



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

HCCR NO. 13 OF 2014

REPUBLIC.....PROSECUTION

VERSUS

AUGUSTINE KIPKEMOI BOSIBEN.....ACCUSED

JUDGMENT

1. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information against him states that on the 23rd day of March 2014 at Kalyonguet Location within Kericho County he murdered Vincent Kipchumba Korir.
2. The hearing of the case commenced before Ong'udi J on 12th May 2015 who took the evidence of four witnesses. Following her transfer out of the station, I took over the conduct of the matter, and the accused elected to proceed from where the matter had reached.
3. The prosecution case was presented through 7 witnesses. Sally Chelangat (PW1) operated a bar at her home in Chebitet. On 23rd March 2014 at 6.00 p.m., she was serving customers at her bar when she heard people quarrelling from where the accused was seated. She went there and found the accused and Vincent (the deceased), who were seated outside, together with Joseph Sang, Kenneth Kipngetch and Mark Kipkorir Rotich. There were many other customers but they left. Sally heard the accused asking to be bought beer, but Vincent refused.
4. The accused then removed a knife from the inside of his jacket and stabbed Vincent on the head and later on the lower cheek. He then said that he wanted blood to drink. Sally screamed, while Mark Kipkorir called the police. Sally testified that she saw the knife that the accused used, which was a penknife and had a grey handle. She stated in cross-examination that the deceased had sold his shamba and the accused knew he had money. This emerged from the quarrel between the accused and the deceased. Sally had asked the deceased if he had money and he told her that he had, but that he had not carried it with him.
5. After the deceased was stabbed, he had been rushed to hospital by Mark Kipkorir and Joseph Kibyegon. He had died on the way to hospital.
6. Mark Kipkorir Rotich (PW2), a brother of Sally Chelangat (PW1) was at his shop on 23rd March 2014 at 6.00 p.m. when he heard some shouting from his sister's house. He closed his shop and ran to the scene where he found the deceased, Vincent Kipchumba, lying down. He was bleeding from the head and the lower cheek. There were people at the scene trying to help the deceased, such as Joseph Sang, Cheruiyot and Kenneth. Joseph and Kenneth were 'arresting' the accused for stabbing the deceased.
7. Mark had found a knife at the scene, which Kenneth had. They had called for a motor vehicle and carried the deceased to the road, but he had died before they could get him to hospital. They had taken the accused to the police station. He confirmed in cross-examination that he had not witnessed the accused stab the deceased, but had asked Joseph Sang and others who had stabbed the deceased. The accused had already been 'arrested' when PW2 arrived, and Kenneth had the knife.
8. Joseph Kipngetch Sang (PW3), a medical laboratory technician at Kabianga, was at Sally's bar on 23rd March 2014 at 6.00 p.m., drinking alcohol. He was in a group of about 20 people, among them PW1, the accused and the deceased. He had seen the accused stab the deceased, but they had not exchanged any words. He had tried to give first aid to the deceased, who had been stabbed on the head and lobe of the ear. The accused, who had used a pocket knife to stab the deceased, was present as PW3 tried to give first aid to the deceased. PW3 stated that he had snatched the knife from the accused and handed the knife and the accused to the police. They had called for a motor vehicle to take the deceased to hospital, and he had notified the area Chief, one Benjamin Cheruiyot, about the incident. The deceased had died on the way to hospital.
9. In cross-examination, PW3 testified that he was 30 metres away from where the accused was. He had seen the accused stab the deceased, but he did not hear them quarrel. The accused's sister, one Selina, had witnessed the stabbing, but PW1, who was not serving them with drinks, was not present when the stabbing occurred, but came after. PW3 had called PW2 to assist to take the deceased to hospital.

10. Benjamin K. Cheruiyot, PW4, was the Chief of Kariawet location within whose jurisdiction the offence occurred. He was at home on 23rd March 2014 at 6.00 p.m. when he received a call from a neighbour, Mark Rotich (PW2), informing him that the accused had stabbed the deceased. He went to the scene and was informed that the accused had been arrested and the victim had died. He met the accused and those who had arrested him, Mark, Joseph and Kenneth, on the way. Joseph Sang (PW3) had the pen knife. He took the accused to Sosit Police Station. He then went back to the scene with police officers and took the body of the deceased, which had injuries on the neck and the head.

