



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL CASE NO. 26 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

AMOS KIPKORIR BETT.....1ST ACCUSED

NICHOLAS CHERUIYOT KIGEN.....2ND ACCUSED

JUSTIN KIPKURUI LANGAT.....3RD ACCUSED

JUDGMENT

1. The accused persons, Amos Kipkorir Bett, Nicholas Cheruiyot Kigen and Justin Kipkurui Langat 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 night of 2nd July 2016 at Kedowa trading centre in Londiani within Kericho County, they murdered David Kimutai Komen. All the accused persons pleaded not guilty to the offence.

2. The prosecution case was presented through 7 witnesses and was as set out in the following paragraphs.

3. Daisy Chelangat (PW1) was at Kwenet Bar at around 4.00 p.m. on 1st July, 2016. She stayed at the bar until 10.30 p.m. then closed the bar. The deceased had been sent by Daisy's employer, Mary, to find out how work was going. The 1st and 2nd accused then entered the bar and Daisy informed them that she had closed the bar and they could come back the following morning. The deceased also told them that the bar was closed, and they started quarreling with him. The 1st accused, Amos, held the accused by the neck. Daisy told them to leave the bar, and they did. The deceased also left the bar. Daisy then left the bar and went home and slept.

4. At around 12.55 a.m., the deceased called Daisy and informed her that the two people who had quarreled with him at the bar had followed him. Daisy asked the deceased to return to the bar and get a room, but he declined and disconnected the phone.

5. The following day, Daisy's employer called her at about 8.00 a.m. and informed her that the deceased had been killed and his body was in the quarry. She went to the quarry with her employer and they found the deceased lying face up in the quarry. Daisy recognised the clothes he was wearing as the ones he had been wearing at the bar the previous night.

6. The deceased did not name the two people who had followed him when he called Daisy. Her evidence was that it was the 1st and 2nd accused who had quarreled with the deceased. She knew the 1st accused as Amos and the 2nd accused as Kipsaburyo, but she did not know the 3rd accused. The 3rd accused was not at the bar when the deceased quarreled with the 1st and 2nd accused.

7. Julius Kipngetch Tanui (PW2, Julius), the deceased's cousin, had received a telephone call from the deceased at around 12.27 a.m. on 1st July 2016. The deceased informed him that 'Saramiat' had beaten him and had held his neck. The deceased further informed him that he had been attacked by 3 people, but that he knew Saramiat, whom the deceased said was wearing a blue shirt. The deceased had further told him that there were three people attacking him near the roundabout. The deceased had told him that Saramiat, the 1st accused, had held him by the neck and hit him on the face. The deceased had told him that he did not know the names of the other two people who had attacked him.

8. Julius had told his cousin that he would go to assist him, but the deceased had disconnected the call. Later, at around 12.54 a.m., the deceased had called Julius again and told him not to go and that the deceased was on his way.

9. The following morning, Julius had inquired from his sister, Norah Chepkemoi, whether the deceased had returned home and was informed that he had not. Julius had then gone to the quarry where he worked and met with his colleagues to plan for work. He had later been informed by his sister, Norah Chepkemoi that the deceased was lying in the quarry. He was lying facing up, and after they checked him,

they realised that he was dead.

10. Julius confirmed that the 1st accused has an identical twin, hence the name Saramyek (Saramiet). The deceased had told him about the blue shirt that the 1st accused was wearing, which was found in his house.

11. Schola Cherono (PW3) had gone to the Groline bar at Kedowa on 1st July, 2016 at about 9.00 p.m. She had stayed there until around 11.00 p.m. when the bar closed. She left the bar and crossed the road to Malo Malo bar where she stayed until that bar also closed. On the way home, she found the deceased and the 1st accused (Amos) quarreling, but did not hear what they were quarreling about. The deceased called her and asked her to help him seek forgiveness from Amos. He further told her that he had fought with Amos and that Amos was preventing him from going home. At the time, the accused and the deceased were alone. Schola had asked the 1st accused to forgive the deceased, then she had left, as had the deceased, leaving the 1st accused alone at the roadside. The following morning, she heard that the deceased was dead in the quarry.

12. Norah Chepkemoi (PW4, Norah), was also a cousin of the deceased. She was the owner of the quarry in which his body was found. On 2nd July, 2016, she went to work at the quarry in the morning and found the deceased lying face up in the quarry, some distance from the top of the quarry. She had gone to the place where the body of the deceased was when the police came to the scene. She stated that one could not jump to the place where the body of the deceased was, as one would get injured as there are rocks at the quarry. There was a road and a short cut to get down into the quarry.

