



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 94/2012

REPUBLIC.....PROSECUTOR

VERSUS

HILLARY KIPLAGAT.....ACCUSED

JUDGMENT

1. The accused (**HILLARY KIPLAGAT**) was charged with the offence of murder Contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge being that on **4th December 2012 at KIPSUGUR VILLAGE**, within **Nandi** County he murdered **DANIEL KOSKEI**. The accused denied the charge. Five witnesses testified for the prosecution

2. **JULIUS KIMELI KIRUI (PW1)** testified that on **4.12.2012 he was at his home within KAPTIBWA** village when the deceased wife came and informed him the accused had assaulted **DANIEL KOSGEY** (deceased), who was his brother. His wife **ANN** went with the deceased's wife to check, but he remained inside the house.

In the morning he went to the deceased's home and found that the deceased with injuries on the right side of the head (bleeding), stomach left hand were bruised and the right leg was bleeding. The deceased told him **HILLARY** (who was their younger brother) had a fight with him at a drinking spree but they got separated, however on his way home he met him and he was hit by an iron. He was narrating this to him while on his bed.

3. PW1 washed him and took him to **KAPAKANGANI** Dispensary but he died on the way. After their father died, the deceased and the accused had been having disagreements especially over a cow. On cross-examination he stated that he disclosed that the accused and the deceased used to consume **busaa** and **changaa**, although he did not see them drinking on the material date. The discussion with the deceased was however not in the statement he had recorded on 5.12.2012, and PW1 had told the police that he did not want to pursue the matter.

4. **SERGEANT BENJAMIN TUWEI (PW2)** of **Kapsikur Police Post** was at the post on 5/12/2012 when he heard a screams about a kilometer away and rushed to inquire. When he got to the home of **CHEBORUSHIO** he found members of the public milling while screaming and was told Kosgei had died from an attack. He noted that the scene which was near a muddy river had been disturbed.

5. Incidentally the accused had gone to the post on 5.12.2015 and made a complaint that he had been attacked by the deceased although he did not have any visible injuries, and it turned out that it was the deceased who had been attacked. Apparently for the last four years PW2 had received complaints regarding disagreements between the deceased and the accused. On cross –examination he said there had been a complaint in 2011 about a threat to life, and he had arrested the accused. Further in 2010 the accused had threatened his mother but all these were settled at the police station. This evidence was not included in his statement.

6. **SAMUEL KIPROP TANUI (PW3)** testified and stated that on 5.12.2012 at about 9.00am, he was called by his sister **JANE** that his brother was unwell. He told her to take him to **KAPKANGANI** dispensary but died on the way. He went to hospital and noted that the deceased had blood on the right side of the head. He too confirmed that the accused and the deceased used to have disagreements.

7. **PAUL KIRUI KIPKOLUM (PW4)** was informed by **SAMUEL (PW3)** attended the postmortem and observed injuries on the head, right hand, right of the stomach and leg.

8. **ABDIKADIR HASSAN (PW5)** who was the Officer in Charge of Crime at **KAIMOSI** police station within **NANDI** County was informed that someone had died out of injuries inflicted by the brother. He visited the scene and learnt from members of the public that the two brothers had family disagreements and the accused way-laid the deceased at the gate while armed with a panga and attacked. He did not recover any weapon from the scene. The accused disappeared from the scene and was later arrested in **KAPSABET** town by members of the public who took him to the police station.

9. The accused in his in his unsworn defence denied being involved in his brother's death. He stated that his elder brother **JULIUS** started selling the cows after their parent's death in 2011. He also wanted to sell the land that had been left for them and the accused and the deceased were opposed to his schemes, so **JULIUS** stopped. However this did not go down too well with him and he became hostile to both the accused and the deceased.

10. He stated that he had left home on 3rd of December 2012 and on 7.12.2012 while in **KAPSABET** at his place of work, his uncle went to his place of work and told him his brother has died and that **JULIUS** was claiming he (the accused) knew the cause of his death. He was arrested for two weeks awaiting the finding of the investigations.

