



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL CASE NO. 18 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**VINCENT KIPKEMOI SIELE.....ACCUSED**

**JUDGMENT**

1. Kipkemoi Siele, the accused in this matter, is 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 15<sup>th</sup> of September 2015, at Chepkemel centre, he murdered Bernard Kiptoo Rono.
2. The case commenced before Muya J, who took the evidence of 3 witnesses. Thereafter, I took over the conduct of the matter after the accused elected to proceed with the matter from where it had reached before Muya J.
3. PW1 was Japhet Kibet (Japhet), a farmer from Chepkemel. On 15<sup>th</sup> September 2015, at 9.00 p.m., he went to Chepkemel Trading Centre to buy sugar. While at the shopping centre, the deceased, Bernard Kiptoo Rono, called him and they went to a bar where the deceased bought PW1 a soda. The deceased then left PW1 inside the bar and went outside. PW1 decided to go outside to check on the deceased.
4. He found the accused holding the deceased's shirt. He tried to separate them but the accused pushed him away, so he decided to go to the bar counter to report what was happening. He did not know why the accused and deceased were holding each other's shirts. When he returned outside, he found that the accused had left. The deceased was sitting on the ground. Someone called Wilson came and decided that the deceased should be taken to hospital for treatment, and PW1 decided to go home. In cross-examination, Japhet stated that he had seen the accused and the deceased holding each other's shirts. He did not know what happened later.
5. PW2, Denis Cheruiyot Kipngeno (Denis) had, on 15<sup>th</sup> September 2015, at about 9.00 p.m., gone to a bar at Chepkemel where he was taking a soda. He heard shouts from outside and saw three people, the accused, the deceased and Japhet. The accused and the deceased were fighting while Japhet was trying to separate them. Dennis went to report to the bar owner who had gone to fetch change. On his way back outside, he found the deceased, who had been stabbed, being brought inside the bar. He and others at the bar looked for transport for the deceased to be taken to hospital. Denis had received information the following day that the deceased had died. Dennis testified that the deceased had been stabbed on the left side of the chest, but he did not see the accused stab the deceased.
6. In cross-examination, he stated that he was taking a soda in the bar. He had gone outside upon hearing shouts from outside. There were security lights at the scene, and he was able to see the assailant clearly. He had not seen the accused stab the deceased.
7. The third prosecution witness was Wilson Kiplangat Arap Ngeno (Wilson). On the material day, the deceased had come to where he was at around 9.00 p.m. He was already injured. Wilson looked for transport to take him to hospital. The deceased had a stab wound on the left side of his chest. He was taken to Sigowet Hospital and later Kericho District hospital where he was later pronounced dead. It was Wilson's testimony that the deceased was saying that he had been stabbed by the accused.
8. His evidence on cross-examination was that the deceased had said in the Kipsigis language that he had been stabbed by the accused. He had said this while at the hospital. Wilson had not conversed with the deceased while they were in the car on the way to the hospital. He was the one who was operating the bar where he had about three customers in the bar at the time. He had gone out briefly to look for change. It was his testimony that he did not see the accused stab the deceased.
9. PW4 was the investigating officer, No. 234637 Inspector Jonathan Lekachunula. At the time material to this case, he was stationed at Sondu Police Station. On 16<sup>th</sup> September 2015 at around 9.00 am while he was in the office, he received a report of a murder reported by the Assistant Chief of Chepkemel Location. The murder had occurred on the night of 15<sup>th</sup> September 2015, at around 2030 hours in a bar at Chepkemel centre. The report was that Bernard Kiptoo, the deceased, was stabbed by Vincent Kipkemoi Siele.

10. PW4 stated that the information he had received was that the two and others were refreshing themselves in the bar when the deceased excused himself and went outside to join others who were playing cards. He left his soda in the care of his friend Japhet Kibet Sang (PW1). Moments later, the accused, Vincent, followed the deceased outside. A fight had ensued between the accused and the deceased which attracted those inside the bar, including Japheth Kibet Sang (PW1). When he went outside, PW1 saw the accused and deceased fighting and tried to separate them, and the accused threatened to stab PW1 if he tried to separate them. PW1 retreated when he saw the accused holding a pocket knife.

11. According to PW4, the accused stabbed the deceased on the left side of the chest which resulted in the deceased falling down. PW1 rushed to help him while seeking help from those inside the bar. He took him to the side of the road while seeking help from the owner of the bar, (PW3) an uncle of the deceased. PW3 looked for a vehicle and took the deceased to Sigowet District Hospital where they were referred to Kericho District hospital. The deceased died at 1.00 am while undergoing treatment.