13. Norah confirmed that the 1st accused has a twin brother, and that it is hard to distinguish the two of them.

14. The Assistant Chief of Cheptangulgei sub-location, Nicholas Korir (PW5, Nicholas), was called on 2nd July, 2016 at about 8.30 a.m. by his colleague, Charles Too. He was informed that someone had been murdered at the nearby quarry. He went to the quarry and found the body of the deceased lying down the cliff inside the quarry.

15. While at the scene, he was informed by Julius (PW2) that he had received a phone call from the deceased who had informed him that he was being beaten by 'Saramek'. PW5 had arrested the said 'Saramek' and taken him to the police station as some members of the public wanted to beat him up. Nicholas did not see the 1st accused with a blue jersey, though he heard that the 1st accused had had one on.

16. Edward Kiptoo Suter (PW6, Edward) was an uncle of the deceased. He had received information on 2nd July 2016 at around 8.00 a.m. from his sister, Evalyne, that the deceased had been found dead in a quarry at Kedowa. He and his brother, the father of the deceased, had travelled to Kericho and had attended the post mortem of the deceased at the Kericho District Hospital Mortuary. The deceased had injuries on the head, on the wrist and thigh and on the ankle and neck. Edward had identified the body for the doctor who performed the post mortem.

17. The post mortem report on the deceased was produced as exhibit 1 by Dr. Georgina Lasoi on behalf of her colleague, Dr. Daisy Chebet, who had performed the post mortem on the body of the deceased on 8th July 2016 at 12.10 p.m. The report showed that the deceased was a 26 year old male. He had a cut wound on the left arm, an abrasion on the left thigh, and two abrasions on the front left of the neck. He also had a cut wound on the scalp.

18. The deceased also had a bruise on the chest, and there was a depression. He had peripheral cyanosis in the nail bed and toes. His left lung had collapsed and the pleural cavity was filled with blood. His pericardium was also filled with blood, but there was no blood in the brain, either inside or outside, though he had a linear scalp fracture on the midline. In the opinion of Dr. Chebet, the cause of death was severe lung collapse/pulmonary failure/ respiratory arrest due to severe lung collapse. Dr. Lasoi explained this to mean that the respiratory failure was due to the severe lung collapse that in turn was due to the blunt trauma to the chest that caused the bleeding to the pleural cavity. She did not indicate what caused the blunt trauma to the chest.

19. Kennedy Kiprotich Kemboi (PW8, Kennedy) was with the deceased on 1st July 2016 at about 6.00 p.m. at Kedowa Centre where they were playing pool. They stayed there from 7.00 – 8.00 p.m. then went to Kwenet Bar, where they drank until 11.00 p.m. The deceased and Daisy (PW1) were at the bar. Saramiat (3rd accused) who was wearing a Chelsea sweater, peeped in for about 3 minutes but did not say anything. Kennedy and the deceased stayed in the bar until 11.10 p.m., then Kennedy told the deceased that they should leave, but the deceased refused to leave, so Kennedy left him at the bar and went home and slept. Kennedy and the deceased used to live in the same place, about 25 minutes walking distance from Kedowa.

20. The following morning, at around 7.00 a.m., Julius (PW2) asked him where the deceased was and he informed him that he had left the deceased at a bar. He and Julius had then gone to the quarry where Julius worked and they had found the deceased in the quarry. His body was in a depression in the quarry, and he had his phone with the phone torch on. He was facing up and was bleeding from the nose and mouth.

21. No. 536674 Corporal Simon Koech Maridany (PW9) of Londiani Police Station was at the Kedowa Patrol Base on 2nd July 2016 when Mr. Nicholas Korir (PW3) the Assistant Chief of Kimasian location and members of the public escorted a suspect to the patrol base on suspicion that he had murdered the deceased. The deceased, according to Maridany, was known by the nickname Saramiat but his name was Nicholas Cheruiyot Kigen. Maridany had re-arrested the suspect then had gone to the scene at the Kedowa quarry. around 9.30 am. He had found the deceased's mobile phone and some slippers, and the deceased lying in the quarry, facing downwards. PC Maridany stated that the deceased had injuries on the head, that he had been hit by a blunt object on the head. He had bruises on the arms and neck. The suspect he had arrested was Saramiat, the 3rd accused. In re-examination, he stated that the suspect he had arrested was re-arrested was Nicholas Cheruiyot Kigen, *alias* Saramiat, the 2nd accused in this case.

22. No. 36066 Sergeant Peter Oliech (PW10), the investigating officer, had gone to the scene with other officers. They had found the body

of the deceased, David Kimutai Komen, in the quarry at Kedowa. The body had injuries on the head, left arm, left thigh and bruises on the neck. They had removed the body to Kericho District hospital mortuary and had interrogated the accused and recorded the statements of witnesses. They were convinced, after recording the statements of witnesses, that the accused persons murdered the deceased. PC Oliech summarised the statements from the witnesses, Daisy, Scola, and Justus on the basis of which the police had decided to charge the accused.

