



**REPUBLIC:.....PROSECUTOR**

**VERSUS**

**KIPROP NGETICH:.....ACCUSED**

### **JUDGMENT**

**KIROP NGETICH** is 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 Kipro Ngetich on the 23<sup>rd</sup> December 2007 at around 5:00pm at Cheplabus Sub location Tenges Division in Baringo District of the Rift Valley Province murdered **KIPNGETICH CHIRCHIR**.

The prosecution called a total of eight (8) witnesses. PW1 was Doctor Philip Mbithi a medical doctor stationed at Kabarnet District Hospital. He holds a medical and surgery decree from the University of Nairobi. On 31<sup>st</sup> December 2007 he performed a postmortem on the body of Kipro Ngetich Chirchir. The body had blood stained clots and there were blood clots on the head face and the back. The body had multiple cut wounds 3 of them on the head. The one on the right frontal area measured 26 centimeters in length and the other two were parieto occipital and measured around 10 centimeters in length. There was a cut wound on the back around the right scapula region measuring about 12CM in length. There was a small cut wound on the left hand and another on the left leg both measuring about 3 centimeters. The head had massive occipital scalp haematoma, the skull was fractured from the frontal to the occipital region. There was both extra and subdural massive intracranial hemorrhage and the parietal cortex of the brain was pierced by bone fragments. As a result of his examination he formed the opinion that the cause of death was severe head injury and massive hemorrhage resulting from multiple cut wounds. He produced the post mortem report – P exhibit No.1.

His further evidence was that on 8<sup>th</sup> January 2008 he performed a mental examination on the accused who was unkempt but mentally oriented and fit to stand trial. He produced the P3 form in respect of this examination – P Exhibit no.2. On cross examination he stated that although not a pathologist by specialization pathology was part of the training leading to his degree and that from the nature of injuries a doctor can detect the type of weapon used and in this case he said it was a sharp long weapon.

**KOPILO NGETICH** was PW2 and the wife of the deceased and the mother of the accused herein who was her first born. Her evidence was that on 23<sup>rd</sup> December, 2007 at about 5:30 pm she was at home with her late husband. She and her husband finished taking dinner and then left to open for their goats. She heard her husband screaming and on coming back she found the accused cutting her husband. She had left the husband alone when she went to unteether their goats. When she saw the accused cutting the deceased she screamed calling for help from her other children. She did not speak to either the accused or the deceased. The accused continued cutting the deceased as the witness continued screaming. Her other children Daniel Ngetich (PW3) and Miriam Ngetich (PW4) came running to where the deceased and the witness were. The accused had ran away by the time the two arrived. The deceased had collapsed and they helped him to Kabarnet District Hospital. The deceased died the following day. She said the deceased was cut on the head and other parts of the body. The witness was at a loss as to why the accused would attack his father as the accused was not at home that day and only came in the evening and she was also not aware of any differences between the accused and the deceased. She said the killer

panga was the accused's and she identified it in court. On cross examination she maintained that she saw the accused cut the deceased. She was gone for about 3 minutes when she saw her son the accused walking towards the couple's house but did not talk to him. She did not know whether the accused and the deceased talked all she heard was her husband screaming about a minute after she left to unteether the goats and she ran back and found her son the accused cutting her deceased husband and he continued cutting him even as the witness screamed. She said that the accused used to work in people's shambas as a casual labourer and he was gone the whole day. She did not know why the accused cut the deceased.

