



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

**Criminal Case 51 of 2004**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**ISAAC KIPLAGAT BETT ..... ACCUSED**

**JUDGEMENT**

The Accused, Isaac Kiplagat Bett was charged with 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 10<sup>th</sup> August, 2004 at Kapleng Village in Marakwet District within Rift Valley Province, murdered Cheptoo Cheboswony. The deceased was the accused's own father.

The Prosecution called seven (7) witnesses. PW 1 a brother of the accused testified that on 10.8.2004 he was at his parent's house. He was with one Bernard Wanjala. He said that the accused screamed that he would kill someone. That he had a hammer, an arrow and a knife – a Somali sword. That he repeated the same words. He said that he ran away with Bernard and they hid in the shamba.

He said that Isaac, the accused damaged Lazaro's house. Lazaro was another brother. PW 1 said that the accused was 30 metres away. That he attacked the deceased. He said that the deceased was in his house. He heard the old man scream. That Isaac was beating the deceased. They did not help the Mzee. He said that he went to see the old man. He found him injured on the head. That he was bleeding from the nose. That he was lying on the floor.

PW 1 said that he telephoned Lazaro who lived in Uasin Gishu. Lazaro came the next day. That they took the deceased to Chebiemit Hospital. That after two weeks he died.

On Cross-examination he said that the accused was his step-brother. That he did not see accused hit the deceased. He said that his father did not suffer from epilepsy and he did not fall down. He said that there was no dispute between his mother's house and the house of the accused's mother as co-wives. He denied that the accused faced another criminal case for malicious damage to Lazaro's house. He said that he did not know of any case opened against the accused. He added that a report was made to the Police about the assault before the deceased died. He said that the injury was on the left hand side and not the right as stated in the police report. He confirmed that the deceased died at home.

PW 2 was Bernard Wanjala who looked after cows for the deceased. He worked for the deceased. He said that on 10.8.2004 at about 2 p.m., the accused went to the home and damaged a house. That he was with PW 1 and the deceased was inside his house. He could not walk. PW 2 took him into the house. PW 2 said that Isaac, the accused was screaming that he would kill someone. He had damaged Lazaro's house.

PW 2 said that the accused had a hammer, arrows and a Somali sword. That they ran away. He said that the accused entered the deceased's house. That the deceased screamed while the accused shouted. He did not understand the language. That accused left the house after five (5) minutes. When he went to see the deceased he found him bleeding from the nose. There was an injury on the left side of the head. They helped him to sit up.

PW 2 said that Gilbert PW 1 did not get a doctor but next day his brother Lazaro came. That Lazaro went to report the matter to the Police. PW 2 was given some money to go to his home.

PW 2 said that when Isaac came he was feeding the deceased inside the house. That the accused came with a hammer and a rod. It was blue in colour. He said that he went to the Police on 2.9.04 to write the statement.

On cross-examination he said that he did not see what happened inside the house.

PW 3 was a police officer, based at Provincial Headquarter, Nairobi. P.C. Christopher Cheptoo. He is also a son of the deceased but from the other house. He said that after his father died, they were to bury him. That they were told to do a post-mortem. That they went to the District Hospital and identified his father's body. He saw an injury on the left hand side of the deceased's head. There was a crack.

He said that his father used to have epileptic attacks but was cured. He said that he had no differences with the accused and they lived in harmony.

He said the post mortem was carried out on 1.9.04 that the injury on the head was new.

PW 4 was Lazaro Cheptoo another brother of the accused. He belonged to the other house other than the accused. He is a driver of a matatu. He said that on 11<sup>th</sup> August, 2004 he went to see his father. He was taking him some medicine. That he heard someone cutting something. Upon inquiry he was told that it was the accused cutting down his house. He heard that the accused had hit the deceased on the head. He said that he saw Isaac, with a long knife and arrows. He said that he would kill someone. That he retreated and ran away. That he reported the matter to the Police.

