



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NUMBER 29 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

RAINSON TEKEI CHEPKUTO.....1ST ACCUSED

EDITH CHEPKWEMOI NGWEIYO.....2ND ACCUSED

LYDIA CHESANG CHEPKUTO..... 3RD ACCUSED

DAN OPETO KIBET.....4TH ACCUSED

HELLEN CHEPKWEMOI NGEIYWO..... 5TH ACCUSED

J U D G M E N T

The accuseds' **Rainson Tekei Chepkuto, Edith Chepkwemoi Ngweiyo, Lydia Chesang Chepkuto, Dan Opeto Kibet, Hellen Chepkwemoi Ngeiywo**, were accused of murder contrary to Section 203 as read with Section 204 of the Penal Code. That on 23rd September, 2015 at Kona Tatu village, Chemwesus sub location in Mt. Elgon Sub County within Bungoma County murdered Nicholas Kiprotich Chepkuto alias Kola

Before the commencement of the hearing **1st Accused Rainson Tekei Chepkuto**, **2nd accused Edith Chepkwemoi Ngeiywo** and **4th accused Dan Opeto Kibet** who were on bond absconded and warrant of arrest issued against them. These proceedings are in respect of **3rd accused Lydia Chesang Chepkoto** and **5th Accused Hellen Chepkwemoi Ngeiywo**.

PW 1 Hilda Chepkorir is a child aged 13 years. She was the daughter of the deceased Nicholas Kiprotich Chepkuto alias Kola. **3rd Accused Lydia Chesang** and **5th Accused Hellen Chepkwemoi** are her aunties; **1st accused** was the deceased's father and **2nd accused** was the deceased's mother and **4th accused** was deceased's brother.

On 23rd September, 2015, PW 1 Hilda was at their home with Accused 1, 2, 3, 4, 5 Accused persons. She was in the kitchen house while the accuseds and the deceased were in the main house. She heard noise from the main house. She went there and found them beating her father the deceased. **5th Accused** on seeing her chased Hilda away. Before she left she saw **3rd accused** and **5th accused** together with others beating the deceased. They were beating him because he had objected to them selling land. Later, her mother called Celestine Yego informed her that deceased had died. Upon cross-examination she stated that the incident occurred at 5 p.m. and she saw **5th accused** armed with a rungu. She stated that at time she saw **3rd** and **5th accused's** beating the deceased.

PW 2 Robert Mokoioy Ngeiya was with the deceased on 23rd September, 2015 at Kona Tatu from 12.00 p.m. to 5.00 p.m. when they parted on 24th September, 2015 he heard screams and was informed deceased had died. He went there and confirmed. He confirmed in cross-examination that they were together and they drank alcohol.

PW 5 No. 56246 Sgt Biffeunt Otieno the investigating officer together with OCS Mt Elgon, visited the scene of murder at Kona Tatu area. On arrival they found a body in a maize plantation. The body had injuries on the head and burns in the body caused by hot water. He also recovered from the scene a water tank which had bloodstains.

3rd Accused Lydia Chesang Chepkuto gave sworn evidence in her defence. She testified that on 23rd September, 2015 at 6.30 p.m. she was

at home with Hilda and 5th accused in the kitchen house. The deceased came home drunk and greeted them. He then left. She came out and heard screams from main house. She went there and found 1st accused Nelson her father and 4th accused Dan Obeto and 2nd accused Edith their mother in the house where there was a fight. The father chased her away and she ran into a maize farm. When she came back, the father (1st accused) told her deceased had asked for land. She did not find deceased. On 25th September, 2015 5th accused while at the maize farm found the body of the deceased. Police were informed and took the body away. She denied pouring hot water on the deceased.

5th Accused Hellen Chepkemoi Ngeiywo testified that on 23rd September, 2015 she came to her parents' home arriving at 6.30 p.m. she found 3rd accused and her child together with Hilda (PW 1), in the kitchen house where Accused 3 had cooked ugali and vegetables. Deceased came greeted them and went away. She then slept. On 25th September, 2015 while looking for green maize in the farm, she saw the body of the deceased. She screamed and people came. She denied participating in the killing of the deceased.

Mr. Makokha for the 3rd and 5th accused filed written submissions. He submitted that the prosecution did not tender direct evidence to link 3rd and 5th accused to the commission of the offence. He further submitted that the evidence relied on by the prosecution is circumstantial evidence as the only eye witness Hilda was in the kitchen with 3rd and 5th accused. Counsel submitted that even the circumstantial evidence relied on did not meet the threshold set in **R Vs Kipkering arap Koskei and Kamune arap Meteti 1949 16 EACA 135** on circumstantial evidence.

