



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

**Criminal Case 48 of 2001**

**REPUBLIC.....APPLICANT**

**=VERSUS=**

**JOSEPH KIBIGO KUTTO**

**SAMWEL KIPTANUI KIBIWOTT AND**

**LUKA KIPKETER KUTTO.....RESPONDENTS**

**JUDGMENT**

The three Accused persons, JOSEPH KIBIEGO KUTTO, SAMUEL KIPTANUI KIBIWOTT AND LUKA KIPKETER KUTTO were charged with the offence of murder contrary to section 203 and as read with section 204 of the Penal Code. The particulars of the offence are that on 6<sup>th</sup> December 2000 at Kiebor Village in Keiyo District of the Rift Valley Province jointly murdered JONATHAN BARTENGE.

The Prosecution called 13 witnesses. P.W.1 testified that on 6.12.2000, he saw two people lying on the road. Those were Jonathan Bartenge, the deceased and the other one was one Kipkemoi (P.W.11). The deceased was bleeding from the head. P.W.1 said that he went home and brought water to wash the deceased's head. That the deceased told him that they had been beaten by Joseph Kipyego, Samuel Tanui and Luka Kuto.

P.W.2 – saw the deceased being carried by one Morris to the Hospital. He was injured in the head. Before that she said that accused No. 2 had been through to her kiosk to ask for change of Kshs 20/=.

P.W.3 told the Court that on 6/12/2000, he had gone to join others to cut down a tree as requested by the school teacher called Paul Serem. At the place where the tree was, he met the following, Joel Kibet, Joel Kiplangat, James Chemoiyo, Sammy Kibor, Luke Kuto (Accused No.3), Joseph Kibiego (Accused No.1), Pius Tanui, Elkana Chepkong and Joseph Tanui and Michael Chirchir. A man he did not identify came to the scene and asked them to stop cutting the trees. The teacher told them to stop. He said he heard that some people had fought but he was not present.

P.W.4 – He testified that on the material day, 6<sup>th</sup> December, 2000, Mr. Paul Cheserem came to him and requested him to assist in cutting a tree for the school. He agreed and went to the forest. He found many others including Joel Kiplagat, Joel Kimepur, Joseph Kuto, Luke Kuto and two men with a power saw. There was also a guard from the forest Department. A lady called Agness Jonathan came and questioned

them as to why they were cutting the tree which belonged to them. Her husband Jonathan Bartenge arrived and told them to stop cutting the tree which had been brought down and was on the ground. He said that they left due to this. He did not see how the deceased was injured and by whom.

P.W.5 testified that he was also invited to go and assist in the cutting of the tree for the school. While cutting the tree the wife of Jonathan Bartenge, i.e. deceased came to the scene. She asked the men why they were cutting the tree. She claimed that the tree belonged to them. He claimed that she abused the men. Her husband came to the scene and ordered that they stop cutting the tree. The headmaster ordered them to stop and everybody dispersed. The witnesses went to drinking plue. He heard screams from the main road. He went there and found the deceased injured. He was lying in the middle of the road. Somebody was pouring water on him. He had a small wound on the head and under the eye. P.W. 5 said that no one else was injured. He saw Kipkemboi but that he did not see any wounds. He said he saw Joseph Kibiego (Accused 1) at the scene. He later learnt that the deceased had died.

P.W. 6 gave similar evidence but he said that he learnt of the beating of the deceased the next day. P.W.7 gave similar evidence about the cutting of the tree. He said Mr. Serem told them to stop after the deceased had arrived. He learnt then later in the day that the deceased had been involved in a fight. The deceased died after a few days.

P.W.9 was the teacher from Kitay Primary School. He was called Paul Serem. He testified that he went to the village to seek assistance to cut down a tree. The tree was for fencing the school. He got permission from the Forest guard and the assistant Chief. He mobilized the people to assist and others with a power saw. Mr. Owino, the Forest Officer identified the tree to be cut. After the tree was cut and was being split, P.W.9 left the scene to go and look for transport. He then heard screams. Before that he had met Bartenge and Titus.

When he went back, he found Joseph Kuto struggling with Mrs. Bartenge and her two daughters over a panga that she held. P.W.9 separated them and they took the panga away. This was handed to Mr. Bartenge.

P.W.9 ordered that they stop to cut the trees and he went to report the matter to the Chief. The Chief said he would write a letter to Bartenge. Later P.W.9 heard that Bartenge had been involved in a fight and was seriously injured.

P.W. 10 was the Assistant Chief. He was not at the scene of where the tree was cut down or at the road where Bartenge was injured. P.W. 11 was Titus Kipkemboi Cheruiyot. He said that on 6/12/2000 he was at his home. He heard the sound of a power saw coming from the river. He went to find out and saw many people. He knew and recognized some of them including the three accused persons. He said that they were cutting down a tree on their farm. He told them to stop cutting the tree. He said Joseph wanted to beat him up but was stopped.

