



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KERICHO**  
**CRIMINAL CASE NO 36 OF 2002**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**ABDUL RAJAB HAMMED RONO ..... 1ST ACCUSED**

**MOHAMMED CHEPKWONY ALIAS KABAISA ..... 2ND ACCUSED**

**JUDGMENT**

The charge against the accused persons before this court is murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63). The particulars of the offence are that on the night of 24th and 25th of November, 2000 at unknown time at Bomet Township in Bomet District of the Rift Valley Province, the Accused persons jointly with others not before this court murdered Charles Kipruto Kirui.

Murder is defined in section 203 of the Penal Code as follows;

**“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”**

Malice is further defined as follows:

- a) An intention to cause the death of the deceased, or any other person
- b) An intention to cause grievous harm to the deceased or any other person. It is immaterial that the person targeted is not the one who is finally killed or injured
- c) An intention to commit a felony.

Failure to prove murder whose Mens Rea is malice aforethought the accused persons maybe charged with manslaughter which is defined in the Penal code cap 63 as;

**“Any person who by unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter”**

The evidence presented in court was as follows; PW 1 APC Charles Mwaura, told this court that on the material day he went to Paradise bar and ordered beer. APC Benjamin Emonu, William Papai and Kirui, a

businessman, were already there. He joined them. The deceased was also there drinking and later they had dinner together, courtesy of Kirui (businessman). They ordered for more drinks but the deceased declined the offer and instead asked for a refund from the counter which he was given. He left at about 8.30pm. The rest of them continued drinking until around 1.00 am when they left to go home. Kirui deposited his money, Kshs. 20,000/=, for overnight custody with the barman. Kirui spent at APC Papai's house. The following morning PW 1, APC Papai and Kirui the businessman went back to the bar to collect the money which they had left the previous night. It was then that they heard that Charles Kirui (deceased) with whom they had been drinking the previous night had died. They proceeded to the scene of crime, and found that his body had been taken to the mortuary. They left for their camp.

PW 2, Dr. Stanley Bii a doctor with the Provincial Medical Office in Nakuru, carried out a postmortem on 27th September 2000 at Tenwek Mission Hospital in the presence of a police officer. The body had a cut from the left ear ring finger and blood oozing from the left ear. He formed an opinion that death resulted from asphyxia due to strangulation.

PW 3, APC William Papai, corroborated the evidence of PW 1 that they were together on 24th September 2000 at 8.00pm in Paradise bar in the company of APC Charles Mwaura, APC Benjamin Emoro, APC Parker and Kirui (the businessman). While drinking beer Charles (the deceased) joined them. He didn't know him but was introduced to him as working in Bomet "supplies". They left leaving the rest of them drinking until 1.00 am. He left with Kirui (the businessman). They met in the morning in the bar to collect Kirui's money, when they heard the deceased had been killed. They went to the scene of crime but could not find the body, and proceeded to the camp and reported on duty.

PW 4, Daniel Cheruiyot who was working in the bar testified that he was in the bar on 24th September 2000 when the deceased walked in and ordered a beer. Other people joined them and identified Mwaura (PW 1) as one of them. They all drank and Kirui joined them too. The deceased left at around 9.00 pm leaving the rest drinking. Just before they left Mwaura and another man gave him Kshs.22,000/= for overnight custody. On the following day he heard that Kirui (the deceased) was found dead along the road. Later Mwaura and the man whom they left their money for overnight custody went to collect it.

PW 5 Dr Joseph Sotonik, testified that he examined the accused persons and found them fit to stand trial.

PW 9, PW 10 and PW 11 gave evidence that the 1st and 2nd accused persons made confessions as to the fact that they killed the deceased. The Defence objected to the production of these confession statements, and in a trial within a trial held by this Court it was ruled that the confession statements were not admissible.

The 1st Accused himself chose to give unsworn evidence. He denied being involved with the murder of the deceased whom he didn't even know. He stated that he had differences with the Police Inspector who accused him of being a nuisance in the cells, and of implicating him with malicious statements. He said the Inspector had threatened to put him behind bar for life.

The 2nd Accused also gave unsworn evidence. He also denied being involved with the murder of the deceased. He said he did not know either the deceased or the 1st accused.

In his submission, Mr. Korir, for the defence, argued that the prosecution case depended solely on the Confessions made by the Accused, which were held inadmissible by this Court. There are no eye-witnesses, and nothing else to connect the accused persons to the murder of the deceased. Mr. Mutuku, for the State, conceded that the prosecution had intended largely to rely on the confessions, but argued that there was circumstantial evidence to link the accused persons to the death of the deceased.

In order for a Court to convict an accused person based solely on circumstantial evidence, the law as set out in the case of **Kipkering arap Koske vs Republic (1949) 16 EACA, 135** is that:

- (a) the inculpatory facts must be incapable with the innocence of the accused;

(b) they must be capable of no other conclusion or explanation except the guilt of the Accused.

In the light of the principles layed down in the **Kipkering's case** on circumstantial evidence, I am not persuaded that the prosecution has proved its case beyond reasonable doubt. In my evaluation of the evidence, I have come to the conclusion that the circumstantial evidence relied on by the prosecution is very weak and cannot be a sound basis for conviction of murder or manslaughter.

All the assessors returned a verdict of not guilty.

In the result, I find the Accused persons **Abdul Rajab Hammed Rono and Mohammed Chepkwony Alias Kabaisa** not guilty of murder and order that they be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kericho this 28th day of July, 2004.

**ALNASHIR VISRAM**

**JUDGE**