



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

**AT KERICHO**

**Criminal Case 21 of 2008**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**BENARD KIPKURUI CHERUIYOT ..... ACCUSED**

**JUDGMENT**

**I: Criminal Law**

a) Charge

1. Bernard Kipkurui Cheruiyot, a male adult aged about 23 years old in 2008 is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence being:-

*“On the 10<sup>th</sup> January, 2008 at Siryat village Sotik District within the Rift Valley Province murdered Gilbert Kipkemoi Sigei”.*

b) Procedure

3. On 22<sup>nd</sup> May, 2008 the accused was arraigned in the High Court and pleaded not guilty to the charge (*Mugo J*). The advocate for the accused offered a plea bargaining to the state on 6<sup>th</sup> October, 2008 on 3<sup>rd</sup> November, 2008 the state declined to accept an offer of a lesser charge. The trial was set down for hearing on 5<sup>th</sup> May, 2009. There was no state counsel available to prosecute the case for good reasons and unforeseen circumstances. The case was adjourned to the 19<sup>th</sup> May, 2009 for trial and prosecution of the case by a different state counsel; partially through out the trial.

II: Facts

4. It was the prosecution case that the accused Benard Kipkirui Cheuiyot and others including the deceased had been drinking. A dispute arose as they walked home. According to PW2 Geoffrey Kipkemoi Kirui, he had been in the company of the deceased one Gilbert Sigei and PW3 one Julius Koros. PW2 admitted in evidence that they had been drinking a brew known as Busaa. This is a traditional brew that is sold under license. They then began to drink “*changaa*” an illicit brew that is

illegal from about 3.00p.m.

5. At about 4.00p.m they proceeded home. On their way, the deceased scream. It is not known why, perhaps just a scream of one intoxicated. The deceased and the accused began to quarrel. They were separated by PW2 Geoffrey and PW3 Julius.
6. As they walked a second quarrel arose. On being separated the accused ran into his mother's house and returned with a knife which he used to stab the deceased on the chest. PW2 on seeing this ran to rescue the deceased but he in turn was stabbed on his left side back near the shoulders and ran away to protect himself. He fell down at a distant.
7. The witness, PW2 was admitted to hospital for two or more days. The deceased passed away as a result of his injuries.
8. The motive of the attack on the deceased was alluded to by PW2 as being a dispute over 100/= and or the deceased screaming or making a noise.
9. The attack was seen when the accused ran into the mother's house that was about 200 meters away and returned with the knife that he then used to stab the deceased.
10. The prosecution called formal witnesses to corroborate their case. PW5 Police constable John Ondieki on receiving the information that members of public had brought the accused to the station, he visited the hospital where he found the deceased had passed away. The witness, PW2 was admitted to hospital having been admitted with stab wounds. On 14<sup>th</sup> January, 2008 he witnessed a post mortem carried out on the body of the deceased to establish the cause of death.
11. Dr. Joyce Chepkoech attached to the Kapkatet hospital who performed the post mortem stated that her findings was that the deceased had sustained a deep cut on the right artrio chest wall of about 4 cm long that would have been caused by a sharp object. The wound cut could admit two fingers. The respiratory system had a right sided haemothorax. She concluded that the cause of death was cardiorespiratory arrest due to sever haemorrhage that was caused by the injury inflicted.
12. PW2, was examined as to his injuries. A P3 form was produced indicating that he too sustained injuries.
13. The father to the deceased PW1 gave evidence of how he was informed of his son's death and went to hospital to examine the body before removing it for burial.

#### IV: Defence

14. The defendant claimed that he had some moneys at home. In his unsworn statement he said he took this money and went to drink. He returned home and slept. He then went to Bomet where he was arrested.

#### V: Submissions

15. The state alleged that the accused defence case is but a denial of the incident a case has been made out.
16. The advocate for the defence has stated that there was no "*mens Rea*" or a guilty mind in the commission of the offence. No malice aforethought had been proved.
17. She relied on the case law of Kioko V R (1982-1988) IKAR 157. In this case there were two appellant. Both were drink and had gone to beat the deceased with a panga. The 1<sup>st</sup> accused pleaded guilty to a lesser charge. The appellant 2<sup>nd</sup> accused did not agree to the charges. Just before sentencing but after conviction he wished to plead not guilty to murder but guilty to an offence of man slaughter. He

was sentence on the charge of murder. The court of appeal held that, the real culprit was the 1<sup>st</sup> accused already sentence. They dealt with the issue of common interest. If the 1<sup>st</sup> accused was sentenced to manslaughter, then the common intent then could not stand for murder against the appellant, 2<sup>nd</sup> accused.

18. The argument by the advocate for the accused is that the accused had no malice aforethought to murder.

V: Opinion

19. The prosecution has established that the deceased was afflicted an injury and died. The cause of the fatal injury was explained by the prosecution witnesses as being the accused using a sharp object being a knife to stab the deceased and further inflict injury upon PW2. If the deceased had lived, the accused would have been charged with assault. The deceased passed away and a charge of murder was preferred.

20. The accused denied the charge and in his defence denied knowing anything of the incident.

21. The four young men are said to have been drinking for quite a considerable time. They were intoxicated. They were in their early twenties by age. This aspect of being intoxicated arose during cross-examination.

22. It is therefore implied that the accused was intoxicated and may not know what he had done when he stabbed the deceased. This thought was not the accused defense. He never stated that he was intoxicated nor did he state that he stabled the deceased and did not know what he was doing? He had no defence.

23. I would find that the deceased met his death as a result of injuries inflicted by the accused person.

24. I find that the attack by the accused person occurred in this states. The first time he was separated, he would have refrained from fighting. The second time he ran a distance of 200 meters and returned with a knife. He would have had the time during this time to reflect on what he was going to do when he attacked the deceased, an attempt to separate him proved fruitless, when he proceed to attack PW2 and wounded even this witness.

25. I find that the prosecution has established its case. The accused is found guilty as charged. And is accordingly convicted.

DATED this 9<sup>th</sup> day of June, 2009 at KERICHO

**M.A. ANG'AWA**

**JUDGE**

R.K. Koech Senior State Counsel instructed by the Attorney General for the state – present

J.R. Kimetto advocate instructed by the firm of M/S Bett & Co. advocates for the accused – present

Accused – present