He accompanied Mr. Paul Serem to see the Assistant Chief. He met Joseph Rotich his uncle who said that he should inform another uncle called Bartenge. P.W.11 met Agness Bartenge and told her about the tree. He then went to Kaptarakwa and informed Bartenge about the matter. It was about 100 metres. They both went back to the scene. He told the men to stop cutting the tree.

P.W.11 said that the men rushed to Bartenge to beat him up but others stopped them. People dispersed. P.W.11 went with his uncle towards Kitani Centre. Bartenge stopped to speak to a lady. P.W.11 stated that when they reached Kiapol, they were attacked. He said Joseph 'Banggi'; the first accused threw a stone at him. That Joseph was across the road and he told P.W.11 to stop.

- That Joseph threw another stone at him.
- That he was with Joseph Kuto, Tanui and Luka.
- He said he saw 6 people

The others were; Serem and Joel. He said that Bartenge started riding his bicycle, but he came back after alighting from the bicycle.

P.W.11 said he fought with 'Bangji'. That Luka and Bangji attacked the deceased. He said that they were armed with stones and metal bars. He said that he was 7 metres away. He said that he was (P.W.11) himself injured and bleeding above the eye and back of the head. He said he lost consciousness. He said that the attackers also used blows. He said that Joel (not charged) had a metal bar. He said that they had stones and Luka, Serem and Joseph hit the deceased on the head. Serem and Joel were not in Court.

On Cross-examination, he confirmed that the stones and metal bars were not produced and shown to him in Court. He answered that he fell down when he was hit. He said that a James Chemoiyo had a metal bar. He said that he saw Joseph when he was about to throw the stone. He said he saw the attack on Bartenge.

P.W. 12 was Agnes Bartenge the deceased's wife. She testified about the disputed tree and how they all left. She later heard her husband had been attacked. She found him at Kaptarakwa Hospital. She said that her husband had a lot of injuries. He did not tell her who had attacked him. Titus was in hospital. She said that he was confused and not talking.

She saw that her husband was not well as she went to get vehicle to take him to Eldoret District Hospital. She said that her husband was admitted in Hospital where he died after 2 days.

P.W.13 was a nephew of the deceased. He witnessed the Post Mortem. P.W.14 was Dr. (Prof) Koslova who carried out the Post mortem. She found massive injuries on the deceased head. There was a fracture of the skull. Haemorrhage took place. There was a big haemotoma and the brain was compressed. There was laceration of the brain. He was admitted in hospital on 6<sup>th</sup> December 2000 and died on 8/12/2000. The injuries had affected the brain leading to bronchial pneumonia.

The 1<sup>st</sup> accused gave an un-sworn statement. He gave similar evidence about the cutting of the tree. He testified that he went home when he heard noise from the road. He said he saw James Chemaiyo running away. He went to the scene and was told people had fought. He denied beating the deceased. The Second (2<sup>nd</sup>) Accused gave sworn statement. He denied killing the accused. He confirmed the incident at the river about the tree. He said due to the commotion with the deceased Paul Serem ordered that they stop the cutting of the tree. He said that he then went to market. He said that he was arrested the next day. The third Accused gave a sworn statement. He confirmed the incident at the forest. He said that thereafter he went back to his farm. He said he went to the police station on 11.12.2000 when he was arrested. He said that he had no reason to kill the deceased.

From the above mentioned evidence, it is certain that all the accused were at the forest near the river to cut down the tree for the school. After that a dispute arose and they had to stop the cutting of the tree. There were many people at the scene. The deceased claimed ownership of the tree.

It transpires that later in the morning along the main road, the deceased and P.W.11 Titus were attacked and both sustained serious injuries. The deceased died (2) two days later.

P.W.11 testified that he saw the attackers. He said he saw the 1<sup>st</sup> accused Joseph Bangji who threw a stone at him. He claims he also saw the 2<sup>nd</sup> and 3<sup>rd</sup> Accused. He said that he also saw Joel and Serem. He said that Joel had 4 metal bars while the others Luke, Serem and Joseph had stones. He said there were a total of 6 people.

From the testimonies, it is the prosecution's case that the Accused persons had been requested to cut down a tree in the forest area by the school teacher Paul Serem for use of the wood for fencing the school. All those requested were parents of children at the Kitany Primary School or neighbours. The school teacher had obtained permission from the forest department and the Assistant Chief to cut down the tree. It was a large group of people which included the three Accused. When the tree was brought

down using a power saw, P.W.11 went to the scene when he heard the sound of a power saw coming from the river. He went and saw that the group had cut down the tree and were about to cut it in pieces. P.W.11 told them to stop since the tree belonged to his family and was on their land. The school teacher decided to go with P.W.11 to the Assistant Chief to discuss the matter. P.W.11 decided to go and inform his uncles Mr. Bartenge about the tree. He went to call him. In the meantime, the wife of Jonathan Bartenge the deceased, one Agnes Bartenge (P.W.12) arrived at the scene with her 2 daughters. She had come from cutting wood and had a panga. She also complained about the cutting of their tree. An argument arose and even insults hauled at the men. The men disarmed her.

