



REPUBLIC OF KENYA

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

**Criminal Appeal 43 of 2003**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**STANLEY CHERUIYOT.....ACCUSED**

**JUDGMENT**

The accused herein STANLEY CHERUIYOT stands charged with the offence of murder contrary to section 203 as read with section 2004 of the Penal Code. The particulars of the offence are that on the 13<sup>th</sup> day of August 2003 at Kurgung Location in Nandi North District of the Rift Valley Province, murdered STANLEY KIPROTICH KOGO.

The prosecution called seven witnesses in this case. The evidence of KIPEREN SAINA (PW1) who is also called RASHID was that he was a farmer at Kimong village in Nandi District. On the 13<sup>th</sup> August 2003 at 8.30 p.m. he was at home. The accused ran there and informed him that he had cut someone who was trying to steal. Then the accused went on to give the story to DAVID SAINA (PW 2). David Saina was a brother of Kiperen Saina.

The accused then came back and took him to where the deceased person was lying. He observed that the deceased was injured on the leg. The deceased was still alive but could not talk. David Saina also came to the scene. David Saina suggested that they should look for a vehicle to take the deceased to hospital. However, after a half an hour and before a vehicle was obtained to take him to hospital, the deceased died. He knew the deceased person before.

Those present then lighted a fire until morning. The next morning David Saina went to report to the police. The police came at about 3 p.m. and took the body of the deceased.

The deceased was lying in the farm of one Joseph Saina. He knew the accused before. The accused had gone home when the police came to take the body.

In cross examination he stated that when the accused came and informed him that he had cut somebody, he was at home with his wife called Milka Sarina. He reiterated that the deceased was lying in the farm of Joseph Saina, who was his brother. He stated that other people such as Ezekiel Rono a neighbour, and Hilary Kipkurgat a brother of the deceased, went to the scene. He stated that when Hilary Kipkurgat came to the scene, the accused was not present as he had escaped. However, the deceased was still alive but not talking. The deceased was at the edge of the farm. The maize crop that was near the deceased was a young crop. But there was no maize crop near where the deceased was lying. He also stated that the deceased's body was about 4 metres away from the maize plants. The accused sent some maize to his house and informed him that it was the maize that the deceased tried to steal. He stated that Joseph Saina

was the owner of the maize. The accused was the herdsman of Joseph Saina. He used to live with Joseph Saina. However, on that day Joseph Saina was absent.

He also stated in cross examination that they went and got the machete (panga) used from the house of Joseph Saina. It was his contention that the accused told him that he had used that panga. However he did not see the panga, as it was the police who took the panga from the house of Joseph Saina. He observed that the deceased was cut on the left leg.

In re-examination he stated that there was no harvested maize near the deceased. The accused is the one who had brought to his house some maize, which he claimed to have recovered from the deceased.

The evidence of DAVID MUREI SAINA (PW2) was that he used to be a village elder in 2003. On 13/8/2003 between 8 p.m. and 9 p.m. he was at house with his wife. Someone came and called his wife from outside and asked whether he was in the house. Then he confirmed that he was in the house. Then that person from outside, whose voice he had recognized as that of Cheruiyot whom he knew before, told him that he had cut someone further down. When he came out that Cheruiyot had already gone away. However he could guess where the incident took place, so he proceeded there. At the scene he met Saina (PW1). He saw the deceased who had a wound on the left leg with the trouser lowered. He tried to talk to the deceased. The deceased only managed to say that he was injured. He tried to get a vehicle to assist the deceased. However, it had rained on that day and he was not able to get a vehicle. He recognized the injured person as Kiprotich. He saw the injury and recognized the deceased because he lit a matchbox. He also heard his voice. He had known the deceased since birth.

Then he went to back to his house and stood outside for a short while. A woman appeared shortly and informed him that the injured person had died so he went back to the scene. This time, the person who had told him that he had injured somebody was not there. There were now many people who had put a bon-fire.

He went and reported the incident to some relatives of the accused. He told them to go and look for the accused. He then went and reported to Kabyet Police Station. The police at Kabyet did not have a vehicle, so they called Kapsabet Police Station. Before the vehicle came, the accused came to the police station escorted by his brother and uncle.

When the police vehicle came, they boarded it and proceeded to the scene. The police took the body away in the vehicle. The next day, he recorded a statement with the police. He identified the accused in the dock, by pointing at him. He knew him before. He knew that the accused used to live at Kabyet, but he did not know his occupation.

