



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Kipngetich (Criminal Case 49 of 2018)
[2023] KEHC 20156 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 49 OF 2018
HK CHEMITEI, J
JULY 12, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

NICHOLAS CHIRCHIR KIPNGETICH ACCUSED

JUDGMENT

1. The accused herein was charged with the offence of murder contrary to section 203 as read with 204 of the *Penal code*. The particulars of the charge were that on the night of October 6, 2018 at Lulukwet village in Njoro sub county within Nakuru county murdered Anyesi Cheronon Mwei.
2. The accused denied the charge when the matter came up for plea and the prosecution called a total of 10 witnesses to establish its case and whose evidence can be summarised as hereunder.
3. PW1 Josiah Kiptanui testified that on the night of October 6, 2018 he was in his house when he heard screams from the neighbour's house (the deceased). He rushed to the scene and he found her lying down and saying "Nicholas ameniua". They rushed her to the dispensary but was pronounced dead on arrival.
4. He said that they slept and in the morning he heard that the accused had been arrested. When cross examined he said that they were neighbours as well with the accused and that he did not see him that night.
5. PW 2 Daisy Chepkoech Sang testified that she was the accused neighbour for the last 10 years and the deceased was her sister in-law. She said that the accused told her not to go to his house as he had disagreed with the deceased. After about 5 minutes when they parted ways with the accused she heard screams from the deceased house and she rushed there and found her lying down.



6. The deceased was bleeding and saying that “Nicholas ameniua”. She was rushed to the hospital but was pronounced dead when they arrived.
7. On cross examination she said that the accused was angry when he left her house and that he was drunk and that she heard the deceased screaming and saying that the accused was killing her.
8. PW3 Flosy Chemutai who was deceased neighbour testified that she heard her screaming that evening and saying that the deceased was killing her. They rushed to the scene with pw2 and found her lying down injured and blood oozing from her chest.
9. The other neighbours came and they took her to the hospital but sadly the following day they heard that she had died. She said that the accused was not at home that time.
10. On cross examination she said that she was with the children preparing supper and that the accused’s other name was Sospeter.
11. PW4 Dr. Titus Ngulungu produced the post mortem report which he prepared after undertaking autopsy on the deceased body and he concluded the cause of death to be injury to the iota causing bleeding due to sharp object on the chest.
12. PW 5 Jonathan Kipngeno testified that he met the accused on the evening of the material day chasing children along the road and he advised him to leave them alone. He then went to his house and after sometime he heard screams and he saw people rushing to the deceased’s house who was her neighbour.
13. He also rushed to the scene and found the deceased lying on the floor and bleeding from her chest. She was rushed to the hospital and pronounced dead on arrival. In the morning they traced the accused and found him at the maize farm and took him to the police. They also found a bloodstained knife and handed it over to the police. He identified the said knife in court as well as the deceased bloodstained clothes.
14. The witness testified further that the accused was assaulted by the members of the public. When cross examined he said that he could not remember the clothes the deceased wore and he did not sign any inventory at the police station. He said that the deceased did not have any problem with the accused.
15. PW6 Sgt (Retired) Justus Kasusi went to the scene the following day and arrested the accused at Kahingo trading centre. He said that the accused had bloodstains on his clothes and injuries on the hands. He took him to Njoro hospital where he was treated and later he put him in the cells.
16. PW7 Gilbert Kimweno Rono testified that he was woken up by pw5 the following day and informed him that the deceased had died. They went to the accused house and they found it locked and they searched the maize field and they found a bloodstained knife in the place he had hidden himself.
17. He said that he had heard from his wife that the deceased had been stabbed by the accused. He said that the accused was arrested when he was found crossing some land and he appeared drunk.
18. When cross examined he said that the accused had hidden in the maize field and that the knife was bloodstained.
19. PW8 Kiplagat Arap Mwei the father to the deceased identified the body when post mortem exercise was being carried out and he said that he saw stabbed wounds on the chest.
20. PW9 PC Alex Muinde carried out the investigations and recorded witness statements. He said that the accused was arrested in a maize field by the members of the public. He was thereafter handed a knife by PW7 together with the accused clothes.



