



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

Criminal Case 30A of 2007

1. Criminal Law
2. Murder

- i. Contrary to section 203 as read with section 204 of the penal code.
- ii. **Particulars of offence**

On 20th October, 2007 at Chelelach village in Bing'wa location in Bomet District of the Rift Valley Province jointly murdered Thomas Ogembo Onyali

- iii. Deceased – Forest guard. Reported to the Chelelach Forest Camp on 30.8.07,

Bomet District

- iv. Very strict in work to ensure forest is not destroyed.
- v. Protected forest and ensure offender apprehended.
- vi. 15.10.07 received information from his informer that his life was under threat and would be murdered/killed after the general election of 27th December, 2007.

- vii. Recorded in an exercise book and gave details to his wife.

- viii. In exercise book names of seven named.

viii. 1. Samwel Sigei

viii. 2. Richard Siele

viii. 3. Julius nick named (Tinet)

viii. 4. Wilson Kibet

viii. 5. Kipsang Terer

viii. 6. Joseph Rotich

viii. 7. Wesley Yegon nick named (Kimajani)

ix. On 19.10.09 persons arrested with charcoal from forest taken to police escorted by PW10 and PW

x. Went to sleep but at 1.00a.m. A gang attacked the deceased and his wife alone in their house. Deceased fight off gang. Had cutlass by the bed. Wife managed to run out. Deceased left behind with 10-15 people who attacked him.

xi. Deceased shot with three bows. cut on body with cutlass machet and set on fire.

xii. Neighbour who heard screams that night PW7 and 8.

xiii. Widow to deceased had run naked to the neighbours. She too had been beaten to stop screaming.

xiv. Widow ran to PW2's home and wife clothed her.

xv. PW8 hid with children behind house, also wore clothes to look for chief.

xvi. Chief arrived at scene with PW8 and others, found deceased burnt.

xvii. Stayed at scene.

xviii. Police arrived to investigate.

xvii. Received exercise book and began to track suspects.

xx. That the prosecution proved the said suspects for deceased nature of murder was stopping any encroachment and felling of trees to make charcoal.

xxi. This created enmity namely accused NO. 4, a forest guard who were a threat to his life (PW11) that he was transferred another guard remained but in constant contract.

xxii. Incident earlier reported of attack on forest guard

xxiii. Incident of escape of prisoners deliberately from custody.

xxiv. Police through arrest of suspect able to obtain cell phones of Accused 4 and Accused 5. The crucial message "*Iko shida camp*"

xxv. Police arrested Accused 1 -8 and charged them of murder of deceased. Others not arrested.

xxvi. Formal witnesses' doctor, scenes of crimes gave evidence.

xxvii. Mental assessment of the accused persons.

3. Defence

i) That the accused person all deny the offence.

ii) Each claimed to have been asleep or not at the place where the murder was committed.

iii) Accused 1 - There are three other people having his similar name.

Accused 2 - Not at the scene and was asleep

Accused 3 - Looked for another not at scene.

Accused 4 – Received SMS “*Iko shida Kampi*” because his colleague attacked.

Accused 5 – Sent SMS

Accused 6 - Not at scene

Accused 7 – Went to market and slept

Accused 8 – not at scene

4. **Submission by advocate for accused 1-8**

- a. Only PW1 saw accused attacked, never identified assailant.
 - b. PW3 visited scene.
 - c. The rest gave hearsay evidence.
- d. Exercise book should not be treated as evidence as not signed- not a dying declaration.
 - e. No full description of suspects on exercise book.

5. In reply by new State Counsel who did not have conduct of case. The former state counsel having resigned to be magistrate.

- i) That there is a case against the accuseds.

6. **Held –**

- i. Accused No. 4 guilty as charged.
- ii. Evidence of death threats to deceased. Convicted Accused 4
- iii. No evidence against other suspects. Acquitted.

7. **Case law**

a) **Republic V Yiende**

(VV. Patel J) (1990) KLR 400

b) **Kihara V R (1986) KLR 473**

(Nyarangi, Platt Gachuhi JJa)

c) **James Mwangi V R (1983) KLR 327**

Madan Potter JJa and Chesoni Ag Ja

8. **Advocates**

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

J.K. Kirui advocate instructed by the firm of M/S J.K. Kirui & Co. advocates for the 8th accused - present

REPUBLIC PROSECUTOR

VERSUS

SAMMY KIPRONO SIGEL.....1ST ACCUSED

RICHARD KIPYEGON KORIR alias SIELE2ND ACCUSED

PHILIP KIPLANGAT BETT3RD ACCUSED

SIMON KIPKIRUI LANGAT4TH ACCUSED

GIDEON KIPRONO SANG5TH ACCUSED

ANDREW KIPLANGAT ROTICH alias KANGASIA.....6TH ACCUSED

RICHARD KIPKEMOI SIELE7TH ACCUSED

MOSES KIPKOECH LANGAT8TH ACCUSED

JUDGMENT

I: Procedure

1. The criminal case before me is of murder. The eight accuseds have been charged with the said offence under **section 203** as read with **section 204** of the Penal Code.

