



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Case No. 47 of 2003

REPUBLICPROSECUTOR

VERSUS

PAUL TANUI KOECH.....1ST ACCUSED

RICHARD CHERUIYOT MIBEI.....2ND ACCUSED

JUDGMENT

The accused were charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal code**. The particulars of the offence were that on 31st October, 2002 at Egerton Road in Njoro, Nakuru District of the Rift Valley Province jointly with others not before court they unlawfully murdered Bernard Kiplangat Kirui, hereinafter referred to as **“the deceased”**.

The prosecution called eight witnesses and its case was as follows:-

David Kipkorir Langat, the first prosecution witness (hereinafter referred to as **“PW1”**) was a driver at Egerton University. On 31st October, 2002 at about 10.30 p.m. he was driving from Nakuru to Njoro and near the canning factory he saw somebody lying on the road and he was afraid of stopping the vehicle so he drove on and informed the University Watchmen who were at the main gate. PW1 and the watchmen went to the place where the person was lying and they realised that he was dead. There was a pool of blood next to the body. They recognised the body as that of a son of one Joseph Kipkirui who was working at Egerton University. The deceased was popularly known as **“captain”**. The body had injuries on the head neck and on both hands. Thereafter a report was made to Njoro Police Station and **Police Constable Michael Yator**, the fifth prosecution witness, (hereinafter referred to as **“PW5”**) was one of the officers who went to the scene. He was accompanied by the Officer Commanding Njoro Police Station and his deputy. At the scene, they saw blood spots on the tarmac road. They drew a sketch plan and thereafter proceeded to Egerton Trading centre and enquired about the movements of the deceased the previous day. They were told that the deceased had been seen in the company of the two accused at Diana’s bar. The police officers went to the house of the first accused and they found him there together with the second accused and arrested them.

John Kariuki Kanori (PW4) was one of the people who saw the deceased and the accused on the night when he met his death. He said that on 31st October, 2002 at around 8.30 p.m. he was at Diana’s building where he was taking a meal. The first accused went to the restaurant and after a while the second accused joined them. He said that he heard the first accused saying to the second accused – **“Let us go and tell that man (the deceased) to buy us beer and if he does not we shall beat him up”**.

The accused met the deceased near a bar known as **“Sot Kora”** and the witness saw the three of them

walking towards a bar known as “**Pace Pub**”. The witness said that the area was well lit by electricity light. PW4 did not know what transpired thereafter and he went to bed at about 10.30 p.m. only to learn on the following morning that the deceased had been found dead along the road. The witness said that there had been no disagreement between the accused and the deceased.

Agnes Wanjiru Mubea (PW6) was operating a butchery known as “**Diana’s Butchery**” and a bar known as “**Vet’s Pub**”. On 31st October, 2002 at about 4.00 p.m. she saw the accused and the deceased in her butchery and later they went to her pub and at about 6.30 p.m. the first accused and the deceased went out. At about 8.30 p.m. the first accused went back to the pub alone. PW6 closed her kitchen in the butchery at about 11.00 p.m. and she went to the pub to call the first accused so that they could go home together as they were neighbours but the first accused was still taking beer with his friends and was not ready to leave and so PW6 left to her home. The witness had not seen the deceased after 6.30 p.m. and neither was the second accused in the pub by the time she was leaving. She added that the deceased and the accused were close neighbours.

Grace Cheptui Ngetich (PW7) was working at Diana’s bar. She said that on 31st October, 2002 at about 4 p.m. the two accused went to the bar and bought some drinks and shortly thereafter the deceased joined them. At about 6.30 p.m., the accused and the deceased went to Joash Pub. She said that the accused went back to Diana’s bar but the deceased was not there. After a little while a lady known as Ruth, Sister to the first accused, walked in and told the first accused that his mother was outside and the first accused and his sister went out together. The first accused went back to the bar at about 8.15 p.m. and started watching people as they played a game known as **pool**. She closed the bar at about 2 a.m. and by that time the deceased was not there but the first accused was there and a few other customers. She never saw the second accused after 8.00 p.m. The witness said that she did not witness any disagreement between the accused and the deceased when they were in the bar and added that the accused and the deceased were close neighbours and friends.

Dr. Noah Oloo Kamidigo (PW8) performed a post mortem on the body of the deceased on 5th November, 2002 after it had been identified by the deceased’s cousin, John Kiplangat Koech (PW2). The Doctor’s findings were that the body had multiple deep bruises on the head, shoulder, abdomen and both hands. The fourth to seventh ribs were also broken. The body also had internal injuries to the heart and spleen. There was also dislocation of the fifth cervical vertebrae with laceration of the spinal brain. His opinion was that the deceased’s cause of death was cardio respiratory arrest due to internal multiple severe injuries to the vital organs and multiple body injuries caused by blunt objects.

