



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

Criminal Case 27 of 2003

REPUBLIC PROSECUTOR

VERSUS

**PHILIP KIPCHIRCHIR KIPLAGAT
ACCUSED**

JUDGEMENT

The Accused was charged with the offence of murder contrary to Section 203 as read together with 204 of the Penal Code. The particulars of the Charge were that on 8th December, 2002 at Kipsaos Trading Centre in Keiyo District of the Rift Valley Province, jointly with another not before Court murdered **CYRUS KIPCHIRCHIR CHEBOI**.

The Prosecutor called seven (7) witnesses. PW 1 Luka Kiptoo Chelelgo testified that he is a farmer living in Kipsaos Sub-Location. On 8th December, 2002 he went to he nearby Trading Centre. He went to a hotel called Highway Hotel. He was with the then Chief of the Area, Elijah Barsai. They listened to the News Broadcast and sat there until 8 p.m. when he decided to go home. As he was waiting for the Chief to come out of the Hotel he heard someone called him “Luka, Luka – unisaidie nimechomwa na Kisu.” which means “Luka Luka, help me, I have been stabbed with a knife.”

He said that the person calling him was Robert Kipkurui Chelashaw. He was PW 1’s brother’s son. He said that Robert was 20 metres away. PW 1 said he could see though it was at night since he stood near a security light which was an electric bulb. PW 1 said that he climbed some stairs when Robert came to where he was. PW 1 lifted and removed his shirt. Robert had a knife wound on his chest.

PW 1 said that he rushed to get his vehicle so that he could assist. The vehicle was ½ Kilometre away. When he brought his car he was told that he had died. However, in fact Robert was brought to his vehicle. He was still alive. PW 1 realised that there was another person who had also been injured and now had died.

PW 1 said that they took Robert to Kamosor Dispensary where they were advised to go to Moi Teaching and Referral Hospital as they could not manage treating the injured man. PW 1 took Robert to the said Hospital. While in the car, PW 1 said that Robert did not tell them anything to do with the attack. He did not also want to shock him with the news of the death of the other person.

Later at about 2 a.m., Robert told him that Philip and his brother called Smith had gotten hold of one Chepngoso when he decided to help the man. Philip and Smith were drunk. PW 1 said Philip stabbed him for trying to intervene. Robert (PW 3) ran away. He heard the screams of the son of Chepngoso fade

away. Robert stayed in the hospital for one month.

On the said day PW 1 went back home. People had not slept. They went to look for the suspects.

PW 1 testified that he later heard that Philip had been arrested by Administration Police and that he had been taken to the District Officer's office. PW 1 followed with his car. At the District Officer's PW 1 said that he saw Philip get out of the car. The Administration Police asked him to surrender the knife. PW 1 said Philip give a knife to the Administration Policemen. PW 1 was 10 metres away. PW 1 identified the accused Philip Kipchirchir in the Court. He says that he had known him since the accused was a young boy. PW 1 said that he was an age-mate with Philip's father.

PW 2 was Professor Koslova of Moi University, School of Medicine, Department of Forensic Medicine. She carried out the post mortem on the body of the deceased on 13th December, 2002. She said that there was a stab wound penetration into the abdomen. The liver, oesophagus and Aorta were blemished caused by heavy bleeding. She opined that the weapon used was a double edged object. The stab injuries were double edged.

The cause of death was the stab wound penetrating into the abdomen. There was damage of the abdomen cover, oesophagus, thoracic aorta with subsequent excessive loss of blood. She said the weapon could have been a knife and sword having a curving tapering end.

PW 3 stated that he was a public service conductor (matatu) on the Eldama Ravine – Eldoret Route. On the 8th December, 2002 he went to the Stage Hotel at Kipsaos to look for something to eat but they had no food. He then went to an eatery called Highway Hotel but also found that food had been finished. It was about 8 p.m. He decided to go home.

On the way he met three (3) people. They were pulling each other. He said that he knew them as Philip Kipchirchir, Smith Tuikong and Francis Rotich.

He testified that he asked them what the matter was. Smith then got hold of PW 3 then Kipchirchir stabbed him with a knife. He said that he was stabbed on the chest and arm (witness shows the Court the chest wound and the wound on the arm – they had healed). PW 3 stated that he then ran away to get help. He ran to the hotel where his uncle Luka (PW 1) was. He found PW 1 who took him to Kamoswo for Medical Treatment but he was not assisted.