He submitted that the prosecution in order to prove a charge of murder against an accused person must tender evidence to prove the fact and cause of death, positive identification of the accused doing the unlawful which caused the death of deceased and finally that accused had the necessary malice aforethought.

PW 6 Dr. Edward Wafula performed a post-mortem on body of deceased on 2nd October, 2015. He found the body had extensive burns covering whole chest, 1/3 of back and part of upper and lower limbs: had multiple cut wounds on scalp and face and blood on the surface of the brain. As a result of the examination he formed opinion that cause of death was due to burns and cut wounds on deceased. This witness, therefore, established fact and cause of death.

The only evidence that links the 3rd and 5th accused to the death of deceased is that of **PW 1 Hilda Chepkoro** a minor aged 13 years at time of testifying and 9 years at time of incident. She testified that on materiel day she was with the 3rd and 5th accused in the kitchen house which was near to the main house. It was around 5 p.m. she heard noise in the main house. She went there but 5th accused chased her away. She learnt that it is deceased who was being beaten over a land issue. On being cross-examined by counsel for accuseds she stated that she saw 3rd and 5th accused armed with a rungu and 3rd accused hit deceased on the head and 5th accused on the back. She stated that the assault occurred in the main house of deceased's father.

PW 5 Sgt Biffent Otieno, the investigating officer recorded the statement from Hilda PW 1 confirmed that it was as a result of the statement of this witness that he charged the accused.

The 3rd and 5th defence is that they were at home and they confirm there was a fracas involving the deceased and other family members including the father (1st accused), the mother (2nd accused) and a brother (4th accused). They deny that they participated in the fight which was over land and maintain they were outside with Hilda. Hilda was the only witness called by the prosecution whose evidence connects the 3rd and 5th accuseds to the offence. She informed court that she was 13 years old at time of testifying and 2as 9 years old in 2015, the time of the incident. She was, therefore, a child of tender years to whom a *voire dire* examination was conducted. Section 125 (1) Evidence Act states: -

“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)”.

Also **Section 19 (1)** of the **Oaths and Statutory Declarations Act** has something to do with receiving evidence of a child in the following:-

“Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth”.

Who is a child of tender years is an issue we think requires clarification because the courts have made various conclusions. **Section 2 of the Children's Act defines a child of tender years to mean “a child under the age of 10 years”.** We have not come across any other statutory definition of a child of tender years other than the above which in our view was perhaps informed by the broad interests of protecting children from criminal responsibility and not as a test of competency to give evidence in criminal proceedings. Court decisions regarding the competency of evidence by children of tender years have maintained a higher threshold of 14 years and not 10 years as witnesses of tender years whose evidence must be subjected to *voire dire* examination.

In a recent decision of the Court of Appeal sitting in Nyeri the case of; **Patrick Kathurima v Republic, [2015] eKLR**; it was held:

“We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the

Children’s Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes’.

Did her evidence need corroboration, Section 124 of the Evidence Act provides: -

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in [Rev. 2014] Evidence CAP. 80 43 accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

My understanding of this Section is that the evidence of a child of tender years in a criminal proceedings should be corroborated. The voire dire is to satisfy the court that child has capacity to testify and is a competent witness as he is possessed of sufficient intelligence and understands the need to say the truth. The child’s testimony should be corroborated unless it is shown that the evidence is one that relates to the proviso to Section 124 in relation to sexual offences. Corroboration is not required in proviso to provide Section 124 of the Evidence Act which provides: -

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

PW 1 testified that she saw the **3rd accused, 5th accused** beat the deceased. She stated that she was with **3rd accused** and **5th accused** and that she was in the kitchen while the others were in the main house. She responded to screams of people beating the deceased. Her explanation as to how she saw the accused inflicting the injuries is not clear. Being a child aged 9 years then, it is understandable that she would not be able to clearly discern what was happening in the main house. Her evidence, therefore needed corroboration on this aspect. No evidence to corroborate her evidence was tendered.

The result is that her only evidence will be unsuitable to form a basis of a connection of the commission of an offence of Murder for the **3rd accused** and **5th accused**.

Upon considering the evidence, I am not satisfied that the prosecution have proved an offence of murder in respect of **3rd Accused Lydia Chesang Chepkuto** and **5th accused Hellen Chepkwemoi Ngeiywo**. I, therefore, do not find them guilty of Murder under Section 203 as read with Section 204 of the Penal Code and I acquit them under Section 215 of the Criminal procedure Code. Accused 3 **Lydia Chesang Chepkuto** and accused 5 **Hellen Chepkwemoi Ngeiywo** to be set at liberty unless otherwise lawfully detained.

Dated, delivered and signed at Bungoma this 7th day of May 2020

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S N RIECHI

JUDGE