



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL CASE NO. 30 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

LEONARD KIPNGENO CHIRCHIR.....1ST ACCUSED

GILBERT KIPKEMOI CHIRCHIR.....2ND ACCUSED

JUDGMENT

1. The accused, who are brothers, are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 9th December 2015 at Mabasi sub-location in Bureti District, they murdered John Rono. They pleaded not guilty to the offence and the case proceeded before me, with the prosecution calling 11 witnesses in support of its case against the accused.

2. PW1 was Josphat Kipkoech Rotich (Josphat), a security guard from Kaplelgot who works in Kericho town. His evidence was that on 9th December 2015, he was asleep at a posho mill that he was operating at Kaplelgot village. He heard people making noise and uttering the words "I am killing you!" The people were passing on the nearby road, about 3 metres from his posho mill, so he could hear them clearly. He stepped outside his door and saw people who were chasing somebody. He identified the two people as the two accused persons. He approached where they were and saw they were beating the deceased, John Rono. He knew the accused as they were people he lived with and could identify their voices. He did not use any light but went to where they were. He found them beating the deceased and asking him "Do you know we are going to kill you."

3. PW1 testified that he knew the accused well. They had been in school together and he knew their voices. He could not tell initially that it was the deceased who was being beaten, so he went close to where the accused were and saw that they were beating John Rono, who was screaming. He knew the deceased as a village elder in their village, and he also knew his voice well.

4. According to PW1, the accused were using wooden frames to beat the deceased. The accused left the frames behind when they decided to flee after beating the deceased. People came to the scene and took the deceased to the hospital, and PW1 was among those who took the deceased to hospital.

5. Josphat testified that the deceased was seriously injured, mostly on the head. He was admitted at the Litein Mission Hospital, and Josphat and the other people who had taken him to hospital returned home. The deceased was transferred to Eldoret for further treatment, and they later received information that he had died.

6. PW1 identified two wooden frames as the ones the accused abandoned at the scene (Exhibits 1 (a) and (b)). He confirmed that he was present when the frames were recovered from the scene, and he identified the two accused persons as the ones he had seen beating the deceased.

7. In cross-examination, Josphat stated that the time of the incident was 9.00 p.m. He had been sleeping alone in the posho mill and was woken up by the screams. He heard people running and screaming and went a short distance from his door. He had heard their voices from inside the posho mill but when he got closer, they had moved a short distance away. The deceased was in front and was followed by the accused, who were not far behind as they were able to slap the deceased.

8. It was his testimony further that it had rained on that night, and the deceased had got dirty from the mud. The 2nd accused had been wearing gumboots while the 1st accused had a tee shirt on. He had noticed the gumboots because of the noise they made. The accused had fled when they saw torches held by people going to the scene. PW1 had been the first on the scene, followed by Brenda Chebet (PW2) whose house was also a few metres away from the scene. PW1 had heard the deceased saying in a low tone "forgive me, forgive me".

9. In re-examination, Josphat stated that he had heard screams and come out of the place where he was sleeping and seen the accused. He had recognised them by their voices which prompted him to follow them. He had been able to recognise them visually after about 15 minutes as he was close to them. The accused had fled when they saw the torch that Brenda had.

10. PW2 was Brenda Chepkoech (Brenda), a resident of Mabasi. On 9th December 2015, at about 9.00 p.m., she was at home when she heard people making noise at the road side. She heard a voice saying “forgive me, don’t kill me!” She had gone to the scene, which was not far from her house, a distance of about 4 metres, so she did not take long to get there, as she took about 5 minutes. She found the accused, whom she referred to as Leonard and Gilbert, beating up John Rono, the deceased. Gilbert and Leonard were neighbours whom she had known for about 4 years by December 2015. She also knew the deceased, John Rono, well as he was a village elder. She had seen the accused beating the deceased using the frames that were before the court. She had got there before anyone else, and when the accused continued to beat the deceased, whom they were beating all over the body, she screamed and many people came. The accused fled, and the deceased was taken for treatment at Litein Mission Hospital. She identified the accused as the persons she had seen beating up the deceased.

11. In cross-examination, she stated that she went to the scene at 9.00 p.m. and saw the accused beating up the deceased. She could not remember what the accused were wearing. She had heard loud screams which could be heard from afar, and she could also hear the voices well. It was her testimony further that it was not raining on that day, and it was not drizzling. She was the first to arrive at the scene. She reiterated her testimony, on re-examination, that she had heard a voice pleading “*Don’t kill me, forgive me*”.