He was then taken to Moi Teaching and Referral Hospital. He was admitted and stayed there for eight (8) days. The police went to the Hospital where PW 3 gave his statement.

He testified that he did not know what happened to the three (3) people he had seen struggling. He said that he later heard that Francis had died. This was two days later. That his brother is called Chemwoso. He said that there was light from the electricity supply at the buildings. He said he recognized the three people. He said he knew Philip, the accused as they went together to school. He identified the accused in Court.

He testified that Philip was holding Francis Rotich by the hand. Smith was following them. He did not hear what they were saying. They did not speak to him. That Francis was standing. After PW 3 left the hospital he went to collect a P 3 form which he returned to the Kaptagat Police Station.

In Cross-examination, PW 3 said that he saw the three (3) men pull each other. He testified that he did not know any Cyrus Kipchirchir Cheboi. That they looked drunk. He stated that he did not know or see Francis stabbed. He does not know who attacked or stabbed Francis. He said he did not know why they were quarrelling. He said that he recognized the three (3) men. There was light from the nearby shops at the shopping centre. That Francis was a brother to one Chemwoso.

PW 4 was the Chief of Kapkwony Location. He is now retired. He said that he remembers the 8th December, 2002. He was watching T.V. at Highway Hotel at Kipsaos Centre at 8.15 p.m. There were

many people. He heard someone call out "Luka, Luka". The voice was coming from the front of the hotel. It was the voice of Robert Kipkurui Chelashaw (PW 3). He came to them and said that he had been stabbed by Philip Chirchir. PW 4 saw blood trickling from Robert's chest, hands and the shoulders.

PW 4 instructed Luka to go and get a car so that they could take him to hospital. When Robert was taken, PW 4 heard shouts by the public. He heard someone shout that "...there is another one here."

PW 4 went to the place and found one person lying on the ground. It was one Cyrus Kipchirchir. He was dead. PW4 then called Kaptagat Police Station. The District Officer arrived after half an hour. The police followed who took the body to Moi Teaching and Referral Hospital.

In the morning, PW 4 went to look for Philip Kipchirchir. He did not find him at his house. He met the mother later at Kapchorwa. She said that Philip's father had taken him to Kamwosor at the District Officer's office. PW 4 then went to the District Officer's office. He said he saw Philip coming out from a car. He was searched and PW 4 saw a knife being removed from him. It was a Masai knife.

When cross-examined he said that he did not have any evidence linking the accused with the deceased's death except the knife and the statement by PW 3.

PW 5 was David Kigen Kiplagat. He denied his statement to the police. The prosecution applied that he be treated as a hostile witness. He was stepped down and witness summons ordered to be served on him to return to Court for examination.

At the next hearing, the Prosecution dispensed with the evidence of PW 5.

PW 6 was Police Constable Joseph Mulinge. He testified that on 8.12.2002 at around 9 p.m. he was called from his house by Corporal Githinji who told him that a murder had taken place at Kipsaos Trading Centre. He boarded a police Land Rover and went to the scene. They found the body of the deceased lying on the ground in a pool of blood. There was a stab wound on the left side of the chest.

They took the body to the Moi Teaching and Referral Hospital. PW 6 stated that on 9th December, 2002 one Sgt Kemboi (now deceased) from District Commissioner's office Kamosor came to the Station having arrested the accused. He received the accused from the members of the public. He had recovered a knife and that the accused had given it to him.

PW 6 said that Kemboi handed to him the knife. That it was blood stained. That the knife was taken to the Government Chemist for analysis together with blood sample of the accused.

PW 6 stated that on 13.12.2002 he attended the post mortem on the body of the deceased by Prof. Koslova.

PW 6 got information that the accused had been with his brother one Smith Kipkoech Tuikong on the material day. On the 15.12.2002 PW 6 arrested the said Smith.

PW 6 charged both the accused and Smith with murder of the deceased. Smith is not in Court. He does not know what happened.

The record shows that Smith was discharged by the Chief Magistrate on 23.7.03 during the committal proceedings.

PW 7 was a brother to the deceased. His name is Joseph Chepngoswo. He is the family member who attended the post mortem on 13.02.02 and identified the body.