21. He submitted the knife together with the bloodstained clothes to the government analyst and that he also attended the post mortem exercise. He went on to state that the DNA analysis showed that the bloodstains found in the knife matched with that of the deceased.
22. When cross examined he said that he did not have the inventory of the murder weapon and that the accused was not compelled to give his blood samples. He said that by the time he went to the scene the same had been tampered with.
23. PW10 Ruth Wangare Kahiu from the Government chemist carried out analysis on the clothes, the knife and the deceased as well as the accused blood samples submitted to her and she concluded that the bloodstains on the clothes matched that of the accused while the blood stains on the knife matched that of the deceased. She went ahead and produced the same as pieces of evidence.
24. When the prosecution closed its case the accused was placed on his defence and he gave unsworn evidence denying the charges. He said that on the material day he went to his casual business and later went to the trading centre and a club called “simama Kenya” where he took alcohol till 9pm and went home.
25. He said that he was however assaulted by three people before he reached home and he slept there till the following morning where one lady came to assist him but she screamed when she saw the bloodstained clothes.
26. He said that he was assaulted by PW5 and he felt down and he did not know what happened and that he only found himself at the provincial general hospital (PGH). He was later charged with murder and that he never saw the deceased that day.’
27. The court directed the parties to file their written submissions which they have. The learned state counsel submitted that the state had proved its case against the accused especially the testimony of PW2. That the knife recovered from the maize farm when subjected to DNA analysis clearly found that it was the one which had been used to fatally stab the deceased.
28. He therefore concluded that malice aforethought had been established against the accused person and prayed that he be convicted accordingly.
29. The learned counsel for the accused submitted on his part that the state did not satisfy the ingredients of the offence namely malice aforethought as per the authority of *Republic v. Ismail Hussein Ibrahim* (2081) eKLR.
30. He also submitted that there was no evidence that the accused was properly identified as there was no proper lighting and that the witnesses relied majorly on torches, moon and kerosene lamps.
31. That the dying declaration was not corroborated as was enunciated in *Akumu v. Rep* (1954) 21 EACA 331 and other related authorities. In the absence of a prima facie case against the accused it was therefore unsafe to convict him and he should be acquitted.

Analysis and determination

32. The court has perused the proceedings herein and it is evident that there was no eye witness to the incident. All the witnesses who managed to arrive at the scene found the deceased having been stabbed on the chest and blood oozing therefrom. The assailant was not there. This was contributed by the fact that there was darkness and despite the light from the torches and the moon they were unable to see the assailant.



33. This case therefore centres on two issues, circumstantial evidence and a dying declaration. Circumstantial because of the fact that there was no eye witness. The accused was arrested the following morning in a maize field by the members of the public who went ahead and assaulted him. By the time the police picked him his clothes were already bloodstained and had injuries on his hands.
34. The knife which was recovered at the maize field was bloodstained and when subjected to DNA analysis found that the blood therein matched that of the deceased. It was the conclusion of the pathologist that the deceased had been injured using a sharp object and it is therefore easy to conclude that the recovered knife was the same one that had been used against the deceased some few hours ago.
35. Although there was no clarity how the knife was recovered I have no doubt that the same was recovered within the place the assailant had stayed overnight. The witnesses said that they arrested him not far from his house and that is where the knife was found.
36. In the absence of any other explanation this court concludes that the said knife belonged to the accused person and he had used it to attack the deceased that previous night.
37. On the second issue of a dying declaration the court in *Okethi Okale & Others v Republic* (1965) E A 555 advised that the same ought to be taken with extra caution as it can be very unsafe to base it simply without corroboration. It went on to state that;

“It is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the deceased. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration.”
38. It appears from the evidence of PW1, 2 and 3 that they heard the deceased screaming and saying “Nicholas ameniua”. Within a short time thereafter she was unable to talk. She became unconscious. The three witnesses heard her utter those words. Their evidence in my view squarely corroborated what the deceased said as she passed out.
39. There was an argument by the defence about contradiction of PW1 and PW2 on at what point they heard the deceased saying “Nicholas ameniua.” The contradiction may not matter much as one said that she heard her screaming and saying the above words while the other one heard her when she arrived there. I think it is fair to conclude that at whatever stage they may have heard within those few minutes the deceased clearly mentioned the accused herein as the person who had stabbed her.
40. It is not disputed that the accused and the deceased knew each other and the witnesses as well were all neighbours. It cannot be mistaken that they did not know whom the deceased meant when she said that the accused was killing her. At the same time there was no evidence during trial to suggest that there was another Nicholas or Sospeter within that area.
41. In my view therefore the dying declaration by the deceased was well corroborated by the three witnesses. The accused defence though it did not shake the prosecution evidence was of no probative value for it was unsworn.
42. In view of the above this court finds that it was the accused who fatally injured the deceased that evening for reasons which did not come out during trial. There must have been such reasons but that does not lessen the fact that the accused caused the deceased's death herein



43. In the premises the accused is hereby convicted under the provisions of section 203 of the *Penal code* as read with section 215 and 322 of the *Criminal Procedure Code*.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 12TH DAY OF JULY 2023.

H K CHEMITEI

JUDGE