23. When placed on their defence, the accused elected to give unsworn statements. Amos Kipkorir Bett, the 1st accused, stated that he had woken up on 1st July 2016 and gone to a quarry in Kedowa where he worked until 5.00 p.m. He had then gone to the Kedowa Centre Midway hotel for tea, then to the Guest House Bar. He stayed there till 9.00 p.m., then went to Mali Mali shop, bought household goods, then gone to the main stage, taken a vehicle, gone home and slept at about 10.20 p.m. and slept.

24. While on his way to work the following morning at about 9.00 a.m., he was accosted by two chiefs from Kedowa and an administration police officer and taken to his house. A search was carried out at his home and he was taken to Kedowa Police Station and later to Londiani Police Station. He was subsequently charged with the present offence, and he asserts that he does not know why he was arrested and charged.

25. The defence of the 2nd accused, Nicholas Cheruiyot Kigen, was that on 1st July 2016, he was busy loading stones at a quarry called DC, where he stayed until 6.00 p.m. He went home after work and found that his mother was unwell. He went at about 6.30 p.m. to Kedowa to seek medication for his mother, at a pharmacy adjacent to Kedowa Guest House. He was not able to get the drug he wanted and was informed that he could get it in Londiani. It was raining so he decided to watch the 7.00 p.m. news at Kedowa Guest House, where he stayed until 8.00 p.m. He then went to a bar called Glory Bar and took a bottle of vodka, then he went shopping for his family, found a boda boda rider by the name Hustler who had motor cycle registration number KMBW 823C Pajaj, red in colour, and he was taken home which was about 4 km from Kedowa. He arrived home at 9.00 p.m. and went to sleep.

26. The following day, 2nd July 2016, he went to look for medicine for his mother at Londiani sub-district hospital, then went to work at Kedowa. This is when he heard that someone had been found dead at the quarry. He walked to the scene, which was about 1½ km from Kedowa centre where he met a large crowd of people. He went and saw the body of the deceased in the quarry, and he went along with the crowd to the police station when they saw one Kennedy Kemboi being led by the chief towards the Kedowa Patrol Base. While at the Patrol Base he was arrested and locked up in the cells until 3.00 p.m. when he was taken to Londiani Police Station. He was thereafter charged with the offence he now faces.

27. The 3rd accused, Justin Kipkemoi Langat, stated that he worked at the quarry until 8.00 p.m. on 1st July 2016. He then did some shopping and went to his house. The following morning, he got ready to go to work. He found people heading to a quarry inside which a body was reported to have been found.

28. He, too, went to the quarry and saw the body of the deceased, then he went to work. Soon thereafter, he met the Chief, who inquired about his twin brother, and he informed the Chief that he did not know where his twin brother was. He then took a motor cycle with the Chief, who instructed the rider to proceed to Kedowa Police Station. The Chief asked the police to place the accused in the cells while the Chief went to look for his twin brother. The 3rd accused was later taken to Londiani Police Station and later charged with the offence before court which he did not commit.

29. In submissions on behalf of the accused, Mr. Langat argued that the prosecution had failed to prove their case against the accused beyond reasonable doubt. The witnesses that the prosecution had produced were witnesses before and after the fact. The prosecution had not called any witness to testify and prove that the three accused persons were responsible for the death of the deceased.

30. Counsel further observed that the medical evidence was not very helpful either. It was not possible to discern from the testimony the manner of death of the deceased. The doctor had stated in cross-examination that the deceased could have fallen from the deep cliff in the quarry and the death could have been as a result of a fall. He submitted further that the court does not have the benefit of knowing the manner of death of the deceased, and there was doubt as to whether it was a result of a fall or as a result of being strangled. In his view, this was a case of circumstantial evidence, the testimony of the prosecution witnesses leaves doubt with regard to the circumstances under which the offence was committed, and the doubt should be resolved in favour of the accused persons.

31. I have considered the prosecution evidence and the unsworn statements of the accused. I have also considered the submissions of Mr. Langat, Learned Defence Counsel. The three accused persons are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 of the Penal Code sets out the offence of murder as follows:

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

32. Section 206 of the Penal Code provides as follows with respect to what amounts to 'malice aforethought':

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.

33. The prosecution has a duty to prove, beyond reasonable doubt, that it was the three accused persons who, with malice aforethought, caused the death of the deceased. The evidence before this court is purely circumstantial. Daisy (PW1) testified that she had seen the 1st and 2nd accused quarrel with the deceased at the bar, and that the 1st accused had held the deceased by the neck. This was about 10.30 p.m.