In cross-examination he stated that when he was woken up from his house, he only heard the accused's voice. He did not see him. However, as the accused had told him that he had cut someone further down, he knew where it was and proceeded there on his own. At the scene he only met Saina (PW1) who was alone. There was moonlight. Hilary had not come then. The deceased only told him that he was injured. He did not say that he had been cut with a panga by Cheruiyot. He stated that Saina (PW1) was his brother. He reiterated that he knew the deceased from childhood. The owner of the maize was his brother called Joseph Saina. The deceased was a neighbour of Joseph Saina, but their houses were about 300 meters apart. On that day Joseph Saina was away. He stated that Joseph Saina had a domestic worker by the name Jane. Cheruiyot the accused was not a worker, but was a young man who was staying with Joseph Saina as a brother in law. He did not see the panga used at that time. However because Cheruiyot told him so, he took it that the deceased was cut with a panga.

He also stated that as a village elder he had no information or complaint on the theft of maize. Also that the accused did not tell him the reason why he cut somebody.

JOEL KIPRUGUT ARUSEI testified as PW3. His evidence was that his home is at Kimong in Nandi District.

On 13/8/2003 at about 8.30 p.m. he was asleep at home. A young man called Kipyego woke him up and told him that a person was caught harvesting maize in the farm. He came out and proceeded to the home of this young man where he met his mother, who told him that it was Kiprotich his relative who was caught harvesting maize. She told him that he was cut and was lying down. He went there in a hurry and saw Kiprotich lying down on the road near a river. There was only one other person there and it was dark. He touched Kiprotich and called him twice. He merely responded in a faint voice.

He went and took a lamp from the house. When he came back with the lamp, he found that the deceased had already died. He observed through the light from the lamp that the deceased had a cut at the back of the left thigh. He asked people, especially Rashid (PW1) why the deceased was killed. He was informed that the deceased had stolen some maize. He asked where the maize was and Kiperen Saina (PW1) said that the maize was at home. He was also told by the same person that it was Cheruiyot who had killed the deceased. However, at that time, the said Cheruiyot was not at the scene. The maize allegedly stolen was also not at the scene. It was said to be at home about 200 metres away.

They lit a fire and guarded the deceased. The village elder David Saina went to report to the police. The police later came and took the body.

On 20/8/2003 at Kapsabet hospital, he identified the body of the deceased for postmortem examination. The body was released to them for burial.

He knew the accused as a neighbour. He identified the accused in the dock.

In cross-examination he stated that he was woken up by two young men Philip Kipyego and Josephat Kemboi. He had known Philip Kipyego before, though they were not related. Philip Kipyego is the one who took him to their home and also to the place where the deceased lay. At the scene they met only one person who was Rashid also called Kiperen Saina (PW1). When they arrived the deceased was still alive, though he responded to his calls weakly. He observed that the deceased was injured on the thigh. It was a big cut, therefore it was consistent with a panga cut. It was the police who recovered the panga from the house where the accused used to live. He also stated that he saw the stolen maize between the house of Rashid (PW1) and another man's house. The maize belonged to Joseph Saina. He did not see the accused at the scene or that night. He stated that the village headman came and met them at the scene. Kiperen Saina whom he met at the scene was the brother of Joseph Saina. Initially PW1 did not tell him about Cheruiyot. It was when he later came with the lamp that that he told him about Cheruiyot.

EZEKIEL RONO testified as PW4. His evidence was that he stayed at Kimong and was a farmer. On 13/8/2003 at about 8.30 p.m. he was unwell and went to sleep. Rashid who is also called Kiperen called him to come out. He came out and went and saw a person who appeared to be dead. He asked why that man had been killed. He was informed that it was because of maize. However, he did not see maize at the scene. The maize was about 150 metres away from the place where the deceased was killed. They lit a fire and remained there though it was raining. They sent David Saina to make a report to the police. The police came about 4 p.m. on the next day.

In cross examination, he stated that he was told by Rashid Saina that the deceased was caught stealing maize. He confirmed what was recorded in the police statement that they were a group of three people when they went to the scene. At the scene they met Rashid Saina and Joel Arusei. At that time, the village elder had gone to look for a vehicle. He noticed a mug with a little milk at the scene, but did not know the person who had brought that mug there. He saw the maize allegedly stolen in the morning, near the house of Rashid Saina. The maize was outside the house. He did not see the village elder the whole night. He was aware that a panga had been recovered in the house but he did not see the panga at the scene and had not seen it thereafter.

PAUL NGETICH testified as PW5. His evidence was that he lived at Sasura in Nandi North District. He worked as a pastor with the African Inland Church. He knew the deceased as a son of a sister to his wife.

On 20/8/2003 he went to Kapsabet District hospital mortuary and identified the body of the deceased for postmortem examination. He was together with Joel Arusei. They were then given the body for burial.

In cross-examination he stated that he identified the body for postmortem, but did not know the cause of the deceased's death.