Each of the accused elected to give sworn testimony in their respective defence. The first accused said that on 31st October, 2002 at about 4 p.m. he was at Egerton Shopping Centre together with the second accused. They did some shopping in a shop owned by one Mrs. Bett and they decided to leave their shopping in the said shop and go to Diana’s bar for some drinks. He said that they found PW7 in the said bar. At about 4.30 p.m. the deceased went to the bar and the first accused bought him a drink and they remained there upto about 6 p.m. when the deceased said he was going home.

The first accused and the deceased walked together upto the front of the building and after they parted, the first accused went to a hotel known as “**Choma Zone**” and ordered for some chips. At the time, the second accused was playing **pool** in the bar and the first accused brought two plates of chips and went back to the **pool** table. They remained there until about 7.15 p.m. when the second accused left for home. The first accused left the bar sometimes after midnight and went home in the company of one David Koskei, Job Kibut and John Lokorio. David Koskei was called by the first accused as a witness and he corroborated the defence of the first accused.

The first accused further testified that he never left the bar after he returned from the restaurant where he bought chips. The following day the first accused was told by the deceased’s father that the deceased had been hit by a motor vehicle the previous night. The first accused denied having killed the deceased and added that he was his good friend.

The second accused said that on 31st October, 2002 at about 4 p.m. he went to Egerton trading centre together with the first accused. They did some shopping and thereafter went to Diana's Pub and took some drinks upto about 7.30 p.m. when he collected the items that they had bought and left for his home. He said that the deceased went to the bar at about 4.30 p.m. and they were with him upto about 6.00 p.m. when he left together with the first accused and after about ten (10) minutes the first accused went back with some chips. He said that since 6 p.m. he did not see the deceased again.

Victor Kipngeno Sigei testified as the second accused's witness and said that on 31st October, 2002 at about 8 p.m., the second accused went to his home and they stayed there until sometimes after 9.00 p.m. when the second accused went to his home.

Katum Mathew Magenchi also testified in support of the second accused's testimony and said that on 31st October, 2002 at about 7.30 p.m. he walked together with the second accused from Egerton Trading centre and parted at about 8.00 p.m. near the second accused's home.

I have carefully considered all the evidence on record as summarised above. It is not in dispute that there was no direct evidence that was adduced as against the accused. The evidence against them was purely circumstantial. The question that I have now to consider is whether that evidence is weighty enough to warrant conviction of the accused.

PW1 found the body of the deceased along Njoro-Mau Narok Road at about 10.30 p.m. on 31st October, 2002. The witness thought that the deceased had been hit by a motor vehicle which was being driven along the aforesaid busy road but the police were of the view that the deceased had been murdered elsewhere and his body dumped there. The initial report that was made to the police was that of a fatal road accident.

PW4 said that he saw the deceased at about 8.30 p.m. of the material night when the accused were allegedly saying that they would beat up the deceased if he refused to buy them beer. He then saw the three of them going towards "**Pace Pub**" but he did not know what took place thereafter as he said he went to sleep at about 10.30 p.m.

However, according to **PW6** and **7**, the last time they saw the deceased alive was around 6.30 p.m. The first accused was in Diana's bar until it was closed at about 2.00 p.m. but **PW6** and **7** said that the last time they saw the second accused was around 8.00 p.m. The first accused said that the second accused left the bar at around 7.15 p.m. while the second accused said that he left at about 7.30 p.m.

Dr. Kamidigo who performed the post mortem on the body of the deceased said that he formed an opinion that the deceased's multiple body injuries were caused by blunt force. In cross examination, he said that the injuries were consistent with a road traffic accident except for defensive injuries on the hands of the deceased.

In my view, the evidence that was tendered by the prosecution is too weak to form a basis of conviction as against the accused persons. As was held in **KIPKERING ARAP KOSKE V R [1949] EACA 135** in order to justify a conviction based on circumstantial evidence, 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 and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution.

The evidence on record does not point at the accused as being the only likely people who might have killed the deceased. The possibility that he was hit by a speeding motor vehicle was not ruled out. The deceased may also have been killed by any other person or persons, other than the accused. The evidence that was tendered showed that the deceased and the accused were friends and neighbours. No attempt was made to show that there existed any grudge between them and which could have formed the basis of malice aforethought.

I find that there is insufficient evidence against the accused and hereby acquit them of the charge of murder and order that they be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED at Nakuru this 20th day of February, 2006.

D. MUSINGA

JUDGE

20/2/2006

Judgment delivered in open court in the presence of defence counsel, Mr. Nyamwange and in the absence of Mr. Koech.

D. MUSINGA

JUDGE

20/2/2006