



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

HIGH COURT CRIMINAL CASE NO. 20 OF 2016

CONSOLIDATED WITH

HIGH COURT CRIMINAL CASE NO 21 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

NICHOLAS KIPKOECH.....1ST ACCUSED

VICTOR CHERUIYOT ROTICH.....2ND ACCUSED

JUDGMENT

1. The 1st and 2nd accused were separately charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Pursuant to an application by the state, the charges were consolidated on the 29th of June 2016. The particulars of the offence as set out in the consolidated charge sheet were that on the 3rd day of June 2016, at Kapkitonyi sub-location in Chemamul Location, Kericho West Sub-Location, the accused persons jointly murdered Leonard Kiprotich Sang. The accused pleaded not guilty to the offence and the trial proceeded, with the prosecution calling 10 witnesses in support of its case against the accused persons.

2. The evidence of PW1, Emily Chepngetich (Chepngetich), a bar seller at Cheboen, was that she opened Chelal Bar where she worked at around 5.00 p.m. on the material day. She was serving alcoholic drinks from the counter. Soon thereafter, the 1st accused and one Kelvin came to the bar. The deceased, whom Chepngetich referred to as Solomon, also came to the bar and went to a private room within the bar. Soon thereafter, the deceased came from the private room, got hold of the 1st accused by the shirt, and pulled him outside, where they started fighting. Chepngetich followed them outside and tried to separate them but failed, so she called the watchman, one Robert (PW5).

3. Chepngetich then saw the 1st accused rush to his home, which was about 5 minutes away from the bar, and return with a panga. Chepngetich left the 1st and 2nd accused, as well as one Rono and the deceased fighting and took two female visitors to her house near the bar. Before she reached her house, however, she heard people screaming from outside her bar that someone had died. She did not return to the scene but went to hide with her visitors at a neighbour's house until midnight. She then returned to her bar, where she found a lot of blood on the door. She was informed by the watchman, Robert, that Geoffrey (Mutai) had been stabbed while trying to help the deceased, and that Solomon had been injured and was taken to hospital.

4. Chepngetich testified that she had seen the 1st accused ran home and return with a panga. She had seen the panga as the watchman had a D-light (a rechargeable bulb). She identified the panga (prosecution exhibit 1) that she had seen the 1st accused return with from his home.

5. In cross-examination, she stated that she opened the bar at 5.00 p.m., and the 1st accused came to the bar at around 9.00 p.m. She confirmed that there is no electricity in the bar, and that she uses solar. Outside the bar, it was dark but the watchman had a D- light. She reiterated her testimony in her evidence in chief that the 1st accused had come to the bar with one Kelvin; that the deceased had followed and sat in a private room; that the deceased had come from the private room, pulled the 1st accused out of the bar and started fighting with him. The two fought for about 20 minutes before Geoffrey and Victor, the 2nd accused, came into the compound and tried to separate them.

6. Her evidence was further that the 1st accused had run home with the deceased, and then they had run back together. She did not see what happened after they returned, nor did she see the deceased being stabbed. In re-examination, she stated that she had seen the 2nd accused come from the back of the bar. She had seen the 1st accused ran to his home and return with the panga which had been produced in court.

7. PW2 was Kelvin Kipkurui (Kelvin), a resident of Sanga village in Kapkitonyi location. On the 3rd of June 2016, at 8.00 p.m., he was at

the bar in Kambi Giza owned by Emily Chepngetich (PW1). He was with the 1st accused, Nicholas Kipkoech. The deceased, Leonard Kiprotich, later found them at the bar. They stayed at the bar until about 10.00 p.m. when PW1 told them to leave as it was closing time. As they were paying their bills at the counter, the 1st accused inquired about some women who were with the deceased at a private room in the bar. The deceased then came from the private room and told the 1st accused not to inquire further about the women.

8. PW2 further testified that the deceased pulled the 1st accused and they went outside the bar. When the bar closed, he went outside and found the deceased fighting with the 1st accused. He left one Geoffrey Mutai and Evans Kipro trying to separate them, and run home, which was approximately 500 metres away. Before he reached his home, he heard cries from the 1st accused's home, which is about 200m from the bar and can be seen from the bar. According to PW2, the cries were from the sister of the 1st accused, who was crying and asking the 1st accused where he was taking the panga. He knew her well as she was a neighbour, and he could recognize her voice. He stopped when he heard screams and decided to go back to the bar.