That the Police arrested the accused the next day. He saw his father and the injury on the head. He said that his father had said that the accused had hit him. That on 27<sup>th</sup> August, 2004 he got information that his father had died. He added that on 28<sup>th</sup> August, 2004 they took the deceased body to Iten Hospital mortuary. That they collected the body from the mortuary on 1<sup>st</sup> September, 2004 and took it to the Chebiemit Police Station where they were told that a post-mortem had to be carried out. That the head of Police at Marakwet came and ordered that a post-mortem had to be carried out. The body was returned to the hospital. The funeral was then arranged for 2<sup>nd</sup> September, 2004. He said that the accused used to beat the deceased.

On cross-examination, PW 4 said that he was not present when the alleged assault took place. However, he is the one who made the report to the Police Station. He told them about the house demolition and the head injury. He said that they reported about the death after the body was taken from the mortuary. He denied chasing away Joseph a brother to the accused. He said police stopped them as they passed through Chebiemit. He said that he was not present when the post-mortem was done. He said that he did not know his father suffered from epilepsy.

PW 5 was Dr. Vincent Nyaboga Oyiengo. He is the one who carried out the post-mortem on the body of the deceased on 1<sup>st</sup> September, 2004. He said that upon examination there was an injury on the left side of the head in the temporal region. There was a depressed fracture. He said that there was a depressed skull communitated fracture. There was bleeding in the arachnoid. That bleeding originated from the brain. The cause of death was sub-arachnoid haemorrhage of depressed fracture due to an assault. This could have been by use of a blunt object, falling down, hitting a wall or a strong blow.

On Cross-examination he said that it was unusual that he was on the way to be buried when he was brought to the hospital for the post-mortem. He did the post-mortem at 7 p.m.

PW 6 was the Clinical Officer who certified that the accused was fit to stand trial. PW 7 was a Police Constable who was at Chebiemit Police Station on 1<sup>st</sup> September, 2004. He said he received a report of death of the deceased. He said two sons brought the body. They were on the way home to bury the body when they stopped at the Police Station. He said he was instructed to escort the body to the mortuary for a post mortem.

He said that after the post-mortem, the body was released to the family for burial. That on 5<sup>th</sup> September, 2004 at around 5.15 a.m. accompanied by four (4) other policemen went to the house of the accused. They found him asleep and he was arrested and taken to the station where he was charged with the offence of murder.

He said that it was the O.C.P.D who instructed them to take the body to the mortuary for the post-mortem. He said Philip, Lazarus and Christopher the sons of the deceased were present. He said that most of the information was collected by the Investigating Officer. He said that he did not hear of any allegation of any assault. That it was the Investigating Officer who could clarify on this. The Prosecution did not call the Investigating Officer and it closed its case.

The Accused was placed on his defence. He testified on oath and called five (5) witnesses.

The accused denied that he demolished Lazaro's house. He said that on 12<sup>th</sup> August, 2004, he was arrested on allegations of malicious damage to property. He was arrested by four (4) police officers. He was put in the cells at Chebiemit Police Station. He was moved to Kapsowar Police Station and the Charge was preferred against him in Criminal Case No. 50 of 2004 at Iten Court. The Complainant was Lazarus Kiptoo his step-brother. He was charged on 13.08.2004. He was released on bond of Shs. 50,000/=.

He said that on 30<sup>th</sup> August, 2004 he heard his father had died. He got permission from his employer Kenya Prisons to go and arrange for the funeral. He learnt that his father had died on 27.08.04. He went home on 31.08.04 for the funeral. He was told that the deceased had been sick. He was 77 – 78 years old. That he suffered from epilepsy. That he was in a bad state. He could not walk and had to be carried. That he had wounds all over the body, on the buttocks etc. He had sores all over. They were infected with insects. The sores were rotting.

He said that there were disputes in the family. His father had two wives. The dispute was about land distribution. The 1<sup>st</sup> house of his step-mother had five (5) sons while the 2<sup>nd</sup> house, his mother's had two (2) sons. The 1<sup>st</sup> house wanted the father's land to be divided and shared in accordance with number of sons. While the 2<sup>nd</sup> house wanted it to be divided according to houses i.e. into two equal shares. That the elders had decided in their favour in accordance with Marakwet Culture.

The accused said that there was no report of murder or assault was made to the police. He had no hatred for his father. That he used to help him a lot and take him to hospital.