Daniel Kiprono Ngetich was PW3 and he is the son of the deceased and PW2 and a brother of the accused. His evidence is that the accused is his elder brother and the deceased his father. He was in his house which is near his parents house on 23/12/2007 when he heard a scream from the direction of his parents house. It was a woman screaming. He immediately ran towards the house and on the way he met his sister Miriam (PW4) who was calling the witness as she also screamed. He realized that his mother (PW2) was also screaming. While the witness was about twenty (20) meters away he saw the accused cutting their father. As he approached the house the accused saw the witness and ran away. On getting to the scene he saw his father lying down and the accused running away. The witness pursued the accused. The accused fell down and got up and continued running. The witness found a panga where the accused had fallen. He went back and tried to talk to his father but the latter was not able to talk. He and Miriam tried some first aid and then he called his brother Samuel Ngetich (PW5) on the phone and informed him what had happened. The witness and Miriam (PW4) carried their father and met their brother Samuel Ngetich (PW5) on the way in a motor vehicle and Samuel Ngetich and someone he had come with in the vehicle took their father to hospital and the witness and Miriam went back home. The witness then reported the matter to the chief and he called three of his friends on phone and told them what had happened. A day after the deceased's death the accused was arrested at a local brew "busaa" drinking place by members of the public. The witness arrived when the accused had already been tied with ropes by the public and this witness rang PW5 who in turn called the police. The accused was led to the chief's camp where he was re-arrested by an administration policeman. Police came for the accused at about midnight and took him away. The witness said that he was the one who recovered the panga. It was a small panga with a tyre handle and had blood stains. He identified the panga marked MFI 3 as the killer weapon. He said that he had seen the panga earlier in the accused's house. He did not know what could have led the accused to kill his father. He was not aware of any bad blood between the two. He said that the father used to drink busaa but there was none at home that day.

On cross examination his evidence remained the same and added that the accused used to beat his wife who had ran away to her parents. He repeated that he recovered the blood stained panga which he later gave his brother Samuel Ngetich (PW5).

Miriam Ngetich was PW4. She was the sister of PW3 and that of the accused. On 23/12/2007 she was in her house with her children when she heard her mother (PW2) screaming. She ran towards her mothers' house which is about 10 meters from that of the witness. On seeing the accused cutting her father the witness ran back to call her brother Daniel (PW3) who came running past her towards their parents' house. She said the accused ran away carrying a panga before she and PW3 got to the scene. The accused dropped the panga and ran away. At the scene the father could not talk as he was badly cut on the head and on the body. She said PW4 called PW5 on phone who advised them to carry their father to the road which they did and met the brother PW5 on the way in a vehicle and he took the father to hospital. He was given the panga by PW3. The witness identified the panga in court and said the relationship between the accused and the deceased was not bad and so she did not know why the accused cut his father.

On cross examination she confirmed that Daniel (PW3) ran faster than her and so got to the scene before her and that on the way to the scene she saw the accused running away. She also had seen him cutting the deceased. She saw the accused fall down, drop the panga and get up and continue running. She saw no stones or sticks at the scene. PW5 was Samuel Ngetich who told of how he received a call while at his butchery at Flouspar. The call was from his brother Daniel PW3 informing the witness the deceased had been injured by the accused. He got a motor vehicle and proceeded towards home and on the way he met PW3 and PW4 escorting their father. The witness took the deceased and put him in the motor vehicle and

took him to hospital. He said his father was badly cut on the head and on the body and could not talk when the witness saw him. He took his father to hospital where he died later that night. The witness said that his father never spoke up to the time he died. The witness was given blood stained clothes and a panga by PW4. He said he was told the panga was used to cut his father and the clothes were left at the scene by the accused when he fled. He reported the case at the D.O's office. He identified the panga in court as being the one he was given by PW3. He said he would not know why the accused cut his father as he was not aware of any bad blood between the accused and the deceased. He maintained his evidence in cross examination.