11. Dr. Shadrack Kiprono (PW5), a medical doctor at the Kericho County Referral Hospital, produced the post mortem report on behalf of Dr. Soi who had performed the post mortem on the deceased but had since left the hospital. He had performed the post mortem to ascertain the cause of death of the deceased, Vincent Kipchumba Korir. The report indicated that the deceased had a stab wound on the head near the left ear measuring 9 inches deep and three inches wide. He had, inter alia, laceration of the left external carotid and jugular veins. The cause of death, according to Dr. Soi, was massive haemorrhage secondary to the deep stab wound and laceration of the major blood vessels in the neck. A copy of the post mortem report was produced pursuant to section 68 (1) (c) of the Evidence Act as exhibit 1.

12. PW6 was Kenneth Cheruiyot Langat. On 23rd March 2014, at around 5.00 p.m., he had gone to the house of Sally (PW1) to take alcohol. There were about 12 people sitting outside the house. He had stayed there for an hour. A fight had ensued between the accused and the deceased, who were sitting with PW6 and others. He knew both the deceased and the accused before the incident. He did not know what made them fight, but he saw the accused stab the deceased on the ear. The deceased was seated on the ground when he was stabbed. PW6 had tried to assist and had brought a chair and hit the accused with it, and the accused fell down and released the knife he was holding. PW6 had seen the knife, which was a short knife, but he could not describe it as it was full of blood. They had tried to rush the deceased to hospital but he had died on the way.

13. He confirmed in cross-examination that he was not seated far from the accused, and that he was able to see clearly as it was around 5.30 p.m. and there was enough light. He had not heard any conversation between the accused and the deceased from where he was sitting, nor could he tell who started the fight. The deceased was drunk but the accused was not too drunk.

14. The investigating officer (PW7) No. 77672 Police Constable George Achola, was attached to the Sosit Police Station at the time material to this case. On 23rd March 2014, at around 7.00 p.m., he was at the station as the crime stand-by for that day when a Chief, Benjamin Cheruiyot of Kalyangwet location came to the station in the company of around 4 people. He had arrested the accused, who was alleged to have killed the deceased.

15. They had also received a knife from one Joseph Kangethe alleged to have been used as the murder weapon, and had booked the accused in the cells. They had then gone to the scene of crime with the OCS and the chief where they had found the body of the deceased outside PW1's house. The body had open wounds on the head, and they had taken it to the Kericho District Mortuary where a post mortem was conducted. PW7 produced the knife alleged to be the murder weapon as exhibit 2.

16. When placed on his defence, the accused elected to give a sworn statement and call no witnesses. He stated that prior to his arrest, he was a shoe repairer at Kiptere. On the material day at about 6.00 p.m., he had closed his workplace. He had shoes that he had been given by a customer called Sally, who used to brew chang'aa. When he arrived at her homestead at Chebetet village, he found many people who were drinking there, one of whom was his sister, Selina. He had sugar and vegetables which he wanted his sister to go home with, so he went to where she was. He then gave Sally the shoes and ordered chang'aa.

17. As he was enjoying his drink, the deceased, Vincent, came and requested the accused to buy him chang'aa, but the accused informed him that he had no money and had to buy things for his family. They had an exchange of words after which one Chebet told the accused to leave since the deceased was drunk. He went inside as Sally had not given him money for the shoes he had repaired, and he was also waiting for alcohol that was being brewed.

18. At around 7.00 p.m., he left with his sister Selina, and the deceased called them to wait for him. It was the accused's evidence that it was the deceased who started the fight while they were on the way home. That the deceased hit him on the mouth and the forehead and he fell down. That the deceased followed him and continued beating him, so the accused took his knife which he used for repairing shoes and stabbed him twice on his right ear and his neck, and the deceased left him and the accused ran after his sister who was running away, screaming. It was his case that while this was happening, only his sister Selina was around.

19. When the accused got to Mark Rotich's shop (PW2), Mark had asked him why his sister Selina was running, and the accused had explained about the fight with the deceased, and that the deceased had gone back to the chang'aa den. The accused had gone back with PW2 and had found the deceased lying down with people attending to him. The accused had told PW2 that they should get a taxi to take the deceased to hospital; that they had waited for the taxi and the deceased was losing a lot of blood; that Joseph, a medical officer at Kiptere hospital had told them he was dead. The accused stated that he had gone with the others to Sosit Police Station where he was arrested and charged in court. He had known the deceased for a long time, and had no grudge against him. He was drunk when they fought and had no intention to kill him. The deceased had been sitting on him, and he had acted in self defence.