The Accused was placed on his defence. He gave a sworn statement. He denied allegations against him. He testified on 8.12.2002 he worked on his farm and never went to Kipsaos Trading Centre. He said that on 9.12.02, he was on his way to Kipkabus to arrange for harvesting of the father's maize. He was

arrested at Kamosor Centre. He was taken to the cells where he found four (4) other people including his brother Smith. They told him that they had been arrested on suspicion of murder.

He said that he was arrested by the Administration Police. He denied ever meeting PW 3. He said he knew the deceased but did not have any grudge against him. He denied having any weapon.

I have carefully considered the testimonies on record of all the witnesses and the evidence on record.

The accused is charged with the murder of one **CYRUS KIPCHIRCHIR CHEBOI** on 8th December, 2002 near Kipsaos Trading Centre.

PW 1 did not witness the incident leading to the death of the deceased. His testimony related to how PW 3 came to him injured and how he took him to hospital. The accused is here on a murder charge in relation to the deceased. He is not charged with an attack or assault of PW 3. I therefore find his evidence not to be material or relevant.

PW 2 was Prof. Koslova who carried out the post mortem. She explained the cause of death which is not in dispute.

PW 3 testified that he met three (3) people on the evening of 8.12.2002. It was 8 p.m. at night. He said that he met Philip Kipchirchir, Smith Tuikong and Francis Rotich. They were pulling each other. Upon inquiry of what was going on, he claimed that Philip stabbed him with a knife. PW 3 ran away.

In his testimony and in particular the examination in chief, the PW 3 did not mention meeting or seeing the deceased on 8.12.02. He did not mention or refer to the name Cyrus Kipchirchir Cheboi.

In Cross-examination, he testified that he does not know of any Cyrus Kipchirchir Cheboi. He kept on referring to one Francis Rotich who he said was with Philip and Smith. He did not see the said Francis Rotich being stabbed.

PW 3 did not tell this Court that the person who died i.e. the deceased was Cyrus Kipchirchir Cheboi.

No other witness connected the said Francis Rotich with the deceased. I do find that there is no proof that Francis Rotich the person seen by PW 3 in the company of the accused and Smith was indeed the deceased.

In his Statement to the police PW 3 said that the three people he saw were Smith Lagat, Kipchirchir Lagat and Biwott Kiprotich. However, during examination and cross-examination he did not mention any Biwott Kiprotich. In any case, the said Biwott Kiprotich if he ever existed was neither Francis Rotich and of more importance was not Cyrus Kipchirchir Cheboi.

PW 4 was the Chief. He did not witness the incident leading to the death of the deceased. He said that he was told that the accused had been taken to the District Officer's office by the father. PW 4 said that at the District Officer's office he saw accused come out of a vehicle after which he was searched by the administration police and a knife was recovered. That it was a Masai knife.

The prosecution did not call the father and mother of the accused. PW 6 the investigating officer later testified that Sgt. Kemboi told him that the accused was brought to them by members of the public. PW 4 said that the knife had blood on it. Is this sufficient proof that accused had killed the deceased.

I do find that the accused was found with a knife and it had blood stains. There is evidence that he had attacked PW 3 with a knife. PW 3 sustained serious injuries. There is possibility that the blood came from PW 3.

No evidence was adduced to prove or show whose blood was on the knife. Nobody saw the accused attack the deceased. There is some credible evidence that the accused stabbed PW 3 with a knife.

I do find that there is no sufficient evidence to prove that the knife found on the accused was the knife used to stab the deceased or any evidence that indeed it was the accused who stabbed and killed the deceased.

PW 6 was the police officer and arrested the accused and received the knife from Sgt. Kemboi. PW 7 identified the deceased body during the post mortem.

The net effect of the foregoing is that there prosecution have not proved beyond any reasonable doubt that the accused killed the deceased. There was no eye witness to the incident and the circumstantial evidence relating to the knife is weak and insufficient to sustain a conviction.

I therefore do hereby acquit the accused of the offence of murder and I do hereby order that he is released from custody unless otherwise lawfully held.

DATED AND DELIVERED AT ELDORET ON THIS 4TH DAY OF DECEMBER, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Omutelema for the State

Mr. Kipnyekwei for the Accused