9. Upon his return, he found many people at the bar, and two people were lying down. These were the deceased and Geoffrey (Mutai), who had been trying to separate the 1st accused and the deceased. PW2 could also see blood on the ground, which he testified was coming from Geoffrey's body. Geoffrey was still breathing but the deceased was still, though there was no blood on his body. He could see because there were many people with torches at the scene. PW2 was helped by people at the scene to place the deceased, who had a stab wound on the chest, on a motor cycle, and he took him to Kiptere dispensary. They found the dispensary closed but a nurse at the hospital informed them that the deceased was already dead.

10. In cross-examination by Mr. Kiprono for the accused, PW2 stated that he had gone to the bar at Kambi Giza at around 8.00 p.m. with the 1st accused. The deceased had gone to the bar around 9.00 p.m., and had gone straight to the private room. The 1st accused had asked about the women who were in the private room and the deceased had left the private room and told the 1st accused not to make further inquiries about the women. The deceased had then dragged the 1st accused out and they had started fighting. PW2 had left while the 1st accused and the deceased were still fighting. He had heard screams when he was a few metres from his home.

11. PW2 further testified that he had not seen the 2nd accused at the bar, and did not see him when he went back to the bar. He had gone back after Geoffrey and the deceased had been injured, and did not know how they had been injured. He had heard the 1st accused's sister screaming, and knew that it was his sister as he heard the voice and recognised it. According to PW2, he was related to the 1st and 2nd accused, who are cousins, and the deceased was also their cousin. He confirmed in re-examination that it was the 1st accused's sister who was screaming.

12. The 3rd prosecution witness was John Kipngetich Boiyon, the Assistant Chief of Kapkitonyi sub-location. On 3rd June 2016, he had gone to PW1's bar at around 8.00 p.m. and sat at an inner room of the bar. At around 9.00 p.m., the deceased, Leonard, who is also called Solomon, had gone into the bar with two women He was followed into the room by another man called Kiprotich, a meat seller. PW3 had a soda and left the bar and went home.

13. At about 11.00 p.m., one Moses Malal called him and informed him that the deceased, Leonard, had been killed and one person injured and taken to Kericho District Hospital. PW3 had called the Officer Commanding Station (OCS), Kericho, who had told him to go to the scene. He had gone to the bar and seen blood behind the bar on the verandah, and at the front on the murrum. There was nobody at the scene at the time. He called the OCS and informed him, and was told by the OCS that he had taken the deceased to the mortuary, so he went back home.

14. Before he slept, however, the watchman and the owner of the bar, Chepngetich, as well as the two women who had been at the bar, went to his home. He inquired from the watchman what had happened, and was informed that the deceased had fought with the 1st accused, who had ran to his home and returned with a panga and cut the deceased on the chest. PW3 stated that he had not seen any fight between the 1st accused and the deceased. He had later been informed that the 1st accused had been arrested, and later, that the 2nd accused had given himself up to the police.

15. In cross-examination, he confirmed that he knew the 1st accused, whose home was about 200 metres from his office. He had been informed by one Moses Malal that the deceased had been killed, though not by whom.

16. PW4 was Edwin Kiprono Rotich, also known as Evans, a probox matatu driver on the Sondu-Kericho route. He had gone to PW1's bar where he usually drank at around 10.30 p.m. He had found the 1st accused and one Kennedy, also known as Kelvin Kipkurui (PW2) seated near the door at the main bar. He sat and drank with them till about 10.30 p.m. when PW1 told them she wanted to close the bar.

17. PW4, the 1st accused and Kelvin then proceeded to the bar where Kelvin paid the bill. The deceased then appeared from the private room where he had been sitting, pulled the 1st accused outside, and slapped him on the face. PW4 went to separate them and one Geoffrey Mutai also came from the bar and tried to separate the 1st accused and the deceased. PW4 testified that he left at that point and went home, but was called back by Gideon Langat, who was his relative, and requested to accompany him to take Geoffrey to hospital. He was also informed that Leonard, who had been stabbed, had been taken to Kiptere. He did not have his vehicle with him as he had walked from the bar. He went to see Geoffrey at the Mamul Factory where he was being escorted to the hospital, then went back home. He was informed later that the deceased had died.