12. The third prosecution witness was Isaiah Langat Toweet, the Assistant Chief of Mabasi sub-location. His evidence was that on 9th December 2015 at about 9.05 p.m., he was at home when he received an anonymous call that one of the village residents from Kaplelgot village was being beaten. He made inquiries and was informed that the person who was being beaten was John Rono. He informed the area Chief, Richard Ngeno, who asked him to find out the situation on the ground. Upon inquiring, he was informed that the said John Rono was being beaten by Alice Ngeno’s children, Gilbert and Leonard. He was told by the Chief to go to the scene.

13. On the way, he was informed that the village elder had been taken to Litein Mission Hospital by a good Samaritan, so he went back home. The following day, he went with the area Assistant Chief to Roret Police Station to record a statement, then went to Alice Ngeno’s home to arrest the suspects, but they did not find them. He was informed on 12th December 2015 that the suspects had surrendered themselves to Roret Police Station. PW3 stated that they had received information on 14th December 2015 that the deceased had died. PW3 confirmed that he knew the accused, whom he identified in the dock.

14. His evidence on cross-examination was that he had received an anonymous call at about 9.05 p.m. The caller, who did not identify himself, informed him that John Rono was being beaten. He had left his home for the scene and on the way had been informed that the deceased had been taken to hospital.

15. The fourth prosecution witness, Cheruiyot Sang, was a nephew of the deceased. He was a teacher at Ketinkoi Primary School. He had been called on the phone on 9th December 2015 and informed that his uncle, John Rono, had been beaten and was taken to Litein Mission Hospital. On 10th December 2015, he went to the Litein Mission Hospital where he found that the deceased’s state was very bad and the doctor recommended that he be taken to Moi Teaching and Referral Hospital, Eldoret. He had stayed with the deceased at the said hospital from 11th December 2015 to 14th December 2015 when he died. He had attended the post mortem on the deceased on 18th December 2015. The post mortem was done on the deceased’s head. It showed that the head had blood which had gone to the brain. Two young men whom he knew, the two accused persons, had been arrested in connection with the death of the deceased. His evidence on cross-examination was that he had not witnessed the beating but was informed by his wife about it.

16. PW5, Evans Kipsang Kirui, was a son of the deceased. He heard on 9th December 2015 that his father, the deceased, had been beaten by two brothers. He had heard the news after his father had been taken to Litein Mission Hospital. He had gone to the hospital and they had been told to take the deceased to Moi Teaching and Referral Hospital. The deceased was taken to the hospital by Cheruiyot Sang (PW4). He had heard later that his father had died. He had attended the post mortem on 18th December 2015 at the Moi Referral Hospital. He was with Cheruiyot Sang and Corporal Prisca, and they had identified the body for the doctor. The doctor had informed them that the deceased had died from the beating on the head. Two men had been arrested in connection with the death of the deceased. In cross-examination, he confirmed that he had not witnessed the beating.

17. PW5, No. 58439 Sergeant Prisca Onchoma from Roret Police Station had been at the station on 12th December 2015 at around 10.00 a.m. She was called by PC Lydia and informed that there were very many people at the station. She went there and found around 20 people, some armed with pangas. They told her that there were some young men who had assaulted their neighbour and they had arrested them. The people gave the names of the two men as Gilbert and Leonard, and demanded a P3 form for the deceased, whom they said was at the hospital in Eldoret. The crowd had left after the police told them that they would arrest the two young men.

18. On 13th December 2015, when she was going through the Occurrence Book, she realized that one suspect, Gilbert (the 2nd accused), had been arrested by Administration Police Officers from Roret. The 1st accused, Leonard, had surrendered himself. She had interrogated Leonard and he had said that they had assaulted the deceased as they had found him doing ‘tabia mbaya’ (bad manners) in their father’s bed. The accused were escorted to Litein Police Station, and on 14th December 2015, she charged them with assault causing actual bodily harm contrary to section 251 of the Penal Code, and a plea of guilty was entered. On 16th December 2015, she was informed that the complainant had passed away, and the accused were then charged with the offence that they now face.

