



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL CASE NO.8 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

DKK.....1ST ACCUSED

DAVID KIPLANGAT CHELULE.....2ND ACCUSED

JUDGMENT

1. DKK *alias* K and David Kiplangat Chelule are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 27th day of February 2016 at Tingoro Village in Kipkelion West Sub-county within Kericho County they jointly murdered Stanley Kibet Kosgei.

2. The 1st accused was a minor at the time of the alleged commission of the offence. The 2nd accused is his uncle. The prosecution case against them was presented through 12 witnesses. Betty Bett (PW1, Betty) was a neighbour of the accused at Ngendalel village in Kamasian location. On the night of 26th/27th February 2016, she was called by Veronicah, a sister of David (the 2nd accused) at midnight. Veronicah informed her that there was a stranger in David's house, so she went to David's home, which was less than 5 metres from her home. When she got there, she found David standing outside. D, the 1st accused, was also standing outside, next to the window.

3. Betty found one Stanley Sigei, also a neighbour, at the 2nd accused's home, just standing there. Betty asked David who the stranger in the house was, and he answered that it was 'Stanley'. Betty called out to the deceased and asked him what he was doing inside the house, while the 2nd accused flashed his torch inside the house. Betty saw a drunk man inside the house, whom she recognised as Stanley Kosgei, the deceased. The deceased was seated inside the house alone, on a sack of maize, and appeared sleepy. Betty also saw children sleeping on the floor of the house. When David asked Stanley what he wanted inside the house, he said he wanted change and alcohol. The deceased wanted to get out of the house, and he found a small opening in the house, which was made of grass with mud walls.

4. When he managed to get out, David, the 2nd accused, chased him with a rungu (club) and hit him once, and the deceased fell down. The 2nd accused continued to beat him up while he was down, using a thick stick, white in colour. The 1st accused, D, also joined the 2nd accused in beating up the deceased. The two accused persons continued to beat up the deceased until he fainted. They then tied his hands with rope, and were joined by two people from Kaisugu company (tea estate) in beating up the deceased. Betty stated that she knew the two people, whom she identified as one Daniel Bii and the other as Bernard Kipkurui. Betty and others tried to stop the accused and the other two people from beating the deceased, but Daniel Bii chased them away, so she went back to her house. She left the deceased lying outside the 2nd accused's house. She had noted that he had also been assaulted in his private parts as he was naked and his testicles were swollen.

5. Betty had later gone to the house of Nancy, the deceased's sister, and asked her to take him clothes as the ones he had were torn. She and Nancy had brought tea for him to take, and he had taken two cups with Betty's help. The area chief had arrived thereafter and ordered that the deceased be taken to hospital. Betty had heard later that day that the deceased had died.

6. She stated in cross-examination that the 1st accused had a stick with which he beat the deceased, while the 2nd accused had a rungu. The deceased had gone to David's house to get liquor as David's sister used to brew liquor. She had tried to talk to the accused to stop beating the deceased but they did not listen. The accused persons had been joined by two guards in beating the accused. The two guards had 'nyahunyu' or whips, while the accused beat the deceased with a rungu and stick. The deceased was a customer of the mother of the 1st accused, who was the 2nd accused's sister, who used to brew liquor in the home. The deceased was already drunk when Betty found him being beaten by the accused persons.

7. Nancy Kirui (PW2), was a sister of the deceased. At about 5.00 a.m. on the night of 26/27th February 2016, she was at home when her neighbour, Betty Bett (PW1) went and told her to go and see Stanley as he had been badly injured. She went to the place where he was being beaten up, about 2km away, at David Chelule's home. Her brother was not able to speak. She found the Chief, one Geoffrey, there, as well

as David (2nd accused) and his sister Rose. They told PW2 to take the deceased away.