18. In cross-examination, he stated that he had gone to PW1's bar where he sat with the 1st accused, who was his friend and cousin. The 1st accused had told him that the deceased was in the private room. The deceased had come out of the private room at about 10.30 p.m. The fight between the 1st accused and the deceased started when the 1st accused and his friends, including PW4, were paying the bill. The deceased had come and pulled the 1st accused outside. PW4 had left the 1st accused and the deceased fighting and gone home. He had

heard a scream from the home of the 1st accused, which is about 400m from his home. He had later been called and told to take some people to hospital. He did not see the 2nd accused at the bar.

19. The 5th prosecution witness was Robert Kiplangat, a farmer from Chemamul. In June of 2016, PW5 was working as a watchman at PW1's bar. On 3rd June 2016 at 10.00 p.m., he found the deceased and the 1st accused fighting outside the bar, where there were several people. He stood and watched them fight, and saw some people, including Geoffrey, try to separate them. After the fight, the 1st accused went for a panga from his home, which was about 100m from the bar. PW5 had used the light from his torch to see the panga that the 1st accused had fetched from his home.

20. According to PW5, Geoffrey was asking the deceased why he was beating up the 1st accused. The 1st accused then came back, running, and went straight and stabbed the deceased on the chest. The 1st accused had used a knife, not the panga, to stab the deceased. After the deceased was stabbed, PW5 put him on a motor cycle and he was rushed to hospital at Kiptere. PW5 then went to the Assistant Chief's home with PW1 and two women to report that someone had been stabbed, and the Assistant Chief advised them to report the incident at the Sosiot Police Station.

21. In cross-examination, PW5 stated that he had reported to work at 8.00 p.m. PW1 was selling at the bar, and PW5 had seen the deceased at the private room at the bar, drinking alcohol. He had also seen the 1st accused at the bar, drinking alcohol with one Kenneth.

22. PW5 stated that the fight between the 1st accused and the deceased had started around 10.00 p.m. He was outside when the fight started. He had tried to separate the deceased and the 1st accused.

23. PW5 further stated that there was a panga in the bar, but that it was not the one that had been produced in evidence in court as exhibit 1. He confirmed that the 1st accused had rushed home, and the deceased had followed the 1st accused to his home, then the two had returned together. PW5 had tried to separate them, then had left them fighting. He further stated that when the 1st accused returned from his home, he had sat down, for about 5 minutes, and the deceased was there when the 1st accused was sitting down.

24. According to PW5, the 1st accused then got up and left with his panga, and did not come back; that he left the deceased and Geoffrey with PW5. It was also PW5's evidence in cross-examination that the deceased and Geoffrey were taken to hospital, but he does not know what happened to them, but he saw a stab wound in the deceased's chest.

25. PW5 also stated that he saw how the deceased got the wound; that four people, among whom was the 1st accused, beat him up. He named the others who were involved as Kiprono, Geoffrey and Victor. He did not know who stabbed the deceased as there were many people. In re-examination, he stated that he was not armed on the material night, and did not recognise the panga produced in evidence. He stated that when the 1st accused came back to the bar, he did nothing, and that it was the 2nd accused who stabbed the deceased.

26. PW6, Ronald Cheruiyot Rono, was a *boda boda* (motor cycle) rider from Chemamul. He had been called to take Geoffrey Mutai, who had been stabbed, to hospital. He went and found Geoffrey lying down. He had been stabbed on his thigh and was bleeding profusely, so they placed him on PW6's motor cycle to take him to hospital. They later transferred him to a motor vehicle at the Mamul Factory gate and he was taken to hospital. PW6 then went on his motor cycle to Kiptere dispensary where the deceased had been taken and found that he had passed away. In cross-examination, he stated that he did not know what had happened to the deceased and Geoffrey. He had just found Geoffrey lying down.

27. PW7 was a matatu driver. He lived about 500 metres from PW1's bar. He had been called on the material night and requested to take two boys, Leonard and Geoffrey, to hospital. He went and found Geoffrey lying in a pool of blood. Leonard was not at the scene, and on inquiry, he was informed that Leonard had sustained a serious injury and had been rushed to Kiptere. He did not have his vehicle so they requested a Mr. David Too, who had a vehicle, to take Geoffrey to hospital. They took him to Kericho District Hospital where he was admitted. In cross-examination, he stated that he had been woken up and informed that some two boys, Geoffrey and Leonard, had injured themselves. He had gone to the bar but had not seen the 1st and 2nd accused at the bar. He was the one who drove the vehicle that took Geoffrey to hospital.

