



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

HIGH COURT CRIMINAL CASE NO.20 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

KIPROTICH HILLARY KITUR.....ACCUSED

J U D G M E N T

1. The Accused Person in this case, KIPROTICH HILLARY KITUR (hereafter referred to as the Accused Person) was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

2. The particulars of the charge were that on 6/8/2017 at KAPLELIT Village, in CHILCHILA division of KIPKELION Sub-County within Kericho County, the Accused Person Murdered KENNEDY CHIRCHIR.

3. The Accused Person pleaded not guilty to the charges. The Prosecution called a total of five (5) witnesses whose evidence was as follows:-

PW.1 – WESLEY TERER who is a boda boda rider said on 6/8/2017 he took Kadogo (Stella) to Fort Tenan on his Motor Cycle. He said he entered Stella's house and she told him to wait for supper. While she was cooking, PW.1 was seated when KENNETH CHIRCHIR (the Deceased) entered the house running. He was followed by the Accused Person who was armed with a nut fitted rungu. The Accused Person wanted to hit the deceased with the rungu but PW.1 restrained him

4. The Accused Person and the deceased were quarrelling over a pair of trouser. The Accused Person told the deceased to pack and leave his house. The Accused Person rose and struck the deceased with the rungu once on the head. The Accused Person who appeared drunk ran away.

5. PW.1 called Stella and they tried to give the deceased first aid. They took him to Fort Tenan Hospital with the assistance of Titus Rono. The deceased passed away at Fort Tenan Hospital.

6. PW.2 STELLA KOLA said at the material time she was at her house preparing supper. She told PW.1 to wait for supper. PW.1 had gone to collect money from her for ferrying her from FORT TENAN to KAPLELIT. While in the house, PW.2 said the Accused Person and the Deceased entered. The Accused Person who was holding a rungu (Club) with a metal bold (nut) was quarrelling with the deceased over a trouser.

7. The Accused Person hit the deceased with the club and he fell down. PW2 said she went to look for a boda boda and they took the deceased to FORT TENAN Hospital with the help of TITUS RONO and he was later transferred to KERICHO Hospital where he died.

8. PW.3 TITUS KIMUTAI RONO said he was called by PW.1 and told someone had been injured at Kadogo's house. PW.3 went and assisted to take the deceased to Hospital. He said they took the deceased to FORT TENAN and left him there and they informed his relatives.

9. PW.4 Dr. WESLEY ROTICH, a medical officer at Kericho Referral Hospital conducted the Post Mortem on the deceased. He said the body had a deep cut wound on the right parietal region of the head measuring 2 x 8 cm. He had bruises on the left temporal region and blood was oozing from the nose.

10. The Doctor formed the opinion that the cause of death was severe head injuries caused by trauma to the head by a blunt object. He produced the Post mortem Report as an Exhibit.

11. PW.5 No. xxxxx CORP. GEORGE MAKAU said on 7/8/2017 which was General Election Day in Kenya, he was going round on patrol to various polling stations when he was called by CIP. Musemi Kyalo and told to go to FORT TENAN Police Station where there was a

Murder Suspect.

12. PW.5 proceeded to the said Police Station where he found the Accused Person in this case who had been arrested by members of the Public.

13. PW.5 went to the scene of crime at FORT TENAN where he met PW.1 and PW.2. He said he learnt that the deceased and the Accused Person were drunk when the incident occurred.

14. PW.5 recorded statements from the witnesses. He did not recover the Murder Weapon. The Accused Person had been arrested by members of the Public. PW.5 charged him with this offence.

15. This case started before Hon. Lady Justice Mumbi Ngugi (as she then was), I took the evidence of PW.5 after complying with Section 200 of the C.P.C. I also perused the Prosecution evidence and made a ruling under Section 210 and 211 of the Criminal Procedure Code and I placed the Accused Person on his defense.

16. The Accused Person gave sworn evidence. He said on 6/8/2017 he was at his home at 3 pm when he decided to go to KAPLELIT where he drunk alcohol at a club. He left the club at 7 pm and went to the house of Stella Kola (PW.2) where he drunk some more alcohol.

17. The Accused Person said a neighbor had told him to buy some things to carry home. He said he found the deceased who was his uncle knocking at a hotel. The deceased said he had not eaten. The Accused Person said he told the deceased that they would go and eat at home.

18. The Accused Person said they went back to PW.2's house and continued drinking. He said he did not enter the house. He said he quarreled with the deceased and he hit him with a stone which was near the door and he was pushed out of PW.2's house and he went home and slept and the following day he went to work. In the evening, he was arrested by PW.1 and PW.2 and taken to the Chief's Camp.

19. The Accused Person said from the Chief's Camp, he was taken to FORT TENAN Police Station where he was arrested together with PW.1 and PW.2 and others. He said they were released and he was told he had killed his uncle.

20. The Accused Person said he had fought with his uncle and he did not have a reason to kill his uncle.

21. I have considered the evidence on record in this case. It is the duty of the prosecution to prove the guilt of the Accused Person and the standard of proof in criminal cases is beyond reasonable doubt.

22. The Prosecution must prove the following elements:-

- (i) The death of the deceased and the cause of death
- (ii) That the Accused Person caused the death of the deceased through an unlawful act or omission.
- (iii) That the Accused Person caused the death of the deceased with malice aforethought.

23. Section 206 of the Penal Code sets out what constitutes malice aforethought as follows: - *Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—*

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- (c) an intent to commit a felony;*
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

25. The Court of Appeal in *Nziuki versus Republic, (1993) eKLR* defined Malice aforethought as follows: *“Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:*

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder."

26. In the current case, I find that there is evidence that the deceased died and that it was the Accused Person in this case who inflicted the fatal injuries on the deceased.
27. PW.1 was an eye witness who saw the Accused Person hit the deceased with a club which had a metal nut. The deceased fell down and the Accused Person ran away.
28. The Doctor who produced the Post Mortem Report formed the opinion that the cause of death was severe head injuries due to trauma to the head caused by a blunt object.
29. Although the Murder Weapon was not recovered, PW.1 and PW.2 saw the Accused Person armed with the said weapon inflicting injuries on the deceased.
30. The incident occurred in the house of PW.2 and PW.1 was an eye witness to the same. The deceased was taken to Hospital by PW.1, PW.2 and PW.3. He was later transferred to Kericho Referral Hospital where he died.
31. On the issue as to whether the deceased had malice aforethought, I find that there is evidence that the deceased and the Accused Person who were staying together quarreled over a trouser.
32. There is evidence that they had drunk together and both were drunk. Although there is no evidence whether the Accused Person was so intoxicated to the point of being incapable of comprehending what he was doing, I find that the element of malice aforethought is lacking in this case.
33. I accordingly reduce the charge to manslaughter and I convict the Accused Person with the lesser charge of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 1ST DAY OF OCTOBER, 2021.

A. N. ONGERI

JUDGE