He said that it was on 5<sup>th</sup> September, 2008 that he heard about the allegations of murder. He was told by the OCS when he was being arrested. He said that he followed the OCS and about 800 metres from his house they found the vehicle of Philip Cheptoo. He was in the car with two others. He was taken to the Station and charged with murder. He was shocked.

He said that he is surprised that it is only his brothers who testified.

DW 2 was the deceased brother. He said that the deceased suffered from epilepsy. He said that his brother had divided his property in accordance with their culture i.e. according to houses/wives. The two houses did not live peacefully. That there were problems between the male children. That the house of

the elder wife wanted to divide the property according to numbers of boys. The second house wanted it to be shared according to houses.

He gave an account of his brother's illness. He said that he had bruises on the buttocks. He had been infested by maggots. He said that the children in the first house did not allow visitors. That they did not like the house of the younger wife.

He said that Lazarus constructed on the side of the younger house. The accused then destroyed the said house since it was on their side. DW 2 said that he saw the body but he saw no injuries on the head.

He said that when the deceased died on the night of 27-08-04 he went to the house. He locked the body in the house at night. He opened the door in the morning.

They took the body the next day to the mortuary. They used Philip Cheptoo's vehicle (1<sup>st</sup> house). There were about eight (8) people accompanying the body. The sons of the 1<sup>st</sup> house were all there. That the brother of the accused from the 2<sup>nd</sup> house was chased away. He was also chased away from the mortuary by Lazarus, Philip and the others.

He said when they left the hospital with the body on 1.9.2004 they reached Chebiemit. Philip, Lazaro and Christopher all sons of the 1<sup>st</sup> house went into the Police Station at Chebiemit. They told DW 2 and others to alight and took the body to the Station. No post mortem had been done. DW 2 said that they were given another vehicle as the sons of the 1<sup>st</sup> house entered the Police Station. That the body had not been brought by midnight. That in the morning the body had arrived in Philip's vehicle.

He said that the accused and his brother were chased away and they could not come to the grave or attend the burial. Other elders were also chased away.

He said that he did not see any stitches or sutures on the body to indicate any post-mortem had been carried out. He reiterated that the deceased suffered from epilepsy.

On cross-examination he said that the sons of the 1<sup>st</sup> house did not allow him to visit the deceased. He was kept away for three (3) years. He did not visit for three (3) years. In his opinion the deceased died due to his sickness.

He said that they removed the clothes of the deceased to see whether there are injuries and also the family members wanted to check.

DW 3 was a cousin of the deceased. He corroborated what DW 2 had stated. He said that at the mortuary, he washed the body with water. He was with one Vincent. There was no injury on the head and no post-mortem was carried out. Vincent chased Joseph away from the mortuary. They were almost about to fight. He told Joseph to go out.

He said that after the body was released they put it in a pick-up driven by Christopher Kiptoo, the Police Constable. The other vehicle was a matatu.

When they reached Chebiemit, Philip and Christopher said that they wanted to collect a letter from the Police. The vehicles stopped. That Philip and Christopher went into the Police Station and after half (½) an hour they came out and said that things had changed. That the body had to be returned. They told DW 3 to get out of the vehicle and enter the other one.

That policemen came out with guns. They said that the OCS had ordered that the body be taken back to the mortuary. Philip and Christopher refused any elder to go with them. The body was brought back at night. DW 3 a Cousin did not go to the burial. He protested as to why the body was taken back to Iten. He was also afraid there would be a fight. He said that he does not believe the accused could beat his father.

DW 4 was an elder brother of the deceased. He said that the deceased suffered from epilepsy. He had fallen into fire and had his fingers amputated. He talked of the dispute between the two houses of the deceased. He did not go for the burial. He said that there are five (5) brothers of the deceased yet the sons of the deceased had refused them to go to the burial.

DW 5 was a brother of the accused, Joseph. He corroborated the evidence of DW 2, DW 3 and DW 4.

DW 6 was a village elder. He corroborated the evidence of the other defence witnesses. He confirmed that the sons of the deceased were not on good terms. They fought over their father's land. He said that the deceased died from illness. He said he could not go to see the old man as the children did not like people. Particularly the children of the 1<sup>st</sup> house. He said that they were "wild". He said that no investigations took place.