28. PW8, Samuel Kipsang Ngetich, was the father of the deceased. He had been at home on the material night when he received a phone call at 10.30 p.m. informing him that there was an incident at Kambi Giza and that he should go there. He had gone with his wife, Recho Chemutai. On arrival, they were informed that the deceased had been taken to Kiptere. He went to Kiptere and found his son, who had passed away, lying on the verandah. PW8 later learnt that a person suspected of killing his son had been arrested. The suspect was Victor, the 2nd accused. A second person, the 1st accused, was also arrested.

29. PW8 had identified the body of his son to the doctor who performed the post mortem. The doctor had told him that his son's heart had been stabbed.

30. PW9 was Dr. Kibos Ezekiel, a medical officer at the Kericho District Hospital. He presented the post mortem report on the deceased, which had been prepared by Dr. Daisy Chebet.

31. According to the post mortem report, the deceased, who was of the apparent age of about 20 years, had, among others, a stab wound on the wall of the heart at the junction of the pulmonary vein and the left atrium. The cause of death of the deceased was a stab wound to the heart with injury to the myocardium and bleeding into the pericardium cavity causing cardiac tamponade. The post mortem report dated 8th June 2016 was produced as prosecution exhibit 2.

32. PW10 was the investigating officer, No. 88157 P. C. James Rena, who had been based at Sosiot Police Station at the time material to this

case. His evidence was that he was on patrol with other officers on 3rd June 2016 at around 11.30 p.m. when he received a call from the OCS, Sosiot Police Station, that there had been an incident at Chemamul Centre and a person had been stabbed and rushed to Kiptere Health Centre. They went to the Kiptere Health Centre where they found a group of people. They were informed by the duty nurse that the deceased, Leonard Kiprotich, had been examined and pronounced dead on arrival.

33. The information that PW10 had gathered was that the deceased had been drinking at a bar in Chemamul Centre. A quarrel had started between the deceased and the 1st accused, and the 1st accused had rushed to his home, which was nearby, had come back with a panga, and had stabbed the deceased. One Geoffrey Mutai, who had tried to separate the 1st accused and the deceased, was stabbed in the thigh and rushed to Kericho District Hospital. The police had removed the body of the deceased to Kericho District Hospital Mortuary for post mortem. PW10 stated that they had visited Geoffrey Mutai who was in critical condition at the hospital. They had also visited the scene of crime. On the 5th day after the incident, the 1st accused had surrendered himself at Sosiot Police Station.

34. The 2nd accused, Victor Cheruiyot Rotich, had also surrendered himself to the police, and on interrogation, had informed the investigating officer that he was also at the scene of the incident. He had heard the noise from the scene from his house and had gone there to find out what was happening. He had been armed with a panga when he went to the scene. PW10 had then charged the two accused persons with the offence they now face.

35. According to PW10, the deceased had a stab wound on the chest which was caused by a panga that the police had recovered at the scene. PW10 produced the panga in evidence.

36. PW10 stated in cross-examination that he had received a call from the OCS, Sosiot, to the effect that someone had been stabbed at Chemamul. He had gone to Kiptere Health Centre where the OCS had told him the injured person had been taken. Upon arrival, he was informed that the person, Leonard Kiprotich, had died. They had taken the body to the Kericho District Hospital Mortuary. He had visited the scene of crime where they had found the panga, which had blood stains.

37. The 2nd accused had presented himself to the police on 6th June 2016 and said that he was at home when he heard the fight and came armed with a panga and joined the fight. PW10 did not know whom the 2nd accused had stabbed, and his testimony was that all the evidence pointed at the 1st accused, who had rushed home to get a panga. There was no evidence pointing at the 2nd accused. He conceded that there was no blood on the panga that he had produced in court, though it had blood when it was taken from the scene. The panga had not been subjected to analysis to establish whose it was.

38. PW10 asserted on re-examination that the panga produced in court was the one used to stab the deceased. It had blood when first collected from the scene. The prosecution then closed its case, and after considering the prosecution evidence and the submissions of Counsel for the state and the defence, the court found that the accused persons had a case to answer and placed them on their defence. The accused persons elected to give sworn evidence and call no witnesses.

