



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO. 42 OF 2017

REPUBLICPROSECUTOR

VERSUS

GILBERT KIPKEMOI BORE1ST ACCUSED

SIMON CHERUIYOT BORE.....2ND ACCUSED

JUDGEMENT

INTRODUCTION

1. The accused are charged with murder contrary to section 203 as read with 204 of the Penal Code (Cap. 63) Laws of Kenya, in respect of the deceased, Justice Bore. They pleaded not guilty.

The prosecution called six witnesses in support of the charge.

2. The accused made unsworn statements and called no witnesses in their defence.

THE CASE FOR THE PROSECUTION

3. The prosecution called Miriam Chemweno Langat (PW 1), who is the sister to both accused. She testified that on 8/12/2017 the two accused quarreled with the deceased over a mobile phone, in particular the 1st accused demanded that the deceased return the mobile phone to him. It was her evidence that the 1st accused had sold the mobile phone to the deceased for Shs.500/=. In response, the deceased asked the 1st accused to return to him shs.500/=: being the purchase price of the cell phone. A quarrel ensued between them. The 2nd accused joined in the quarrel by supporting the 1st accused. The 2nd accused abused the deceased by calling him “*ngetai*,” meaning an uncircumcised boy. In the process of the quarrel, the 2nd accused held the deceased and pinned him to the wall. The 1st accused then stabbed him in the left chest with a kitchen knife. This is clear from the evidence of Gideon Kipkurui Cheruiyot (PW 2). The deceased collapsed and fell outside the house where they were having their lunch.

4. It is the evidence of PW 1 that both accused were drunk with chang’aa. It is also her evidence that the deceased told PW 1 that the accused had stabbed him. She also testified that family members raised screams following this fighting. Members of the public answered the screams and arrested both accused by tying their arms with ropes. Members of the public subjected both accused to mob justice.

5. The evidence of PW 1 is supported by that of Gideon Kipkurui Cheruiyot (PW 2). PW 2 was a child of tender years who testified on oath following a *voir dire* examination.

6. The body of the deceased was taken for Postmortem examination at Longisa Referral District Mortuary. It was examined by a doctor, who found the following. That the deceased was aged 26 years old. He had a cut wound on the left upper chest. He also had cyanosis of mucus membranes. According to the doctor, the cause of death was cardiac tamponade.

7. The Postmortem report of the deceased was put in evidence by consent of the parties as exhibit 3.

8. Both accused were taken for mental status examination at Narok County Referral Hospital. The 1st accused was found to be 21 years old and was certified fit to stand trial. His report was put in evidence as exh 2(a). Furthermore, the 2nd accused was also subjected to a medical mental status examination. He was found to be mentally fit to stand trial. His report of examination was put in evidence as exh 2(b).

9. Furthermore, the prosecution called No.65450 PC Samuel Liu (PW 4). It was the evidence of PW 4 that he was accompanied to the scene

of murder by Cpl Henry Kiboma (PW 5). PW 5 took photos of the body of the deceased and the scene of murder. The photos were put on evidence as exh 5a, 5b, 5c,5d and 5e.

10. It was the evidence of PW 4 that both the accused were subjected to mob justice. As a result, they sustained injuries. PW 4 then took both accused to Narok Referral Hospital for treatment. A report of the treatment of Simon Bore shows that he had a cut wound on the forehead. He also had a cut wound on the left hand. He was treated and those injuries were dressed. His report was put in evidence as 1(a).

11. Similarly, Gilbert Bore was also taken for treatment. He was found to have a tender swollen hand. He was also found to have a tender left shoulder. He was treated for these injuries and his treatment report was put in evidence as 1(b).

12. The last witness called by the prosecution was Benard Kipsang Korir (PW 6). He is the village elder for Kapsilibwa village. His evidence was that on 8/12/2017, at 2 pm, he was informed about this incident and he then informed the assistant chief, Edwin Bett. As a result, he was instructed to go to the scene of murder, which was 2 kilometres away from the house of his mother. While at the scene, CID police arrived in company of the assistant chief. They then put the body of the deceased in a police vehicle and took it. The police then rearrested the accused persons.