12. PW4 had visited the scene on 16<sup>th</sup> September 2015. He had collected witnesses and recorded their statements. He did not recover a pocket knife at the scene. He had been informed by witnesses that the accused had taken the knife and ran away immediately after he stabbed the deceased. The accused had reappeared on 18<sup>th</sup> September 2015 and was advised by his relative to go to the police station where PW4 had arrested him and charged him with the offence of murder.

13. In cross-examination, PW4 stated that he was the Officer in Charge, Crime, at the Sondu Police station, and the investigating officer in the matter. He had visited the scene the day after the incident and seen the blood where the deceased was stabbed. He had been informed that the accused had a pocket knife, but he did not recover it. The accused had surrendered to the police on 18<sup>th</sup> September 2015. PW4 had recorded his statement in which the accused had stated that it was true that he had stabbed the deceased but had not intended to do so and was begging for forgiveness.

14. According to PW4, the accused had further stated that he was sitting in the bar when the deceased had lit a cigarette. That the accused had told the deceased to go outside as the accused did not smoke. The accused had later followed the deceased and a fight ensued. The deceased had held him by the shirt and he felt pain, and that is why he stabbed the deceased.

15. PW5 was Dr. Kibos Ezekiel, a medical officer at the Kericho District Hospital. He produced the post mortem report on the deceased on behalf of Dr. Gilbert Langat who had performed the post mortem on the deceased on 21<sup>st</sup> September 2015. The report indicated that the deceased was of the apparent age of 20 years. He had a stab wound on the left upper chest measuring 5cm x 3cm x 6.5cm in depth. He also had a penetrating wound to the chest cavity on the left side involving the muscle, the upper lobe of the lung and the pericardium, the covering of the heart. He had right haemothorax, that is blood in the chest cavity estimated at 3 litres. The deceased also had blood around the pericardium covering.

16. The opinion formed by Dr. Langat with respect to the cause of death was haemorrhage secondary to a stab wound in the chest involving the lung and the pericardium. The post mortem report dated 21<sup>st</sup> September 2015 was produced as prosecution exhibit 1.

17. When placed on his defence, the accused elected to give an unsworn statement and call no witnesses. He stated that on 15<sup>th</sup> September 2015 at around 8.30 pm he was at the Chepkemel bar at the Chepkemel trading centre. He was with Kirui Vincent and had taken alcohol until 7.00 p.m. He had then gone to a hotel next to the bar and taken dinner then returned to the bar. On arrival at the bar, he had found a fight going on. On inquiring, he was informed that a reveler had been told not to smoke in the bar. He did not know who this reveler was.

18. At around 8.00 p.m., he had gone outside the bar and found people playing cards. The person who had been told to leave the bar, upon seeing the accused, went and grabbed his collar. The accused asked him why and the person said that the accused was one of the people who had forced him out. The accused had tried to tell him that he was not, as had several other people. The man had then left the accused, who had then gone home and slept.

19. The accused further stated that he had attended to his duties as usual the following day. He had received information on Thursday that he was wanted over somebody who had been stabbed. He had gone to the police station to inquire why he was wanted. He was still shocked at the charges of murder that he was facing.

20. The accused confirmed that he knew PW1, Japheth Kibet Sang, whom he normally saw at Chepkemel market. He stated that it was Japheth who told the deceased to leave him alone. He denied that he stabbed the deceased, stating that when the deceased released him, he had gone home.

21. I have considered the prosecution evidence on record, as well as the unsworn statement of the accused. Section 203 of the Penal Code provides that ***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”***

22. Section 206 defines “malice aforethought,” as follow:

***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;***

...

23. The prosecution bears the burden of proving, beyond reasonable doubt, that it was the accused person who caused the death of the deceased, and that he did so with malice aforethought as defined in section 206 of the Penal Code, the relevant portions of which I have set out above. To discharge this burden, the prosecution must prove three things. It must first prove the death and cause of death of the deceased. Secondly, it must prove that the accused person or persons committed the unlawful act that led to the death of the deceased. Thirdly, the prosecution must prove that the accused person or persons caused the death of the deceased with malice aforethought.

24. The evidence of PW5 and the post mortem report that he produced (exhibit 1) establish the death of the deceased. The opinion of Dr. Gilbert Langat, who performed the post mortem, was that the cause of death was hemorrhage secondary to a stab wound in the chest involving the lung and the pericardium.

25. The person who stabbed the deceased in the chest did so with such force that he penetrated both the deceased's lung and the pericardium, the membrane enclosing the heart, leading to massive haemorrhage which resulted in the death of the deceased. Such an act falls within the definition of malice aforethought as defined under section 206: the wielder of the knife with which the deceased was stabbed did so with an intention to cause the death of or to do grievous harm to the deceased; and he knew that his act would probably cause the death of or grievous harm to the deceased.

