REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 50 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

DAVID KIBET CHESEREK.....ACCUSED

JUDGMENT

[1] The accused person herein, **David Kibet Cheserek**, was arraigned before Court on **25 June 2014** on a charge 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 in the particulars of the charge that on **the 6th June 2014**, at Nyirar Village in Nyirar Sublocation in Elgeyo Marakwet County, he murdered **Joseph Kibor Chepkwony**. The accused denied those allegations; whereupon the Prosecution called evidence in proof thereof from 6 witnesses. Here below is a summary of the evidence adduced by the Prosecution Witnesses.

[2] The chief of Koibatek Location in Marakwet East, **Mr. David Chelimo Kiptoo (PW1)**, told the Court that at around 6.30 p.m. on the **6 June 2014,** he heard screams coming from the direction of the home of the deceased, **Joseph Kibor,** who was his neighbour. When he made inquiries about the reason for the screams, he was told that there had been a fight between the deceased and **David,** the accused herein; who were also neighbours. He accordingly proceeded to the deceased's home and found him already dead with a stab wound on his left hand and neck. He further told the Court that there was a large crowd already gathered at the scene by the time he got there; and that he got to learn that members of the public had administered mob justice on the accused for the death of **Joseph Kibor**. It was, thus, the evidence of **PW1** that he found the accused lying down outside the house of the deceased; while the deceased was lying in a pool of blood inside the house.

[3] Regarding his further observations at the scene, **PW1** testified that he saw two pieces of bloodstained sticks at the scene, one of which was near the body of the deceased. He also saw a knife at the scene which was also bloodstained. He described it as the type of knives that have sheaths but had been removed from its sheath. He added that the sheath was also at the scene. Given the scenario, **PW1** called the Administration Police Officers from Chesoe Chief's Camp; and they responded and promptly went to the scene; collected the body and arrested the accused person.

[4] The widow of the deceased, **Rhoda Yano,** testified as **PW2**. Her evidence was that she was at home with the deceased on the **6 June 2014** at about 6.00 p.m. when their neighbour, **David Kibet**, the accused herein, went there while drunk and started hurling insults at the deceased, asking him why he had stopped them from gambling. **PW2** explained that the accused found the deceased seated outside the house; and that the deceased did not respond to the accused's insults, but instead got up and entered the house. She further stated that the accused did not relent; but followed deceased inside the house where a fight ensued between the two. She explained that on peeping at them from the door, she noted that the deceased was trying to push the accused outside the house. At that point she raised alarm for help; but it did not take long before the deceased collapsed and fell at the door. It was at that same time that he saw the accused removing a knife from the back of the deceased's neck. She added that, as a result of her screams, many people went to the scene, including police officers; and that at some point, she ran away from home because she was scared on account of the death that occurred in their house.

[5] John Rotich Chepkwony (PW3) and **Edwin Kimaiyo (PW4)** are relatives of the deceased who identified his body to the doctor for purposes of postmortem examination. It was their evidence that the postmortem was done on **11 June 2014** at Kapsowar AIC Hospital mortuary. The postmortem was conducted by **Dr. Charles Kimeli Cherop (PW6),** whose evidence was that the body of the deceased had a stab wound starting from the anterior aspect of the left forearm to the posterior part which was 3 cm deep on the front part and 5 cm deep on the posterior aspect. He also noted that the body had a deep cut on the left side of the deceased's neck, behind the ear, measuring 2 and 3 cms as well as a laceration on the left shoulder. There was another deep stab wound on the posterior aspect of the neck measuring 2x3 cm on the right side of the deceased's neck; such that internally, there were deep vessel lacerations on the left side of the deceased's neck. He came to the conclusion that the cause of death of the deceased was severe haemorrhage secondary to deep penetrating wounds on the left side of the neck. He completed and signed the Postmortem Form which he produced as the **Prosecution's Exhibit No. 3** herein.

