



**Republic v Kipserem & 2 others (Criminal Case 90 of 2017)
[2024] KEHC 1209 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 90 OF 2017
RB NGETICH, J
FEBRUARY 8, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

BERNARD KIPSEREM 1ST ACCUSED

EVANS KIPLAGAT CHEBOI 2ND ACCUSED

BENJAMIN KIMTAI KIPCHUMBA 3RD ACCUSED

JUDGMENT

1. The accused persons herein have been jointly and severally charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence being that the accused persons on the 1st day of October, 2017, at about 5:00 p.m. at Loketetwo in Kabutiei Location in Baringo North Sub- County within Baringo County jointly with others not before court murdered Raphael Kiptoo.
2. The accused persons pleaded not guilty to the charge and the matter was set down for full trial with the prosecution availing 5 witnesses in support of its case. The court found that the accused persons had a case to answer and when placed on their defence, each gave sworn statement.

Prosecution Evidence

3. PW1 one Emily Chemwemo a resident of Kapluk, Baringo North who was a friend to the deceased testified that on 1st October, 2017 at 7.00 a.m., she was at home when the deceased Raphael called her on mobile phone and told her to meet him at Mama Chebor’s place where busaa was sold. She stated that she worked until 12.00 noon when she went to Mama Chebor’s home and found the deceased there. She said there were many people at the home and was able to identify Bernard, Titus and Boit.



4. She stated that they took their alcohol and later the deceased bought her alcohol worth 20/=, then more for Kshs.50/= and later they took beer for 3 liters and went away. She testified that she took the alcohol with the deceased and, a customer one Mama Chepkemoi and that when he bought (3) litres; that they continued and after going, she remembered that she had left her head scarf at the drinking place and went with mam Chekemboi to collect it and on reaching there, she saw Benard, the 1st accused coming from a nearby forest. At this time, Raphael was at Mama Chebor's busaa place. She stated that after telling mama Chepkemoi to go for the scarf, she went back to Mama Cheboi's. At mama Chepkemoi's house, she found Raphael had taken (3) litre busaa. She testified that she told Raphael that they should go back to the place where they had been. That they went back and started drinking. It was only the (2) of them. She stated that they agreed to have sex at the place and as they stayed there, they saw Mama Chepkemoi passing by on her way to Mama Chebor and after a few minutes thereafter they heard people coming from Mama Chebor to the place where they were.
5. She said they came with a stick and started beating them. That the people who came was accused 1 Bernard, the 2nd accused who she did not know his name, and 3rd accused whom she found on the road side. That about (15) people came but she only identified Bernard whom they spoke with.
6. She said they found her and Raphael on the ground and they beat them with sticks and while Raphael was being beaten, she ran away up to her house which is nearby. She said it was about 6.00 p.m. she prepared supper and slept.
7. She said as she went to fetch water the next morning, she found many people at Mama Chebor's home. On asking what was happening, she was told that Raphael had been beaten very badly until he fell into a ditch but she did not go to the scene. She said she knew all the (3) accused persons before the incident as she used to give them casual work and that she saw the three of them beating the deceased Raphael. She said the 2nd accused beat Raphael with a stick and she saw the 3rd accused on the road as she went away. She said she found him standing on the road and she did not know whether he came to where the deceased was being beaten as he was a little further away.
8. PW2 one Isaac Seguton Cherop testified that in the evening of 1st October, 2017, his son Raphael Kiptoo Chepkonga did not go back home. When he went to his house the morning of 2nd October, 2017, he found the door locked with a padlock at 7.00 a.m. He went to school at Kipteiwa where he was working and on reaching there at 8.00 a.m. a pupil one Silas asked him whether he had heard what happened the previous day. That the pupil informed him that Raphael the deceased herein had been killed the previous day on the other ridge. He stated that at this time, he could see many people at the place where the pupil said the killing had taken place which was on the other side of the river. He testified that he asked for permission from the school and went to the scene. He saw a broken mobile phone, Kshs.20/=, his son's shoes and his wallet on the ground on reaching the area. He said the body had been thrown over the hill. He went to where the body was and saw injuries on the head which had been broken open and the arms were also broken. He stated that he called the Assistant Chief who informed him that he had been informed and they should come to guard the body so that animals may not eat it. They stayed until 8.00 p.m. when the police arrived and removed the body. He stated that he knew the accused persons, the 1st accused Bernard, 2nd accused Kiplagat and 3rd he did not recall his name. He said they were pupils at the school as he had fed them at the school where he worked as a cook about 10 years before the incident and he had no grudge with any of them.
9. PW3 one Luka Kiplagat Chepkwony testified that on 20th October, 2017 at 10.30 a.m., he was at Kabarnet when he was called by Jacob Chepturo. He was informed that the deceased who was his brother-in-law had died. He reported to police who took the body to Kabarnet Hospital mortuary. He