Police Constable David Musyimi No.57143 was PW6 and also the investigating officer in the case. On 24/12/2007 at about 9:30 pm he was at his work station at Kabarnet police station when he was asked by the station commander to proceed to Tenges to collect a murder suspect. He and P.C. Omweri proceeded to the scene at Cheplambus where they found the accused tied with ropes by members of the public. They re-arrested the accused and took him to the police station. He recorded all the statements of the witnesses as well as that of the accused. He attended the post mortem on 31.12/2007. He said he received a panga which he was told was the killer weapon. He produced it in evidence as P Exhibit number 3. He said he prepared the exhibit and memo and took blood samples to the Government chemist for examination. He produced a brown checked coat which he said he recovered from the accused. It was marked as P.Exhibit no.4. He also produced a trouser worn by the deceased and which he recovered from the body of the deceased at the mortuary. He identified the trouser in court and produced it in evidence as P.Exhibit number 5. In an attempt to ascertain the blood groups he collected, the witness forwarded to the Government chemist the accused's blood sample, the deceased's blood sample, the blood stained trouser of the deceased, the accused's blood stained coat and the blood stained panga. He signed the exhibit memo form a copy of which he produced in evidence and it was marked P. Exhibit number 6. His evidence was that he could not establish why the accused killed his father. He gathered that the two were together in the morning and the accused came in the evening and cut his father. On cross examination he maintained that he visited the scene but did not take photographs as the body was already at hospital. He said the accused looked normal when he re-arrested him and it was the accused who told the witness that he accused was with the deceased in the morning of the attack.

The Government Chemist was PW7. He is Stephen Matindi Joel Woibe who holds a Bachelor of Science Degree in Chemistry from Moi University. He worked at the Government Chemist Laboratories Nairobi. His evidence was that on 11<sup>th</sup> January 2008 he received from P.C. David Musyimi (PW6) blood sample of the accused, that of the deceased, a cream black checked pair of long trouser, a grayish coat and panga for purposes of ascertaining whether there was a relation between the blood on the items. His findings were that the accused's blood group was O. The blood sample of the deceased, the stains on the cream black checked trouser, greying coat and on the panga were all of blood group B. He formed the opinion that those stains could have come from the deceased blood after injury. He produced his report and it was marked P. Exhibit no.7. On cross – examination he said that time does not affect the result of analysis. Mark Toroitich Mete gave evidence as PW8 and it was that he was at home on 24/12/2007 morning when PW3 flashed him on his phone and he ignored it. PW3 later called him asking him if he had seen the accused. He said he was told that the accused had killed his father and should he see him he should help arrest him. The witness and three others mounted a search and they found the accused drinking "busaa" at the house of Joseph Cheruiyot. On seeing the two the accused started running away. The two called on everyone present to assist arrest the accused and he was arrested and tied with ropes. They started the journey to the Chief's office and on the way the accused was asked whether he knew why he had been arrested and he said that he did not know. On cross examination he reiterated that the accused started running away on seeing the witness in the company of PW3 but they pursued him and tied him up. That marked the prosecution case. The court assessed that evidence and ruled that the accused had a case to answer. The accused opted to give unsorwn evidence. He spoke in Tugen and Japheth Koroni interpreted. The accused testimony in his defence was that he was not at home on the material day as it was campaign time for the 1997 General Election. He said he came back on 24/12/2007 and went to drink Busaa from some house where it was being sold. He said he drank and got very drunk. Some young men came and arrested him and beat him and took him to the chief's office. Later police came and took him away to the police station where he slept. The following day he asked what had happened and he was told that he was drunk and that he had killed somebody. He said that he denied but

he was beaten and kept at the police station until he was brought to court.

I have carefully considered the testimonies of all the prosecution witnesses as well as that of the accused. I have likewise taken into account submissions by counsel for the accused at no case to answer.

I find that the widow of the deceased saw her own son the accused herein cutting her husband viciously with a panga a few minutes after she had left him at home to go and untether their goats a few meters away and to bring them home. The other children of the couple Daniel Ngetich and Miriam Ngetich answered their mother's screams and as they ran towards her house and while still a distance away they both saw the accused cut their father severally. As they came nearer the scene and when the accused saw PW3 he ran away. PW3 pursued the accused who tripped and fell dropping the panga he was holding. He got up quickly and continued running. PW3 then recovered the panga which was blood stained. These three were eye witnesses. Their evidence is believable. The accused was a very close kin against whom they bore no grudge and there was no bad blood between them. Their evidence was consistent as to who injured the deceased. The evidence of PW2 was direct first hand eye witness evidence. She saw her son cut her husband and continue cutting him even as she screamed. I believe the evidence of these three witnesses as to the cutting and therefore the injuring of the deceased. This brings me to the evidence of PW1 and the post mortem report. The injury and massive haemorrhage resulting from multiple cut wounds. I find as a fact that these are the cut wounds the accused was seen by PW2, PW3 and PW4 inflicting on his father. And I further find that they are multiple because as per the evidence of PW2, the accused continued cutting the deceased even as PW2 continued to scream. The evidence of PW8 as to the arrest of the accused deserves consideration. He said that the accused began to run away upon seeing the witness and the other two young men who included PW3. There was no conversation between them and the reason the accused ran away was because he saw PW3 who the previous day had pursued him as he ran away from the scene of his attack on his father. I will revert to this evidence of running away later. I believe the evidence of PW2, 3 and 4 and find and hold that it was the accused who cut his father fatally injuring him and that he ran away and was arrested the following day by PW8 with other young men.

