



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

**Criminal Case 72 of 2003**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOHN KIPTES KENDAGOR.....ACCUSED**

**JUDGMENT**

The accused, John Kiptes Kendagor 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 night of the 14<sup>th</sup> and the 15<sup>th</sup> of August 2003 at Kaprop village Elburgon, the accused murdered Joseph Cherogony (*hereinafter referred to as the deceased*). The accused pleaded not guilty to the charge. At the trial, the prosecution called nine witnesses in its bid to prove the case against the accused on the charge. After the close of the prosecution's case, the accused was put on his defence. He opted to give sworn evidence in his defence. He did not call any witness.

The circumstances leading up to the death of the deceased according to the testimony of the prosecution witnesses is as follows: On the 14<sup>th</sup> of August 2003, PW5 James Ogao Ounga and PW4 Mary Kwamboka (*a husband and wife*) invited their neighbours to assist them to work on their farm on the understanding that after work they were going to be fed and served with traditional liquor (*busaa*). PW5 testified that on the material day he was not feeling well and was asleep in his house. PW4 testified that the work at the farm went on uneventfully until about 1.00 p.m. when the neighbours who were working at the farm came to her homestead to have a meal and thereafter to drink busaa. Among the neighbours were the deceased and the accused. PW1 Phillip Koros Rono was also there.

PW4 testified that after the accused and the deceased had taken traditional liquor, they started quarrelling. She did not understand what the two were quarrelling about because they were talking in their mother tongue – Kalenjin. She testified that the two then held each other as they struggled over a panga. She stated that PW1 tried to separate the two but was unsuccessful. She testified that after a while the deceased fell on the panga which had fallen on the ground. It was her testimony that the accused had not injured the deceased with the panga. After the deceased fell down, he stood up and showed PW4 and PW5 his back where he claimed he was injured by the panga. PW4 and PW5 saw little blood oozing from a small wound on the back of the deceased. The commotion outside his house had woken up PW5 who was asleep in his house. He came out to investigate and was told by the deceased that the accused had hit him (the deceased) on his back with the blunt side of the panga.

The version of events narrated by PW4 was however contradicted by PW1 who testified that he was with the accused and the deceased when they started quarrelling. He testified that the two quarrelled for

about five minutes after which the accused picked a panga from the ground and hit the deceased on his back with its blunt side. After hitting the deceased with the panga, the accused threw the panga into a nearby bush. The accused then left the compound of PW4. He testified that he did not see any visible injuries on the back of the deceased. On the following day, he learnt that the deceased had been found dead on a path near a place whereby there were bamboo and tree stumps. He testified that he was not sure if the deceased had died because of sleeping out during the cold. All the three witnesses i.e. PW1, PW4 and PW5 testified that the deceased walked away from the compound of PW4 without apparently having suffered any ill effect from the attack by the accused.

PW2 Wilson Kipruto Chebon, a nephew to the deceased, was informed of his death on the 17<sup>th</sup> of August 2003. He went to the house of PW4 and was informed of the circumstances which the deceased and the accused fought. He made a decision to look for the panga in the bush where it was alleged the accused had thrown the same. He searched the thicket with the assistance of one William Cherutich, Mzee Chebon and another man called David. After searching for a while, he was able to recover the panga which was produced in evidence as prosecution's exhibit No. 1.

PW3 PC John Mogere and PW6 PC John Kipsang were instructed by the OCS Elburgon Police Station to go and arrest the accused after the report of the circumstances under which the deceased met his death were made to the police. The two police officers were directed to a forest where the accused was working. They found and arrested him. They testified that the accused made no attempt to run away when he saw the police.

PW8 Dr. Phillip Wainaina Kamau produced the post-mortem report which was prepared by Dr. Bett who was unable to attend court due to the fact he was undertaking a Postgraduate course at the University of Nairobi. He testified that according to the post-mortem report, the deceased's body had maggots when the post-mortem was performed on the 26<sup>th</sup> of August 2003. Dr. Bett observed that there was a stab wound between the 3<sup>rd</sup> and 4<sup>th</sup> ribs along the spinal cord. He also saw that the spinal cord had truncated between T3 and T4. He also observed a stab wound between T3 and T4 spinal column. He formed the opinion that the cause of death of the deceased was cardio respiratory arrest due to truncated spinal cord between T3 and T4. He further testified that the accused was seen by Mr. Mugendi, a registered nurse working in the psychiatric unit of the hospital who found him to be mentally fit to stand trial. The post-mortem report and the P3 form were produced in evidence as prosecution exhibits No. 2 & 3 respectively.

PW9 PC Julius Tiang' was the investigating officer in the case. He testified that after the report of the finding of the body of the deceased was made to the police, he was assigned the case. He visited the scene and noted where the body of the deceased was found lying. The body was half naked. He examined the body and saw that there was a slight injury on his back near the spinal cord. He drew a sketch plan of the place where the deceased's body was found. He took the body of the deceased to Elburgon Hospital Mortuary where post-mortem was performed by Dr. Bett after the body of the deceased had been identified by PW7 Kibor Cherogony, the brother of the deceased. He commenced investigations and was able to establish that the deceased had been hit by the accused with a panga after they had quarrelled. The accused was arrested and charged with the current offence. He testified that the night before the body of the deceased was recovered, it had rained heavily at the area. He admitted that if the deceased had slept in the open under such conditions he could not have survived if he was not healthy. He testified that he had not dusted the panga to see if it contained the fingerprints of the accused.