8. Nancy noted that the deceased's clothes, a white shirt and black trousers, had been removed and were on the side. She also saw a torn sack and an axe. The deceased was taken to the hospital by the Chief, the 2nd accused and his sister Rose. She was later informed that he had died. According to Nancy, the deceased used to buy alcohol from the 2nd accused's sister, who used to sell alcohol from her house.

9. In cross-examination, PW2 stated that there was not enough food at home, but that the deceased was not looking for food. She confirmed that she had seen an axe on the ground where the deceased was lying when she went to the 2nd accused's home. The deceased had lost consciousness and could not speak. PW2 stated that they had a land dispute with the 2nd accused but confirmed that she did not witness the deceased being beaten up.

10. Ezekiel Kibet Ngetich, PW3, had been at home on the night of 26th/27th February 2016 when DK, the 1st accused, went and woke him up. He informed Ezekiel that there was a man in their house, and he had been sent by his uncle, David, (PW2) to call Ezekiel. Ezekiel had continued sleeping, then Dennis came and called him again. He went to the home, which was about 250-300 metres away, and he found someone saying that *'he was trying to get out'*. The 2nd accused ran to the back, to a cowshed, and Ezekiel followed him.

11. Ezekiel saw the 2nd accused hit the deceased with the club (fimbo) he was carrying, and the deceased fell down. Ezekiel had been able to see the 2nd accused hit the deceased as there was a full moon. He saw the 2nd accused hit the deceased on the head and the right knee, and he saw the deceased bleeding from the forehead. The 2nd accused was being assisted by the 1st accused to beat the deceased. Ezekiel asked the two accused persons not to beat the deceased, who was drunk and was asking for forgiveness. The accused stopped beating the deceased when he asked them to, then the 2nd accused asked for a rope and tied up the deceased. Ezekiel then left the deceased and the accused and went home. He also left Betty Bett (PW1) and Stanley Sigei at the scene. The following morning at around 7.00 a.m., Ezekiel saw four people, including the 2nd accused, carrying the deceased. He later learnt that the deceased had died on the way to hospital.

12. In cross-examination, he stated that he had thought that a stranger was in the 2nd accused's home, but when he went there, he found that it was the deceased, who was a neighbour. He did not see him being beaten, but he saw that he was bleeding. He confirmed that there were cows in the cowshed, and that they had horns, but he did not know whether they hit the deceased. He stated in re-examination that the cows were outside when he told the accused not to beat the deceased. The accused had stopped when he told them to stop beating the deceased, but it is possible that they beat him again after he left.

13. Stanley Kibyegon Sigei (PW4) was also a neighbour of the accused, living in Kimolokit. He was asleep in his house at about midnight on 26th February 2016 when he was woken up by the 1st accused, DKK. The 1st accused had informed Stanley that there was someone inside his grandfather's house. Stanley had gone to the house, which was at a distance of about 50 metres from his house, and had found the 2nd accused standing outside the house. He had gone close to him and asked him who was inside the house. David had a torch, which he flashed inside the house and Stanley saw the deceased sitting on a sack of maize. The deceased was asking for money, but Stanley was unable to tell whether he was asking for money from David or from someone else.

14. According to Stanley, the deceased thereafter came out of the house through a window. When he jumped out of the window, the 2nd accused hit him on the head with a rungu, and the deceased fell down. The 2nd accused then proceeded to beat him up. He was joined by the 1st accused in beating him up. The 1st accused was armed with a stick, and the two accused persons beat up the deceased together. Stanley had asked them to stop, tie him up and wait for the administration to take him. The two accused persons tied the deceased up, after which Stanley left and went to his house to sleep.

15. The following morning, Stanley saw the deceased lying next to a store in the 2nd accused's compound. He did not get close to where he was. He later heard that the deceased had died.

16. He stated in cross-examination that he was not there when guards came from Kaisugu. He had found the 2nd accused at the scene when he arrived there at about midnight. He had seen the 2nd accused beating up the deceased with a rungu, while the 1st accused had a long stick. He stated in re-examination that he had heard about the guards from Kaisugu from Betty (PW1) but had not seen them beat up the deceased. There was moonlight when the deceased was being beaten up, and the 2nd accused had flashed his torch at the deceased.

