



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**(CORAM: D.S. MAJANJA J.)**

**CRIMINAL CASE NO. 29 OF 2018**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**JOHANNA CHEPKWONY KIPKORIR .....ACCUSED**

**JUDGMENT**

1. **JOHANNA CHEPKWONY KIPKORIR** (“the accused”) is charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. According to the information dated 7<sup>th</sup> August 2018, it was alleged that he murdered his father, **ANDREW CHEPKWONY SOI** (“the deceased”) 24<sup>th</sup> July 2018 at Kapsimotwo Village, Transmara East Sub-County within Narok County. After denying the charge, the prosecution marshalled 6 witnesses to prove that the accused hit his father on the head with a rungu and an axe fatally injuring him. The accused gave sworn testimony in his defence.
2. The offence of murder is defined in **section 203** of the **Penal Code** as follows, “*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*” The prosecution is therefore required to prove first, the fact of death of the deceased and the cause of that death; second, that the accused committed the unlawful act or omission that led to that death; and third, that the accused committed the unlawful act or omission with malice aforethought.
3. The fact and cause of the deceased’s death is not in dispute. Dr Ronald Kibet produced the Post Mortem Form on behalf of Dr Abud Mahat who conducted the post mortem on the deceased’s body on 30<sup>th</sup> July 2018 at Longisa Hospital Mortuary. He observed that there was a cut wound measuring 17cm X 4cm on the left side of the head which cut through the skull to the brain tissue. The skull bones were fractured and brain tissue was oozing with massive bleeding. There was another laceration on the side of the head and a fracture on the left mandible. Dr Mahat concluded that the cause of death was bleeding associated with traumatic brain injury.
4. On the issue whether the accused caused the injury to the deceased which led to his death, the evidence was that on 24<sup>th</sup> July 2018 at about 8.00am, the deceased was having breakfast in his house with his wife and daughters-in-law, Lilian Chepkwony (PW 1) and Mercy Chepkwony (PW 2). The accused came in and asked for an axe to go and cut a tree. PW 1 recalled that the deceased told him not to cut down trees but the accused did not heed the warning. The accused took the axe and went out of the house and returned within a few minutes with a rungu. He hit the deceased on the head and when the deceased collapsed, he cut him with the axe. On her part, PW 2 recalled that the when the accused asked for an axe, the deceased told him not to cut the trees and following a dispute, the accused hit the deceased on the head twice with the rungu and then with the axe.
5. The accused’s brother, Paul Kipyegon Chepkwony (PW 4), testified that on the material morning, he was in his house when he heard screams coming from the deceased’s house. He ran straight to the house and along the way he met the accused carrying an axe. When he went into the house, he found that deceased’s blood soaked and still body.
6. Another of the deceased’s sons, Peter Chepkwony Cheruiyot (PW 3), was informed by PW 4 that the deceased had been killed. As he headed to the deceased’s house, he met the accused who started chasing him with an axe. As he screamed, people came as the accused ran away. PW 3 recalled that the accused threw away the axe went to his house and came out with a bow and arrows. By that time villagers had come to the homestead and since he was overwhelmed by the crowd he ran to the nearby Administration offices.
7. The Investigating Officer, PC Jacton Ingolo, recalled that on the material day, he was informed of the incident. In the company of other officers, he proceeded to Kapsimotwo village. He found the deceased lying on the ground of his kitchen in a pool of blood, his brain matter was oozing on the left side of the head as a result of a deep cut. He interrogated the deceased’s relatives, who were present, on circumstances of the incident. He removed the deceased’s body to Longisa Hospital Mortuary. At the scene, the area Chief handed over to him the blood stained axe which he recovered from a neighbour’s compound. Thereafter he completed investigations and caused the accused to be charged.

8. The prosecution case is founded on the direct testimony of PW 1 and PW 2 who saw the accused strike the deceased with the rungu then proceed to cut him with an axe. Although the accused denied striking the deceased, the direct testimony of PW 1 and PW 2 puts him in the house at the time. In addition, PW 3 and PW 4 met the accused leaving the deceased's house immediately after the incident in a manner inconsistent with his innocence. The totality of the evidence is that the accused is the person who assaulted the deceased with the rungu and axe on the head resulting in his death. I therefore find and hold that it is the deceased who caused the unlawful act that led to the deceased's death.

9. The last issue for determination is whether the accused killed the deceased with malice aforethought. Counsel for the accused submitted that the accused had an argument with the deceased over the trees and was thus his unlawful act was provoked. **Section 207** of the **Penal Code** describes as "killing on provocation" as follows;

*When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.*

**Section 208(1)** of the Penal Code defines "provocation" as follows-

*The term "provocation" means and includes, as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.*

10. The implication of **section 208** of the **Penal Code** is that an unlawful killing in circumstances which would constitute murder would thus be reduced to manslaughter if the act is done in the heat of the passion caused by sudden provocation. It is a question of fact whether the accused in all circumstances of the particular case was acting in the heat of the passion caused by grave and sudden provocation (see **Wero v Republic [1983]EA 549**). Furthermore, while the accused does not shoulder the burden of proving the defence, the prosecution must marshal evidence to disprove the defence beyond reasonable doubt (see **Kenga v Republic [1999] 1 EA 141**).

11. PW 1 and PW 2 gave somewhat contradictory evidence on what took place. PW 1 was clear that the accused came into the house and when he was told by the deceased not to cut down trees, he went out with the axe and returned after a few minutes with the axe and rungu and proceeded to assault the deceased. PW 2's testimony is that there was a quarrel between the accused and deceased before the accused assaulted the deceased.

12. I am inclined to believe PW 1 as PW 2 appeared confused while giving evidence. In any case the evidence of the post mortem show that the deceased was beaten at least twice first on the cheek which fractured the mandible then with the axe which fractured the skull. Further, PW 2 admitted in cross examination, that the accused hit the deceased more than once as she tried to stop him. This conduct is inconsistent with an act of provocation particularly in view of the fact that the deceased, who was an old man, was seated having breakfast and was not armed. I do not think that the accused act of giving himself up negates my finding on the issue of provocation as he only ran for protection when the villagers went after him.

13. Malice aforethought may be established by considering the nature of the weapon used, the manner in which it was used, the part of the body injured and the conduct of the accused before, during or after committing the offence (see **Republic v Tubere s/o Ochen [1945] 12 EACA 63**). In this case, the accused not only hit the deceased with a rungu twice but proceeded to cut him on his head with an axe causing his skull to fracture and ooze brain matter. The use of weapons to inflict blows on the head could only have been intended to cause grievous harm or indeed death within the meaning of **section 206** of the **Penal Code**. I therefore find and hold that the prosecution proved malice aforethought.

14. The prosecution has proved its case against the accused beyond any reasonable doubt. I therefore find **JOHANNA CHEPKWONY KIPKORIR** guilty of the murder of **ANDREW CHEPKWONY SOI** and I convict him.

**DATED** and **DELIVERED** at **KISII** this 7<sup>th</sup> day of **MARCH 2019**.

**D.S. MAJANJA**

**JUDGE**

Mr Godia, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.