I have carefully considered the testimonies of the prosecution witnesses and the defence witnesses. I have perused the proceedings and analyzed the evidence.

I find that there was no person among the prosecution witnesses who actually saw the accused hit his father the deceased on the head.

PW 1 said that he heard the deceased scream and heard the accused shout that he would kill someone. That the accused was armed with a hammer, an arrow and a knife.

I found that PW 1 lied to this Court and that he was dishonest throughout the proceedings. He said his father did not suffer from epilepsy yet witness after witness including PW 3 confirmed that the deceased suffered from epilepsy and had epileptic attacks. He claimed that there were no differences between his mother's house and the house of the second wife. However, the overwhelming evidence on record is that indeed the two houses were bitter rivals and enemies. There was a serious dispute regarding the distribution of their father's property. He denied that there was any case opened against the accused regarding malicious damage to property. This is the very person who telephoned his brother Lazaro to inform him about the demolition of his house.

I have no doubt that PW 1 lied to this Court on the aforesaid matters. As a result, I doubt that he could have been truthful when he said that the accused was armed with a hammer, arrows, and a Somali sword. PW 1 and his side of the family were bitter enemies with the 2<sup>nd</sup> house and the sons of the second wife. He had every reason to frame the accused hence his ability to lie to this Court.

PW 2 was a servant of the family hired by the 1<sup>st</sup> house to look after the deceased and his cows. He said that the accused damaged a house on the material day. He did not say how he came to know about this since he did not see the incident. He said that he was with PW 1 while the deceased was inside the house. They were outside PW 1's house. He said that he heard screams. That the accused shouted he would kill someone. He said that he ran away when the accused entered the deceased's house. That the accused shouted inside the house but he PW 2 could not understand the language. PW 2 did not tell the Court in what language the accused spoke the first time he understood him to threaten to kill someone. It is noted that PW 2 was a Luhya while the deceased and his family are Marakwet. I find this to be inconsistent.

Again PW 2 upon cross-examination said that when Isaac the accused came shouting that he (PW 2) was inside the house feeding the old man. That he came with a hammer and a rod. This was different from his evidence-in-chief when he said that he was outside Gilbert's house.

I do find that PW 2 was untruthful and that he lied to the Court. Considering that he had been employed by the sons of the 1<sup>st</sup> house, I am inclined to believe that he had been couched and possibly a witness for hire. His duplication of PW 1's evidence was quite impressive. I find that PW 2 was one of the conspirators to frame the accused. In any case he did not see the accused hit the deceased.

PW 3 was a son of the deceased from the 1<sup>st</sup> house. He was a police officer. I find that he lied that they had no differences with the accused. He is one of the sons in the 1<sup>st</sup> house who disagreed with the second house on mode of distributions of their father's land. He lied when he said that the two families lived in harmony.

From the evidence on record, this Court is inclined to believe that it is PW 3 who influenced his brothers that the body be taken to the Police Station and for there to be a post mortem. Strictly there is nothing wrong for a post-mortem to be done or carried out on a body if there is suspicion of foul play. It is within the Police's powers and discretion to order this. However, it is the manner the whole exercise was carried out.

Firstly, the body was released by the hospital without a post-mortem. This shows that no report of any assault had been made for there to be an inquiry as to cause of death other than the obvious ill-health of the deceased. The deceased was in a terrible condition from the evidence. He virtually rotted to death due to the unsanitary conditions he was kept in by the members of the 1<sup>st</sup> house. He had sores that were not cleaned leading to infestation by maggots. He urinated on himself and sleep on a mattress that was worn out leading to the sores on his buttocks and body.

The hospital quite correctly must have opined that he had died due to his illness. No report of any assault was made and no need for an inquiry then.

However, suddenly, the sons of the 1<sup>st</sup> house led by PW 3 a Police Officer virtually chase everyone and take the body to the Police Station. The entourage is sent away by armed policemen. The body is returned to the mortuary at night and a post-mortem carried out in the absence of members of the accused side of the family, the deceased brothers and the elders of the community. This draws serious suspicion. What was there to hide? Why was everybody else chased away? When was the report of any injury to the deceased made and by whom? The deceased was taken to hospital on 28.08.04. The alleged assault took place on 10.8.2004. Why did PW 1, PW 2 or any other person not report the assault immediately, particularly if the deceased was bleeding on the ear and from the nose?