17. Richard Kiprono Kemei (PW5) had identified the body of the deceased, who was his brother, at the Kericho District Mortuary on 4th March 2016 for the doctor who performed the post mortem. He had been accompanied by his father, Joseph Cheruiyot.

18. Geoffrey Kiplangat Chirchir (PW6), the Chief of Borowet location, Kimasian ward had received a report from his assistant chief on 27th February 2016 at around 6.30 a.m. that someone had been attacked. The report was that 'Ndili,' the nickname of the deceased, was caught trying to steal at the home of the accused. He had gone to the scene where he had arrived at about 8.00. a.m. He found the deceased who informed him that his name was Stanley Kosgei. The deceased was still tied up, and though he had no visible injuries, PW6 realised he was injured. He had asked that he should be untied. PW6 had reported the matter to the police and sought a vehicle to take the deceased to hospital. He was rushed to Kipkelion Sub-district hospital where he was pronounced dead.

19. PC Titus Rukunga (PW7), a scenes of crime support services officer at the Directorate of Criminal Investigations Kericho had received, on 2nd May 2016, exposed photographs from the DCIO Kipkelion. He supervised the processing and printing of the photographs which had been taken by the investigating officer at the scene of crime.

20. PW8, No. 231684 Chief Inspector Chitibwa Mwadzombo Said, the DCIO Kipkelion, was the investigating officer. He had received a

report on 29th February 2016 from the OCS, Kipkelion, about the incident involving the deceased.

21. He had been taken to the scene of the killing by the 2nd accused, David Chelule, on 1st March 2016. When they got to the scene with the 2nd accused, the neighbours had started screaming and wanted to lynch the 2nd accused. PW8 and his colleagues had rescued the 2nd accused. They had been shown where the deceased had been attacked and had interviewed the neighbours, some of whom had recorded statements and were witnesses in this case (PW1, PW2 and PW3).

22. The results of the interviews with neighbours as narrated by PW8 were that the deceased was asking for some money from one Mama Rose, a sister of the 2nd accused and the mother of the 1st accused. The deceased seemed drunk. He was asked by neighbours to come out of the house. Screams from the homestead had attracted two guards from Kaisugu farm, which was about 50 – 100m from the homestead. The 1st accused had jumped through a window into the house and started attacking the deceased, and the deceased tried to get out through a hole. He was then attacked by the 2nd accused with a *rungu* when he got out of the house. The two accused persons and the guards from Kaisugu had jointly attacked the deceased. While the two accused persons had been arrested, the two guards from Kaisugu were still at large.

23. PW8 had taken photos of the scene, including a sack of maize that the deceased was alleged to have stolen, which were produced in evidence as Exhibit Nos. a – h.

24. It emerged from the statements of witnesses that the deceased had been served earlier in the day by Mama Rose, an aunt of the 1st accused and sister of the 2nd accused. Mama Rose was an illicit brew seller. On the night of 26/27 February 2016, she had served the deceased with licit brew at her den, and the deceased had given her Kshs.200, taken brew worth Kshs.150, and there was a balance of Kshs.50. This was the change the deceased was insisting on getting back before leaving the house.

25. The deceased had had a conversation with the two accused persons and neighbours for about fifteen minutes before the attack by the accused persons. The conversation had taken place while the deceased was inside the house and the others outside. The deceased had been attacked by four people, the two accused and the two guards from Kaisugu, not by a mob as had been alleged by the persons who had reported the incident to the police. The two guards from Kaisugu were identified as David and Rono, but they had not been arrested by the time the matter went to trial. The two accused persons had alleged that the deceased had stolen maize in order to cover up their assault that led to his death.

26. PW8 confirmed in cross-examination that the Kaisugu guards were still of interest, and if found would be charged with the offence of murder. Efforts to trace them had been in vain, and he had also been unable to recover the weapons used.

