



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CRIMINAL CASE NO. 9 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PHILIP KIPLANGAT TOWETT.....ACCUSED**

**J U D G M E N T**

**Introduction**

The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya, in respect of the deceased, Weldon Kiplangat.

The accused pleaded not guilty and called no witnesses for his defence.

The prosecution called eight witnesses in support of the charge.

**The case for the prosecution**

The prosecution called Karen Chepkemai Kebene (Pw 1). Pw 1 testified that the accused is her cousin and the deceased was his brother in law. It was her evidence that on 15/10/2018 at 11.00 pm the deceased went to her house with the intention of raping her. The deceased had a six-inch-long iron rod. Pw 1 screamed. The accused responded to her screams and went to her rescue. It was also her evidence that the accused and deceased were friends. She did not see the accused kill the deceased.

The prosecution also called Weldon Tuwei (Pw 2). Pw 2 testified that he ate supper and then went to watch football on TV in the neighbourhood. Thereafter he returned through the house of Pw 1. He then heard the deceased saying "*amenitunga*." (he has stabbed me). Upon arrival he found the accused and the deceased fighting. The accused was inside the house of Pw 1, while the deceased was at the door step. Pw 2 tried to separate them and in the process the accused stabbed him on the right hand side finger with a knife. The accused then stabbed the deceased and thereafter the accused wiped his knife and said that the deceased was dead. PW 2 is a neighbour to the accused.

Mary Bunei (Pw 3) went to the scene of murder after she learned of the death of the deceased. Upon arrival she found the deceased lying down. The deceased was breathing. Alice and Pw 3 raised screams. People responded and arrived at the scene. Thereafter the village elder arrived followed by the police and the chief. When Pw 3 arrived at the scene of crime, Pw 1 was in her house. She had been injured in the head.

Furthermore, Kipruto Chesosi (Pw 4) is the village elder, who responded to the screams. Upon arrival, Pw 4 found the fighting had stopped. The body of the deceased was outside the house of Pw 1. The body had injuries in the stomach, the ribs, neck and left temple.

In addition to Pw 4 the prosecution called Richard Misoi (PW 5), who is the father of the deceased. He saw five stab wounds in the body of the deceased. Pw 5 testified that there was moon light.

The prosecution also called Wesley Kiplangat (Pw 6), who testified that in night of 16/10/2018 the accused went to his house. The accused told him that he had stabbed a person. He also told him that he had dropped the knife at the shamba of Bareigwat. The clothes of the deceased were blood stained. Pw 6 told the chief about the knife. The accused told Pw 6 that he stabbed the deceased as the deceased was fighting Caren (Pw 1). Pw 6 was a brother of Caren.

Finally, the prosecution called No 82653 Cpl Eric Munene (Pw 7), who was instructed to investigate this case on 17/10/2018. It was his evidence that the deceased disagreed with the Pw 1. The deceased then hit Pw 1 in the head with a metal rod. Pw 1 sought help. As Pw 1 and

the accused were in the house the deceased arrived. An argument arose between the accused and the deceased, which led to a fight. In the course of Pw 2 separating them, the accused stabbed the deceased. Pw 2 was injured by the accused in the course of separating them. The deceased fell down and accused ran away. He was later arrested on 17/10/2018.

The report of the postmortem examination was put in evidence by consent of both parties as exhibit 2. The report was signed by Dr. Stanley Byegon. The findings of the doctor were as follows. The deceased was in his early 20s in terms of age. There was a penetrating stab wound through the right posterior neck which penetrated all the structures to reach the right lung collapsing it. There was another stab wound through the heart penetrating all structures to puncture the right atrium. The pericardial cavity was filled with blood. There was a penetrating stab wound through the anterior abdominal wall around, but it spared the liver and stomach. There was a cut wound on the upper lip, right aspect. The cranium was intact. The cause of death was due to cardiac tamponade and pneumothorax after being stabbed severally by a sharp weapon during an assault.

## **THE CASE FOR THE ACCUSED**

The accused made an unsworn statement. He stated that he is a casual labourer. On the material day at 7.30 pm the accused went to drink busaa and chang'aa in the house of Pw 1. The deceased arrived later in the course of drinking. Thereafter Pw 1 and the deceased quarreled and begun to fight. He then assisted Karen Chepkemoi (Pw 1) to remove the deceased out of the house. The accused and Pw 1 pushed the deceased out of the house. Pw 1 is a cousin of the accused. In the following morning the accused learned of the fight at the house of Pw 1. He was arrested while going to work and was then taken to the AP Camp and was subsequently taken to Melelo police station. He also stated that the deceased was his cousin. He finally stated that he never quarrelled with the deceased.