- said the body of the deceased had injuries all over the body with depressed skull, both arms broken, one leg broken twice. He identified the body of deceased to the pathologist on 12th October, 2017.
10. PW4 one Peter Mosop testified that he resides at Kabutie and that he was a Kenya Police Reservist. That on 1st October, 2017 at 10.00 a.m. he received call from Area Assistant Chief (Alfred Cherutich) He went to the Assistant Chief who requested him to take action against Benard Kipchumba, Evans Cheboi and Benjamin Yatich.
 11. He stated that together with Nixon Kibet and Zakaria Kibor Keitany they went to look for the suspects and they got a young man who gave them telephone number for Evans. They then asked Evans to call his colleagues and his two friends arrived. They took them to area assistant Chief. He stated that those that they handed over to the Assistant Chief were Benard Kipchumba, Evans Cheboi and Benjamin Yatich whom they had arrested at Kapluk centre and who are the accused persons before court.
 12. PW5 one Dr. Lenson Kiprotich Chesimet a Regional Medical Officer in Baringo county testified that on the 12th October 2017, at Baringo Referral Hospital, he performed postmortem on the body of Raphael Kiptoo. On examination he concluded that the cause of the death was injury on the head due to blunt trauma. He produced the post mortem report in court as exhibit 1.
 13. Upon the closure of the prosecution's case, the court delivered a ruling on 27th April, 2023 finding that a prima facie case had been established by prosecution to warrant accused be placed on his defence in accordance with Section 306(2) of the criminal procedure code.

Accused's Defence Case

14. The 1st accused gave a sworn statement. He denied the charge and stated that on the 1st October, 2017, he was at his home at Legetetwo and at 11: 00a.m he untethered his goats and shortly after, he heard screams. He said he heard and saw someone being beaten from far. He stated that he ran away. He said the deceased was making love with a woman called Emily and over 20 people found them having sex. He testified that the deceased was beaten and he fell in a cliff and he was beaten by about 20 people using whips but he was not among those who beat the deceased. He said the deceased stepped on the grass near a cliff and fell.
15. The 2nd accused Evans Kiplangat Cheboi gave a sworn statement. He denied killing the deceased. He said that on 1st October, 2017 he was at home and at noon he was going to Kapluk, when he heard people talking where the deceased was drinking. That on reaching there, he found deceased being beaten and the people beating him were drunk. He stated that none of the people beating the court is in court. He testified that he tried rescuing him but he too was beaten with many whips. That he saw the deceased fall and he left.
16. The 3rd Accused Benjamin Kimutai Kipchumba gave a sworn statement. He said that on 1st October, 2017, he was herding cattle near his home then he took the cows to the river and returned them around 2p.m when he met Emily on the road crying. He said on questioning her, she informed him that she had been beaten by many people but she did not identify them. He stated that Emily informed him that she was with Raphael and that she had been from taking illicit brew and was very drunk; that she had been beaten together with the deceased Raphael. The 3rd Accused denied beating Raphael and Emily and said Robert did not testify in court. He also stated that he did not go to where Emily was coming from. He drove the cattle home and the next morning he learnt that Raphael had died. He said he did not know what killed the deceased but he was told that he fell. He said he did not know why Emily mentioned him as one of those who beat her and that he never met anyone else other than Emily that day. Both the State and accused persons opted not to file written submissions. They relied on evidence adduced.



Analysis And Determination

17. The accused persons are charged with the offence of murder. As per Section 203 of the penal code, the ingredients for the offence of murder are proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.
18. In view of the above, I have considered evidence adduced and it is clear that death of the deceased is not disputed. All prosecution witnesses testified that the deceased died on the night of 1st October, 2017. This was confirmed by postmortem report was also produced by PW5 Dr. Lenson Chesimet who conducted postmortem examination on 12th October 2017 and found that the cause of the death was injury on the head due to blunt trauma.
19. What is in issue is whether it is the accused persons who inflicted injuries on the deceased which led to his death. PW2 who is the deceased's father confirmed that the deceased was found at the cliff the next morning. PW5 stated that his conclusion was that the cause of the death was injury on the head due to blunt trauma.
20. PW1 was with the deceased and were both beaten but she escaped while the deceased was still being beaten by a mob. She said she did not know exactly how the deceased met his death. She learnt the next morning that the deceased had died. PW5 the Doctor attributed the blunt trauma to too much force applied. He could not say whether these severe injuries (multiple fractures) were caused by beating or a fall. None mentioned any other weapon other than whips; neither was it indicated that any of the accused persons pushed the deceased to a cliff. Evidence adduced do not also point at specific role played by each accused in the injuries sustained. This raises doubt as to whether the deceased's death was caused by any of the 3 accused persons. The doubt that arises in the mind of the court goes to benefit the accused persons. From the foregoing, I find that the prosecution failed to prove their case beyond reasonable doubt.

Final Orders: -

21.

- 1) Prosecution case is hereby dismissed.
- 2) Accused 1, 2 and 3 are hereby set free unless lawfully held.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 8TH DAY OF FEBRUARY 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kipkulei for Accused 1.

Mr. Kiptoon for Accused 2.

Mr. Chepkilot for Accused 3.

1st, 2nd & 3rd Accused - present.

Elvis/Momanyi – Court Assistants