19. PW5 further testified that she had taken the accused to Kericho district Hospital for age assessment, and had then interrogated them. She had gathered information and visited the scene at Mabasi sub-location. She had recovered the two pieces of wood (the frames) which had been brought by Josphat (PW1), who had collected them from the scene where the deceased was. She had also attended the post mortem of the deceased, which was conducted by Dr. Walter Nalinya. The doctor had said that the cause of death was severe head injury. She produced the wood frames in evidence as exhibit 1 (a) and (b).

20. PW5 confirmed that the persons arrested were the ones before the court. Gilbert Chirchir was then a Form 3 student at Kericho Tea Secondary, while Leonard was a pupil in class 6 in Mabasi.

21. PW7, was Administration Police Corporal (APC) Roitei Ponoto based at Roret District Officer's office. On 12th December 2015, members of the public from Mabasi went to Roret Police Station looking for two brothers who had beaten and injured their village elder. He had asked one of the members of the public whom they were seeking and had been informed that they were looking for Gilbert Chirchir and Leonard Chirchir. He had been called shortly thereafter on the phone by a friend of Gilbert Chirchir's who informed him that Gilbert was hiding in his car due to the public anger and he wanted PW7 to assist to take him to the police station. PW7 had therefore arrested the 2nd accused, Gilbert Chirchir, from where he was hiding in the car and taken him to Roret Police Station. He pointed out the 2nd accused in the dock as the person he had arrested from where he was hiding in a car and taken to Roret Police Station.

22. His evidence on cross-examination was that he had got a call from a person who did not want to identify himself. He had not written the number of the person who called him in his statement. He had been informed that John Rono had been beaten, and he had gone to rescue the 2nd accused, Gilbert Chirchir from a vehicle.

23. PW8 was No. 101278 Police Constable Lydia Kemunto Aroni stationed at Roret Police Station. On 12th December 2015, at around 6.00 p.m., she was at the report office about to hand over duties to other officers. She had gone to the flag post and on coming back, she saw a young boy who seemed stranded. She asked him who he was and he said he was Leonard Chirchir and he was from hiding as he was fearing that villagers were following him. When she asked him why, he told her that it was because he and his brother, Gilbert Chirchir, had assaulted a village elder, John Rono. That he further told her that he wanted to be taken where his brother had been taken.

24. As PW8 had been on duty that morning, she knew that Gilbert Chirchir had been taken to Litein Police Station. PW8 arrested Leonard Chirchir and booked him as a suspect for assault and placed him at the cells at Roret Police Station. PW8 testified in cross-examination that Leonard was from a hiding place. He was the one who had come to the report office. When Leonard mentioned Gilbert, PW8 knew he was suspected of having committed assault.

25. PW9 was Dr. Walter Nalianya, a pathologist at Moi Teaching and Referral Hospital who had practised for over 20 years. He had conducted the post mortem on the deceased, John Kipkirui Rono, on 18th December 2015.

26. He had observed that the deceased was an elderly male. He had multiple healing stitched wounds on the forehead, the frontal part of the skull, the right parietal region (right side of skull) and on the occipital region and behind the skull. On dissecting the body, he found that the skull was intact and there was blood on the surface of the skull, beneath the scalp. The blood was on the front of the skull, the parietal and occipital part. On opening the skull, he found that there was blood on the whole surface of the brain. His conclusion was that the cause of death was severe head injury due to multiple blunt trauma. He produced the post mortem report as exhibit 2.

27. At the end of the prosecution case and after considering the evidence, the court found that the prosecution had established a prima facie case against the accused and placed them on their defence. Both the accused persons elected to remain silent.

28. I have considered the prosecution evidence against the accused in this matter. The two brothers, aged 17 and 21 years respectively at the time of the offence, are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. For the accused to be convicted of the offence of murder, the state must establish beyond reasonable doubt that the accused did, with malice aforethought, cause the death of the deceased.

29. Section 206 of the Penal Code provides 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.

30. The evidence before me indicates that the deceased, John Rono, was attacked by some two persons who were using wooden frames to hit him on the head. The post mortem conducted by Dr. Walter Nalianya showed that the deceased had healing stitched wounds on the forehead, the frontal part of the skull and the right parietal region (the right side of the skull) on the occipital region and behind the skull. The doctor had also found blood on the surface of the skull, as well as blood on the whole surface of the brain. The cause of death, according to Dr. Nalianya, was severe head injury due to multiple blunt trauma.