34. Later, at around 12.55- about two hours later-the deceased had called her and informed her that the two people who had quarreled with him at the bar had followed him. PW2, Julius, testified that at 12.27 a.m., the deceased had called him and informed him that three people-among them 'Saramiat' who was in a blue jersey, had followed him and were attacking him. At 12.54, he had again called PW2 and informed him that the three people had left him and he was on his way home. Scola, PW4, had seen the deceased and the 1st accused alone at a roundabout. The deceased had called Scola to seek 'forgiveness' for him from the 1st accused. The deceased and Scola had then left, leaving the 1st accused alone. The following day, the deceased had been found dead in the quarry, his phone torch on.

35. From this evidence, it is clear that no-one saw the accused attack the deceased. No one saw them throw him into the quarry, or cause his fall into the quarry. The medical evidence does not assist the court very much with respect to the cause of death of the deceased. From the post mortem report produced by Dr. Lasoi, the cause of death of the deceased was severe lung collapse/pulmonary failure/respiratory arrest due to severe lung collapse. What caused the lung to collapse is not clear. The report did not indicate that the deceased had, say, broken ribs, which would have punctured the lung and caused it to collapse. Had the deceased been thrown down into the quarry, he may well have had more injuries than what was identified in the medical report – a depression on the chest, a collapsed lung, blood in the pleural cavity and pericardium, and a linear scalp fracture on the midline.

36. How did the deceased get into the quarry? He was found facing up, his phone, with the phone torch on, besides him. Did he fall, or was he pushed into the quarry? If he was pushed into the quarry, was it the accused who did so?

37. The evidence points to the fact that the deceased had stated at 12.54 a.m. that he was on his way home. The people who had been attacking him had left him. That was the last time he spoke to anyone.

38. Then there is the question of the identity of the people who attacked the deceased. The evidence of Daisy is that it was the 1st accused, Amos, who, with another, had attacked the deceased at the bar. Scola's evidence is that she saw the deceased with Amos at the roundabout. Scola and the deceased had left the 1st accused at the roundabout. The 2nd and 3rd accused were not at the scene then.

39. Then there is the identity of 'Saramiat' said to have attacked the deceased. By the close of the prosecution case, it was not clear who 'Saramiat', meaning, I understand, 'twin' in Kipsigis, was. PW2 referred to the 1st accused as Saramiat, while PW8 referred to the 3rd accused as Saramiat. From the evidence, it was the 3rd accused who had an identical twin, hence the name 'Saramiat.'

40. The prosecution has a duty to discharge the burden of proof placed upon it. It has the onus, which always rests upon it, to prove its case against an accused beyond reasonable doubt. In **Stephen Nguli Mulili vs Republic [2014] eKLR**, the Court of Appeal stated as follows concerning the burden and standard of proof in criminal cases:

“On the issue of whether the prosecution discharged its burden of proof, it is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, (2013) eKLR.

The standard of proof required is “proof beyond reasonable doubt”. In reference to this Lord Denning in MILLER V MINISTRY OF PENSIONS, [1947] 2 ALL ER 372 stated:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

41. In discharging this burden, the prosecution can do so by adducing circumstantial evidence, and the court can properly convict on circumstantial evidence. However, the circumstantial evidence must point irresistibly to the accused as the perpetrator of the offence charged. In **R vs Kipkering arap Koske & Another 16 EACA 135** the court stated:

“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.”

42. In its decision in **Sawe vs Republic [2003] KLR 364 at page 375**, the Court of Appeal stated as follows:

“There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

43. In the earlier case of **Abanga alias Onyango vs Rep CRA No. 32 of 1990 (UR)**, the Court of Appeal observed that:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

44. From the evidence adduced by the prosecution in this case, I am unable to find that the prosecution has discharged the burden placed upon it to prove the guilt of the accused beyond reasonable doubt. What evidence is before me shows that the deceased quarreled with some people-one of whom was the 1st accused, at the bar in which Daisy was serving. He was seen by Scola a short while later with the 1st accused, then he left with Scola, leaving the 1st accused at the roundabout, An hour or so later, he called Julius to say some three people were attacking him, then later called to say that they had left and he was on the way home.

45. It is unfortunate that a young man of 26 lost his life so needlessly. Whether he fell into the quarry or was killed and thrown in is not clear from the evidence. More importantly, there is no proof, to the required standard, that the three accused had a hand in his death. In the circumstances, it is my finding that the prosecution has failed to prove the offence of murder against the three accused persons beyond reasonable doubt. I therefore proceed to acquit them in accordance with section 215 of the Criminal Procedure Code.

Dated Delivered and Signed at Kericho this 6th day of February 2019.

MUMBI NGUGI

JUDGE