



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

**Criminal Case 30 of 2008**

1. Criminal Law
2. **Murder**
  - 2.a) Male adult, early 20’s attacked at a bar together with another.
  - 2.b) Sustained injury and admitted for three days to Kericho District Hospital.
  - 2.c) Passed away.
  - 2.d) Two accused namely a patron and watchman at bar originally arrested for assault and released on cash bail.
  - 2.e) Upon death of deceased two charged with murder.
3. Plea not guilty by the two accused.
  - 3.a) **Trial**
    - i) PW1 patron/guest at the bar saw accused NO. 1 assault deceased with a jiko and accused NO. 2 with a rubber weapon whip.
    - ii) One with deceased escaped. Deceased sustained injuries.
    - iii) Police (AP) on patrol at site took injured to hospital and accused No. 1 and 2 to the police station.
  - 3.b) **Defence**  
 Accused No. 1 – police swoop raid was arrested. Wished to call the witness one Erick Kipeygon Kosgey but upon advice of advocate closed his case.  
 Accused No. 2 – police swoop raid. After two days was arrested and charged.
4. **Held**
  - a) Murder ingredient proved.
  - b) Guilty as charged.
5. **Case Law**
6. **Advocates**  
 P. Kiprop State Counsel instructed by the Attorney General for the state.  
 T.M.O. Nyaingiri advocate instructed by the firm of M/S Nyaingiri & Co. advocates for the accused - present

REPUBLIC ..... PROSECUTOR

VERSUS

COLLINS CHEPKWONY ..... 1<sup>ST</sup> ACCUSED

DAVID KIPROTICH SIELE ..... 2<sup>ND</sup> ACCUSED

**JUDGMENT**

**I: Criminal Law**

1. Collins Chepkwony and
2. David Kiprotich Siele are both before this High Court charged with the offence of  
**Murder**

***“Contrary to Section 203 and 204 of the Penal Code.”***

3. The particulars of offence being

***“On the 23<sup>rd</sup> day of July, 2008 at Snow Bar in Kericho Town of Kericho District of the Rift Valley Province jointly with others not before court murdered Patrick Kipng’eno Korir”.***

4. **Section 203** of the Penal Code **Cap 63** reads

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

5. **Section 204**

***“Any person convicted of murder shall be sentenced to death”***

**II: Background facts**

6. The incident in question took place at a bar known as Snow Bar, in Kericho Town. A fight broke out in the inner Section of the bar and spilled into the outer section of the bar Collins Chepkwony, believed to be a patron at the bar was witnessed by PW1, one Kibet Torongei assaulting the deceased, Patrick Kipng’eno Korir and at one point using a “*jiko*” to hit him. The second accused David Kiprotich Siele used a rubber weapon believed to be a whip (*a watchman*).
7. The deceased was with another who managed to escape. The deceased was beaten to such an extent that he laid down on the ground.
8. A crowd gathered. A group of four administrative police were on patrol when they came upon the said group of people surrounding the deceased, who was by then still alive. Taking the matter as a simple assault case, they PW5 and 9 took the deceased to hospital and they took accused 1 and 2 to the police station after arrest.
9. The time was 8.00p.m – 9.00p.m. They found at the bar people drinking and dancing thereafter.
10. PW6 a police constable had thought the matter was an assault case and had the two suspects released on bond. On 28<sup>th</sup> July, 2009 when the deceased passed away they were arrested and charged with murder.
11. PW4, a worker at the bar recalls a commotion/and fight occurring but could not know what and how exactly it was about or started. This commotion went onto the street outside. She was not particularly interested in what occurred.
12. The prosecution called PW2, a medical doctor to produce a post mortem report to court on behalf of a colleague Doctor. On a later date the medical doctor who filled out the form attended court and produced the same in evidence. This was PW8.
13. The evidence was that the deceased died of “*septic shock secondary to peritonitis*”. He found
- a) **Bruises on the forehead left side oozing blood and clear secretions from both nostril.**
  - b) **Laceration on medial aspect of right upper arm.**

c) **Laceration on lateral aspect of right thigh**

d) **Stomach lesser curvature and omental patch Feature of peritonitis on liver and spleen and diaphragm and fibrin Deposits. Gangrenous cecum.**

