



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL CASE NO. 31 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSES**

**STEPHEN KWEMOI SIMELE.....ACCUSED**

**JUDGEMENT**

1. The Accused was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that on the **9<sup>th</sup> day of December 2015 at Kayos Farm in Chepchoina Location within Transzoia County jointly with another murdered EMMANUEL PAPA ETYANG**.

2. The accused denied the charge and the prosecution called several witnesses to establish its case against him. Their evidence can be summarised as hereunder.

**3. PW1 SIMON KIPKOSIA WAMALWA** testified that on the 9<sup>th</sup> day of December, 2015 at around 8.30 p.m he was taking alcohol at the accused bar together with the deceased. The deceased then requested for a song to be played but the accused brother, Geoffrey said that the same should not be played. He then quarrelled with the deceased and they went outside and began fighting.

4. The witness went outside and attempted to separate them but he was hit by Geoffrey on the head and he lost consciousness. He was also cut on the head by use of a panga. He said that he did not see what objects they used in the fight and that there was electricity light. He was taken to the hospital by Bonny, Stephen, the accused and Mike a KPR.

5. On the 12<sup>th</sup> December 2015 he heard that the deceased body had been found in a dam floating. He however did not see it since it had been removed. Though he did not see any weapon he maintained that it was the accused who had assaulted the deceased.

6. When cross examined the witness stated that it was the accused who was fighting the deceased and that he was assaulted by the accused brother Geoffrey when he tried to intervene.

**7. PW2 JOHN BARASA** the father to the deceased was not at the scene but he heard that he had fought with the accused. He went to the scene and he met the accused who told him that the deceased had started the fight and had taken off. The deceased disappeared and he reported this at Endebbes police station on the 11<sup>th</sup> day of December 2015. The following day his body was found floating at Mowlem dam. He identified the body after being retrieved. He had injuries on the head, neck, chest and stomach.

**8. PW3 PC SIMON KIRUI** from Endebbes Police Station carried out the investigation after the body was retrieved on the 12/12/2015. They took the body to the mortuary and he further said that it had injuries on the head. The deceased father had reported on the 11/12/2015 about his disappearance. He then recorded statements from the witnesses and preferred charges against the accused.

**9. PW3 DR OKUMU MOSES** from the Kitale County Referral hospital produced the post-mortem report on behalf of **DR OBALA** who found the cause of death to have been cardiopulmonary arrest secondary to severe head injury. He said that the deceased body had multiple deep cut injuries.

10. When placed on his defence the Accused gave unsworn evidence denying the charge. He said that there was a changaa den beside his shop and on the material day about 8.30 pm he was called by a lady who usually assist him in the shop and informed him of some people who were fighting. He separated them and one had been injured whom he wanted to assist. He then organised for Simon to be taken to the hospital where he was treated. The third day he heard that there was someone who had been killed and the body was floating on water.

11. The person was the same one who had been involved in the fight. Thereafter he was required to go and record his statement at the police station. He was subsequently charged but he continued to deny the offence.

### **ANALYSIS AND DETERMINATION**

12. The court has perused the proceedings as well as the submissions by the learned state counsel. There were no submissions by the defence counsel.

13. Section 203 of the Penal Code identifies malice aforethought as a key element which must be proved for the offence of murder. The same states that;

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

14. Was the cause of death of the deceased proved? The post-mortem produced by Dr Okumu which had been prepared by Dr Obala established this. There were multiple injuries on the deceased body and he concluded that it was as a result of severe head injury. Although the body was floating in a dam, there was no evidence of drowning.

15. PW1 spoke of a fight between the deceased and one Geoffrey who was the brother to the accused. The cause of a fight was over some song which the deceased had requested to be played and the deceased brother had refused. They then went outside and started fighting and PW1 tried to intervene but he was beaten by Geoffrey and was also injured. He was cut on the head by use of a panga.

16. From PW1 further evidence the deceased also fought with the accused outside near the fence although he did not see what objects they were using. He said that he lost consciousness and stayed for about 40 minutes and when he regained his consciousness he did not see anyone and went back to the bar. He met one Stephen who was a Kenya Police Reservist (KPR) and the accused came back and inquired what he was doing. He left and he was then taken to the hospital for treatment. I have laid emphasis on the above line of evidence in chief as PW1 was the only eye witness. The accused brother disappeared and has not been seen to date.