### **The submissions of the accused.**

Ms Kudate, counsel for the accused submitted in respect of the constituent elements of the offence of murder namely the cause of death, the *actus reus* (the act or omission that caused the death) and the *mens rea* (the intention to murder); which had to be proved by the prosecution. Based on the evidence of the prosecution witnesses, counsel submitted that it was common ground that death was proved. She also submitted that the evidence of both Karen Chepkemoi (Pw 1) and Weldon Tuwei (Pw 2) placed the accused at the scene of crime. She further submitted that the deceased went to the house of Pw 1. Upon arrival in that house the deceased asked Pw 1, the whereabouts of her husband. The deceased then tried to rape her and hit her with a six-inch-long metal rod on the head. She screamed.

It was also her submission that the accused went to the house of Pw 1 in response to the screams and not to kill or fight the deceased. A fight followed between the accused and the deceased. This was after the accused asked the deceased as to why he wanted to kill Pw 1. She submitted that the accused and deceased were friends.

Counsel further submitted based on cases in respect of self defence or defence of another namely *R v Williams [1987] 3 All ER 411 and Republic v Joseph Macharia Waweru, HC CR NO. 58 OF 2010* reported in [2015] e-KLR, that the accused acted in defence of the Pw 1; when Pw 1 raised distress screams. She therefore submitted that the accused is not guilty of murder and should be acquitted.

## **THE SUBMISSIONS OF THE PROSECUTION**

No submissions were filed by the prosecution as the prosecuting counsel was not the Director of Public Prosecutions or his deputy. See section 310 as read with section 161 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

## **ISSUES FOR DETERMINATION**

I have considered the evidence of both the prosecution and the defence and the submission of the accused. As a result, I find the following to be the issues for determination.

1. Whether or not it is the accused who caused the death of the deceased.
2. Which offence is disclosed by the evidence?

### **Issue 1**

I believe the evidence of Weldon Tuwei (Pw 2) that he saw the accused and the deceased fighting. The accused was inside the house of Karen Chepkemoi Kebene (Pw 1), while the deceased was at the door step. Pw 2 tried to separate them. In the process, the accused stabbed Pw 2 in his right hand finger. The deceased then fell down. The accused then followed him and stabbed the deceased with a knife in the right hand side of the neck. The accused then wiped his knife and said that the deceased is dead. I also believe his evidence that he heard the deceased say: "*amenitunga*" meaning "*he has stabbed me.*" Pw 2 then went and informed his aunt namely Mary Bunei (Pw 3).

Furthermore, I believe the evidence of Wesley Kiplangat (Pw 6) that the accused went to his house in the night of 16/10/2018. The accused then told Pw 6 that he had stabbed a person. He also told Pw 6 that he had dropped the knife in the shamba of Bareigwat. Pw 6 testified that the clothes of the accused were blood stained. Pw 6 was able to identify the accused as he had put on his D-light lamp. Pw 6 then told the accused to go and report to the AP camp, but the accused told him that he wanted to rest first.

The accused then rested and in the morning the accused woke up and told Pw 6 that he was going to Chemaner centre. They then parted ways.

Pw 6 then reported this encounter to the village elder and what the accused had told him. In particular, Pw 6 told the village elder that the

accused had told him that he stabbed the deceased with a knife and left it at the shamba of Bareigwat.

While under cross examination, the accused told Pw 6 that he stabbed the deceased because the deceased was fighting with Karen Chepkemoi Kebene. Pw 6 was a sister of the accused.

Furthermore, I believe the evidence of No. 82653 Cpl Eric Munene (Pw 7) that the deceased disagreed with Pw 1 and as a result the deceased hit Pw 1 with a metal rod in the head. As a result, Pw 1 sought help. The deceased then fled. It was the evidence of Pw 7 that as Pw 1 and the accused were in the house an argument arose between the deceased and the accused, which led to fighting. As Pw 2 tried to separate the deceased and accused. The accused stabbed the deceased. The deceased then fell down.

The accused then ran away.

