



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 125 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

NELSON CHEPKWONY.....ACCUSED

JUDGMENT

1. The Accused Person, Nelson Chepkwony, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 29th day of November, 2014 at Ekapulele Village within Nakuru County, the Accused Person is alleged to have murdered Robert Kipyegon Kiptesot.

2. The Prosecution called six witnesses to establish its case. The Prosecution narrative is that the Accused Person was a friend to the Deceased and that they were last seen together when the Deceased went to sleep in the Accused Person's house. Later, his remains were found in a bush. The Prosecution alleges that blood stains in some items found in the Accused Person's house further links him to the murder.

3. According to the Deceased's mother, Janet Chebet Mulei, the Deceased used to work in "Maasailand" as a shepherd – hired to graze other people's cattle. Janet testified as PW1. She testified that the Deceased had come back home for a short sojourn. While at home, he used to sleep in his mother's compound as he had no house of his own. In November, 2014, the Deceased had come home for a sojourn. Janet testified that on 28/11/2014 in the evening, the Deceased went to sleep in the Accused Person's house. She said that the Deceased left with the Accused Person at around 2:00pm on that day and that he never came back the following morning or at all.

4. Janet said that when the Deceased failed to return home by the third day, she went to the Accused Person's house to inquire on his whereabouts. She testified that the Accused Person claimed that the Deceased had called him using a "wrong number from Mauche." Janet never saw the Deceased again. Later, she said, some village elders found remains of a person in the bushes. She says she recognized the clothes of the Deceased as well as his beads and a woolen cap at the scene. This confirmed to her that the remains belonged to her son – although only part of the head and teeth were found.

5. In cross-examination, Janet insisted that she was sure that her son was dead though she did not identify the body since only bones and a skull were found. She confirmed that she did not go to the mortuary to identify the body. Asked how she knew that the Accused Person killed the Deceased, she said that blood was found in his house. In fact, no evidence to that effect was brought to Court. She however conceded that the Accused Person and the Deceased were friends and that she could not hazard a motive for the murder. She also conceded that most of the time when at home the Deceased used to sleep at the Accused Person's house as they were good friends.

6. David Sigiei is a cousin to the Deceased. He testified as PW3. He testified that on 13/12/2014 at about 2.00p.m. while at Kaplelei where the mother of Deceased lived, he heard villagers saying that some human remains have been recovered in the forest. He went with other villagers to the scene. There, he saw a skull and a jaw and teeth. He testified that he was able to tell that the skull and jaw were those of the Deceased. In part, he said, he was able to do this by comparing the jaw of the sister of the Deceased with the skull and jaw that was found. He said that they concluded that the skull and jaw were those of the Deceased.

7. David Sangale, the Area Chief for Sururu location where the Deceased lived testified as PW2. He recalled that on 13/12/2014 he received a call from the village elder of Kapletet village, Samuel Sigilia, informing him that the remains of a human body had been found in the bushes near the village. He told Sigilai to go and confirm and call back. Sigilai did so and called with the confirmation. Sangale, then, phoned the OCS of Mau Narok with the information. They linked up and proceeded to the scene. There, they found a jaw and what seemed like a skull of a human. He also saw beads at the scene. The body was in Nderit forest near the river. Villagers had congregated around the remains. Upon inquiry, the villagers said that the remains were those of Robert Kipyegon who had gone missing several days before. Sangale said that the villagers said that the Accused Person is the one who would know where the Deceased was since they were friends. Sangale also testified that the villagers told him that they had seen the Accused carrying a bundle in a lesso and that he had claimed that he had gone to wash clothes. Sangale testified that the Police were dispatched to go look for the bundle and then they retrieved it in the plantation, they

discovered it was a bundle of male clothes. On cross-examination, Sangale said that the Deceased's family said the clothes belonged to the Deceased; but that the Accused Person claimed that the clothes were his. However, the Deceased's mother, Janet, did not identify the clothes in her testimony.

8. Finally, Sangale confirmed that neither he nor the Police had received any information on a missing person prior to the discovery of the human skull and jaw.