2. The particulars being that

“On the 20th October 2007 at Chelelach village in Bingwa location in Bomet District of the Rift Valley Province jointly murdered Thomas Ogembo Onyali”

3. Seven appeared before Kimaru J on 5th November, 2007 and took a plea of not guilty. Then later an 8th accused was arrested and charged in case NO. 2 of 2008. The two files were accordingly consolidated (*Mugo J*). The case was not reached.

4. On 9th April, 2008 the trial commenced before Koome J. The case was adjourned to 29th May, 2008 when the station obtained a permanent Resident Judge. New dates of 27th, 28th and 29th October, 2008 (*Kariuki J*) were taken for hearing. This was adjourned and new dated fixed for hearing for 6, 7 May, 2009.

5. The conduct of both the state of the defence advocate has been commendable in this very complex matter.

II: Facts of case

6. Thomas Ogembo Onyali (*now deceased*) was a forest guard. He reported to the Chelelach Forest camp on 30th August, 2007 in the Bomet District. He was zealous in his work being very strict to ensure that the forest is not destroyed. He worked with the community policing to arrest offenders, to ensure that no felling of trees and burning of charcoal would be undertaken.

7. Just two months of his stay at the forest station he received death threats from his workmate. One who gave him a difficult time was accused No. 4 and PW9. He reported to PW11 who took action and he transferred accused No. 4 from that station PW9 and accused No. 4 kept in touch nonetheless.

8. On 15th October, 2007 he recorded in an exercise book that he handed over to his widow the following words:-

Page No.1

“10.9.07

Onyar Charles

Tel 0710240117

Wife’s. No. 0710240116

My account No. 12512634600

(National bank)

PIN”

Page 2

“12.9.2007

I reported at Chepalungu. Chelalach Forest Camp on 30th August, 2007 at Bomet District”

Page 3

15.10.2007

“The following are the people who will be held responsible in case anything bad happens to me. I have been given these names by my informers who told me that, they were planning to kill me immediately after general election which will be on 27.12.07. They say I am a Kisii immediately after in tribe also when I find then destroying the forest. I am strict. The names of the suspects are:

6.1. Samwel Sigei

6.2. Richard Siele

6.3. Julius nick named Tinet

6.4. Wislon Kibii

6.5. Kipsang Terer

6.6. Joseph Rotich

6.7. Wesley Yegon nick named (Kimajani)

9. The advocate for all eight accused in submission stated that this exercise book amounts to a dying declaration and should not be taken seriously, because the deceased was not expecting imminent death. He relied on the case law of

Kihara V R

HCCR. 54/85

where it was held caution must be taken in such evidence.

R V Yiende

Kisii HCCr Case No. 16/90

that a dying declaration is of the weakest of evidence as is made in the absence of accused person and it is not subjected to cross-examination.

10. On the 19th October, 2007 the deceased, according to his widow and other officer, had prisoners arrested from the forest brought to the camp. The said prisoners were thereafter transferred to the police station to be charged in a court of law. The guards PW8 and PW13 gave evidence that they took the said prisoners.

11. Both the deceased and PW1 his widow went to sleep that night. Her husband always slept with a cutlass/matchet on the floor. At around 1.00a.m they were attacked by a gang of people. She screamed. She saw about ten persons. They hit her on the chest to keep quite. Her husband grabbed his cutlass matchet and went out of the door. They followed him out. She had a chance to run out. She turned to see a borne fire. She ran to the neighbours, being PW6.

12. The deceased in the mean time was attacked with arrows that was found embedded in his body. His legs and body stomach was cut and guts protruded out. It was thereafter that he was set on fire.

13. There was screams from the deceased and earlier his widow. These screams were heard by PW7 who feared and went to hid in the maize plantation. He could see about 10 to 15 people. PW8 took his family outside the house and also hid. He too heard the screams and saw the fire ablaze. He then asked for his clothes and ran to call the chief.

14. PW6 saw the blaze. He only came out when the deceased widow knocked at his door. Realizing she was nude, he asked his wife to assist her.

15. PW7 and others, after the gang had fled leaving the weapons behind, sat by the body. They lit a fire to ward off the marauding dogs who may eat the body.

16. In the morning the police moved in to begin their investigation. The chief had already arrived at the scene.

17. The prosecution brought in evidence of the conflict the deceased faced as a forest guard. This was indeed the attack that came upon the forest workers. The arrest of suspects and how such suspect would escape mainly because they would offer bribes to be released.

18. It was also the prosecution case that the motive behind the murder of the deceased forest guard was

due to his resisting those who were plundering the forest.

19. Using the exercise book the police attempted to arrest those named. They were able to obtain the cell phone of accused 4 and 5. Accused No. 5 had, SMS to accused 4 the words “*Iko shida kampi*” translation “*There is problems at the camp*”.

