which was the house of PW1, only PW1, accused and deceased

were present. It is my finding that the evidence of PW1, an eye witness, is corroborated by the postmortem report which showed several stab wounds, contrary to the defence evidence of the accused that the deceased fell on his own knife which pierced his left side and he died there and then.

The accused first took plea on the 23/09/2004 and due to his many complaints during trial about illness and the denial of his name the court ordered on 12/10/2009 that he be subjected to a mental examination to ascertain his status and whether or not he was fit to stand trial. The medical report dated 25/10/2006 sent to court stated that the accused had auditory hallucinations in which he was hearing gunshots and people running to safety. He had delusions that he fell from a flying plane and that he had special undefined abilities. The doctor's conclusion was that the accused was at the time suffering from schizophrenia, a chronic mental illness and he required to be on treatment and the doctor said that he needed further history from the accused's relatives to facilitate treatment. His opinion was that as at 25th October 2006 the accused was not fit to plead. The accused was then put on treatment and was re-examined on 6th June 2007 and the conclusion of the examination and opinion of the psychiatrist was that there was no evidence of mental illness then and that the accused could continue with the case. Plea was then taken afresh on 12/07/2007 and the trial commenced on 26/11/2007. Nowhere at all during the trial was either in examination in chief or in cross-examination the issue of the mental illness of the accused raised. Nowhere was it raised that the accused's mental health had lapsed and in any event the doctor's medical report of 6/6/2007 was not contradicted and the same is conclusive. I find that the prosecution were properly guided in calling for the examination of the accused to eliminate doubt as to his mental status.

Now I must turn to the issue of malice aforethought and ask the question whether or not the accused possessed the requisite malice aforethought necessary to commit murder. **Section 206** of the **Penal Code** cap.63 of the Laws of Kenya defines malice aforethought as:-

- a) **An intention to cause the death of or to do 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 bodily harm to some person, 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)
- d)

Evidence was adduced that the accused and PW1 were drunk on the material date. However, no evidence was led that the accused was so drunk as not to contemplate the consequences of stabbing the deceased severally on his chest. Indeed the accused gave a vivid account of the day; upto the time of the commission of the offence. And when the accused stabbed the deceased, as I have found he did, he did not stab him on his legs, it was the chest he stabbed and not once but three times. By such action he intended to either cause grievous bodily harm to the deceased or indeed to kill him as I find he did. The act of the deceased and PW1 of asking the accused to go home and leave PW1 to sleep could not have

caused and I find that it did not amount to provocation and further, as I have stated earlier, the accused did not state that he was first attacked by the deceased and so he acted in self defence. I find that the accused person's act of stabbing the deceased as he did was meant to kill him if not to cause grievous bodily harm. I therefore find that the accused person was possessed of the necessary malice aforethought and accordingly I find the accused guilty of murder as charged and accordingly convict him under section 203 of the penal code chapter 63 of the laws of Kenya.

DATED SIGNED AND DELIVERED AT ELDORET THIS 18th DAY OF MARCH, 2010.

**P.M.MWILU
JUDGE**

IN THE PRESENCE OF:-

The accused person
Court Clerk - Andrew Omwenga
Mr. Omboto advocate for the accused
Mr. Kabaka holding brief for Chirchir for the state

**P.M.MWILU
JUDGE**

MITIGATION OF THE ACCUSED PERSON BY HIS COUNSEL

MR. OMBOTO.

The accused person is a first offender. He is a young man below the age of 35 years who wishes to start his life afresh. He has a long history of being mentally unfit. I rely on the case of Muiruri V Republic – CA at Nakuru Criminal Appeal No.161/2003 on the point of mental illness. Accused has been in custody since year 2004 and medical reports are on file. He is remorseful for what he did. He was under the influence of alcohol. Accused is a bread winner the 2nd born in his family. The accused asks for leniency. We pray that he be found guilty but insane.

**P.M.MWILU
JUDGE**

COURT: Sentence on 22/04/2010.

**P.M.MWILU
JUDGE**

SENTENCE: I have considered the mitigation on behalf of the accused. The issues, of drunkenness and insanity are being raised too late in the day as the same should have been covered appropriately during evidence in trial. In any event none of the two issues were materially evident from the available evidence at trial. An innocent life was lost by the criminal act of the

accused. There is only one sentence allowed by law for the offence of murder. Accordingly I sentence the accused to death as by law provided under section 204 of the Penal Code. Right of appeal within 14 days of today.

P.M.MWILU

JUDGE

IN THE PRESENCE OF

Court Clerk – Andrew Omwenga

Accused person

Mr. Omboto for accused

Mr. Chirchir for state