39. In his evidence, the 1st accused, an employee of Kapchebet Tea Factory, stated that on 3rd June 2016, in the evening, he was at a bar which has no name but is not far from his home. He had gone to the bar to drink alcohol. All was well till 10.00 p.m. when his friends, Kelvin Kipkurui and Evans Kiprono, arrived. They continued drinking till about 10.30 p.m. when the deceased, Leonard Kiprotich, arrived. The 1st accused left his friends and joined the deceased in the private room, where they were with the area chief, John. They stayed in the private room for about 20 minutes, then the 1st accused left the room and joined his friends, and they continued drinking.

40. At around 11.00 p.m., the owner of the club informed them that she wanted to close the bar. She also told him that she could hear customers calling from the private room, where the deceased and the chief were, and she asked the 1st accused to find out what was happening. He went to the room and the chief informed him that he wanted to leave, while the deceased stated that he wanted more alcohol. The 1st accused went back with this information to the bar owner, and the bar owner proceeded to close the bar, locking the 1st accused and the others inside.

41. The watchman then came and told them that he wanted to close the bar, and the 1st accused told his friends, Kelvin and Evans, that they should leave. The bar owner asked the 1st accused to wait and escort her home, and while he was at the counter, the deceased came and slapped him, but did not tell him why. Kelvin and Evans got hold of the deceased while the bar owner asked him why he had slapped the 1st accused, the response to which was that he had slapped him as he had caused the bar to be closed.

42. After the deceased was restrained, the 1st accused had moved outside the bar, and the deceased had chased after him. The 1st accused had run home, with the deceased chasing after him. He had found people at his home having dinner and had rushed in without knocking, followed by the deceased. His parents restrained the deceased and as the 1st accused saw that the deceased wanted to fight, he got hold of a panga. When the deceased saw that the 1st accused had a panga, he moved outside the house and told the 1st accused to follow him outside. When the deceased heard him coming out, he ran away.

43. It was the 1st accused's testimony further that he waited for 15 minutes then followed the deceased to the end of their compound. He did not find the deceased anywhere. He then went to the bar fence, to the end of his home's compound which borders the bar compound, and could hear people fighting at the bar. He did not go back to the compound but called Kelvin as he wanted his phone which he had dropped at the bar. He did not see the deceased. He had earlier seen his co-accused enter the bar while drunk. The 1st accused stated that he slept outside the compound as he was tired and very drunk. He was woken up by Kelvin and Victor, the 2nd accused, but he did not see the deceased. He had a panga with him when he went to sleep, but he did not find it when he woke up. He denied stabbing the deceased, and did not know who had stabbed him.

44. The 1st accused further testified that he had been informed the following morning by his cousin, Vincent, that the deceased had been stabbed and was dead. Vincent also informed him that it was alleged that the 1st accused had fought with the deceased, and later the deceased had fought with Geoffrey, who had been injured and was in Kericho District Hospital. The 1st accused had then taken Vincent on a motor bike to Sosiot Police Station where he was arrested. He maintained that he did not stab the deceased, did not see him get stabbed, and the panga that was in court was not the panga that he had the night the deceased was stabbed.

45. In cross-examination by Ms. Keli for the state, the 1st accused confirmed that he had visited the bar called Kambi Giza, owned by PW1, on the material night. The bar shared a fence with his home. PW1 had told them to leave but had not locked them in with the chief and the deceased. He frequented the bar almost daily, and the owner would sometimes ask for his assistance, and that is why she had asked him to inquire what the chief wanted.

46. He stated that after the deceased slapped him, he did not rush home as the deceased was restrained and the 1st accused pushed inside the bar. He had then rushed home and into the house where the door was open and his parents were inside. The deceased had entered the house 10 minutes after him, which was enough time for him to cool down as he was being questioned by his parents. The deceased had come into the room and was pushing the 1st accused's parents, and when he saw the deceased pushing his parents, the 1st accused took the panga which was inside the house. The deceased had gone outside when he saw the 1st accused armed with the panga.

47. According to the 1st accused, his parents were trying to restrain him from going outside with the panga, but when the deceased insisted that he goes outside, the 1st accused pushed his parents aside and went outside. He alleged that the deceased was calling that he comes outside "the uncircumcised one", though he conceded that he had not stated this in his examination in chief. He had taken 15 minutes to go outside as his parents were restraining him.

48. The 1st accused further testified that he slept outside in the compound as he was drunk; that even in the rain, he would sleep outside as "alcohol and drunkenness don't know the rain." He did not find the deceased when he went out into the compound from his parents' house, and that is when he slept out in the compound. He did not find the panga when he awoke. He had met the 2nd accused, who is his cousin as their mothers are sisters, at the gate as he was being chased by the deceased.