[6] On his part, the Investigating Officer, **Cpl Dan Olalo Owiti (PW5)** testified that, at about 9.30 p.m. on the **6 June 2014**, the DCIO, Marakwet East informed him of a murder that had occurred within Ibos Village; and that he proceeded to the scene with other police officers

and found the dead body lying inside the house with stab wounds on the neck, right arm and chest. The body was identified to be that of **Joseph Kibor. PW5** further told the Court that, outside the house, he recovered a knife and a sheath; and that the assailant, the accused herein, was also lying down outside the house with injuries which they were told had been inflicted by members of the public. They then collected the body and took it to Kapsowar AIC Hospital mortuary while the accused was admitted at the same hospital for treatment. The accused was subsequently charged with murder and arraigned before court. **PW5** produced the knife and its sheath as exhibits herein. They were marked the **Prosecution's Exhibit 1(a) and (b)**. He also produced the two sticks recovered from the scene and they were marked the **Prosecution's Exhibit 2(a) and (b);** and with that the Prosecution closed its case.

[7] In his unsworn statement of defence, the accused told the Court that at around 5.00 p.m. on the **6 June 2014**, he passed through the home of the deceased on his way home from the home of **Mzee Tororey**; and that he found many people taking changaa at the home of the deceased. He further stated that he wanted to partake of some changaa but was told it was finished; and so he decided to leave. He further told the Court that, on his way out of the deceased's house, he met the deceased who stabbed him on the neck without saying anything; and that he was shocked as the deceased proceeded to stab him severally on the neck, left hand and head. He added that he felt down and lost consciousness and that when he came to, he found himself at Kapsowar Hospital ICU with bandages on his head, neck and left hand; and that there was a tube attached to his stomach. He concluded his statement by saying that the did not have any problem with the deceased who was his step-father.

[8] The accused called **Dr. Wilfred Kimosop (DW2)** as his witness. His evidence was that he examined the accused person, then a murder suspect, at the instance of the OCS, Kapsowar Police Station to ascertain his fitness before his arraignment before court. **DW2** testified that the accused had a bandage on his left upper limb as well as obvious wounds on the face, neck and head. He added that the patient was still a little bit confused but was able to recall all the events that had transpired. Upon a detailed examination of the accused, **DW2'**s findings were that, on the head there was a healed scar on the left side which was 10 cm long. There was also a healed scar on the right side of the head which was 5 cm long. The accused also had healed multiple lacerations on the scalp, a cut wound on the left forearm and a stab wound on the left side of his chest. The lower limbs were normal and therefore **DW2'**s conclusion was that the accused had sustained grievous harm based on the fact that the nerve injuries are almost always permanent. **DW1** produced the P3 Form that he filled and signed in respect of the exercise as the **Defence's Exhibit 1** herein.

[9] Thus, in his closing submissions, Counsel for the accused urged the Court to acquit him, arguing that both the accused and the deceased were from a drinking spree; and were therefore intoxicated at the time; and therefore the accused had no capacity to form a specific intention to kill the deceased. Counsel further submitted that from the evidence adduced by the Prosecution witnesses, the quarrel between the deceased and the accused was spontaneous; and not pre-planned, and that it followed the deceased's act of interrupting a gambling session involving the accused and his friends. Thus, Counsel cited **Section 13(4)** of the **Penal Code** and the case of **Joseph Karanja Kinuthia vs. Republic [2011] eKLR** and urged the Court to find that, in the circumstances, the Prosecution had failed to prove the charge of murder against the accused.

[10] The second limb of the arguments proffered by the Defence Counsel was that the accused only assaulted the deceased in self defence and in reaction to the attack on his person by the deceased. He based this argument on the evidence of **PW2** that there was a fight that took place on the material date between the accused and the deceased; as well as the evidence of **Dr. Kimosop (DW2)** who, upon examining the accused found him with, *inter alia*, stab wounds that could not be attributed to the sticks that the Prosecution exhibited herein. Counsel therefore discounted the evidence of **PW1** and **PW5** to the effect that the accused had been assaulted by a mob after he murdered the deceased. Counsel referred the Court to **Ahmed Mohammed Omar & 5 Others vs. Republic [2014] eKLR** as well as **R. vs. Williams [1987] 3 AllER** in support of his arguments. He, accordingly, urged the Court to find that the murder charge has not been proved to the requisite standard, and acquit the accused person thereof.