Her husband arrived with P.W.11 and he was given the panga. He protested vehemently about cutting of his tree. The teacher told the group to stop and to disperse due to the protests pending resolution of the matter.

All parties left. It is the prosecution's case that at the road, the three accused with others not before court attacked the deceased and the P.W.11 to retaliate against them for stopping the cutting of the tree. That during the attack, the deceased sustained serious injuries from which he died. P.W.11 sustained serious injuries. It is the prosecution's case that their action was activated by malice aforethought and that they had a common intention of committing the act of murder.

A careful perusal, consideration and analysis, shows that there was only one eye witness to the alleged attack. This was P.W.11, Titus Kipkemboi Cheruiyot, a nephew of the deceased. After the confrontation with the men at the river, he went with the deceased towards Kitani centre. At a place called Kiapol, they were attacked by several people. He said that the first Accused threw a stone at him. That the first Accused was with second and third Accused persons. He saw 6 people. Two of the others were one Serem and a Joel.

P.W.11 said that the deceased fought with the first Accused who attacked the deceased. He said the 6 were armed with stones and metal bars. He was 7 metres away. He was himself injured and bleeding above the eye and back of the head. He said the attackers also used blows. He said Joel had a metal bar.

On cross-examination, P.W.11 said that when he was hit, he had fallen down. He said that a James Chemoiyo had a metal bar. There was no other witness during his attack who saw the deceased being attacked, hit or injured.

It is clear to me that the deceased and P.W.11 were attacked by some people along the road on the morning of the fateful day. There is no doubt that the 3 accused were part of the group that had been confronted by the deceased and stopped from cutting down the tree. Was this enough reason for the accused to decide to kill the deceased or cause him grievous bodily harm? Were they the attackers of the deceased? Did the deceased die from the injuries sustained by an attack by the 3 accused?

From the Post-mortem report, the deceased sustained a massive blunt head injury incompatible with life. There was a fracture of the skull left-side epidural haemorrhage with compression of brain, subdural haemorrhage confusion and caceration of the brain, oedema of brain. There was Bronchopneumonia and bilateral premonary oedma. I hold the view and agree with the doctor that the death was caused by the head injury. The injury was received from blunt objects. There are indications that the metal bars were used to hit the deceased on the head causing the fracture of the skull. The stones could have caused the lesser injuries on the head. P.W. 11 saw one Joel and James Chemoiyo with metal bars. P.W. 11 did not see any of the accused with the metal bars. Two Joels testified during the trial, Joel Kibet Ego (P.W.5) and Joel Kiplagat Kamasha (P.W.6). P.W. 6 testified that he had received tools from James Chemoiyo to keep for him after leaving the scene at the river. P.W.4, James Chemoiyo in his testimony stated that he had left his hammer and two mattocks with Joel Kiplagat Kamasha (P.W.6).

It is noted that these two people who were allegedly seen with metal bars were not charged but were in fact prosecution witnesses. Which of the 2 was telling the truth is difficult to determine. It would appear that Joel Kiplagat Kamasha had the metal bars which he admitted he was keeping for James Chemoiyo. However, he said he did not go to the scene of the attack.

P.W.11 did not see any of three accused with the metal bars. Neither the metal bars nor the stones used in the attack were produced in court as exhibits.

It is my view that it would be unsafe to convict any of three accused with the offence of murder on the basis of the evidence of P.W.11. This evidence was inconsistent. At the time, he had been injured on the head and other parts of the body even before the deceased was attacked. This most likely affected his alertness and recollection. He later became unconscious. At the hospital he was confused and did not talk.

It is quite disturbing that no other eye witnesses were identified yet the incident took place on a public road. All other witnesses who testified were persons who were around the river and also were “adversaries” of the deceased i.e those who had been ejected from continuing cutting the tree at the river. It is noted that many of them had been placed in custody and treated as suspects. There are all chances that the police did not get full support and co-operation of the witnesses and other members of the public.

The important thing is that P.W.11’s evidence required to be corroborated by another eye-witness and other strong circumstantial evidence. The purported circumstantial evidence was not sufficient or strong to connect the 3 accused with the attack, the weapons or common intention of any. All the persons at the scene cutting the tree over a dozen could have had the similar intention and could have been at the scene. They had the opportunity after they left the scene at the river.

For the forgoing reasons, I do hold that the prosecution has not proved their case beyond any reasonable doubt as required by law. To the contrary, they fall far short of this mandatory requirement.

**I therefore do hereby acquit the 3 accused persons of the offence of murder and I do hereby order that they be released from custody unless otherwise lawfully held. Orders accordingly.**

**DATED AND DELIVERED AT ELDORET THIS 29<sup>TH</sup> DAY OF OCTOBER 2007.**

**M.K. IBRAHIM,**

**JUDGE. 29/10/2007.**