



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Criminal Case 24 of 2002

REPUBLICPROSECUTOR

VERSUS

WESLEY KIPYEGON KIRUI ARAP TOWETT.....ACCUSED

JUDGMENT

The accused, Wesley Kipyegon Kirui Arap Towett was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 17th October, 2001 at Itembe village, Bomet District, the accused murdered Bernard Kipketer Bii (*hereinafter referred to as the deceased*). When the accused was arraigned before this court, he pleaded not guilty to the charge. The prosecution called eight witnesses in its bid to establish the charge of murder against the accused. After the close of the prosecutions case, this court put the accused on his defence. The accused gave an unsworn statement denying that he had killed the deceased.

The facts of this case as can be reconstructed from the evidence that was adduced by the prosecution witnesses is as follows: on the 17th October, 2001 at about 8.00 pm, the deceased was with PW1 Leonard Kibet at a local restaurant at Itembe Market in Bomet District. PW1 testified that soon thereafter they decided to walk out of the restaurant. They met with the accused outside the restaurant. The accused appeared drunk. He confronted the deceased and asked him why he was provoking him. The deceased did not answer the accused. According to PW1, the accused then punched the deceased. The deceased responded by punching the accused. He punched him once. PW1 asked the accused why the deceased had punched him, the deceased did not answer. PW1 and the deceased then walked some short distance before the deceased suddenly fell to the ground outside butchery within the said Itembe Market. According to PW1, he then saw the accused run away from the scene. He went to where the deceased had fallen to the ground. He testified that there was light at the scene where the deceased had fallen to the ground. The source of the light was a pressure lamp which was being used at the butchery. PW1 saw that the deceased had been stabbed on the left side of the neck. Blood was oozing from the said injury. The deceased was not talking.

PW2, Julius Kiprono Bett testified that as he was walking within the trading centre, he saw the deceased approaching him. When the deceased reached near where he was, the deceased fell on him and thereafter collapsed to the ground. PW2 saw that the clothes of the deceased were bloody. He also saw that the deceased had a wound on his neck which was oozing a lot of blood. PW2 cried for help. PW3 Shadrack Kipsang Tonui and one Johana Kikwai, among others, responded to his cry for help. They reached the scene where the deceased was lying on the ground. PW2 and PW3 testified that when they were at the scene, the deceased was no longer talking. PW1, PW2 and PW3 then rushed the deceased to the road side where they were able to get a motor vehicle which took the deceased to Tenwek Hospital. PW3 testified

that the deceased died before he reached the said hospital. They took the body of the deceased to the hospital mortuary and then made a report to the police at Bomet Police Station.

PW4, David Kipkoech Mariso, the area chief of Itembe Location of Bomet District testified that on the 17th October, 2001, at about 8.00 pm as he was at Itembe market, he received information that someone had been stabbed by the accused. PW4 knew the accused prior to the incident. PW4 went to Bomet Police station and made the report. Later the same night, he went to Tenwek hospital and found PW1, PW2 and PW3 who informed him that the deceased had succumbed to his injuries and died. PW4 made a decision to look for the accused because he was apprehensive that the accused would be killed by angry members of the public if he was not arrested before the information reached the members of the local community that the deceased had been killed. PW4 mobilized the youth of the area who included PW2 and PW3. He testified that they looked for the accused in his house but they did not find him. They went to his mother's house but they did not find him.

PW3 testified that as they were searching for the accused, they were using dogs. He testified that sometimes after 10.00 pm, the dogs sniffed out the accused. The accused was found hiding in a maize plantation. According to PW4, the accused threatened to stab the people who wanted to apprehend him with a knife. The accused appeared drunk. The people were able to subdue him after they had disarmed him. They apprehended him and took him to Bomet Police Station. The knife which was found in possession of the accused was taken to Bomet Police Station as an exhibit. According to PW3 and PW4, the said knife was blood stained.

