



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL CASE NO. 42 OF 2018

BETWEEN

REPUBLIC.....PROSECUTOR

AND

BENARD KIPKURUI KORIR.....ACCUSED

JUDGMENT

1. **BENARD KIPKURUI KORIR** (“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)*. It was alleged that on 24th November 2018 at Mamboleo shopping centre, Emurua Dikir Location of Transmara East Sub-county within Narok County, he murdered **JULIUS KIPRONO MARITIM** (“the deceased”).

2. The prosecution case was that on the material night, two men were seen struggling with each other. When the witnesses went to find out what was happening, they found that he deceased at the scene having been stabbed. The prosecution marshalled 7 witnesses to prove that the accused was guilty of murder while the accused gave sworn testimony in his defence.

3. Joseph Cheruiyot Langat (PW 1) testified that he knew the accused and deceased. When he went to check on his cows at about 9.00pm, on the material night, he heard screams coming from a nearby church. He rushed to where the screams were coming from whereupon he saw the accused stabbing the deceased with a maasai sword. He tried to scare him away by threatening to shoot him with arrows, but the accused ran away. He followed him but the accused out run him. He raised alarm causing people to come to the church compound where the deceased was found lying on the ground with injuries to his head. Several people responded to his alarm and arrived at the scene. They arranged for a vehicle to take the deceased to hospital while some of them went to report the incident at Dikirr Police Station.

4. Leonard Kipkemoi Ngetich (PW 4) also knew the accused and deceased. He testified that he used to work with the deceased at Mamboleo. On the evening of 24th November 2018, the deceased passed by his hotel to pay for the tea he had delivered to his shop earlier that evening. After closing the hotel at about 9.00pm, he heard screams coming from a nearby church. When he went there he found the deceased on the ground nursing serious head injuries.

5. Among the people who arrived at the scene was the deceased’s brother, Richard Kipkemoi Maritim (PW 3). PW 3 told the court that was called to come to the church as his brother had been stabbed. When he arrived at the scene, he found the deceased had been stabbed. PW 3 and PW 4 accompanied the deceased to Longisa County Hospital but he was declared dead on arrival.

6. Richard Kiprono Chelule (PW 2) told the court that on the material night at around 9.00pm while he was in his house, he was called by the Chief and told about a stabbing incident. He had heard commotion outside his home but did not make much of it. When he went to the church near his home, he found the deceased being put in a car.

7. PW 2 testified that he found several two caps, the deceased’s mobile phone and a rungu at the scene. He reported the incident at the police station and on the next day they went to look for the accused in the company of the police. PW 2 recalled that the group went to the accused’s house where they found blood drops at his door. When they entered the house, they found a pair of blood stained safari boots under his bed. When they searched outside the house, they found a blood stained Maasai sword and a sheath in the napier grass outside the house. They took all the items to the police station where they found the accused had been arrested.

8. On 25th November 2018, the investigating officer, PC George Ojwang (PW 6), was requested to investigate the incident of murder that had taken place on the previous night. He proceeded to Dikirr Police Station, where he found the accused had been brought by the area Chief and village elders. He re-arrested him and proceeded to the scene of the incident at a church compound. He recovered the exhibits which included a blue and a black cap, a techno mobile phone, a blood stained sword and sheath, a blood stained Maasai rungu, a pair of blood

stained safari boots and a blood stained jacket from the accused's house. He prepared an exhibit memo form dated 3rd April 2019 and forwarded the exhibits to Government Chemist for analysis. PW 6 stated that from his investigations, he found that the accused and deceased were married from the same family. The accused had a dispute with his wife which the family and church had tried to resolve. According to investigations, PW 6 explained that the accused blamed the deceased for escalating differences between him and the wife leading to the accused attacking the deceased.

9. The government analyst who tested the items forwarded to him PW 6, Richard Langat (PW 7), confirmed that he received a Police Exhibit Memo Form from Transmara indicating the accused as Benard Kipkorir and the deceased's as Julius Maritim. He received the following items for purposes of determining the DNA relationship:

Exhibit No. 1 – Blood stained Maasai sword marked A.