11. It was the accused's contention that Julius had lied to the court as he had differences with the deceased and himself, thus it was **JULIUS** who knew the cause of death. He pointed out that when the deceased wife called on Julius to go check on Daniel, the latter sent his wife to check on the deceased, alleging that he was sick and could not go, and it's no wonder his wife refused to record a statement with the police. Further that even the deceased's wife was chased away by **JULIUS** when the accused told him to record the truth.

12. RONALD KIPCHUMBA KEMBOI (DW2) a neighbor to the accused within the village. Said he was with the accused on **3rd of December 2012** when the accused was going back to **KAPSABET** where he worked. On **5.12.2012** he heard noises from the accused home and the accused wife went to call him, he escorted her home and on arrival, Daniel told him he was attacked by thugs on his way home the previous night as he was coming from a drinking spree. He was bleeding excessively and he was taken to hospital. He knew Julius was mistreating his brothers as they had questioned him about his sale of livestock left by their parents, and that this is what led to the accused leaving home for **KAPSABET**.

13. On cross-examination he stated that he left the accused in **KAPSABET** on **3.12.2012** and he could not tell whether he came back to the village on **4.12.2012**. He further said that he was present when the deceased was lying on the ground and he never heard him mention that the accused as his assailant. He is the one who washed Daniel since they were the same age-mates.

14. The accused urged the court to note that PW1 was unable to tell if it was the accused person who attacked the deceased, as he never saw the accused person attack the deceased. PW1 statement did not indicate that the deceased had told him he was drinking alcohol with the deceased and a fight ensued when the deceased refused to buy him alcohol, and the accused waited and attacked him on his way.

15. In addition it was submitted that the evidence of **PW3** contradicted PW1 regarding who took the deceased to hospital. PW3 the sister said she took the deceased to hospital but died on the way, yet PW1 the brother testified he is the one who took the deceased to hospital. Pw4 the deceased brother testified that he was only informed of his brother's death and came home to organize his burial.

With tremendous respect to counsel, that contradiction is not fatal as it does not touch on the key issues namely that the deceased had injuries all over his body on the date in question, and that he succumbed to those injuries. He never witnessed the deceased person being attacked.

16. The court was urged to uphold the defence case since PW1 had a sour relationship with his brothers for selling the parents property. The accused strongly denied attacking the deceased. In fact PW1 had refused to go see the deceased when his wife Annah when to see him.

17. In addition, that there was no weapon that was recovered from the scene and there were contradictions on the weapon used to attack the deceased. PW1 said the deceased was attacked with a metal bar and PW5 said it was a panga. DW2 evidence was that the deceased did not mention any person's name before he died.

18. It was their submission that the prosecution did not lead any evidence to show and prove that the accused person had the intention to kill. The prosecution had failed to prove beyond reasonable doubt.

19. Section 203 of the Penal Code provides:-

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

Section 204 provide that:-

Any person convicted of murder shall be sentenced to death.

20. It is not in dispute that the deceased died as a result of multiple injuries inflicted on him. The issue for determination is who inflicted the injuries and what was the motive/reason. The accused herein stated that he was not involved in the death of his brother. He availed a witness to corroborate his evidence that he was away in Kapsabet when the deceased was attacked. The threshold to sustain murder charge was set in **ROBA GALMA WARIO V. REPUBLIC** [2015] eKLR where the court held that;

For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.

The court went and further defined malice aforethought as follows in:

NZUKI VS REPUBLIC [1993] **KLR 171** where the Court of Appeal held that before an act can be murder it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

i. Intention to cause death

ii. Intention to cause grievous bodily harm

iii. Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

iv. It doesn't matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.