49. In re-examination, the 1st accused stated that when the deceased entered the house violently, he took a panga. When the deceased saw him armed with a panga, he ran outside. The 1st accused stated that he took 10 minutes to go out of the house after the deceased left, and he did not find him outside.

50. In his sworn testimony, the 2nd accused, Victor Cheruiyot Rotich, stated that he was a *boda boda* rider from Sanga village. He had come from Chebrilbei to Sanga and visited the Kambi Giza bar on the 3rd of June 2016 at around 11.00 p.m. He had found people outside the bar in groups who told him that there had been a fight. He did not witness the fight. He was drunk, and after he was told that there was a fight, he went home.

51. It was his testimony further that he saw the 1st accused lying down and took him to his house, then proceeded to his own house. He was arrested on 7th June 2016 when he went to visit the 1st accused at the police station. His testimony was that he was not there when the deceased was stabbed, and he did not stab him. He was at home between the 3rd of June 2016 and 7th June 2016 when he was arrested.

52. In cross-examination, he stated that when he arrived home from Chebrilbei, he was drunk and the fight was over. He did not see the deceased that night. He had not surrendered himself to the police but was arrested when he went to see the 1st accused.

53. I have considered the prosecution evidence and the defences offered by the accused in this matter. The 1st and 2nd accused have been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 provides as follows with respect to the offence of murder:

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

54. As for what amounts to "*malice aforethought*" an essential ingredient for the offence of murder to be found to have been committed, section 206 of the Penal Code states as follows:

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.

55. I have set out above the prosecution and defence cases with respect to the events that led to the death of the deceased, Leonard Kiprotich Sang. In a murder case, the prosecution has the burden to prove three things: the death and cause of the death of the deceased; that the accused person(s) committed the unlawful act that led to the death of the deceased; and that the accused persons caused the death of the deceased with malice aforethought as defined in section 206 of the Penal Code.

56. There is no dispute about the death of the deceased. The prosecution placed before the court a post mortem report by Dr. Daisy Chebet, which was produced by Dr. Kibos Ezekiel, a medical officer at the Kericho District Hospital. The post mortem report, which is dated 8th June 2016, indicated that the deceased, a young man of the apparent age of 20, had a stab wound on the wall of the heart at the junction of the pulmonary vein and the left atrium. The report indicated that the cause of death was a stab wound to the heart with injury to the myocardium and bleeding into the pericardium cavity, which resulted in cardiac tamponade.

57. The question is who and what caused the stab wound that led to the death of the deceased. The prosecution charges that it was the 1st and 2nd accused who stabbed the deceased, resulting in his death. The prosecution lined up 8 civilian witnesses and the investigating officer and the doctor. Of the 8 civilian witnesses, 5 placed the 1st accused and the deceased at the Kambi Giza bar in Sanga where the deceased was stabbed. The 1st accused had been seen to fight with the deceased, and to rush home and return, armed with a panga.

58. The evidence of PW1, Chepngetich, the owner of the bar who knew both the accused and the deceased, was that she had seen the deceased slap the 1st accused and pull him outside the bar, where they started fighting. She had seen the 1st accused ran to his home, which was a few metres away, and come back with a panga. Chepngetich left the 1st accused and the deceased fighting and went with two female guests to her house. Before she reached her house, she heard people screaming that someone had died. She went to hide in a neighbour's house. She identified the panga produced in court as the one the 1st accused had returned with from his home.

59. Her evidence with respect to the fight between the 1st accused and the deceased was corroborated by PW2, Kelvin, who had been with the 1st accused. He had seen the deceased pull the 1st accused outside, and had left them fighting and gone home. On his way, he had heard the 1st accused's sister screaming and asking the 1st accused what he was going to do with the panga. He recognised her voice as they were cousins and neighbours. Kelvin had gone back to the bar after he heard the 1st accused's sister screaming, and had found two people lying down, the deceased and Geoffrey Mutai, who had been trying to separate the 1st accused and the deceased.

60. PW4, Evans, also testified that he had seen the deceased pull the 1st accused outside and slap him. He had tried to separate them, then had left them fighting. He had also heard a scream from the 1st accused's home, and later heard that the deceased had been stabbed and had died.

61. The prosecution evidence therefore is consistent that there was a fight between the 1st accused and the deceased. The 1st accused had rushed home and gone back to the bar, armed with a panga. Shortly thereafter, the deceased was stabbed in the chest, and was pronounced dead upon arrival at the Kiptere Health Centre.