Exhibit No. 2 – Blood stained brown jacket marked B.

Exhibit No. 3 – Blood stained safari boots marked C.

Exhibit No. 4 – A Maasai rungu from accused marked D.

Exhibit No. 5 – Blue cap from the deceased marked E.

Exhibit No. 6 – Blood sample from deceased marked F.

The preliminary examination of the Maasai sword (A) and the Maasai rungu (B) showed that they were heavily stained with human blood. The brown jacket (B) and the pair of safari boots (C) were stained with human blood. PW 7 extracted DNA from the listed items and subjected them to a genetic analyser and they all generated genetic profiles. He concluded that the DNA profile generated from the Maasai sword (A) and the blue cap (E) matched the deceased's DNA profile. The DNA profile generated from the Maasai rungu (D) was a mixed DNA profile of a deceased and another male person probably the accused. DNA profile from the brown jacket (B) and safari boots (C) matched the accused blood.

10. In his sworn defence, the accused (DW 1) testified that his wife and the deceased's wife were sisters. He confirmed that he had been having problems with his wife and he suspected that the deceased was involved. He had sent several people including members of both families, the church and chiefs from both sides to try and intervene in resolving the differences between him and his wife. Prior to the day of the incident he had met the deceased with one *Benard Rono* to discuss the matter but the deceased told him not to involve anyone else.

11. On 24th November 2018, the deceased invited him for a meeting after work. He left home and proceeded to the deceased's shop. The deceased told him that there should look for a quiet place where they could talk. They both went to the church compound. The accused told him that the matter had been discussed by the family and that it had emerged that the deceased was the one inciting his wife against him and that he was supporting his wife financially. When the deceased demanded proof, the accused told him that he had heard that he had been giving her money and also supplying her the maize she was selling. He also told him that he knew that he was having a relationship with his wife. The accused testified that the deceased was angered by what he told him. The deceased hit the accused on the head with a nut he was holding and the accused fell on the ground. The second time he tried to hit the accused, he hit a tree and the nut fell. The accused removed his sword and cut him on the leg leaving bleeding profusely. The deceased then swung the sword and he blocked it with his fingers. The accused further testified that he tripped the accused causing him to fall on the sword he was holding and it cut him on his cheek. The accused left with the sword, sheath and went home to sleep. The accused stated that it is the deceased started the fight.

12. The offence of murder is defined by **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 must prove beyond reasonable doubt the following three ingredients; the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

13. As to the fact and cause of death, PW 1, PW 2, PW 3 and PW 4 all testified that when they went to the church compound, they found the deceased lying on the ground bleeding profusely as a result of injuries on the head. These and other injuries were confirmed by Dr. Ronald Kibet (PW 5), who conducted the post mortem on the deceased's body on 26th November 2016 at Longisa County Hospital Mortuary. He made the following observations:

- The deceased had multiple deep cut wounds on the left side of the head.
- He counted 7 cut wounds, the largest measuring 16cm long and the smallest 8cm long.
- The wounds were on the left side of the scalp, left ear, left mandible and left side of the neck.
- Most of the cut wounds penetrated to the brain exposing the meninges and parts of the brain.
- Part of the left molars were exposed.
- There was a stab wound on the left side of the neck measuring 5cm x 6cm in length and 8cm deep.
- There was a cut wound on the right thumb measuring 3cm, a cut wound of the left shoulder measuring about 2cm and the left

parietal brain was exposed.

14. PW 5 concluded that the cause of death was open head injury with massive bleeding secondary to massive cut wounds. In cross-examination, PW 5 stated that the cut wound on the right thumb may have been a defensive wound. He also observed from the multiple wounds that the deceased may have been immobilized or intoxicated hence he did not defend himself or that it was possible that the first wound or cut was so severe that it immobilized the deceased.