31. This evidence can only lead to one conclusion: that the person or persons who assaulted the deceased did so with the intention of causing his death, or with the intention of doing him grievous harm, and with the knowledge that their act would probably cause the death of or grievous harm to the deceased. The person or persons who inflicted the blunt trauma injuries on the deceased, in my view, did so with malice

aforethought. Their act of causing his death constitutes murder as defined in section 203 as read with section 204 of the Penal Code.

32. The prosecution's case is that it is the two accused persons in this matter who, with malice aforethought, caused the death of the deceased.

33. The prosecution case as presented through their 9 witnesses is that the two accused persons attacked the deceased because he was 'doing bad manners' on their father's bed. This emerged from the evidence of PW5, Sergeant Prisca Onchoma, who had interrogated the 1st accused, Leonard Kipngeno Chirchir, when he surrendered to her at the Roret Police Station.

34. PW1 and PW2 were neighbours of the accused. They had heard screaming and gone to check what was happening. They knew the deceased as their village elder, and they also knew the accused.

35. PW1, Josphat Kipkoech Rotich, was asleep at a posho mill that he was operating at Kaplelgot village. He had heard people making noise and uttering the words "I am killing you!" He recognised the voices of the accused, whom he had gone to school with. They were beating up the deceased, whom he also knew. He did not recognise initially that the deceased was the one who was being beaten by the accused, so he got closer. He had found the accused beating the deceased and asking him "Do you know we are going to kill you?" He had also heard the deceased pleading with the accused to forgive him. The accused were using wooden frames which they abandoned and fled when people went to the scene.

36. The evidence of PW2, Brenda, was that she was home at about 9.00 p.m. when she heard people making noise by the road side. Like PW1, she heard a voice saying "*forgive me, don't kill me!*"

37. She had gone to the scene where she found the accused beating up the deceased. They were hitting him all over the body using the wooden frames that were before the court. She had screamed and people had come to the scene, and the accused persons had fled from the scene, leaving the wooden frames behind. She, too, knew the accused persons well, having been a neighbour for a period of 4 years. She also knew the deceased and had heard him pleading for forgiveness.

38. From the evidence before the court, I am satisfied that it was the two accused who attacked the deceased, John Rono, and injured him grievously, leading to his death a few days later from the injuries he sustained in the attack. They were using wooden frames to attack him, and from the evidence of PW5, Sergeant Onchoma, from her interrogation of the 1st accused, it would appear that they attacked him because he was having an affair with their mother.

39. Whether minor children-indeed children of any age - have the right to dictate whom their mother associates with is a question this court will not attempt to answer. It conjures up images of a patriarchal society where sons imagine they have a right to dictate their mothers' conduct. That the deceased was pleading with the accused to be "forgiven" suggest that he, too, may have accepted the narrative that the accused could control what their mother does or does not do. That they took it upon themselves to attack the deceased so viciously that he succumbed to his injuries beggars belief. It is particularly tragic when one notes that the accused were school going children at the time of the offence with which they are charged: Gilbert Kipkemoi Chirchir was then a Form 3 student at Kericho Tea Secondary School, while Leonard Kipngeno Chirchir was a pupil in class 6 in Mabasi.

40. There are some contradictions in the evidence of the two eye witnesses to this incident. Both PW1 and PW2 say they were the first to arrive at the scene. It may be that PW2 did not see PW1 when she arrived at the scene with a torch which, according to PW1, caused the accused to flee. The second contradiction relates to the weather that night. PW1 was clear that it was raining, while PW2 testified that it had not rained that night. These contradictions, however, are not in my view material contradictions. I am satisfied that the prosecution has established beyond reasonable doubt that it was the accused who, with malice aforethought, caused the death of the deceased.

41. In reaching this conclusion, I bear in mind that the burden cast by the law on the prosecution is to prove its case beyond reasonable doubt. Denning JA explained what 'reasonable doubt' is in the case of **Millier vs Minister of Pensions [1947]** as follows:

"It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice."

42. I therefore proceed to convict the accused of the offence of murder contrary to section 203 as read with section 204 of the Penal Code in accordance with section 215 of the Criminal Procedure Code.

Dated, Delivered and Signed at Kericho this 13th day of June 2018

MUMBI NGUGI

JUDGE