21. PW1 testified that the deceased had told him the accused had attacked him. This was evidence adduced in chief which this witness confirmed to the court was not in his recorded statement with the police. PW1 had further said that the accused and deceased had gone on a drinking spree and quarreled but the accused waited for his brother and attacked him causing grievous injuries. The postmortem report which was produced as exhibit one showed the circumstances of the death as follows:

“The deceased was assaulted by his brother who cut him on the head, legs and hand using a panga and died while being rushed to hospital.”

22. Did the accused have malice to have attacked his brother? The prosecution witnesses (five in number) that testified all were not present during the attack, none saw who attacked the deceased. The prosecution thus relies on the circumstantial evidence to demonstrate the accused was the culprit. The basis for this being that:

- The accused and the deceased had long standing disagreements which had been reported to police, including a threat to life. This was confirmed by all the family members plus the police who had in the past received such report.
- On the same day after the incident, the accused went to masquerade as the victim, yet it turned out that the victim was the deceased - the accused did not deny this
- After the incident, the accused disappeared from the scene and was found in Kapsabet

23. The claims about long standing hostilities between PW1 on one hand. And the accused and the deceased on the other hand was an afterthought which was never raised during cross-examination of all the prosecution witnesses. Likewise DW2 claims that he was at the scene when the deceased was dying and never heard him mention the accused had assaulted him, were an afterthought which only sprang up at the defence stage, but was never subjected to the test on cross-examination of all the prosecution witnesses.

The accused in his defence said he was in Kapsabet and was only informed of his brother's death by an un-named uncle who asked him to escort him to the police post only for him to be arrested. This is in contradiction by PW2 who testified that the accused had made a report about being attacked

24. It is suggested that the conduct of PW1 was suspect because in his testimony he stated that the deceased wife came to inform him of his brother being attacked yet instead he asked his wife to go and check on him, and he only went to see him in the morning. However the witness explained that he was scared.

25. Of course it is importance to note that the deceased's wife did not record any statement with the police yet she was a crucial witness. PW1 wife whom was sent by PW1 to check on the deceased also did not record her statement with the police yet it's her who allegedly saw the deceased after the attack. Both PW1 wife and the deceased wife did not testify in court. Is there anything to suggest that if they had come to testify, their testimony would have been adverse to the prosecution?

26. The evidence by the accused was that PW1 did not have a good relationship with both the deceased and him. He further testified that he chased the deceased wife who has never returned to date to their homestead. That also PW1 wife had gone for three months but later came back after 3 months. Why weren't these issues raised during cross-examination of the prosecution witnesses? If that had been done, then it would have formed a very good basis of finding that failure to call the two women was fatal to the prosecution case... but as matters stand I am persuaded the same is an afterthought. The court in *Tubere S/O Ochen v Republic EA* (1945) 12 EACA 63 the Court of Appeal of Eastern Africa said as follows:

“The duty of the court in determining whether malice aforethought has been established is to consider the nature of the weapon used, the manner in which it is used, the part of the body injured, the conduct of the accused before, during and after the attack”.

Yet another case by the same court in *Nyamweru S/O Kunyaboya v. Republic* (1953) 20 EACA 192, **“that the use of lethal weapon may indicate a malicious intention but it is not conclusive of the existence of an intent to murder”.**

27. PW1 evidence that the deceased told him he had been hit by a metal iron contradicted PW2 version that the deceased was hit by a panga differed. None of these items was ever produced in court, yet that does not alter the common denominator, which is that the appellant was the assailant.

The death of **DANIEL KOSKEY** is not in dispute and the motive was well set out... the long standing dispute between the two brothers. The circumstances in their totality point inculpably to the guilt of the accused, and to the exclusion of any other reasonable hypothesis. I thus find the evidence sufficient to sustain a conviction and return a finding of accused being **GUILTY** of the murder of **DANIEL KOSKEY**.

DELIVERED, SIGNED AND DATED THIS 5TH DAY OF MARCH 2019 AT ELDORET

H. A. OMONDI

JUDGE