9. The remains were taken to Nakuru Provincial General Hospital where they were examined by Dr. Titus Ngulungu. He did the examination on 22/12/2014. As PW4, he testified that the remains were identified by: Janet Bunei; Wesley Mutai and P.C. Alex Moinde. He said that he was informed that the Deceased had gone missing and later his body was recovered after 2 weeks. The body was marked and the remains were just bones – the bones were for a male adult. He could not establish the physique or nutritional status. No postmortem changes were noted as there were mostly bones. There was chiseling due to canine animal attack. There were no tissues to examine. The bones were human bones. There was a lower jaw with all teeth except central incisors. The maxilla (upper jaw) was present. The upper skull bones were present as well as lateral and side skull bones. The upper limbs scapula was in fragments. There were several fragments of the long bones. The bones showed chiseling at all the edges as result of attack by carnivorous animals. No soft tissues were present. There was no brain, heart or internal tissues. Finally Dr. Ngulungu found it difficult to determine the cause of death as he only had bone fragments and there were no soft tissues to be examined. He took bone and marrow fragments to be taken to the Government Chemist for DNA analysis to establish identity. He filled and signed the postmortem report which he produced as evidence. In cross-examination, Dr. Ngulungu conceded that it is not possible for relatives, as laymen, to identify bones and a skull of a loved one as their Deceased loved one absent scientific DNA tests.

10. Chief Inspector Nicholas Kiprop testified as PW5. He participated in the initial investigations of the homicide. He testified that he visited the scene on 13/12/2014 after he received a call from the area chief. He found members of the public present at the scene. He was accompanied by were PC Olenara, PC Mungai and PC Mudenyi and PC Kidani who was the driver. The scene was about 200 metres inside the forest. They were led by the area chief and some village elders.

11. On arrival at the scene, CI Kiprop testified that he saw the body parts – including a fractured skull, a jaw and some bones. He also saw a woolen hat and some beads from a Maasai necklace. He identified the hat in Court and produced it as an exhibit.

12. CI Kiprop testified that they engaged members of the public to search the area but got no other body parts. Thereafter the Area Chief called a Baraza in which a woman came up and said that the body parts and the items belonged to her son who had disappeared two weeks previously. That woman is PW1 (Janet). CI Kiprop says that they took the body parts to Nakuru PGH for preservation and examination. Upon the information that he got from the members of the public, CI Kiprop testified that he sent Police Officers to the Accused Person's residence where, he said, they recovered a lessso and a 20-litre jerry can which had some blood stains on them. He produced the lessso and the jerry can as evidence

13. On cross-examination, CI Kiprop explained that he must have forgotten to record about the woolen hat and the lessso – although the jerry can is in his statement. He however conceded that he is not the one who recovered the jerry can although it is in his statement. He also could not explain the whereabouts of the beads and why they were not produced in Court. CI Kiprop said that he put the items in the Exhibits store from where they were to be handed over to the DCI for onward transmission to the Government Chemists for analysis.

14. The final witness was the Investigating Officer, PC Alex Muinde of DCI Njoro. He took over the case from PC Mungai of Mau Narok Police Station. He testified that he was instructed to take over the matter on 19/11/2014; and that he went to Mau Narok and interrogated the Accused Person and took over the following exhibits:

- a. Yellow blood stained jerry can
- b. Lessso – which was blood stained
- c. Blood stained white baby shawl.
- d. Deceased's jaw, ribs, skull and human bones.

15. He took the human body parts to the Nakuru Municipal Mortuary and kept the rest in the police exhibit store. He produced the shawl as an exhibit since the rest had already been produced. He also testified that there were beads but that he realized that they were now missing. He said that these items were recovered from the Accused Person's house by PC Olonana and PC Mungai. However, neither PC Olonana nor PC Mungai testified.

16. PC Muinde stated that they forwarded the jaw and marrow to the Government Analyst for analysis together with the blood stains from the jerry can, baby shawl and lessso. The Government Analyst did an analysis and forwarded a report dated 27/11/2017 ref A160/15. It has findings. It was done by E.W. Onyienko.

17. The Prosecutor then closed its case without calling the Government Chemist, PC Olonana or PC Mungai.

18. Put on his defence, the Accused Person gave an unsworn statement. He said that the Deceased was his friend and that he did not kill him; that he last saw him in June, 2014 when he was on his way to "Maasaiini" for work. He said he does not know anything about the alleged murder.

19. 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.

20. To successfully obtain a guilty verdict in a murder charge, the Prosecution, therefore, is required to tender sufficient proof 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*.