17. On cross examination he said that;

**“the deceased was fighting with the accused. Geoffrey and the deceased were fighting earlier. I intervened then I was assaulted. Geoffrey hit me”.**

18. From the evidence in totality it is apparent that the deceased fought with both the accused and his brother Geoffrey who is still at large. Although PW1 was unable to know what transpired from the moment he lost consciousness it appears that that may have been the time the accused and his brother left with the deceased.

19. Apparently nobody saw the deceased leave the accused bar and it was only later that the accused arrived and questioned what PW1 was still doing there. The next thing was the deceased body being seen three days later.

20. Was the accused an accomplice in the offence? It is noted that though the fight was between the deceased and Geoffrey earlier, later he joined in the fight. He fought with the deceased outside the fence. PW1 could not do much to assist since he had been injured by Geoffrey. This was exemplified when the accused asked pw1 what he was doing when he came back.

21. PW1 went on to state that;

**“the accused went aside and fought with the deceased. I did not see what objects they were using to fight. They fought near the fence and I did not witness what transpired after that. I stayed for about 40 minutes. When I regained consciousness I did not get anybody.”**

22. He was later taken to the hospital by the accused and others. It therefore means that the witness had equally been injured.

23. In his cross examination the witness said that the accused was trying to separate the deceased and Geoffrey from their fight. The deceased body was found in a dam three kilometres away from the scene.

24. Was the accused an accomplice in the act? The circumstances surrounding the fight at the drinking den in my view was generally a mix up of a fight between the deceased, Geoffrey, the accused brother who is still at large and PW1. This was confirmed by the investigating officer PW3. There was no evidence to suggest that the fight was orchestrated by the accused. It was an issue between the deceased and Geoffrey. In fact, the deceased was injured and later taken to the hospital by the accused as explained by the deceased father.

25. There was no evidence of how the deceased left the scene. PW1 said that he did not know what transpired thereafter as he had lost consciousness. The deceased father PW2 said that the deceased was taken to the hospital by the accused and the village elder. His body was found three days later with various injuries. There was no evidence of drowning.

26. Although there was a fight at the drinking place, the deceased was still taken to the hospital by the accused and others. His brother Geoffrey who is still at large did not participate in taking him to the hospital. This court has tried to find the accused culpability even circumstantially but it has been unable to.

27. There was no explanation on how the deceased left the hospital and his body being found at the dam. Who for instance treated the deceased? Were the injuries he sustained as a result of the first fight or there was another fight elsewhere? Why did the accused take part in the separation of the fight and eventually taking the deceased for treatment?

28. The submission by the prosecution of a common intent by the accused and his brother does not carry much weight. It was the accused who later came and assisted in carrying the deceased to the hospital. PW1 was equally injured in the mix. More importantly there was a missing link from the time the deceased was taken for treatment and when his body was found.

29. This court finds that the accused ought to be granted the benefit of doubt. The real person who ought to have an explanation is the accused brother Geoffrey. His disappearance is suspect to say the least. There was no evidence that after the incident he appeared anywhere. The prosecution did not explain whether there was any attempt to trace him.

30. In reaching the above conclusion the court has taken into consideration the findings in the famous case of **REPUBLIC VERSES KIPKERING ARAP KOSKE & ANOTHER 16. EACA. 135**, where the court stated the following in regard to circumstantial evidence;

**“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis *than that of his guilt.*”**

31. The facts as presented by the prosecution as well as the evidence does not place the accused directly culpable or even circumstantially. The court does not find any guilt despite him giving unsworn evidence in his defense.

32. The accused is hereby set free under the provisions of Section 215 of the Penal Code unless lawfully held. The sureties are discharged.

33. Orders accordingly.

**Dated, signed and delivered at Kitale in open court this 13<sup>th</sup> day of October, 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**13/10/2020**

**In the presence of:-**

**Mr Omooria for State**

**Court Assistant – Kirong**

**Accused – present**

**Judgement read in open court.**