



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL CASE NO.35 OF 2014**

**REPUBLIC.....PROSECUTOR**

**V E R S U S**

**JOSEA KIPNGENO MUTAI.....ACCUSED**

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

1. The Accused Person in this case **JOSEA KIPNGENO MUTAI** was charged with **MURDER** Contrary to Section 203 as read with Section 204 of the Penal Code.
2. The Particulars of the charge are that on 7/10/2014 at Mindililwet v Village, Mindililwet Sub-Location in Kericho District within Kericho County, the Accused Person Murdered **ERICK KIPKIRUI RONO**.
3. The Accused Person pleaded not guilty to the charge. The Prosecution called Eight (8) witnesses whose evidence was that on 7/10/2014 at 4 p.m., PW.1 **RASHID KIPYEGON ARAP CHERUIYOT** went to the home of **CALISTUS KOSKEI** who was his neighbor and found four people being Fred Arap Cheruiyot, Samuel Chepkwony, Josiah Mutai and Erick Rono (the deceased).
4. PW.1 said they normally frequented the house drinking traditional brews. On arrival PW.1 found the Accused Person quarrelling with Pen Pati (a teacher).
5. The Deceased was standing behind the Accused Person. Pati was swollen on the face. When PW.1 asked the Accused Person why he was quarrelling with Pati, the Accused Person moved and Pati said the Accused Person had slapped him and that is why he was swollen on the face.
6. PW.1 said he sat with the Deceased. The Deceased gave him his bottle of alcohol and went to release himself and when he returned, he asked the same question PW.1 had asked the Accused. The deceased went to the fence, took a stick and hit the Accused with it. PW.1 said the deceased and the accused person started fighting and he went and separated them and the Accused Person ran away.
7. At 6.00 pm they left the drinking joint and the following day he learnt that the Deceased was in Hospital.PW1 said he left the drinking place with the deceased and they parted ways when the deceased took the path leading to his home. He also learnt that the Deceased and the Accused Person had a fight after they had left the drinking spree.
8. PW1 said the accused person picked a stone and showed them the place he had fought with the deceased.
9. In Cross-Examination, PW.1 said the Deceased was a violent man who liked fighting and that when they left the drinking joint he was drunk. He also said in cross examination that it was one person by name Kimalel who picked the stone and further that there people who wanted to lynch the accused person at the time he was arrested.
10. PW.2 **CALISTUS KIPKEMOI KOSKEI** said his wife used to brew changaa and sell it. He witnessed the fight and at 6 p.m. the people who were drinking departed. He said the Accused ran away after the fight.He also said when the deceased left with the other people who were drinking at his home he was well.
11. PW.3 **EDNA CHEPKORIR** a sister to the deceased said on the material day she was cooking when the deceased arrived home bleeding from the head. She asked him what had happened and he said the Accused Person had hit him with a stick. PW.3 called their brother called Gilbert and they administered first aid on the Deceased and he went and slept.
12. At around 11 p.m. the same day PW.3 went to wake the Deceased up but he did not respond. She called their brother Gilbert again and he

came with their father and they took the Deceased to Kapkatet Hospital where he died.

PW.3 said the Accused sent his wife to check on the Deceased and she found the Deceased had died.

13. PW.4 **GILBERT KIPROTICH RONO** gave a similar account as that given by PW.3. He said he administered first aid on the Deceased and put him to bed. At 11 p.m. PW.3 called him and told him the Deceased was unconscious and they took him to Kapkatet Hospital where he died.

14. **PW.5, ELIJAH KIPRONO KETER** the father of the Deceased said he was called by PW.4 and they took the Deceased to Hospital where he died.

15. **PW.6, LINA KITUR** the Assistant Chief of Mindililwet Sub-Location said on 8/10/2014 while in her office she learnt about the death of the Deceased from his father. PW.6 said she caused the Accused Person to be arrested before he could be lynched. He was taken to Kebeneti and he was handed over to the Police.