21. On the other hand, under section 206 of the Penal Code, *malice aforethought* is established, when there is evidence of:

- i. *Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not;*
- ii. *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;*
- iii. *Intent to commit a felony; or*
- iv. *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.*

22. The task of the Court here is to determine if on the evidence brought before the Court, the Prosecution has established the three elements of the offence of murder. Each element must be proved beyond reasonable doubt.

23. Was the *actus reus* proved in this case? The *actus reus* in a murder case is evidence that the person named in the Information actually died. The fact of death must be proved by evidence beyond reasonable doubt. It cannot be a matter of conjecture. In the present case, the Deceased as named in the Information is Robert Kipyegon Kiptesot. Robert's mother testified as PW1. She said she was able to tell that the remains found on 13/12/2014 at Nderit Forest were her son because she saw beads and a woolen hat which belonged to Robert. She also said that she could tell from the shape of the skull. Robert's cousin, David Sigei, also testified that he could tell that the remains were those of Robert because of the shape of the jaw. He said that they called Robert's sister and they compared the jaws and concluded that the remains must have been those of Robert.

24. Based on this initial identifications, Janet and Sigei were called to identify the remains to Dr. Ngulungu when he was carrying out the autopsy. Dr. Ngulungu conceded that he carried out no forensic investigations to confirm the identity of the remains and that any such investigations were to be carried out as DNA analysis by the Government Chemist. He further conceded that it is not possible for relatives to definitively tell who the Deceased is when only bones and part of a skull are available.

25. It is unclear whether the samples of the remains taken by Dr. Ngulungu were ever taken to the Government Chemist for analysis. If they were, no report was filed in Court or produced in evidence. The result is that none of the witnesses who testified before the Court could be said to have proved beyond reasonable doubt that the person named in the Information to wit, Robert Kipyegon Kiptesot. The presence of the woolen hat at the scene which Janet claimed belonged to her son is not irrefutable proof that Robert Kipyegon Kiptesot was, in fact, the person's whose remains lay there for purposes of sustaining a murder charge.

26. This is an unfortunate shortfall on the part of the Prosecution and Investigators. In the present case, nothing short of forensic evidence would have sufficed to establish that the Deceased is the person named in the Information – and the Prosecution failed to marshal that evidenced. It boggles the mind why this step was not done: nothing would have been easier than to draw DNA specimens from the mother of the Deceased, who was present, and the remains found and comparing them to establish parentage.

27. There is a second even more damning shortfall on the part of the Prosecution. The only ostensible link between the Accused Person and the alleged homicide – assuming the remains were those of Robert Kipyegon Kiptesot – are three items which were allegedly recovered in the Accused Person's house and which allegedly contained blood whose DNA make up, upon analysis, were found to be that of the person whose remains were found in the forest. However, two major mis-steps happened.

28. First, there is no proper chain of custody of these items from their alleged recovery in the Accused Person's house to their presentation in Court. The items were allegedly recovered by PC Olonana and PC Mungai. However, evidence adduced showed that it was CI Kiprop who gave the items to PC Muinde – even though he is not the one who had recovered them. Neither PC Mungai nor PC Olonana were called to confirm that they had, in fact, recovered the items in the Accused Person's house and handed them over to CI Kiprop. This is a fatal omission.

29. Second, there is an even worse omission – if that is logically possible: the Prosecution failed to call the Government Chemist who did the analysis of the items to testify and produce her report. As such the Government Chemist report allegedly linking the Accused Person with the murder of the person whose remains were recovered on 13/12/2014 was never established.

30. There is no reason to belabor the point. The Prosecution woefully failed to even verge close to the degree of proof required to establish its case of murder beyond reasonable doubt. It did not sufficiently establish demonstrate that the person named in the Information is indeed a victim of homicide; and it did not demonstrate sufficiently the link between the Accused Person and the person whose remains were

recovered.

31. It is, therefore, my finding that the Prosecution has failed to prove beyond reasonable doubt all the three elements of murder against the Accused Person. Consequently, I find that the Accused Person is not guilty of the offence of murder of Robert Kipyegon Kiptesot. I, accordingly, acquit him under section 322(1) of the Criminal Procedure Code. He shall be set at liberty unless otherwise lawfully held in custody.

32. Orders accordingly.

Dated and delivered at Nakuru this 16th day of April, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Rita, the Defence Counsellor, Mr. Wambeyi Magomere, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Other authorized personnel and representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.