[11] I have given careful thought to the particulars set out in the Information Sheet as well as the evidence presented in support thereof. I have, likewise, given consideration to the statement of defence given by the accused, the evidence adduced on his behalf by **Dr. Kimosop (DW2),** as well as the written submissions filed herein by learned Counsel for the accused. The charge was laid under **Section 203** of the **Penal Code**, **Chapter 63** of the **Laws of Kenya,** which provides that:

> **"any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder.**

[12] Thus, the key elements of the charge that the Prosecution needed to prove are: the fact of death; that the death was caused by the accused by an unlawful act; and malice aforethought on the part of the accused person. These elements were aptly explicated in **Republic vs. Andrew Omwenga [2009] eKLR,** thus:

> **"...for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-**
>
> **(a) The death of the deceased and the cause of that death.**
>
> **(b) That the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought."**

[13] There is clear and uncontroverted evidence that the deceased, **Joseph Kibor**, died on the **6 June 2014** at his home, at about 6.00 p.m. or so. His widow, **Rhoda Yano (PW2),** testified to this fact and implicated the accused as the culprit. The occurrence was confirmed by the area chief, **PW1,** whose attention was attracted to the scene by **PW1'**s screams. The Investigating Officer, **PW5**, who was one of the police officers who responded to the report and promptly visited the scene, confirmed that they found the body of the deceased lying in a pool of blood on the floor. They collected the body and took it to the mortuary at Kapsowar AIC Hospital. Moreover, **PW6** who conducted the postmortem in the presence of **PW3** and **PW4**, confirmed that the deceased died on **6 June 2014** of haemorrhage due to deep penetrating

injury on the left side of the neck which had the effect of severing the blood vessels on the left side his neck. He produced the Postmortem Form as the **Prosecution's Exhibit 3** herein. Indeed, at paragraph 21 of his written submissions, the Defence Counsel conceded that the death of the deceased had been proved as well as the cause of death. It was further conceded by the defence that the act causing death was attributable to the accused; what is in contention is whether the act was unlawful; to which end the accused pleaded the defences of intoxication and self-defence, which I shall revert to shortly.

[14] The third element of the offence of murder is malice aforethought; which is defined in **Section 206** of the **Penal Code** thus:

> **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.**

[15] Accordingly, in the case **Nzuki vs. Republic [1993] KLR 171** the Court of Appeal held that:

> **"...murder is the unlawful killing of a human being with malice aforethought. 'malice aforethought' is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result...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) The intention to cause death;**
>
> **(ii) The intention to cause grievous bodily harm;**
>
> **(iii)Where accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.**
>
> **It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in one of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."**

[16] In the instant case, the Prosecution version of the events was through the lens of **PW2**, the deceased's widow. She testified that she used to sell *changaa*, and that on the **6 June 2014**, the accused first went to their home at about 12.00 noon looking for some *changaa* to drink. He was accompanied by the deceased and they were already drunk. She then told them the *changaa* was not ready; and so the accused went to the neighbouring home to play a game of cards with his friends. According to **PW2**, after about 5 hours, the deceased went to the neighbour's home to stop the gambling activity that the accused and his friends had been engaged in; and thereupon they dispersed. **PW2** further testified that the accused then went away and returned later at about 6.00 p.m. and picked a quarrel with the deceased, who he found seated outside his house. He then followed the deceased inside his house and there began fighting with him to the point that he inflicted the fatal stab injuries on the left side of the deceased's neck.

[17] The accused's version was that he only returned to the home of the deceased to drink c*hangaa* and that it was the deceased who attacked him for no apparent reason. Clearly the version by the accused appears flawed for two reasons. The first is the fact that it does not account for the fatal injuries that the deceased sustained. There is no indication as to how the deceased could have suffered his injuries as nowhere did the accused say that he fought back. His defence simply states as follows in part:

> **"On my way out of the house I met the deceased who stabbed me on the neck. I was shocked. He stabbed me several times on the neck, left hand and head. I collapsed and lost consciousness. I found myself at Kapsowar ICU…"**

[18] Clearly therefore, the factual basis for the submissions by Counsel for the accused that he reacted and assaulted the deceased in self defence is completely missing from the version proffered by the Defence. The second incongruent aspect of the accused's defence was his contention that he found many people at the home of the deceased taking *changaa* when he returned there at about 5.00 p.m. The evidence of **PW2**, which appears more credible, was that she was at home with the deceased and that the accused and the deceased fought for about one hour before she raised alarm. She added that it was the alarm that she raised that attracted people, including **PW1**, to the scene. Otherwise, the two would have been separated in good time.