PW8, PC Josiah Kiplangat received the said knife from the OCS, Bomet Police Station and took it to the Government Chemist at Nairobi for analysis. He also took the blood samples of the accused and the deceased. PW8 produced the government chemist report as *prosecution exhibit No. 3* together with the exhibit memo form. He also produced the knife as *prosecution's exhibit No. 4*. According to the said report, the blood samples of the deceased were of blood group O while the blood sample of the accused were of blood group A. The knife which was sent to the government chemist for analysis was found to contain blood stains of blood group O.

PW7, Dr. Alfred Terer performed the post mortem on the body of the deceased on the 19th October, 2001 at Longisa district hospital mortuary. The body of the deceased was identified to the doctor by the relatives of the deceased, PW5 Isaiah Koskei and PW6 Richard Ngeno. He observed that the deceased had sustained a right supra clavicular wound measuring 3cm in diameter and 6cm in depth. The external jugular vein was severed. He formed the opinion that the cause of the death of the deceased was cardio pulmonary arrest due to hypolemic shock secondary to the neck injury. In his view, the probable weapon used was a sharp object. The post mortem report was produced as *prosecution exhibit No. 1*. PW7 examined the accused on the 2nd November, 2001 and found him to be mentally fit to stand trial. The P3 form was produced as *prosecution exhibit No. 2*.

When the accused was put on his defence, he denied that he had any thing to do with the death of the deceased. He testified that on the 17th October, 2001, he left his place of work and attended a meeting which went on upto 7.00 pm. After the meeting was concluded, he passed by a house within the neighbourhood where he took tradition liquor with his friends upto 8.00 pm. After that, he went to the house of his employer called Joseph Kilel and asked to be paid his dues. His employer told him to return the following day because he told him that he (*the accused*) was drunk. He testified that he then proceeded to his house. While on the way, he was confronted by thugs who attacked him and demanded that he gives them money. He managed to escape and went home. On the following day, he was surprised when he was arrested by the police and told that he had killed someone. He reiterated that he had not killed the deceased.

In criminal cases, it is the duty of the prosecution to prove its case against an accused person to the required standard of proof beyond reasonable doubt. The burden of proving a criminal case against an accused person is on the prosecution and does not shift to the accused. The accused is under no obligation to prove his innocence. His only obligation is to raise reasonable doubt on the criminal case brought against him by the prosecution. The issue for determination by this court is whether the prosecution

proved its case on the charge of murder to the required standard of proof beyond reasonable doubt.

In the present case, no one saw the accused stab the deceased. The prosecution did not offer direct evidence. They offered circumstantial evidence. For the prosecution to secure the conviction of the accused based on circumstantial evidence, it must establish that it is the accused and only the accused, and no one else who killed the deceased. In **Sawe vs. Republic [2003] KLR 364** at page 372, the court of appeal held that:

"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no co-existing circumstances weakening the chain of circumstances relied on. The burden of proving the facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused"

In the present case, the PW1 testified that as he was walking with the deceased within Itembe trading centre, they were confronted by the accused who appeared drunk. The accused asked the deceased why he was always provoking him. The deceased did not answer back. The accused then punched the deceased for no apparent reason. The deceased responded by punching the accused. PW1 testified that at that time, although it was dark (*it was at 8.00 pm*), he was able to identify the accused by his voice because the accused was known to him prior to the said incident. He was also able to identify the accused by the light of the pressure lamp at the shops within the trading centre.

After the confrontation, the deceased walked a few paces and then fell on PW2 who was walking towards his direction at the shopping centre. It was at that moment that PW1, PW2 and later PW3 realized that the deceased had been stabbed on the neck. The deceased was rushed to hospital but succumbed to his injuries before reaching Tenwek hospital. PW4, the area chief upon learning of the stabbing incident went and made a report to Bomet police station. He later went to Tenwek hospital and learnt that the deceased had died. PW4 mobilized the youth of the area who included PW2 and PW3 and managed to apprehend the accused. The accused was found hiding in a maize plantation near his homestead. The accused was hostile and threatened to stab the people who were seeking his arrest with a knife which was in his possession. The accused appeared drunk. He was able to be subdued, apprehended and taken to Bomet police station when he was detained.