I find that PW 3 was an untruthful witness and possibly the architect of the conspiracy against the accused. I attach no value to his evidence.

PW 4 is a son of the deceased from the 1<sup>st</sup> house. He reported to the Police that his house had been demolished on 10.08.04 by the accused. He made the report on 11.08.04. He did not report about any assault on his father.

His claim that his father had told him that the accused had hit him is a malicious lie. If it was so, he surely would have reported the matter to the Police. Instead he reported the issue of demolition upon which the accused was immediately charged with malicious damage to property on 13.8.04 in Criminal Case No. 50 of 2004 at Iten.

I find PW 4 also to be a liar and unreliable witness. Considering his bitter rivalry with the accused on their father's property, I find that he had the motive to lie and frame the accused. He was part of the conspiracy to frame and put the accused away so that they could distribute their father's property after his death in accordance with their wishes. The advancing age and ill-health of the deceased must have catalyzed the urgency to fix the accused who must have been perceived to be the obstacle and greatest foe being a well placed prisons officer.

PW 5 was the doctor who carried out the post-mortem. I do not doubt his finding that the cause of death was due to sub-arachnoid haemorrhage as a result of a depressed skull fracture. However, I do not accept his conclusion that it was due to assault. I find that the doctor has not given the medical history of the deceased. The deceased was an epileptic who had suffered falls before to the extent that he got burnt on one occasion that his fingers had to be amputated. There was no eye-witness to any assault and the doctor could not comment on this. One cannot rule out that he fell due to an epileptic attack or seizure.

In any case if he was assaulted, it is not known who did it.

The doctor also was not told that the body had been removed from the hospital mortuary and taken to the Police Station. It is not known what transpired at the Station and how the body was handled. It is not known how the body was carried and whether it was exposed to any risk of falling, being knocked or otherwise.

A strange aspect regarding the post mortem is that witnesses for the accused who included the deceased own brothers said that they did not see any marks, stitches or sutures to show that a post mortem or autopsy took place. The truth on this may possibly never be known.

PW 6 was the clinical officer who certified that accused was fit to stand trial.

The Prosecution did not call a very vital witness the Investigating Officer. While it has been held that the failure to call the Investigating Officer is not fatal to criminal proceedings or does not diminish the value of the testimonies of the other witnesses, yet in some cases, their evidence of the Investigating Officer is critical and invaluable if conviction is to be sustained. It is my view that the evidence of the Investigating Officer in this case was absolutely necessary to piece the evidence of the other witnesses and to explain his decision to charge and the basis there. It is to be noted that all the witnesses other than the formal ones are step-brothers of the accused who are bitter rivals and enemies. They had every reason/motive to have him put away. The Investigating Officer would have been an independent witness without any interest in the case or the parties disputes.

As a result, I find that the prosecution's failure to call this witness undermined their case considerably.

The net result is that I find that the evidence of PW 1, PW 2, PW 3 and PW 4 unreliable, untruthful and unacceptable. They are tales of liars and conspirators. It was motivated by malice and ill-will against their brother to achieve selfish objectives touching on their father's property. The said foursome and other members of the said home hatched a conspiracy to frame their brother so that he was out of the way for them to have full control of their father's property whom they hoped would die due to his serious ill-health which they appeared to have aggravated by failure to clean him and give him medical attention. They violently chased away the deceased's brothers, the accused's side of the family and the community. They were considered wild and people scared of them. The injury on the deceased's head is quite suspect in the circumstances but there was no evidence that it was as a result of the act of the accused.

the prosecution have not proved their case beyond any reasonable doubt. I therefore do hereby acquit the accused. He shall be released from custody forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT ELDORET ON THIS 16<sup>TH</sup> DAY OF APRIL, 2009.**

**M. K. IBRAHIM**

**JUDGE**

**In the presence of:**

Mr. Chirchir holding brief for Mr. Omutelema for the State

Mr. Obwatinya for the Accused