



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
Criminal Case 08 of 2008

REPUBLIC PROSECUTION
VERSUS
SAMWEL KIPNG'ENO BIRIR ACCUSED

JUDGMENT

I: Procedure

1. On the 6th March, 2008 the accused Samwel Kipngeno Birir was 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 21st day of February, 2008 at Kategat village in Bomet District within the RiftValleyProvince murdered Richard Kiprotich Ngeno”.
3. A plea of not guilty was entered (*Maranga J*) and the hearing date scheduled to hear the case was set for the 9th November, 2008 (*G.B.M. Kariuki J*).
4. On that day the accused pleaded guilty to the charge but after consulting with his advocate this court entered a plea of not guilty.
5. This court decline to have evidence from his wife be brought against him.

II: Backgrounds facts.

6. The accused person has a large family- there seems to be at least two houses in which he has several children.
7. PW2 his 21 year old son informed the court albeit reluctantly that he had quarreled with his father. His step brother now deceased also quarreled with him over iron sheets that he intended to take to actually construct from the store against his father wishes. He himself quarreled with the accused over not weeding the tea plantation/garden
8. The chief was informed of an incident of the accused cutting his son. He went there and found a slit wound at the throat the accused had been arrested and brought by members of the public. The deceased had a cut wound on the head.

9. The body of the deceased was levied to the district hospital. PW4 took relatives for the post mortem report and had a post mortem conducted. A doctor attached to the hospital (PW6) confirmed conducting the post mortem on the 26th February, 2008 at about noon. The body he stated on being identified and pointed out to him was well preserved and refrigerated. The body was well nutritioned and the only injury was the slit throat.
10. As to the accused he was found to be mentally fit and having a wound on his head.
11. The relative to the accused PW7 had arrived first after the assault incident and assessed. He saw the deceased had been cut at the neck. Another witness PW10 also proceeded to the scene where he had heard the screams. He found the deceased on the ground and found he had bled from the throat excessively.
12. The prosecution then called Chief Inspector Shadrack Opiyo (*No. 218501*) who had been given the accused to take a charge and caution statement on 4th March, 2008 at 4.30p.m. The accused made a confession to him after being warned of the charge of murder facing him. The accused opted to make a confession and said "It is true but he was the first to cut me with the panga"
13. When the accused was placed in his defence he opted to give unsworn statement. He denied any offence and spoke as if nothing unusual happened. According to him he heard of the death of the son. He attempted to go and look for an ambulance to take the deceased to hospital.
14. His witnesses stated that they arrived after the incident DW2 on receiving information saw members of public left the accused up and promptly arrest him and take him to the chief's office. The advocate for accused called DW3 who stated he came after the incident but did not see the accused. Both witnesses saw the deceased laying in a pool of blood.

II: Opinion

15. The prosecution have proved that the deceased met his death unlawfully. The murder weapon was produced before court having been recovered under the deceased's mattress. In the processes of running away the accused bruised his head with tea branches.
16. He was arrested immediately and the deceased's cut at the throat was fatal.
17. The court herein requires to ask whether the deceased had any malice aforethought and did accordingly cause the death of the deceased?
18. **Section 206** of the Penal Code describes malice aforethought as being "established in evidence proving any one or more of the following circumstances.
 - a) **An intention to cause the death of or to do grievous 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 grievous harm to some person whether that person is the person actually killed or not,**

although such knowledge is accompanied by indifference whether death or grievous 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 committed or attempted to commit a felony”**

19. The accused is herein a person who had the intention to cause the deceased’s death. He had knowledge that his act or omission or would cause the death to the deceased.
20. There is a possibility that the accused may have been provoked. The deceased herein is said to have picked a quarrel with him. the state said the accused had time to “cool off”
21. Provocation means and includes under **Section 208(1)** of the Penal Code
“ any wrongful act or insult of such nature as to be likely when due to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal parental, filial or fraternal relation or in the relation of master or servant to deprive him of the power of self- control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is due or offered”.
22. The relationship between the accused and the deceased was such as cause the accused to commit the said offence.
23. The accused did not plead provocation in his defence nor did his advocate lead this evidence. Instead the defence was a denial that the accused was not at the scene.
24. The evidence through shows clearly the accused being apprehended immediately after the incident.
25. I find the accused guilty as charged.

DATED this 17th day of December, 2008 at **KERICHO**

M.A. ANG’AWA

JUDGE

Advocate

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

J.K. Koskei advocate instructed by M/S Koskei & Tegekyon & co. advocates for the accused/appellant – present.