15. From the facts I have outlined, there is sufficient evidence to show that the accused is the person who assaulted the deceased and thereby causing his death. The prosecution relied on the direct evidence of PW 1 who testified that he saw the accused stab the deceased with a sword. Although the incident took place at night in less than ideal circumstances for positive identification, this was not a case of identification of a stranger but of recognition of a person well known to the deceased and the accused. PW 1 stated that he had a torch and was able to see the deceased. He followed the accused as he ran away. I am satisfied from the totality of the evidence that PW 1 positively identified the accused as the person who stabbed the deceased.

16. Apart of the direct evidence of PW 1, there was physical evidence putting the accused and deceased together on the material night. The testimony of PW 7 confirmed that the fact that both the accused had deceased had had an altercation which led to the spilling their blood. PW 1 and PW 3 identified the accused's brown cap which was found at the scene. That the accused was at the church where the deceased was attacked was also confirmed by the finding of the blood stained Maasai Sword and its sheath in his compound. The Maasai rungu which had blood from the accused and deceased also confirms that the two were together. At this stage I wish to point out that PW 7 testified that the accused's blood sample was not taken. I find that this did not diminish the weight of the evidence on the ground that it is only the accused and deceased who were together leaving no other conclusion that the of the other person belonged to the accused. All this evidence pointed to the accused as the person who inflicted fatal injuries on the deceased.

17. The final element of the offence of murder; malice aforethought. Malice aforethought constitutes the mental element of the offence of murder, that is, *mens rea* or the *intention* to kill another person. **Section 206** of the **Penal Code** defines it as follows;

206. 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.

18. Since malice aforethought is the mental element in the offence of murder, it may be negated by a defence put forward by the accused. The accused may raise the defence affirmatively or it may emerge from the evidence. In both cases, the court must consider it in light of the duty of the prosecution's duty to prove its case beyond reasonable doubt. In other words, the prosecution must disprove the defence beyond reasonable doubt.

19. The accused's case was that he was attacked by the deceased and that the injuries sustained by the deceased were accidental. He explained that when he tripped the deceased, he fell on the sword and injured himself. On consideration of the evidence of the injuries, I reject this line of defence as the cause suggested by the accused is inconsistent with multiple injuries sustained by the deceased which could not have been caused by a single fall on a sword.

20. There was a suggestion when counsel for the accused cross-examined PW 1 that the accused was among three people fighting. I reject this suggestion as the totality of the evidence does not support this line of defence. Moreover, the accused in his defence, was very clear that he met with the deceased alone after the deceased insisted that the meeting should be between the two of them.

21. The other possible defence emerging from the evidence is that of self-defence as the accused narrated how the deceased attacked him when he confronted him about having a relationship with his wife. The law regarding self-defence is to be found at **section 17** of the **Penal Code** which states as follows;

17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.

22. Recently, the Court of Appeal considered the law regarding self defence in **Ahmed Mohammed Omar & 5 others v Republic NRB CA CRIMINAL APPEAL NO. 414 OF 2012 [2014]eKLR** stated as follows;

The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP v Morgan [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v Morgan (Supra) it was held that:

...if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of

facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.

23. In **IP Veronica Gitahi and Another v Republic MSA CA Criminal Appeal No. 23 of 2016 [2017] eKLR** the Court of Appeal once again reiterated the common law position regarding self-defence as follows:

*The common law position as regards the defence of self defence was well articulated by the Privy Council in **Solomon Beckford v. The Queen [1987] 3 All ER 425**. After a comprehensive review of previous decisions, the Council rejected the view that for an accused person to be availed the defence of self defence, his belief that he was in imminent danger should not only be genuine but also based on reasonable grounds. Instead they approved the view that if the accused person held the belief, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant and that the accused had to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view reasonable or not.*

24. The question for determination is whether under the circumstances, the accused believed that his life was in danger to the extent that he was entitled to use force to protect himself. I have already discounted the accused's explanation that the deceased's injuries were accidental. In his defence, the accused did not state that he hit the deceased with the sword, rather, he was attacked with the Maasai rungu and then the sword which he blocked with his fingers. The accused then took the sword and sheath and ran away.