The knife which was found in his possession and which was blood stained was taken to the government analyst. He wrote a report which was produced in evidence by the prosecution and which established the blood stain found in the said knife was of blood group O which was of the same blood group to that of the deceased. The doctor who performed the post mortem was of the opinion that the cause of death of the deceased was due to the stab wound on the neck of the deceased. He testified that the likely weapon that caused the death of the deceased was a sharp object. The fatal injury which the deceased sustained, is consistent with an injury which could have been caused by the knife which was found in possession of the accused.

Upon evaluating the evidence adduced by the prosecution and the defence offered by the accused, it is clear that there existed a grudge between the accused and the deceased. Although evidence was placed before this court that the accused was drunk at the material time of the incident, it is apparent that the attack on the deceased was not random. It was premeditated PW1 heard the accused tell the deceased why he was provoking him (*the accused*). The accused had not quarrelled with the deceased prior to the incident. When the accused confronted the deceased, the deceased did not answer him back. It is at that point that the accused punched the deceased. The deceased retaliated by punching the accused. It is then that that accused stabbed the deceased on the neck with the kitchen knife. Although it was at night when the altercation between the accused and the deceased took place, PW1 testified that he was able to recognize the accused by his voice. The accused was known to the deceased prior to the fateful incident.

It is clear from circumstantial evidence, that the accused had armed himself with a kitchen knife with a

view to confronting the deceased. After stabbing the deceased, the accused ran away from the scene. He was seen running away from the scene by PW1. Later that night, PW4 the area chief went to the homestead of the accused to look for him. This was after PW4 had been informed that the deceased had succumbed to his injuries and died. The accused was not found at home. He was also not found at his mother's house. He was found hiding in the maize plantation after the dogs had sniffed him out. When he was found, the accused was still armed with the kitchen knife. He threatened to stab PW4 with the knife. PW4 testified that the accused appeared drunk. He was subdued, disarmed and apprehended. He was taken to Bomet police station where he was arrested.

The blood stained knife which was recovered from the accused was taken to the Government analyst who examined the said blood stains on the knife. The blood samples of the deceased and the accused were also taken to the said government analyst for analysis. The government analyst's report and the blood stained knife were produced in evidence by the prosecution. The government analyst established that the blood stain on the knife which was found in possession of the accused was of the same blood group as that of the deceased.

Having evaluated the above evidence, I do hold that the prosecution has established its case on circumstantial evidence on the charge of murder. The prosecution has proved to the required standard of proof beyond reasonable doubt that the accused killed the deceased with malice aforethought. Section 206 of the Penal Code defines malice aforethought as hereunder:

"Malice aforethought shall be deemed to be established by 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 caused the death 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."

In the present case, the prosecution proved that it is the accused and no one else who inflicted the fatal injury on the deceased. The accused was armed with a lethal weapon. He provoked a situation where he could have a justification to stab the deceased. Although witnesses *i.e* PW1, PW3 and PW4 testified that the accused appeared drunk, it is apparent that the accused had taken the drink to gain dutch courage. All his actions during the material time clearly indicate that he was aware of what he was doing. If he was drunk, he could not have run away from the scene and hidden in the maize plantation. He hid in the maize plantation because he knew what he had done. I have considered his defence and find the same to be without merit. The accused skirted the issue by claiming that he had been attacked by thugs when he was going home. If indeed he was attacked by thugs, why did he hide in the maize plantation after the attack and not make a report to the authorities or alternatively inform his relatives at home?

The assessors who assisted this court during the hearing of this murder trial reached similar verdicts finding the accused to be guilty of murder. I agree with them. The accused is consequently convicted of murder contrary to Section 203 as read with Section 204 of the Penal Code.

It is so ordered.

DATED at Kericho this 23rd day of March, 2007

L. KIMARU

JUDGE