16. PW.7 Chief Inspector Thomas Parkolwa investigated this case and charged the Accused with this offence.

17. **PW.8, DR. PETER KOECH** a Deputy Medical Superintendent at Kapkatet District Hospital produced the Post Mortem Report on behalf of Dr. Samuel Langat. He said the cause of death according to the Post Mortem Report was severe intra-cranial bleeding (bleeding into the brain) following head injuries caused by a blunt object.

18. The Accused Person was placed on his defence and he said on the material day he went to the home of CALISTUS KOSKEI (PW.2) and found 10 people drinking changaa. He said the Deceased was there and greeted the people with a loud voice. The Accused said he ran away because it was almost raining and went to his home. He said it rained for almost two hours.

19. The Accused Person said the following day he was arrested at the house of Daisy where he had gone to do some work. He said he was tied with ropes and told he would be lynched if he did not carry a stone he was shown which he saw in Court.

20. The Accused Person said he was handed over to Police who handcuffed him and arrested him. He said there were two **JOSEAS** in the house. The other **JOSEA** was called **JOSEA LANGAT OBOSI**. He asked the court to release him.

21. I have considered the evidence adduced by the prosecution and find that there is evidence that the Deceased and the Accused Person had a fight on the material day at the house of PW2 where they were drinking traditional brew.

22. PW.1 who witnessed the fight said he saw the Deceased hit the Accused Person on the back with a stick.

23. The evidence that the two fought again after they were separated has not been corroborated. The Accused denied that he hit the Deceased with a stone as alleged.

24. The evidence by PW1 said the accused person told the people who arrested him that he fought with the deceased and hit him with a stone and showed them the stone amounts to a confession which has not been obtained in accordance with the law.

25. **Section 25A** of the **Evidence Act** states as follows;

**“(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.”**

26. The circumstances under which the said confession was taken would undermine the administration of justice since the accused person was under threats of being lynched by the mob that had arrested him..

27. **Section 203** of the **Penal Code** defines murder as the causing, by a person or persons with malice aforethought, the death of another person by an unlawful act or omission. The said Section states as follows;

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

28. It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission.

29. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

(a) the death of the deceased and the cause of that death;

(b) that the accused committed the unlawful act which caused the death of the deceased and

(c) that the Accused had the malice aforethought.

30. **Section 206** on Malice aforethought states as follows;

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances**

—

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) 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, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an 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.”**

31. The evidence adduced by the prosecution is that the accused and the deceased had a fight at the home of PW2 where they were drinking and the accused ran away.

32. The deceased and the two witnesses (PW1 and PW2) continued drinking and left at 6.00 p.m. and the deceased and PW1 parted at the path leading to the home of the deceased.

33. When the deceased got to his home, he had injuries on his head and he told PW3, his sister that the accused person had hit him on the head.

34. I find that the Prosecution has not proved the guilt of the Accused Person to the required standard.

35. There is no evidence that the Accused Person with malice afterthought caused the death of the Deceased.

36. The standard of prove required is beyond reasonable doubts. The evidence on record is that the accused person and the deceased had a fight and the Accused ran away.

37. There is no evidence that the deceased sustained head injuries during that fight. The Doctor who did the post mortem said the cause of death was **“severe intra-cranial bleeding (bleeding into the brain) following head injuries caused by a blunt object”**.

38. The evidence that the accused person hit the deceased with a stone after the deceased left the drinking place is based on a confession by the accused person which cannot form the basis of a conviction as it was not taken in accordance to the law as stated earlier in this judgment.

39. I find that the Prosecution has failed to prove the guilt of the Accused Person to the required standard in Criminal Cases and I accordingly acquitted of the offence of murder.

40. The surety be and is hereby discharged.

**Delivered, signed and dated at Kericho this 6<sup>th</sup> day of November, 2020.**

**A. N. ONGERI**

**JUDGE**