PW2 DAVID MUREI SAINA was recalled. He testified that he had recovered the panga from inside the house of relatives of Joseph Saina. It was a panga with a curved sharp end, and a plastic handle. He identified the panga in court. It was his evidence that he handed over the panga to the police. The panga belonged to Joseph Saina. The accused Cheruiyot was a workman of Joseph Saina.

In cross-examination he stated that the accused told him from outside the house that he had done something, but did not see him with the panga. He was shown the panga by a housemaid, whose name she could not recall. They got the panga the day after the incident. He did not check whether it had blood stains. He did not know whether saina had another panga. The accused used to sleep in Saina's house. The police also took the maize that was recovered.

DR. EVANS KIPROTICH testified as PW6. His evidence was that he was a qualified medical doctor with MBCHB qualifications Moi University, having qualified in 1999. He was attached to Kapsabet District hospital. His functions included conducting post-mortem examination.

On 20/8/2003 at Kapsabet District hospital mortuary he conducted a postmortem examination on the body of Stanley Kiprotich Kogo. He observed that the deceased was a male African adult of about 22 years of age. He had a blood stained shirt. The deceased had died about 5 days previously. There was a 20 cm long deep cut wound on the left upper thigh on the posterior (back) area. The wound had sharp margins running from the posterior towards the medial side. The femoral artery was severed. Examination on other organs was normal.

He formed the opinion that the cause of death was anaemia due to haemorrhage due to the cut wound. He filled the post-mortem form and signed it. He produced the postmortem form as exhibit 2.

He was shown a medical examination report on the accused, and was not able to identify the handwriting.

In cross-examination he stated that he could not know whether the injury was caused by a panga or a hoe. However, the wound was caused by a sharp object. He could not know whether that sharp object was thrown at the deceased. He could not know how long it was between the time the injury was inflicted and the time of death. The wound was not stitched and the cause of death was anaemia due to bleeding or excessive bleeding. He could not say whether the deceased had taken alcohol before he died.

No 48906 CPL SAMUEL AWOUR testified as PW7. His evidence was that he was stationed at Kapsabet Police Station in the crime branch. The investigating officer of the case, a Sgt. Salim Abdalla, was now in a peace keeping mission in Dafur Sudan. The said Sgt. Abdalla handed over to him the investigation file, as well as a panga and maize cobs. The said Sgt. Abdalla explained to him how the items were recovered. He kept the items in his custody. He produced the panga as exhibit 1, and the three maize cobs as exhibit 3. (Mr. Omboto for the defence did not object to the production of the items).

In cross-examination he stated that he did not investigate the case or go to the scene of murder or interrogate witnesses. He stated that it was Sgt. Abdalla and his officers from Kabyet Police Post who went to the scene. He was merely stating in evidence what he was told by Sgt. Abdalla. It was not within his knowledge to know what happened or where the exhibits were recovered.

That was the end of the prosecution case. When the accused was put on his defence he chose to give a sworn defence.

In his sworn defence, the accused stated that he was about 22 years old. That he was a watchman at Kibiyet area. He knew the charge against him.

On 13/8/2006 at about 8 p.m. he patrolled the home of Joseph Saina who was his brother inlaw. A brother of his had got married from Joseph Saina's family. He was also an employee (of Joseph Saina). He took a round in the farm which had mature maize roasting crop. He was conscious that sometimes some animals such as monkeys eat crops. Something appeared in the farm and he did not know what it was. He threw the panga and when he went close to check he found that the panga had cut somebody who was lying down. That person was cut on the leg and was lying down. He therefore went and called PW1 – Kiperen Saina. He informed him that he had injured somebody. He then went and informed David Saina PW2 about what had happened. He was shocked. He went on his own to report at Kibiyet police station. No one forced him to go and report to the police.

The next day, he was told that the deceased had died. He did not know whether the people that he informed went and assisted the deceased. He did not intend to kill. His employer Joseph Saina was a police officer and was not at home then. His wife had also gone on a journey. At the time of the incident he was aged 17 years. The time of the incident was at night, and he did not see the deceased.

In cross-examination he stated that he informed people like Kiperen (PW1) and other witnesses that he had cut someone. He emphasized that he threw the panga. It was not true that he took the panga away from the scene to the house. If witnesses said that they found the panga in the house of Saina, that was not true. He stressed that he did not know that he had cut a human being. He knew that the injury was on the back of the thigh.

At the close of the case for the prosecution and the defence, both counsel addressed me. Mr. Omboto for the accused submitted that the accused was protecting the property of his employer. In the process he injured the deceased with the weapon, which he was carrying for the protection of his employer's property. He injured the deceased in the mistaken belief that it was wild animals that were destroying his employer's property. The accused did not have a guilty mind or mens rea in terms of section 17 of the Penal Code. The force used was also reasonable. He sought to rely on the case of Mungai –vs- Republic (1984) KLR 85. He asked the court to find that the case was for manslaughter.