62. While several prosecution witnesses as detailed above saw the 1st accused fight with the deceased and rush home for a panga, only one witness, PW5, testified to having seen the 1st accused actually stab the deceased. Robert Kiplangat, the watchman at Chepngetich's bar at the time of the incident, had also seen the deceased and the 1st accused fighting outside the bar. He had stood and watched them fight for a while. He had seen the 1st accused rush to his home, and come back a few minutes later with a panga. PW5 had used the light from his torch to see the panga that the 1st accused had fetched from his home. PW5's testimony was that the 1st accused had come back running from his home, gone straight to the deceased, and stabbed him in the chest. According to PW5, the 1st accused had used a knife, not a panga, to stab the deceased.

63. I pause here to observe that PW5, Robert Kiplangat, gave the distinct impression that he wanted to conceal evidence with regard to the events of the material day. In cross-examination, he alleged that the 1st accused ran home, came back with a panga, then sat down and did nothing. He also alleged that it was the 2nd accused who stabbed the deceased.

64. Taken in totality, however, the evidence before the court points to the 1st accused as the person who caused the death of the deceased by stabbing him with a panga, and that he did so with malice aforethought. From the evidence, the deceased was the aggressor, and had started the fight with the 1st accused, it would appear, over some women who were in the bar with the bar owner, Chepngetich. However, the deceased had run home, taken a panga, and gone back to the bar, where he stabbed the deceased. From his own sworn evidence in his defence, the 1st accused admitted the fight with the deceased. He further confirmed the prosecution evidence that he had run home and come back with a panga. His parents had tried to restrain him, but he had ran after the deceased, and stabbed him. Further, the evidence indicates that his sister (who was not named) had tried to stop him, and she was heard screaming and asking him what he was going to do with the panga. The 1st accused's testimony that he had taken the panga, then had fallen asleep with it, but had not found it when he woke up, seems to me to be a pure fabrication which cannot stand in the face of the prosecution evidence.

65. What emerges from the evidence is that the 1st accused fought with the deceased. He ran home and got a panga. He chased the deceased, who it appears had followed him home, back to the bar. His family tried to restrain him, but he went ahead and stabbed the deceased with the panga that he had, which was produced in evidence and identified as the panga he had come back from his home with and used to stab the deceased with. I am satisfied that the prosecution has established, beyond reasonable doubt, that the 1st accused, Nicholas Kipkoeh, with malice aforethought, did murder the deceased. I therefore convict him of the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

66. I now turn to consider the evidence presented by the prosecution against the 2nd accused. Emily Chepngetich, PW1, stated that she left the 1st and 2nd accused, and the deceased, fighting. In cross examination, she stated that she had seen the 1st accused and the deceased fight

for about 20 minutes before the 2nd accused, Victor, and Geoffrey Mutai, tried to separate them. PW2, Kelvin Kipkurui, had not seen the 2nd accused at the bar, nor had PW3 and PW4, who were at the bar.

67. PW5 is the only person who mentioned the 2nd accused person in connection with the death of the deceased. He stated in re-examination by Ms. Keli that when the 1st accused came back to the bar, he had done nothing, and that it was the 2nd accused who stabbed the deceased. The deceased's father, PW8, stated that he had heard that the 2nd accused had stabbed his son, while PW10's evidence was that the 2nd accused had said that he had gone to the bar with a panga after he learnt that the 1st accused and the deceased were fighting, and that he had surrendered himself to the police in connection with the death of the deceased.

68. However, having considered the evidence adduced against the 2nd accused, Victor Cheruiyot Rotich, I find that it falls far below the standard required to base a conviction on. Perhaps he appeared on the scene as the fight between the deceased and the 1st accused was going on. Perhaps he armed himself with a panga and stabbed Geoffrey Mutai, who was apparently stabbed in the thigh while trying to separate the 1st accused and the deceased, but who was not called to testify. He may well have turned himself in to the police a few days after the murder of the deceased. None of these suppositions, however, rises to the standard required for a conviction for murder. I find, therefore, that the prosecution has not proved its case against the 2nd accused to the required standard. Accordingly, he is acquitted under section 215 of the Criminal Procedure Code.

Dated Delivered and Signed at Kericho this 2nd day of May 2018.

MUMBI NGUGI

JUDGE