I do not believe the evidence of the accused that he had gone to the house of the Pw 1 at 7.30 pm, where he drunk both busaa and chang'aa. I also do not believe his evidence that the deceased arrived in the course of drinking. His evidence has no ring of truth. This is so in the light of the cogent and credible evidence of Pw 1; which is that the accused had gone to the house of Pw 1 to rescue her from the felonious attack of the deceased. I believe the evidence of Pw 1 that the deceased wanted to rape Pw 1.

Furthermore, I find that it was in the course of fighting between the accused and the deceased that the accused stabbed the deceased; when Wesley Tuwei (Pw 2) was trying to separate them. It was during the same time that Pw 2 sustained an injury in his right hand finger, when the accused stabbed him with his knife.

I also believe the evidence of Pw 2 that he heard deceased saying that: "*amenitunga*" meaning "he has stabbed me." This is a dying declaration which points to the accused as the person who stabbed him.

Furthermore, while under cross examination, the accused told Wesley Tuwei (Pw 6) that he had stabbed a person. He further told him that the person he stabbed was fighting with Karen (Pw 1), who was a sister to the accused. The clothes of the accused as at that time were blood stained. I find from the evidence of Pw 6 that it was the accused person who stabbed the deceased.

I therefore find that there is ample evidence that the accused caused the death of the deceased.

## Issue 2

The credible and cogent evidence of Karen Chepkemoi Kebene (Pw 1) was that the deceased feloniously attacked her with the sole purpose of raping her. She screamed and sought help. The accused whom I find was either a cousin or a brother in law to Pw 1 went to her rescue. A confrontation ensued between the accused and the deceased. Pw 2 intervened to separate them and he himself sustained an injury in his right finger from the stab wound inflicted by the accused.

The issue that arises is whether the accused was entitled to defend Karen Chepkemoi Kebene against the accused. I find as credible and cogent the evidence of Pw 1 that the deceased feloniously attacked Pw 1 with the purpose of raping her. The deceased used an iron rod in injuring her in the head. This prompted her to seek help. The accused then came to her rescue. In the process of removing the deceased to outside the house of Pw 1 a fight followed between the deceased and the accused. Pw 3 arrived on the scene and intervened and tried to separate them.

The deceased fell down and the accused then fatally stabbed him severally. This leads to the next question as to whether the said killing was justified or not. The law in this regard has been settled by the Court of Appeal for Eastern Africa in *Ilapala s/o Ibrahim v R, 20 EACA 300*; in which that court held that the killing of another is justifiable where the accused acts without vindictive feeling and believes on reasonable grounds that a person's life is in imminent danger and that his action is necessary for the preservation of life. In this regard, I find that the accused had gone to the scene of crime to rescue Pw 1; who had been attacked by the deceased. The deceased had inflicted an injury in the head of Pw 1.

During the process of rescuing Pw 1, a fight ensued between the accused and the deceased. Pw 3 arrived on the scene and tried to separate them. The deceased fell down in the process. The accused then inflicted several stab wounds in the stomach, neck, chest and the abdomen. The accused also in the process of being separated from the deceased also inflicted an injury in the right finger of Pw 3.

It is clear from the report of the postmortem (exhibit 2) that the accused inflicted several severe injuries in the neck, abdomen and the chest of the deceased. I find that these are vital and delicate organs of the body. The attack was savage and brutal

I therefore find that the accused was entitled to defend Pw 1 against the felonious attack by the accused.

On the evidence I find that the accused acted reasonably in rescuing Pw 1 from the felonious attack of the deceased upon her. However, on the evidence I find that the accused had opportunity to disengage after Pw 3 intervened and when the deceased fell down. Section 241 Penal Code criminalizes the use of excessive force and whether the force used is excessive or not is to be determined on the circumstances of each case. In continuing to inflict further injuries on the deceased, the accused acted unreasonably and was not justified in doing so. In the circumstances I find that the accused used excessive force in the defence of Pw 1.

The upshot of the foregoing is that I find the evidence discloses manslaughter and not murder.

Pursuant to the provisions of 322(1) of the Criminal Procedure Code (Cap75) Laws of Kenya, I hereby convict the accused of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

Judgement signed, dated and delivered in open court at **Narok** this **6<sup>th</sup> day of May 2020** in the presence of Ms. Torosi for the state and Ms. Kudate for the accused via Video Link with the accused being in prison.

**J. M. Bwonwong'a**

**Judge**

**06/05/2020**