20. He confirmed in cross-examination that he was the one who had stabbed the deceased. He had a knife when he went to the drinking den. This was the knife which he used in his business of repairing shoes. He would at times carry his tools of trade home as he had customers who brought shoes to his home, and it was not unusual for him to be carrying his knife. It was only his sister who was present when he fought with the deceased, and he did not call her as a witness as she ran away and left him fighting with the deceased.

21. In his written submissions on behalf of the accused, Mr. Motanya argues that there was inconsistency in the prosecution case with respect to exactly where the deceased was stabbed. The inconsistencies arose, according to Mr. Motanya, because PW3 testified that the deceased was stabbed on the ear lobe and the head, which contradicted the testimony of PW4 that the body of the deceased had wounds on the head and his cheek. Further, that the evidence of PW5, the medical officer- was that the cause of death of the deceased was due to massive bleeding secondary to stab wounds to the head and lacerations of major blood vessels of the neck.

22. His submission was that from this evidence it was unclear the exact part of the body of the deceased was stabbed. He further contends that there was inconsistency with respect to the weapon used in the offence, noting that PW3 had stated that the weapon was bloodstained so he could not describe it, while the investigating officer stated that he had recovered a knife from the scene, but that it had no blood stains. Mr. Motanya wondered whether there was a weapon at all, or whether one was planted by the prosecution. Counsel submitted that the contradictions had created reasonable doubt in the prosecution case. He relied on the case of **Dickson Elija Nsamba Shapwata & Another v Republic CR. APP NO. 92 of 2007**, in which the Tanzanian Court of Appeal had stated:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor or whether they go to the root of the matter”.

23. Mr. Motanya further submitted that the witnesses who were present at the scene all agreed that the accused and the deceased were at a local joint taking alcohol. That according to PW1, the quarrel between the accused and the deceased was over who would buy the other alcohol. That the testimony of PW3 was that the incident took place when both the accused and the deceased were drunk. It was his submission therefore that the incident took place when the accused was intoxicated. He cited section **13(4) of the Penal Code CAP 63 Laws of Kenya** to submit that the accused’s state of mind at the time the offence was committed rules out motive on his part, and the prosecution had therefore failed to prove all the vital ingredients that constitute the offence of murder.

24. The final argument advanced on behalf of the accused is that he acted in self defence. That PW3 testified that a fight ensued between the accused and the deceased and the accused had acted while trying to protect himself. His submission was therefore that the prosecution had failed to prove its case beyond reasonable doubt, and the accused should be acquitted.

25. I have considered the prosecution evidence on record and the sworn statement of the accused in his defence. I have also considered the submissions made by Learned Counsel, Mr. Motanya, for the accused. The prosecution evidence as it emerges from the testimony of PW1, PW3 and PW6 is that the accused stabbed the deceased in the head and cheek or ear. The medical evidence showed that the deceased had stab wounds on the head and neck, and the deceased died from massive bleeding resulting from the stab wounds and lacerations of the major blood vessels in the neck, the carotid artery and jugular vein.

26. From the defence statement, there is a clear admission by the accused that he stabbed the deceased on his right ear and his neck, and that he stabbed him with the knife that he used to repair shoes. Contrary to the submissions by Mr. Motanya therefore, there is no doubt that the deceased was stabbed on the neck and ear, that he was stabbed by the accused, and that the accused used a knife to stab him. The argument that there are contradictions in the prosecution case therefore is not borne out by the evidence on record. Even if there were contradictions.

27. Mr. Motanya has advanced two arguments in the accused’s defence. The first is that he was intoxicated, while the second is that he acted in self-defence. With respect to the first argument, he cites section 13(4) of the Penal Code. It is important to consider section 13 of the Penal Code, which deals with the question of intoxication, in its entirety. It provides as follows:

(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. (Emphasis added)

(5)...

28. I have set out at some length the contents of the sworn statement by the accused. The accused stated in his statement that he was drunk, and that he did not intend to kill the deceased. He also stated, however, that the deceased was drunk, and that he had been told by PW1’s sister, one Chebet, to leave as the deceased was drunk. The implication, as I understand it, was that he was not, himself, drunk. Secondly, the evidence of PW3 was that the deceased was drunk, but while the accused had taken alcohol, he was not drunk.

29. Section 203 of the Penal Code provides as follows:

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

30. ‘Malice aforethought’ is defined at section 206 of the Penal Code in the following terms:

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.