20. The police proceeded to arrest all the eight accused though not all 10 to 15 persons were arrested.

21. It was the prosecution case that the deceased person was murdered in cold blood by a gang of persons.

22. One theory by an officer, who escorted the prisoners to police, was that a member of parliament from the locality had been attacked in Kisii and therefore the animosity. He left that night and proceeded to his home area.

23. Medical officer PW19, the medical evidence by him produced on the postmortem of the deceased. He produced the report on behalf of another doctor not available who was not able to attend court for good cause.

24. The mental assessment report were under taken for the accused persons.

25. The police prosecution were able to produce the scenes of crime evidence. The photograph of the charred burnt and cut up body. They produce evidence of the cell phones and the SMS implying there was communication between the accuseds.

26. This court allow the cell phones to be charged in court but the pin numbers was required to Open the phone. The accused refused to actually put in a pin number as they denied the cell phones was theirs.

27. The safaricom print out was able nonetheless to confirm that the SMS was being communicated and used on the said numbers. There were more than one Sim numbers to the phone.

28. They produced a panga, – cutlass a radio said to belong to the deceased. Assorted weapons which were taken to the government analysis with the deceased blood group. The blood group was confirmed to be “B” whilst that of accused No. 5 was “O”.

29. The eight (8) accused were put on their defence.

III: Defence

30. Each of the accused opted to give an unsworn statement. Each gave evidence that amounted to saying they, were not at the scene at the time the murder occurred.

31. Accused No. 1 stated he was named as Sammy Sigei in the exercise books. There were in fact three other persons whom he knew with his name.

ii) Accused No. 2 stated he was asleep and was not at the scene.

iii) Accused No. 3 was at the time visiting one Dave Chepkirui He was informed by his wife that he was with David Cheruiyot. He did not find them.

iv) Accused No. 4 received an SMS of “*Iko shida kampi*” “there is a problem at the camp”. He did this because his colleague had been attacked.

v) **Accused No. 5 admitted sending SMS. Stated he was a teacher and was concerned. He gave an elaborate proceeding to show he was not at the place mentioned.**

vi) **Accused No. 6 stated he was not at the scene. He had been away for nine (9) days.**

viii) **Accused No. 7 went to sleep.**

ix. **Accused No. 8 was not there and in fact went away for Christmas.**

IV: In submission

32. The advocate for the accused stated what is based herein is circumstantial evidence. This type of evidence is one of inference of guilt. He relied on the case law of

Ali V R

Misc. Cri. Case 155/88

James Mwangi 33/83

“That in a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be compatible with the innocence of the accused. The guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt”

33. The State Counsel who was prosecuting this matter has since left the employment to join the bench. His submission was by a new state counsel who best stated that a case has been made out.

V: Opinion

34. The 1-8 accuseds were arrested by the police as part of their investigations. I did note that most of their investigation was interrupted by the rapid transfer of the said officer that there are instance of the investigations that was not complete. An investigating officer should be able to prosecute their investigation to its finality.

35. The circumstantial evidence before court begins with the exercise book. The advocate for all accused stated that the exercise book was not signed and did not indeed completely identified with the deceased. I would not wholly agree with this argument but state that was the document the deceased had presented to his widow to keep and disclose. The best the prosecution could do is to pursue the said mentioned persons. This would be followed up with a confession.

36. I would nonetheless look at the evidence of PW11. A forest officer, who stated, that the deceased shared with him that he was threatened by accused No. 4 who at all times would leave camp to go and

have alcohol. He caused his transfer.

37. PW10 a forest guard called Richard Ngeno were deployed at the Bomet Station. Before the deceased came to work at the station, he and accused No. 4 were involved in the selling of the forest trees although they were guards. They were with accused and were interdicted. On the 12th September, 2007 the deceased had by then arrived to the station, together with PW7 and 8 were enforcing the forest laws. He stated that as they worked they found charcoal in the home of one David Kemei. The youth was arrested. The father to the youth attempted to bribe them to release the youth He did so but he PW10 did not get anything.

38. Later he went to drink chang'aa. They were to then return to work but the accused No. 4 declined.

39. There was resentment for the deceased as they PW10-the forest guard and accused No. 4 were transferred.

40. I am of the opinion that the strongest evidence I have is against the accused No. 4 herein the forest guard whose lively income of taking bribes from members of public and working on the forest to sell the same was indeed a motive for murder. The threats reported from him to PW11 a supervisor officer who caused his transfer did not help.

41. I would accordingly find the said accused No. 4 Simeon Kipkirui Langat guilty of murder with others not before court and convict him.

42. The other accused persons needed to have more investigations carried out against them. This was not complete. I would give them the benefit of the doubt and set them at liberty unless otherwise lawfully held.

DATED this 3rd day of August, 2009 at **KERICHO**

M.A. ANG'AWA

JUDGE

Advocates

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

J.K. Kirui advocate instructed by the firm of M/S J.K. Kirui & Co. advocates for the 8th accused - resent

SENTENCING

The probation report did not recommend Probation. The offence committed does not provide for a non-custodial sentence.

The antecedent is not favourable to the convict.

SENTENCE DEATH

Right of appeal explained

M.A. ANG'AWA

JUDGE