26. The prosecution says that it is the accused who committed the act that led to the death of the deceased. Its first witness, Japheth, was with the deceased having a drink at the bar. He had seen the deceased go out. He had followed him outside and seen the accused holding the deceased by his shirt. He had tried to separate them but failed. He had gone back inside to look for the owner of the bar. Upon returning, he had found the deceased sitting on the ground by himself, the accused having disappeared.

27. PW2 (Denis) had heard noise outside the bar. He had gone to see what was happening and had found the accused, the deceased and PW1. PW1 was trying to separate the deceased and the accused. There was security light outside, so he had been able to see clearly. He had gone back to seek help. On his way back outside, he had met with PW1 and PW3 helping the deceased, who had been stabbed, into the bar.

28. PW3 who, according to PW4, was an uncle of the deceased, was the bar owner. He had looked for a vehicle to take the deceased to hospital. The deceased had said before he died that he had been stabbed by the deceased.

29. It is true, as submitted by Ms. Koech for the accused, that none of the prosecution witnesses had seen the accused stab the deceased. The evidence of PW1 and PW2, however, was consistent that the accused and the deceased had been fighting outside. From the evidence of PW1, it appears that it was the accused who was the aggressor. He had been offended when the deceased took a cigarette and lit it and had followed the deceased outside. PW1 had followed and tried to separate the two, and the accused had pushed him away. There was a suggestion from the evidence of PW4 that the accused had threatened to stab PW1 with a knife and this is why PW1 had stopped trying to separate the two, but this did not emerge from the evidence of PW1 or PW2.

30. The question is whether this evidence, which is purely circumstantial in nature, there being no eye witness evidence that the accused stabbed the deceased, is enough to lead to the conclusion that it was indeed the accused who stabbed the deceased.

31. The law is that a court may convict on circumstantial evidence where such evidence points irresistibly to the accused as the perpetrator of the offence charged. This has been the position in law since the decision in **R vs Kipkering arap Koske & Another 16 EACA 135** in which the court stated:

***“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”***

32. A little more recently, in its decision in **Sawe vs Republic [2003] KLR 364** at page 375, the Court of Appeal stated as follows:

***“There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”***

33. I have set out above the prosecution evidence on the events that led to the death of the deceased. Two witnesses saw the accused fighting with the deceased. PW1 tried to separate them, unsuccessfully, because the accused pushed him away. A few minutes later, the deceased had been stabbed and was found sitting on the ground. He was helped into the bar, and then taken to hospital. He stated to PW3 that it was the accused who had stabbed him.

34. Could there have been anybody else, other than the accused, who stabbed the deceased? In my view, the prosecution evidence, though circumstantial, points irresistibly to the accused as the person who stabbed the deceased. That he had carried a knife into the bar, and that he confronted the deceased, had refused to be separated from the confrontation, and a few minutes later the deceased was dying, points to the fact that he intentionally caused the death of the deceased.

35. I have considered the unsworn statement of the accused in his defence. In many respects, it supports the prosecution case. The evidence of PW1 was that the accused had been aggrieved that the deceased had taken and lit a cigarette. The deceased had gone outside, where the accused had followed.

36. The accused stated that he had been with one Kirui Vincent. He had gone to take dinner at a nearby hotel, then returned to the bar. He had

found a fight going on and had been informed that a reveler had been told not to smoke in the bar. He had gone outside and the reveler had grabbed his collar. The accused had asked him why and he had said that it was because the accused was one of the people who had forced him out of the bar. The accused had then left and gone to sleep.

37. It seems to me that the defence statement of the accused consists of half-truths with regard to the events of the night of 15<sup>th</sup> September 2015. For whatever reason as none emerges from the prosecution evidence or the defence, the accused had gone to the bar while armed. He had picked a fight with the deceased outside the bar. He had pushed PW1 away when he had tried to separate them, had stabbed the deceased, then had disappeared into the darkness. He had surrendered himself to the police three days after the murder.

38. It is hard to comprehend why one carries a knife to a bar unless one does so with the express intention of causing grievous harm or death to another person. Inevitably, the use of a knife on a human being, and there are no longer wild animals to be killed with knives, and certainly none in places of entertainment-is to cause harm or death to another human being. That, in my view, was the intention of the accused in this case. He went to the bar armed, and with the intention of causing the death of the deceased.

39. It is my finding that the accused did, with malice aforethought, cause the death of the deceased, Bernard Kiptoo Rono. I therefore find him guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code, and I convict him in accordance with section 215 of the Criminal Procedure Code.

**Dated, Delivered and Signed at Kericho this 4<sup>th</sup> day of October 2018**

**MUMBI NGUGI**

**JUDGE**