27. John Cheruiyot Samoei (PW9), was an uncle of the deceased. He had been called by his niece, Nancy (PW2) and informed that the deceased had been beaten till he was half dead by David Kiplangat Chelule (the 2nd accused), whom he knew from before. The 2nd accused and the deceased had a dispute over a farm which had been sold to the 2nd accused without the knowledge of the deceased. PW9 had attended the post mortem of the deceased on 4.3.2016 at Kericho District Hospital. He had identified the body of the deceased for the doctor who performed the post mortem. He had noted that the deceased had a bruise on the forehead as well as defensive wounds on both arms, and he also had injuries on the legs. He had also noted that the deceased had a lot of blood in the chest near the ribs when he was opened up, and they had been informed that he had died from internal bleeding.

28. PW10, Janet Chepngetich, was the widow of the deceased. She had travelled to her parents' home in Londiani on 28.2.2016 and had left her husband at home. She had later received a call that her husband had been killed. She had returned to her matrimonial home and had been informed by a neighbour that her husband had been killed by David, the 2nd accused, who was their neighbour.

29. PW11 No. 102131 PC Dennis Nyaoko Mogeni Police Constable attached to Kipkelion DCI Office had accompanied the relatives of the deceased to the Kericho District Hospital mortuary for the post mortem on the deceased. The post mortem had been done by Dr. Fibian Kosgey after the body was identified by his relatives. PW11 had been present during the post mortem and had observed that the body of the deceased had several scars on the body, generally from head to toe. The body also had swollen upper and lower limbs, as well as a cut on the forehead. He had also noted a broken right rib and a lot of blood around the lungs.

30. The final prosecution witness was Dr. Fibian Kosgey who had performed the post mortem on the body of the deceased on 4th March 2016. She had noted that the deceased, a male African aged 36 years, had a penetrating head wound on the left frontal region. He also had multiple bruising and swelling on both upper limbs, the hands, lacerations on the right anterior superior iliac spine, and lacerations on the right chest region. He also had a blister on the left leg measuring 2 x 3cm and lacerations below the left knee. She had also noted on internal examination of the body that he had blood in the right chest cavity with a lacerated lobe of the liver.

31. Dr. Kosgey had formed the opinion that the cause of death was trauma to the chest cavity which led to liver rupture and massive haemorrhage. She produced the post mortem report in evidence. She confirmed in cross-examination that from the lacerations she saw on the liver of the deceased, the injuries were caused by a sharp object, like a pangas. While the horns of a cow could cause such an injury, from the external appearance, it was caused by a sharp object.

32. When placed on their defences, the accused opted to give unsworn statements and call no witnesses. The 2nd accused, David Chelule, stated that on the night of 26th February 2016, he was at home where he and his co-accused used to live. They were woken up at midnight by his sister Veronica Chebet, who informed him that there was someone in the house she was living in, which had belonged to their parents. He had rushed to the scene with a torch which he flashed through a window. He saw 4 children sleeping in one room. In the next room where the maize and sorghum were stored, he saw a person crawling, hiding his face. His co-accused, Dennis, had then arrived, and he had sent his sister, Veronica Chebet, to call their neighbour, Betty, (PW1). He also sent the 1st accused to call Stanley Sigei (PW4) who was a neighbour.

33. Both Stanley Sigei and Betty arrived, and he showed them the person who was sitting on maize. The 2nd accused further stated that he had sent his co-accused to call Ezekiel Sigei (PW3), and they looked for ways to get the person inside the house out so that they could question him. The deceased then tried to escape through the window into a cattle shed which was adjacent to the house. The 2nd accused stated that he found the deceased inside the cowshed, where there were cows, lying down on the ground and asking to be forgiven and not to be beaten. He was bleeding and had a wound on the left side of his forehead. He further stated that since he was already in pain, they did not bother to punish him but instead moved him to a spacious place in the compound.