31. The defence of intoxication is raised to show that an accused person did not have the necessary mens rea to commit the offence with which he is charged. The question is in what circumstances would such a defence be available to an accused person, and what is the evidential burden placed on him, if any?

32. The essence of the defence of intoxication is that the accused person was so intoxicated that he was not capable of forming the necessary mens rea to commit the offence of murder. Under section 13(2) of the Penal Code, intoxication shall be a defence if, by reason of such intoxication, the accused did not, at the time of the offence, know that his act or omission was wrong, or did not know what he was doing. Such intoxication, in order to afford a defence, must either have been caused without his consent by the malicious or negligent act of another person, or was such as to render the accused person insane, temporarily or otherwise, at the time of commission of the offence.

33. In **Roba Galma Wario vs Republic [2015] eKLR** the Court of Appeal considered the defence of intoxication and observed that even though it was provided for by law, the scope of its application was narrow:

“31. Though provided by law, it is clear that the defence of intoxication is very narrow in its application. S. 13(4) of the Penal Code should not be read in isolation. It should be read within the confines of Sections 13(1),(2)(a)&(b). The learned Judge considered this defence in her judgment. Was the appellant so drunk that he was driven to temporary insanity? Or was the appellant so drunk that he did not know what he was doing? The learned Judge considered both instances and in citing the case of Manyara v R, (supra) she was well aware that the burden of proof remained on the prosecution in the latter case. She determined that the prosecution had succeeded in proving its case. In the former case, she held that the appellant had done nothing to show insanity due to intoxication.

32. In the case of Kangoro s/o Mrisho vs R, [1956] 23 EACA 532 the predecessor to this Court, the Court of Appeal for East Africa referred to the case of Cheminingwa vs R, EACA Cr. No. 450 of 1955 (unreported), in which it was stated:

“It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused.” See: Joshua Matata Ndonye v R, [2001] Eklr, Cr. No. 122 of 1991 (Kwach, Shah & O’Kubasu JJ.A).

34. From the prosecution evidence adduced before the court, I am not satisfied that the defence of intoxication is available to the accused in this case. First, it is not his defence that he was so intoxicated that he did not know what he was doing, or that his state of intoxication was such as to render him temporarily insane. Nor has he pleaded any of the conditions under section 13(2) of the Penal Code that would allow the application of the defence of intoxication to him.

35. Secondly, the accused was seen by eye witnesses, PW3 and PW6, to pick a fight with the deceased, from whom he was demanding alcohol. He had then pulled out his knife, described as a pocket knife, and stabbed the deceased, who was seated on the ground.

36. There was no indication that the accused had drunk so much that he was unable to know what he was doing, or to form the necessary intention to kill or cause grievous harm to the deceased. The evidence on record indicates that the accused had not been long at the drinking den, he had taken some alcohol but was not so intoxicated as not to know what he was doing.

37. The second line of defence raised by the accused is that he acted in self-defence. He testified that the deceased attacked him, and he was compelled to use his knife to defend himself. The accused asserted in his defence that the only person who was present when he stabbed the deceased after the deceased attacked him was his sister, Selina. He did not, however, call this sister as a witness.

38. More importantly, the accused was seen by not less than three person to get into an altercation with the deceased outside the house of PW1 where they were drinking, pull out his knife and stab the deceased. The evidence of PW3 and PW6, in particular, is clear about the events leading to the killing of the deceased. Both PW3 and PW6 had seen the accused take out his knife and stab the deceased. PW6 had taken a chair and hit the accused, resulting in the accused dropping his knife, which PW6 had taken, and which had later been handed over to the police.

39. There was no evidence that there was a grudge between the prosecution witnesses, particularly PW1, PW3 and PW6, that would lead to their fabricating such an elaborate tale against the accused. I find that the evidence of the prosecution was consistent and credible, and their version of events was reflective of what happened on the night the deceased met his death. The defence, while acknowledging that the deceased met his death at the hands of the accused, merely seeks to shift the blame by alleging intoxication and self-defence. It is my finding therefore that the prosecution has proved, beyond reasonable doubt, that it was the accused who, with malice aforethought, caused the death

of the deceased.

40. I therefore find that the accused is guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code, and I proceed to convict him in accordance with section 215 of the Criminal Procedure Code.

Dated, Delivered and Signed at Kericho this 22nd day of November 2018

MUMBI NGUGI

JUDGE

In the presence of:

Nelson Kenei – Court Assistant

Ms Keli – For the Director of Public Prosecutions

Mr. Nyadimo holding brief for Mr. Motanya for the accused