



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

**AT ELDORET**

**Criminal Appeal 86 of 2005**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**DAVID KIPROTICH KIPRONO ..... ACCUSED**

**J U D G E M E N T**

The Accused was charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. He was arraigned in Court on 26<sup>th</sup> August, 2005, when he denied the charge. The Court fixed the dates for hearing on 20<sup>th</sup> February, 2006 to 23<sup>rd</sup> February, 2006 but the hearing did not proceed and was adjourned from time to time.

On the 16<sup>th</sup> August, 2006, the Prosecution informed the Court that upon consideration of the case, they intended to substitute the charge of murder with that of manslaughter. The substitution was finally done on 5<sup>th</sup> February, 2007. The accused pleaded guilty to the charge of manslaughter and admitted the facts as read out by the Prosecution.

The facts of the case are that on the 10<sup>th</sup> August, 2005 at around 10 a.m., the deceased person, one Stephen Kipkorir Chebon while in the company of another called Thomas Kiprotich Chebon went to have a drink of chang'aa at the house of the accused person. They were served by the accused's wife, Nancy Chepkemoi Rotich. The Accused joined the two in drinking the local brew. After a while the group started singing and causing some commotion. Nancy Rotich, fearing that the noise would lead to the police coming suggested that since the two had paid Shs. 180/- for the chang'aa, she should pack the remainder so that they could carry it away. As a result, she poured the remaining chang'aa in a 5 litres jerrican and sent the two persons away. The accused decided to escort them.

A disagreement arose as they were departing between the accused and the deceased over an alleged Shs. 100/- which the accused claimed the deceased owed him. The deceased then unleashed a panga which he was carrying and tried to assault the accused with. The deceased aimed the panga at the accused's neck. The accused blocked it with his left arm. He then snatched the panga from the deceased and struck him with it. The accused then ran off to a private clinic at the nearby Chepkorio Trading Centre as he was bleeding profusely.

The members of the public found the accused at the trading centre and arrested him as the deceased had died from the injuries he had sustained. The deceased was collected from the scene and taken to Moi Teaching and Referral Hospital. Post-mortem was carried out on 15<sup>th</sup> August, 2005. The cause of death was found to be, "Chopping wound of the neck with severance of the carotid artery and cutting of

underlying bones and excessive loss of blood”. The post-mortem was done by Prof. Koslova.

On the same day, the Accused was taken for mental assessment at Moi Teaching and Referral Hospital where Dr. Imbenzi found that he had suffered a cut wound on the left forearm. He said that it was a defensive injury and classified it as “harm” and the weapon “sharp”. He found the accused to be sound and that he could stand trial.

The Accused accepted the correctness of the facts and this Court convicted him for the offence of manslaughter. In mitigation, Counsel for the Accused submitted that the accused was remorseful. He is a primary school leaver who has a wife and five (5) children who are depending on him. He said that his family brew chang’aa to make ends meet as they have no other gainful employment. It was submitted that the Accused committed the offence in self-defence when he was attacked. That he has a bad scar on his hand. It was added that there was no enmity between the Accused and the deceased. The Accused has been in custody since his arrest on 10<sup>th</sup> August, 2005. The Accused prayed for a non-custodial sentence in the circumstance and also considering that he was a first offender.

I have considered the facts and the submissions in mitigation. From the evidence before the Court, it becomes clear that both the deceased and the accused were drunk after consuming a substantial amount of chang’aa. A quarrel ensued between them and the deceased who had a panga in his possession attacked the accused. The accused put up his arm in self-defence which was cut by the panga. The accused then grabbed the panga and hit at the deceased on the neck. From the post-mortem report the Pathologist found that the deceased died from:

“chopping wound on the neck with severance of the carotid artery and cutting of underlying bones. Excessive loss of blood”.

It is certain that the accused used extreme force in cutting the deceased with the panga. He aimed the panga at the deceased head and/or neck. He got him at the neck. It was a devastating blow that cut through the underlying bones.

It is true that the deceased did attack the Accused with a panga and the accused acted in self-defence in snatching the panga away. However, once he snatched the panga, he was no longer in danger that the deceased would use the panga again. The Court takes into consideration that the accused must have still been in great pain after being cut on the left forearm. The accused had been provoked and was acting in the heat of pain and passion. Having said that, I do find that despite the provocation and reaction in the circumstances, the Accused used excessive, extreme force and violence. His reaction was unreasonable and could have been substantially suppressed and/or controlled. The Court of Appeal in the case of WERO –V- REPUBLIC (1983) KLR 550, it was held:-

“It is question of facts whether an accused in all the circumstances of the particular case was acting in the heat of the passion caused by grave and sudden provocation when he killed someone and the plea is that the victim performed an act of witchcraft against him or another person under his immediate care in his presence so that he was angered to such an extent as to be deprived of his power of control and induced to assault the person doing the act of witchcraft .....

It is my view that this Court ought to be guided by the said principle in sentencing the accused herein.

It is the view of this court that intoxication by drinking Chang’aa cannot be a defence in this case drinking chang’aa in the morning is a practice that is unacceptable and the necessity for a heavy sentence for such illegal activities is even more necessary. I will only accept the act of provocation by the use of the panga by the deceased.

I do hereby find that the accused had the power of self-control despite the provocation and that he applied extreme, excessive and unnecessary force in defending himself. This knit of conduct must be

deterred and I am under an obligation to sentence the accused to an appropriate custodial sentence.

The accused is hereby sentenced to FOUR (4) years imprisonment. I have taken into account the period he has been in custody.

The Accused has a right to appeal within the next FOURTEEN (14) days.

DATED AND DELIVERED AT ELDORET ON THIS 23<sup>RD</sup> FEBRUARY, 2007.

M. K. IBRAHIM

JUDGE