34. The 2nd accused then went in to change from his night clothes, and when he returned, he found Bernard Bii, one of the watchmen employed to guard Tinga farm, in the company of another person whose name he did not know, beating the deceased. The 2nd accused denied that he had assaulted the deceased. He stated that there were cows in the cowshed which the deceased had jumped into, and that the cows were very hostile, especially the one with a calf, and all of them had sharp horns.

35. The 1st accused, DKK, a minor aged 16 years, initially stated that he wished to adopt his uncle's defence statement in his own defence. On the court expressing disquiet in this regard and upon consulting with his Counsel, Mr. Sang, the 1st accused also elected to give an unsworn statement. His statement was that on the night of 26-27th February 2016, he had heard a lot of screaming when he was sleeping in the house which he shared with his uncle, the 2nd accused.

36. He had found his aunt, Veronica, and Betty Bett (PW1) screaming. He had also found many people at the scene, and heard people saying that there was someone in the house. His uncle asked him to call Stanley Sigei, who came with his wife. His uncle then asked him to call Ezekiel Sigei, which he did, then he returned home to where the crowd was. He had found that there was a lot of screaming at the scene, and he had decided to go to sleep as he was going to school the following day. He had learnt the following day that the stranger at night, the deceased, had been taken to hospital by his uncle, and that he had died on the way. The 1st accused had been arrested on 16th March 2016 in Equator in Timboroa where his mother had sent him to get school fees.

37. Those, then, are the two versions of the events that led to the death of the deceased in this case, Stanley Kibet Kosgei, on the night of 26th and 27th February 2016. The cause of his death, as contained in the post mortem report presented by Dr. Fibian Kosgey was trauma to the chest cavity leading to rupture of the liver and massive haemorrhage. The report also indicated that the deceased had various other wounds on his body. He had a penetrating head wound on the left frontal region, multiple bruising and swelling on both upper limbs and the hands, lacerations on the right anterior superior iliac spine, and lacerations on the right chest region.

38. The prosecution says that it was the two accused persons, the 1st accused, then a 16 year old boy and his uncle, the 2nd accused, 45 years of age, who caused the death of the deceased. The 2nd accused stated in his defence that the deceased was beaten up by two guards from a nearby tea farm. He also suggests that he may have been gored by cows.

39. The two accused persons are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. For the prosecution to establish its case against the accused, it must prove that they committed the offence 'with malice aforethought'. Section 206 of the Penal Code sets out what the prosecution needs to place before the court for 'malice aforethought' to be established:

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.

40. The evidence before me shows that the deceased was assaulted by the two accused persons. They were later joined by two guards from Kaisugu Tea Estate, who also assaulted the deceased but were never arrested.

41. PW1, PW2 and PW4, all of whom were neighbours of the deceased and the accused and knew them well, gave eye witness accounts of the assault on the deceased. PW1, Betty, had been called by Veronica, a sister of the 2nd accused, at midnight and informed that there was a stranger in the 2nd accused's house. She had gone to the house which was a few metres away and seen the two accused persons standing outside the house. She had asked the 2nd accused who the stranger in the house was, and he had answered that it was the deceased, 'Stanley'.

42. PW1 had seen the 2nd accused chase the deceased when he managed to get out of the house and hit him with a rungu. The deceased had fallen down, and the accused persons together had continued to beat him up until he fainted. Betty had also seen two guards from Kaisugu join the accused in beating up the deceased.

43. The evidence of PW1 was corroborated by that of PW3, Ezekiel Kibet Ngetich. He had been called from his home by the 1st accused, who had been sent by his uncle, the 2nd accused, David to call him and inform him that there was a man inside their house. The 1st accused had called him twice, and he went to the scene. He had found the deceased trying to get out of the house, and when he succeeded, the 2nd

accused had hit him with the club that he was carrying, and the deceased had fallen down. There was a full moon, and PW3 was able to see the 2nd accused hit the deceased with the club on the head and the right knee, and also saw that the deceased was bleeding from the forehead. PW3 had also seen the 1st accused join the 2nd accused in beating up the deceased. He had asked the accused to stop beating the deceased, who was drunk, and they had stopped and tied him up.