14. The defence took issue with the doctor personally on grounds that through he may have been a medical officer at the Kericho Hospital he himself was not a pathologist having very little experience. He was paid Kshs. 10,000/= which moneys was never paid to the hospital or government which runs the hospital.
15. This aspect of evidence is a should he referred to the medical practioner and dental board. Whereby the medical doctor admits obtaining Kshs. 10,000/= to perform a post mortem whereby the normal costs for fees to the government hospital is Khs. 750/=.
16. In the evidence before this court, the father of the deceased PW7 and the brother to the deceased PW3 recalled visiting the deceased whilst alive in hospital until he succumbed to his death three days later. The latter recalls attending to a postmortem performed at the hospital and having paid kshs. 10,000/= for this to have been performed.

### **III: Defence**

17. The defence by the accused No. 1 and 2 are similar. Accused No.1 Collins Chepkwony stated that he was arrested in a police swoop that occurred in town. He was released on cash bail. He had no idea of how the deceased died. His attempt to cal a witness one Erick Kipyegon Kosgey was abandoned on advice from his advocate.
18. David Kiprotich Siele the 2<sup>nd</sup> accused herein also stated that a raid occurred when he was arrested by the police. He returned two days later and charged with the current offence of murder. He called no witness.

### **IV: Submissions**

19. The advocate for the accused 1 and 2 stated that no witness was called to court having witnessed the two accused causing the deceased death. The incident occurred at night and it was difficult to identify the suspects.
20. According to the doctors' evidence the deceased died of natural cause. There was nothing to link the deceased death to the two accused.
21. The case, he argued has not been proved beyond any reasonable doubt.
22. In reply the new state counsel who took over the conduct of the case from another and asked for time to prepare his submission and which time was granted, stated that a fight broke out and injuries afflicted upon the accused. The fight was confirmed to be between the accused persons. The deceased sustained injuries with blood from side of head and nostrils.

### **V: Opinion**

23. **Section 206** of the Penal Code **Cap 63** defines Malice aforethought as having been established when the following circumstances, one or more have been proved in evidence by the prosecution.
  - a) **An intention to cause the death of or to do greivous 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 greivous harm to some person, whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or greivous 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 omitted or attempted to commit a felony (*emphasis supplied*)**
24. The evidence before this court is direct. What began as an assault upon the deceased and another not before court turned out to be injuries afflicted upon the deceased by accused No. 1 and 2 herein. The said injuries caused greivous harm to the deceased who was admitted to hospital for three days.
25. When the administrative police arrived at the scene. Soon after they arrested accused 1 and 2 as those who inflicted the said injuries. The intention by the police was to charge both with the offence of assault.
26. Where an assault or greivous harm is caused upon a person and the person dies within one year and a day, such death is termed as murder. The deceased died within three days. The two accused persons were accordingly charged with murder.
27. Both accused defence is that they were arrested in a police swoop. The police on the other hand came to court to state that the two were arrested as a result of assaulting the deceased.
28. The motive of such assault as given by the state counsel in his opening address is that the accused and another may have attempted to rob accused No. 1. Both may have recorded a statement at the police station but because the issue of confession normally is done before the magistrate under the new law such evidence is inadmissible before court.
29. I am satisfied that the two accused afflicted injuries upon the deceased causing him greivous harm that resulted in his death.
30. The accused are accordingly found guilty as charged.

**DATED** this 29<sup>th</sup> July, 2009 at **KERICHO**

**M.A. ANG'AWA**

**JUDGE**

**Advocates**

P. Kiprop State Counsel instructed by the Attorney General for the state.

T.M.O. Nyaingiri advocate instructed by the firm of M/S Nyaingiri & Co. advocates for the accused - present