All the witnesses who knew the accused and his father gave evidence that there was no bad blood between the accused and his father and none could understand why the accused would wound his father fatally. There was no one present when the accused arrived at the deceased's home and started cutting him with a panga. No one therefore can explain what led to the attack. What is now not in doubt is that it was the accused who attacked his father the deceased. The accused's testimony is that he was nowhere near the scene of the attack. That sort of evidence was not brought up anywhere in cross examination of the relevant prosecution witnesses more particularly PW2, PW3 and PW4 who said that it was the accused who attacked his father. Accused was represented all through by counsel and if he wished to set up the defence of alibi then that would surely have been brought up as per the known procedure and the question of his absence from the scene of the attack would have been put to the witnesses in cross examination. The reason this was not done in my considered view is that the alibi is an afterthought and a very poor one at that. The accused did not explain where his jacket was stained with blood whose group matched that of his injured father if he was nowhere near the deceased. He did not deny that the panga produced in court and said to be the killer weapon was his panga. The accused's evidence is clearly a cock and bull story. I do not believe it. Instead I find and hold that the accused inflicted the fatal multiple wounds on his father.

The question that now begs is whether the accused possessed necessary malice aforethought. S. 206 (a) of the Penal Code cap.63 of the Laws of Kenya deems malice aforethought to be established by evidence showing an intention to cause death or to do grievous harm. And it will be remembered that the prosecution does not have to prove the motive for commission of any crime and neither is evidence of motive sufficient by itself to prove the commission of a crime by the person who possesses the motive, see **KARUKENYA & OTHERS –VS- R (1987) KLR 458, (1982 – 1988) I KAR.** The position in this case is that malice can be inferred from the vicious and brutal cutting on several parts of the body of the deceased by the accused. That vicious and brutal attack and the multiple times it was repeated coupled with the force with which it was inflicted resulting in deep cuts and broken bones can only have been intended to result in grievous harm if not death. It can be reasonably inferred that the accused fully

intended the consequences of his action and death here was a direct result of the multiple cut wounds inflicted by the accused on the deceased.

The accused ran away from the scene of crime on seeing his siblings PW3 and PW4. He similarly ran away from his "busaa" drinking place upon seeing PW8 and PW4 and 2 others the day after the attack on his father. This is the conduct of a guilty man. Bearing in mind all the above I find and hold that the accused inflicted the fatal multiple cut wounds on the deceased and further that he was possessed of the requisite malice aforethought and I am satisfied that he is guilty as charged of the murder of his father **KIPNGETICH CHIRCHIR** contrary to the provisions of section 203 as read with section 204 of the Penal Code and I accordingly convict him.

**DATED AND DELIVERED AT ELDORET THIS 29<sup>TH</sup> DAY OF OCTOBER, 2009**

**P.M.MWILU**

**JUDGE**

**MITIGATION:** I pray for pardon. I pray for mercy. I need to go and see my children; my brothers and my mother and I live with them.

**P.M.MWILU**

**JUDGE.**

**SENTENCE:** I have heard the mitigation. I have considered the same. The law allows for only one punishment for this type of offence. Accordingly I sentenced the accused to death as by law provided and in the manner provided by the said law.

**P.M.MWILU**

**JUDGE**

Right of Appeal within 14 days.

**P.M.MWILU**

**JUDGE**