THE CASE FOR THE 1ST ACCUSED

13. The 1st accused, Gilbert Kipkemoi Bore initially elected to remain silent. He changed his position and with leave of the court he was allowed to make an unsworn statement. He did this after the 2nd accused (Simon Cheruiyot Bore) made an unsworn statement. He stated that he burns charcoal and he is also a boda boda rider. He further stated that they burned charcoal with the deceased. He testified that the deceased had some remaining charcoal which he was going to sell and thereafter share the proceeds of sale with the 1st accused.

14. It was his evidence that he returned from his business at 2.00 p.m. and arrived at home. He then asked the deceased who is his elder brother, for a share of the proceeds of sale of that charcoal. In response, the deceased started beating him, which led to a fight. In the course of fighting, they fell down since it was raining. Thereafter, he left and the accused remained inside the house. The 1st accused was surprised when neighbours went to his home and arrested him. That is when they told him that he had stabbed the deceased with a knife. Thereafter he was brought to Narok police station.

THE CASE FOR THE 2ND ACCUSED

15. The 2nd accused (Simon Cheruiyot Bore) stated that he was a farmer growing potatoes. It was his evidence that he went to a neighbourhood to do manual work. After finishing he went to drink changaa at Kabar Sakuta centre. He went home and slept after he got drunk. He slept until 11.00 a.m. in the following morning. That is when he suddenly found himself at Mulot police station.

16. I have considered the totality of the prosecution and the defence evidence of both accused persons. In the light of the applicable law, I find the following to be the issues for determination;

1. Whether or not both accused were positively identified as the ones who caused the death of the deceased.
2. Whether or not the evidence discloses manslaughter or murder.

Issue No. 1

17. I believe as credible the evidence of Miriam Chemweno Langat (PW 1) and Gideon Kipkurui cheruiyot (PW 2) that it is the 1st accused who stabbed the deceased in the left chest. The offence was committed during broad day light when both accused and the deceased were having their lunch meal. The deceased and the accused persons are members of the same family. I therefore find that PW 1 and PW 2 positively identified them as the assailants of the deceased. The evidence of PW 2 in this regard is that it is the 1st accused who stabbed the deceased with a kitchen knife.

18. It was also his (PW 2) evidence that the 2nd accused pinned the deceased to the wall. The cause of the quarrel which led to the fight is because the 1st accused asked the deceased to return his cell phone to him. The deceased replied the 1st accused that he had bought that cell phone from him (1st accused) for sh.500/-. According to PW 1, both accused envied the deceased, because he was living happily with his wife.

19. The evidence of NO. 65450 PC Samuel Liu is that they went to the scene of murder at Kapsilibwa village and rearrested both accused from members of the public. It was also his evidence that they took both accused for treatment at Narok Referral Hospital for injuries they sustained in the hands of members of the public. They were treated for those injuries.

20. In the light of the foregoing evidence which I find credible, I do not believe the evidence of the 1st accused that as he was fighting with the deceased; they both fell down because it was raining. I also do not believe his evidence that he was told by members of the public following his arrest that the deceased had been stabbed with a knife. I reject his defence as being incredible. Furthermore, I do not believe the evidence of the 2nd accused that after he finished his work he went to drink chang'aa until he got drunk. And that thereafter, he went to sleep until the following morning when he found himself at Mulot police station.

21. In this regard, I find the prosecution evidence to be credible and cogent that it is the 2nd accused who pinned the deceased to the wall and

in the process the 1st accused stabbed him with a knife. I therefore find that the accused caused the death of the deceased.

Issue No. 2

22. I find from the evidence of Miriam Chemweno Langat (PW 1) that both accused were drunk with changaa when the offence was committed. I further believe her (PW 1) that the deceased told her that the 1st accused had stabbed him. I believe the evidence of PW 1 and PW 2 that both accused and the deceased are family members and they quarreled over a cell phone which the 1st accused sold to the deceased. I further find as unreasonable the conduct of the 1st accused in demanding the cell phone from the accused; since he had sold it. I find from the totality of those circumstances that the offence disclosed is manslaughter contrary to section 205 of the Penal Code. I therefore find him guilty of that offence in terms of section 306(1) of the Criminal Procedure Code (Cap 75) Laws of Kenya. Pursuant to section 322 (1) of the Criminal Procedure Code (Cap 75), I hereby convict both accused in respect of the offence of manslaughter.

Judgement delivered in open court this 18th day of October, 2018 in the presence of Ms Nyaraita for the state and Mr. Kambo for both accused.

J. M. Bwonwonga

Judge

18/10/2018