Learned Principal State Counsel Mr. Omutelema submitted that the prosecution had proved that the accused caused the death of the deceased. That the death was caused with malice aforethought. He contended that there were two versions of evidence. One was that the accused threw the panga and later found that he had injured someone. The other was that the accused told witnesses that he had cut someone who was bleeding. The accused in his defence seemed to be pleading mistake, while no questions of mistake were put to PW1 and PW2.

There was no evidence that the accused was in any danger. He had not shown that the force that he used was not excessive, especially that a deadly weapon was used. He sought to rely on the case of MARWA ROBI –vs- REPUBLIC (1959) EA 660. The fact that the accused was in the maize farm for an illegal purpose did not justify that the accused should cut him.

After summing up, the assessors returned a unanimous opinion that the accused was guilty of manslaughter, as in their view he was provoked by the deceased.

This is a case in which the accused stands charged with the offence of murder. Murder is the unlawful killing of a human person with malice aforethought. The burden is on the prosecution to prove all the ingredients of the offence beyond any reasonable doubt.

I have first of all to decide on whether the deceased died. Evidence from prosecution witnesses PW1 and PW2 was that they were woken up by the accused who told them that he had injured someone. They went to the scene. They saw the injured person. They knew him before. He was the deceased. He was injured on the left thigh of the leg at the back. They tried to talk to him. He could only answer faintly. They tried to get a vehicle to take him to hospital. It was raining. They did not get a vehicle and the

deceased died. People came and kept vigil until the next morning. A report was made to the police who came and took the body. A postmortem examination was later conducted at Kapsabet district hospital on 20/8/2003. A postmortem report was filled by Dr. Kiprotich and was signed. The doctor found that the cause of death to be due to an anemia due to cut wound. The report was produced as exhibit 2. The report did not show those who identified the body. However the name of the deceased is described as that of STANELY KIPROTICH KOGO. Two witnesses Joel Arusei (PW3) and Paul Ngetich (PW5) also testified that they identified the body. I find that exhibit 2 was the postmortem report on the death of the deceased herein. I find that, indeed, the deceased died. I also find that the cause of death was excessive bleeding due to an injury on the back of the left thigh caused by a heavy sharp object.

Was the death caused by the accused? The prosecution maintain that the deceased was killed by the accused. PW1 and PW2 stated that the accused told them that he had cut the deceased. The accused himself volunteered to the police after the incident and was arrested. In his defence he stated that he cut the deceased with a panga. The panga that was produced might not be the weapon used. The accused stated that he left the panga at the scene. The panga produced was found in the house of Joseph Saina. There is no evidence that it had blood stains. It was not taken to the Government Analyst for examination. However, the accused admitted in court that he cut the deceased with a panga by throwing it. The deceased died of a single cut. It was the bleeding that caused the injury. I find that indeed it was the accused who caused the death of the deceased.

Was the death caused with malice afore thought? The definition of malice aforethought is given under section 206 of the Penal Code (Cap. 63). Malice aforethought can be deduced from evidence that the accused's actions were intended to cause death or cause grievous harm to a person, even if that person is not the person ultimately killed. The accused used a panga which was an offensive weapon. The injury described was definitely caused by a severe cut. The prosecution holds that the accused knew that he was cutting somebody. That he had no threat of danger to himself that would have justified him to use the amount of force that he used. That in any event, even if the deceased was in the farm for an illegal purpose, there was no justification for the accused to cut and kill the deceased. The accused's version is that he did not know that what he was cutting a human being. That he threw the panga at a creature he thought was a wild animal, but realized later that, alas, he had cut someone. That he informed some people about the incident and later went and volunteered to the police.

It is for the prosecution to prove all the ingredients of the offence beyond any reasonable doubt. The burden is on the prosecution to prove that the killing was with malice aforethought. The person who was at the scene was only the accused. His version of the story is not completely far fetched. It can have some truth. It has a reasonable amount of credence. There is no eye witness to controvert his story. The issue of mistake does not arise. The accused has not stated that that was not a place where human being could not be in the maize at night. The houses of people were also quite close. In my view, people could go to the maize because of the proximity of residential houses. That was a possibility.

I find that the prosecution has not proved beyond any reasonable doubt that the accused killed the deceased with malice aforethought. There is no evidence that he aimed at any particular part of the body. The cut was a single cut. I will therefore find the accused guilty of the lesser offence of manslaughter. I agree with the finding of the assessors on manslaughter, but for different reasons.

For the above reasons, I find the accused guilty of the offence of manslaughter contrary to section 202 of the Penal Code (Cap 63) and convict him accordingly.

Dated and delivered at Eldoret this 24<sup>th</sup> day of November 2006.

GEORGE DULU

Ag. JUDGE