[19] Needless to say that the burden of proof is on the Prosecution throughout a criminal trial such as this; and that where self-defence is raised to a murder charge, the accused assumes no onus in proving it. In **Joseph Kimanzi Munywoki Vs Republic, [2006] eKLR**) the Court of Appeal cited, with approval, the case of **Beckford Vs R [1988] AC 130** in which **Lord Griffiths (at p.144)** expressed the view that:

> **"It is because it is an essential element of all crimes of violence or the threat of violence should be unlawful that self defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful."**

[20] I am therefore satisfied that the Prosecution's account of the events preceding the death of the deceased was credible and rendered improbable the defence offered by the accused that he was attacked by the deceased without any provocation at all, and that he lost consciousness without raising a finger at the deceased. I find it unbelievable in the particular circumstances of this case wherein the death of the deceased is a given. But even assuming that the deceased did stab the deceased in self-defence, the question would arise whether the force he used was reasonable in the circumstances; the test here being a subjective one, applied from the standpoint of the accused person. In **Njeru v Republic [2006] 2 KLR 46**, the Court of Appeal held that:

> **1. Killing of a person can only be justified and excusable where the action of the accused which caused the death was in the course of averting a felonious attack and no greater force than was necessary was applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack. 2. In this case, it was the duty of accused to show that at the time of the cutting deceased's neck, he was in the course of averting a felonious attack and that no greater force than necessary was applied. Accused was bound to show that he was in immediate danger or peril arising from a sudden and serious attack by the deceased. 3. By virtue of Section 17 of the Penal Code, the principles of the English common law were applicable in determining criminal responsibility for the use of force in defence of the person or property. Under those principles, a person who attacked may defend himself but he may only do what was reasonably necessary. Everything would depend on the particular facts and circumstances.**

[21] What danger then did the deceased, a man described by **PW6** in the Postmortem Report to be in his old age, pose to the accused, who was then 42 years old, according to the P3 Form produced on his behalf by **Dr. Kimosop.** There is no express indication that the deceased was armed when the fight commenced. To the contrary, the evidence of **PW2** was that, when the accused confronted the deceased and hurled insults at him, he remained quiet and restrained; that he got up and went to his house; but that the accused followed him there and started a fight with him. **PW2** further testified that, after the deceased collapsed at the doorway, she saw the accused remove a knife from the back of the deceased neck; a clear indication that the accused was the one who was armed. As **PW1** and **PW5** recovered only one knife from the scene, it is my finding that the Prosecution availed credible evidence that completely dislodged the allegations by the accused that he had been beaten and stabbed by the deceased. That evidence offers a more logical version of the events, namely that the accused's injuries were inflicted by the mob that responded to **PW2'**s distress call, as was explained by **PW1** and **PW5.**

[22] Clearly therefore, by stabbing the deceased as he did, the accused certainly knew or must have known that there was a risk of death or grievous harm ensuing from his act. Nevertheless, it was conceded by **PW2** that the accused was drunk when he went to their home at about 5.00 p.m. There is a sound basis, therefore, for holding that his mental faculties may have been impaired by alcohol when he attacked the deceased and inflicted the fatal injuries that caused his death. **Section 13(4)** of the Penal Code recognizes that:

> **"Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in absence of which he would not be guilty of the offence."**

[23] Hence, in **Joseph Karanja Kinuthia vs. Republic [2011] eKLR**, the Court of Appeal held that:

> **"With respect, we think that the learned judge ought to have directed himself on the surrounding circumstances, that is, the attack was not planned in advance; that there was an instantaneous fight and that both the deceased and the appellant were under the influence of alcohol immediately before the fight. Had the judge addressed this background, we thin he could have been persuaded to reach a finding that the circumstances and the evidence pointed to the commission of the lesser offence of manslaughter instead of murder."**

[24] In the premises, and on the basis of the evidence on record herein, I would find the accused guilty of the lesser offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code** and convict him thereof accordingly pursuant to **Section 306(2)** of the **Criminal Procedure Code**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF NOVEMBER, 2019

OLGA SEWE

JUDGE