25. As against the accused's evidence, PW 1 testified that he saw the accused stab the deceased with a sword. His evidence is corroborated by the medical evidence which show that the deceased was stabbed not once but several times. The several cuts on the deceased body speak for themselves. They are not only multiple, they are aimed at the neck and head and they are deep to the extent of cutting the mandible and exposing the molars and brain matter. The fact that it is the accused who attacked the deceased is supported by the defensive wounds sustained by the deceased. In as much as the accused testified that he was attacked, I conclude his own injuries may have been sustained as the deceased tried to defend himself.

26. According to PW 7, the Masaai rungu and Maasai sword were heavily stained with human blood but it is only the Maasai rungu that had blood from the accused and deceased which is indicative of the fact that it is the deceased who hit the accused with rungu. The sword only had the deceased's blood which means it is the accused who had the sword which he used to great effect. The accused showed the court some injuries on his head but I observed that they were minor and superficial. The accused's claim that he was cut with the sword is also inconsistent with the blood evidence on the sword. While PW 6 agreed in cross-examination that he took the accused to hospital when he was arrested, he stated that the injuries were minor. I therefore reject the accused's defence that he was attacked and acted in self defence.

27. Despite my finding that the accused did not act in self-defence, it is still open to the court to find that the accused acted under provocation due to loss of control following the blow inflicted on him by the deceased. This position is supported by the decision in **Rex v Shaushi s/o Miya [1951] 18 EACA 164, 168** where the Court held as follows:

No doubt this element of self-defence may, and, in most cases will in practice, merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defence of person or property or as acts done under the stress of provocation. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice aforethought is rebutted and the offence will be manslaughter.

28. The defence of provocation under **section 207** of the **Penal Code** is to the effect that, "... 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 209(1)** thereof goes on to define "provocation" to mean and include "...except 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 person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master 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 ..."

29. Whether the accused was provoked to lose his self-control is a question of fact which the trial court has to determine based on the evidence presented. In **Peter King'ori Mwangi & 2 others v Republic MSA Criminal Appeal No. 66 of 2014 [2014] eKLR**, the Court of Appeal noted that a successful defence of provocation requires that two conditions be satisfied; first, the "subjective" condition that the accused was actually provoked so as to lose his self-control and second, the "objective" condition that a reasonable man would have been so provoked.

30. In my view, the evidence does not support the defence of provocation for that same reasons I have reject the defence of self- defence. The deceased had defensive injuries which show that he was likely defending himself by attacking the accused with the rungu. PW 1 testified that the saw the accused stab the deceased with the sword before running away and the number and viciousness of cuts aimed at the deceased upper part of the body all point dislodge any notion of provocation.

31. The Court of Appeal in **Bonaya Tutu Ipu & Another v Republic MLD CA Criminal Appeal No. 43 & 50 of 2014 [2015] eKLR** accepted that determination of whether there was malice aforethought was a matter of evidence. It stated as follows:

*It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of **CHESAKIT -Vs- UGANDA, CR. APP. NO. 95 OF 2004**, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in **REX -***

Vs- TUBERE S/O OCHEN (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...

32. It is clear that the multiple stab wounds demonstrate malice aforethought as do the number of injuries. They were inflicted with such brutality as to dispel any notion that the accused could not have had any other intention other than to cause the death of or do grievous harm to the deceased. I therefore find that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

33. The prosecution proved the case of murder against the accused. I therefore find the accused, **BENARD KIPKURUI KORIR**, guilty of the murder of **JULIUS KIPRONO MARITIM** and I convict him accordingly.

DATED and DELIVERED at KISII this 14th day of JUNE 2019.

D.S. MAJANJA

JUDGE

Mr Kerosi, Advocate for the accused.

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