44. PW4 also corroborated the evidence of PW1 and PW3. He too, had been asleep in his house at about midnight on 26th February 2016 when the 1st accused was sent to call him by the 2nd accused. He had gone to the scene, a distance of about 50 metres from his house, and had found the 2nd accused standing outside the house inside of which was the deceased. The 2nd accused had flashed the torch he was holding inside the house and PW4 had seen the deceased inside the house, sitting on a sack of maize.

45. According to PW4, the deceased was asking for money, though it was not clear whether he was asking for money from the 2nd accused or from someone else. PW4 testified, as had PW3, that the deceased had then come out of the house through a window, and the 2nd accused had hit him on the head with a *rungu*, upon which the deceased fell down. PW4 corroborated the evidence of PW1 and PW3 that the 1st and 2nd accused had then proceeded to beat the deceased as he lay on the ground. PW4 had asked them to stop beating him and tie him up and wait for the administration to take him.

46. What the evidence presented by the prosecution shows is that the deceased went to a house in the compound occupied by the accused persons. He was found in a house where maize was kept, sitting on a sack. When he got there is not clear, but he was drunk, and was asking for his money. It would appear that he had bought some illicit brew from an aunt or the mother of the 1st accused, it is not clear which, who was a sister of the 2nd accused.

47. The evidence points to a deliberate and concerted assault on the deceased by the two accused persons. The leader of the assault was the 2nd accused, who also sent his nephew, the 1st accused, to call neighbours, PW3 and PW4, who confirmed that they were called by the 1st accused. They went to the scene and witnessed the assault on the deceased.

48. The deceased died as a result of the beatings he sustained from the 1st and 2nd accused persons. It emerged in evidence that the deceased was also assaulted by two guards from Kaisugu estate, who had '*nyahunyus*' or whips. The point though, is that the two accused persons were seen by witnesses beating up the deceased. The 2nd accused was seen to hit him with a *rungu*, which is a heavy club. The 1st accused had a stick. The *actus reus* leading to the death of the deceased is thus not in dispute: he died as a result of an assault by the accused persons, together with two other people who were not before the court.

49. The question is whether the second element in the offence of murder, the *mens rea*, has been established. Section 206 of the Penal Code includes in the definition of 'malice aforethought' any action that is taken with "***an intention to cause the death of or to do grievous harm to any person,***" or knowledge that their action will cause death or grievous harm, "***although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not.***"

50. The accused in this case knew the person who was inside the maize store. The 2nd accused flashed his torch at him. They knew he was their neighbour, and that he was drunk. Yet they proceeded to viciously assault him, several times, using a *rungu* and a stick, intermittently, it would appear, over several hours. They were intent on causing him grievous harm or death, or were indifferent that grievous harm or death may result.

51. Has the defence put forward by the accused displaced the prosecution evidence? The answer must be in the negative. The unsworn statements of the accused confirm the version of events put forward by the prosecution, the variation being the attempt by the 2nd accused to blame the cows for the death of the deceased. His defence statement suggests that the deceased was gored by the cows with their horns, which is not borne out by the post mortem report and the evidence of the eye witnesses, PW1, PW3 and PW4. The defence of the 1st accused is to make himself out to be an innocent young man who went to bed and left the scene where there was a lot of screaming as he needed to go to school the following day. It is my view that through its witnesses, the prosecution has proved, beyond reasonable doubt, that it was the two accused persons who, with malice aforethought, caused the death of the deceased.

52. I therefore proceed to convict the accused persons of the offence of murder contrary to section 203 as read with section 204 of the Penal Code in accordance with section 215 of the Criminal Procedure Code.

Dated Delivered and Signed at Kericho this 7th day of February 2019

MUMBI NGUGI

JUDGE