



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL NO. 78 OF 2011**

**REPUBLIC.....STATE**

**VERSUS**

**COSMAS CHIRCHIR.....ACCUSED**

**JUDGMENT**

1. Cosmas Chirchir (“Accused Person”) is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that the Accused Person murdered PC Emmanuel Maritim on the 27<sup>th</sup> day of August 2011 at Emitik Area in Kuresoi District within Nakuru County.
2. The Accused Person pleaded not guilty and the case was set down for hearing. The first four witnesses were heard by Justice Anyara Emukule before he was transferred out of the Station. My predecessor, Justice Maureen Odero, heard the final Prosecution witness. She then put the Accused Person on his defence but was transferred out of the station before the defence was conducted. It fell upon me to finalize the trial. Like my sister before, I complied with section 200(3) of the Criminal Procedure Code and the Accused Person indicated that his wish was for the Court to proceed from where proceedings had reached. So it was.
3. I duly informed the Accused Person of his options on defence. He elected to give a sworn statement but had no witnesses to call.
4. The evidence from trial was straightforward. John Kipkoech Sigei was operating a Pool table for a fee at Emitik Area. On 27/08/2011, at around 8:00pm, Cosmas went to the establishment. He was in the company of other people – including one John identified as “David”. John says that shortly after the Accused Person went to the facility, John decided to close it for the day.
5. John remembers the Deceased trying to leave but the Accused Person was preventing him from doing so. In any event, John says that they eventually left. John proceeded to lock the establishment. He used a side door to exit but as he exited he found the Deceased’s body slumped there. He also saw the Accused Person chasing away other people in an apparent fit of anger. On seeing this, John, who testified as PW1, fled for dear life. He testified that he knew nothing about any dispute between the Accused Person and the Deceased.
6. Bernard Rotich was one of the young men who were at the pool table at the establishment. He testified that he had been sent to deliver some ciggarettes to the Deceased as he was playing pool. In his testimony as PW2, he says after the pool table place was closed at around 7:30pm, as he was walking away, he heard the voice of the Accused Person say: “Do not hold me!” He then heard the voice of the Deceased say: “Do not stab me!” Bernard says he turned his gaze towards where the voices were coming from and he saw the Accused Person holding the Deceased with one hand. With the other hand, the Accused Person had a knife. Bernard says he clearly saw the Accused Person dragging the Deceased as he stabbed him severally.
7. Bernard testified that he saw Cosmas chasing away Stanley Chiraku (one of the other people who had been playing pool) before returning to pick up the Deceased. He noticed he was dead. He dropped him to the ground and stepped on his neck. He then fled.
8. Bernard Kipsang Rono was also at the scene and testified as PW3. He also says he also saw the Accused Person stab the Deceased before he heard him say: “Let me finish you completely!” Bernard Kipsang also says he saw the Accused Person chasing after Leonard before he himself fled the scene.
9. Similarly, Leonard Sang was at the Pool table. He had been invited there by the Deceased who “sponsored” for the game. He also testified that as the Pool place was being closed, he saw the Accused Person stabbing the Deceased on the leg before he proceeded to stab him on other parts of his body. He also did not know what the dispute was about. Leonard Sang testified as PW4.
10. Dr. George Biketi testified on behalf of Dr. Francis Thalth. Dr. Thalth performed the autopsy on the body of the Deceased after it was

identified to him by Geoffrey Kipyegon Maritim, a brother to the Deceased. Dr. Biketi produced the Post-mortem Examination Form. The examination found that the body of the Deceased had the following injuries: a small bruise on the head; two stab wounds on the left nipple not penetrating into the thoracic cavity; a cut on the lower margin of the left rib cage; a stab wound on the lateral superior region; and a stab wound on the left thigh. All the Deceased's systems were normal. The doctor concluded that the cause of death was "cardiorespiratory arrest due to massive extirpation of blood from torn femoral artery."