When the accused was put on his defence, he denied that he had anything to do with the death of the deceased. He testified that he had not hit the deceased with the panga on his back. He stated that the evidence which was adduced against him by PW1 and PW4 was motivated by a grudge that existed between him and two other persons called Ngala and Koskei over a certain parcel of land. He testified that the said two witnesses had testified against him so that he could be removed from the scene to enable the two triumph over him in the land dispute. He further testified that the deceased was drunk when he left the house of PW4 and had been killed by the cold because when his body was found he was naked. He further testified that the deceased was a known epileptic and could have died because of an epileptic attack. He testified that when he saw the body of the deceased, he did not see any visible injuries. It was his testimony therefore that he was innocent of the charge.

In all criminal cases, it is the duty of the prosecution to prove the charge against an accused person to the required standard of proof beyond reasonable doubt. In the instant case, the onus is on the prosecution to discharge its burden of proof to establish the guilt of the accused. The evidence that was offered by the prosecution against the accused was direct evidence. PW1 testified that he witnessed the accused and the deceased quarrel after which the deceased picked a panga and hit the deceased with its blunt side on his back. He testified that after the attack, the deceased threw the panga into a nearby bush. PW1's testimony was corroborated by the evidence of PW4 who testified that he saw the accused and the deceased quarrel in their mother tongue after which they held each other as they were struggling to get hold of a panga. She testified that after a while, the deceased fell to the ground and was injured when the panga hit him on the back.

PW5 testified that when he heard the accused and the deceased quarrelling, he woke up from his bed and went to investigate the cause of the quarrel. While outside the house, he spoke to the deceased who showed him his back. The deceased told PW5 that he had been injured by the accused who had hit him on the back with a panga. PW5 saw a small wound with blood oozing from the back of the deceased. Both PW4 and PW5 testified that the deceased stayed at their house for a while before going away. On the following day, his body was recovered on a foot path. When the post-mortem was performed on his body, it was established that the deceased had died from the injuries which he had sustained to his back that had caused his spinal cord to be truncated. The injuries which caused the death of the deceased were consistent with the injuries which the deceased claimed were inflicted on his back by the accused. The said injuries were consistent with the evidence adduced by PW1, PW4 and PW5 on how they saw the back of the deceased after he was hit with the blunt side of the panga by the accused.

Further corroboration was offered by the evidence of PW2 who testified that after the death of the deceased, he went to the house of PW4 and PW5, got their version of what took place and immediately embarked on the search of the panga which was thrown into the thicket by the accused as narrated to the court by PW1. The search at the place where PW2 was told the accused had thrown the panga, yielded the panga which was produced in evidence by the prosecution.

The theory advanced by the accused that the deceased could have been injured when he fell down on a tree stump after he had walked home when he was drunk and further that he died from the cold that he was exposed to when he slept in the open at night, is debunked by the evidence of PW8 who produced the post-mortem report of the deceased and which established that the cause of death of the deceased was cardio pulmonary arrest due to truncated spinal cord between T3 and T4. The said injury that caused the death of the deceased was consistent with the evidence of PW1 as to the attack of the deceased by the accused. Further, this court saw the panga which was produced in evidence by the prosecution. The said panga had a sharp point which could have inflicted the small stab wound that penetrated the back of the deceased and truncated his spinal cord.

The issue for the determination therefore, taking into account the circumstances of this case, is whether the accused person killed the deceased with malice aforethought therefore making him liable to be convicted for the charge of murder. The circumstances of this case reveal that the accused and the deceased had taken traditional liquor, *busaa*, after which they quarrelled upon which the accused hit the deceased on his back with the blunt side of the panga thus causing the injury which proved to be fatal. The circumstances of this case reveal that the accused unintentionally killed the deceased. The doctor who did the post-mortem on the body of the deceased, was of the opinion that the cause of death of the deceased was due to the truncated spinal cord which was consistent with the injury which the accused caused to the deceased and which was seen by PW1, PW4 and PW5. It is clear that, although the deceased walked away from the house of PW4 and PW5, on his way home, he succumbed to the injuries, collapsed on the road and died. The theory by the defence that the deceased could have died because of cold was not supported by the evidence of the doctor. Similarly their evidence that the deceased could have fallen down on a tree stump, and therefore sustained the said injuries on his back, is implausible. The doctor who examined the deceased's body was of a different opinion. He testified that the said injury was caused by a sharp object.

I therefore hold that the prosecution proved its case against the accused on the lesser but cognate charge

of manslaughter. The two assessors, who assisted this court during the hearing of this case, returned a verdict of not guilty. Their reason for arriving at the said verdict is because they were of the view that although the accused hit the deceased with a panga on his back, the said assault could not have caused the fatal injuries that the deceased sustained. The assessors were also influenced by the evidence on the location where the body of the deceased was retrieved. In my considered opinion, the assessors ignored the evidence of the doctor who performed the post-mortem and further the evidence of PW1, PW4 and PW5 as relates to the injury that the deceased sustained when he was hit on his back with the panga. The post-mortem report clearly shows that the injury that caused the death of the deceased was consistent with the injury on the back of the deceased which PW1, PW4 and PW5 were shown by the deceased after the attack. I therefore, with great respect, disagree with their verdict.

I therefore hold that the prosecution proved its case to the required standard of proof for the lesser but cognate charge of manslaughter. The accused is accordingly convicted on the substituted charge of manslaughter.

**DATED at NAKURU this 2<sup>nd</sup> day of June 2006.**

**L. KIMARU**

**JUDGE**