11. When put on his defence, the Accused Person gave a sworn statement. In short, he pleaded self-defence. He testified that it was the Deceased who attacked him and that in the struggle a cobbler's knife he had in his pocket injured the Deceased. He said that on that day they were helping the Deceased, who was a neighbour and a friend, cut wood to help build his house. Later in the evening, they went out for food and a few drinks. After the Deceased bought him two beers, the Accused Person says that he was ready to call it a day. However, the Deceased would have none of it; that he became enraged that the Accused Person, for whom he had bought beers, had proposed to leave him instead of waiting for him to finish his beers.

12. The Accused Person says that the Deceased was quite drunk at the time and that he attacked him – grabbing him hard and kicking him. According to the Accused Person, it is in the ensuing struggle that the cobbler's knife must have cut the Deceased.

13. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

14. To succeed in proving a murder charge, the Prosecution, therefore, is required to tender proof beyond reasonable doubt of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

15. In the present case, there is no contest that a death of the victim occurred: PC Emmanuel Maritim was killed on 27/08/2011. His brother, Geoffrey (PW5) saw and identified the body; and Dr. Thalth performed autopsy on it.

16. The next question is whether the death of the Deceased was caused by the Accused Person. There was clear and forthright eye witness testimony by at least three people that they saw the Accused Person severally stabbing the Deceased. These were Bernard Rotich (PW2); Bernard Kipsang (PW3); and Leonard Sang (PW4). All these three people were with both the Accused Person and the Deceased at the Pool Table in the period immediately preceding the incident. They all saw him and interacted with him. They all knew him as friends and neighbours. Shortly afterwards, they saw him severally stabbing the Deceased. There is simply no room for imagining the possibility of misidentification in this case.

17. The question must only turn on whether the Accused Person had malice aforethought when he perpetuated the act. His defence is that it was the Deceased who attacked him and that a cobbler's knife he had in his pocket somewhat cut the Deceased. The Accused Person is completely unable to explain or even proffer a theory how a cobbler's knife in the shirt pocket somewhat fell in the heat of a violent confrontation with the Deceased and ended up inflicting at least five stab wounds on the Deceased. I find the Defence narrative so implausible that there is no inherent possibility that it could be true. While the Defence is not required to demonstrate that its defence theory or narrative is reasonably plausible or probable but it is only required to demonstrate that its version of events or its theory of the case is reasonably possibly true in substance, in this case, the Defence narrative does not meet even this low threshold in order to raise reasonable doubt. The correct test is whether it can be said that the Defence narrative is so improbable that it cannot reasonably possibly be true. (See **S v Shackell (4) SA 1 (SCA)**). In my view, it is not possible to say that the Accused's Person's version of events has any reasonable inherent probability that it is true.

18. The self-defence theory is belied by the number of stab wounds the Deceased had as well as their location. The Deceased had five stab wounds. These were in the breast region, below the rib cage and on the thigh. These are not the type of injuries one gets typically when they are attacking another person. These are injuries inflicted by a person who was committed to cause maximum injury or death. It is not a single stab wound which can be comprehended as self-defence. They are five stab wounds. No theory of self-defence could ever explain the presence of these multiple injuries on the Deceased.

19. In any event, the evidence of the nature of injuries is strongly corroborated by three eye witness accounts of how the Accused Person viciously attacked the Deceased.

20. Finally, another aspect of the case eliminates the self-defence theory: immediately after the incident, the Appellant fled. He was only found more than two months later as a fugitive of justice. This post-offence conduct is in line with the conclusion that the Accused Person did kill the Deceased with malice aforethought.

**21. On the basis of the existing record, there is little doubt that all the elements of murder have been established against the Accused Person. Consequently, I find and hold that the Accused Person, Cosmas Chirchir, is guilty of the murder of PC Emmanuel Maritim contrary to section 203 as read together with section 204 of the Penal Code and I hereby convict him accordingly.**

22. Orders accordingly.

Dated and delivered at Nakuru this 20<sup>th</sup> day of February, 2020

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**JOEL NGUGI**

**JUDGE**