



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 64 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

ALEX KIPNGETICH *alias* KIPMWETICHACCUSED

JUDGMENT

ALEX KIPNGETICH KIBET *alias* *KIPMWETICH* 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 night of 16th and 17th of September, 2011 at unknown time in Chebunet village of Chebiemit sub location in Marakwet West District within the Rift Valley province, the accused jointly with others not before court murdered *Joseph Kigen Banua*.

The prosecution case is that in the year 2011, PW-4 in this case was working as a bar attendant at Kokwet bar. On 16/9/2011 at around 11 p.m he was sleeping in the bar. He was awakened by noise or screams from the deceased. The deceased was crying in Swahili saying “unaniua nasajakula kitu ya mtu”. PW4 woke up and switched on the electricity lights. He looked through the window and saw *Kipmwetich* the accused herein, beating up the deceased. They were outside, at the front side of the bar. The accused was hitting the deceased all over the body with a piece of wood. The deceased was drunk. The accused later dragged the deceased away as he continued beating him. The witness knew the accused for about 2 years. He was dressed in a blue jeans trouser, black purple sweater and red slippers.

That very same night at around 1 p.m, PW6 was walking on a road after leaving Springs bar at Chebiemit Trading center. He was headed home. He was called by *Alex Kimwetich*. He recognized his voice. He had known him since birth as they are neighbours. He was in front of PW-6. PW-6 walked upto where he was. The accused told PW-6 that there was a luggage he wanted PW-6 help him carry. PW-6 accompanied him to where the said luggage was. It was at Kapsiliot road, about 30 metres away. The said luggage was a drunk person whom PW-6 recognized as *Joseph Banda* (deceased). He saw him using moon light. The accused asked PW-6 to help him by putting his arms over their shoulders and walked with him upto the junction that led to his home. His home was about 300 metres from that point. The accused told PW6 to leave them there and go home. PW-6 did so.

On 17th September, 2011 at about 4 p.m PW3 was called by a pastor known as *Christopher Kangogo* and told to go home as his (PW-3's) step brother had been murdered. PW-3 went home. On the farm near the road he found the body of the deceased in a hole. It was a small hole which fitted only his legs. The body had no shirt but trouser. The face had an injury between the eyes. Police and neighbours had arrived at the scene.

PW-2, a bar attendant at Springs Bar had on 16th September, 2011 seen the deceased lying outside Kokwet Bar, on the grass. He went and turned him. He noted he was asleep. After returning to Springs Bar, the accused went and ordered for a beer. He was served and went away. PW2 closed the bar. The following day he was told by *Kibet* that the person he had seen sleeping outside the bar was killed.

On 19th September, 2011 a Barasa was held two kilometres from Chebiemit police post, about the said murder. Its aim was to find the suspect. PW-2 attended it as well as the accused person. The accused took PW-2 aside and warned him against telling anyone that he had seen him at Chebiemit on Friday. PW-5, a police officer attached then at Chebiemit police, was in the said meeting in company of *Cpl Sambu*, *PC Nicholas* and *APC Kilunda*. They had the name of *Alex Kimwetich* as the suspect. He was present and they arrested him. They took him to Chebiemit police post.

On 21st September, 2011 at 1.00 p.m, PW1 conducted post mortem on the body of the deceased at Marakwet East Sub County hospital. The body appearance were that the face was soiled in blood. Was not pale. There were two cut wounds of about 2cm x 1cm at Supra orbital area. There was petechiac on chest wall bilaterally about 3cm x 4cm. There were bruises on right and left upper limbs around elbow region. Strangulation marks were visible around neck.

Respiratory system had clots on chest wall bilaterally around 5th – 7th rib. Lung was fibrosed and dark in colour. There was vascular congestion around neck region.

There was no cut wound on the scalp. There was right parietal depressed skull fracture. Laceration on skull tuines Subdural clot was noted.

The cerebrum was congested with blood and no brain laceration was noted.

The doctor formed the opinion that the cause of death was asyphxia due to strangulation. The head injury was not severe as to cause death.

On 21st September, 2011 the accused was taken to Chebiemit Hospital for examination and was confirmed fit to stand trial. The accused was then charged with present offence.

The accused gave sworn testimony in his defence in which he stated that on the night of 16th and 17th September, 2011 he was at home. He was with his father till 9.00 p.m when he went to sleep. At about 11.00 p.m he was called by the father (DW-2) who asked him whether he had tethered the cows. He said he did. The father said some had moved to the farm. The accused went to drive it out. He did so and returned to sleep.

The following day on 17th September, 2011 the accused was engaged in diesel business. He bought 60 litres of diesel at Maji Mingi. He returned to his home centre. He wanted to have his bicycle repaired so as to use it ferry the diesel. The accused went to buy a tyre tube at the shop of *Stephen Kosgei*. He was told the shop owner had gone to the scene as his neighbour's body had been found. The accused went to the scene. Police were there as well as neighbours. They collected the body. The accused, *Stephen* and *Francis Banua* got into the police vehicle. They wanted to be dropped at the centre. They were dropped there as police proceeded with the body. When he returned home he found there was a funeral in the neighbour's home. He went there and stayed till 10.00 p.m. The village elder said he wanted to know who were with the accused on 16th September, 2011 at the Bar. The accused was sent to Kapsokwo to call people to attend the meeting the following day. On 19th September, 2011 police arrested Mathew Kemboi as a suspect. The accused was called to help police with investigation. He was taken to Kapsowar police station. He said he is not *Alex Kipnetich*. He did not kill *Joseph Banua*.

DW-2 stated on the night of 16th September, 2011 he was home with his children, accused herein inclusive. They ate supper and at 10.00 p.m the accused went to sleep. At 11.00 p.m the father (DW-2) heard the cows feeding on maize plants. He called the accused to remove them. The accused rose and went to drive them out. Later the father heard accused's radio on. He slept. The following morning at 8.00 a.m he saw the accused in his house. At 5.00 p.m he was at Chebiemit centre when his daughter called him and told him that *Joseph* was killed. He went to deceased's home. Police had taken the body. At night he went to sleep. Later he heard his son was arrested in connection to that offence.

At this juncture the court must determine as to whether the offence against the accused is proved by the prosecution beyond reasonable doubt. The evidence of PW-1 leaves no doubt that the deceased was murdered. He had visible body injuries and died of Asyphxia due to strangulation. The question which then arises is who murdered him? The evidence of PW-4 shows that on the material night, in which the deceased met his death, the accused was witnessed by PW-4 striking the deceased who was drunk and lying outside Kokwet Bar, with a stick. The same night PW-2 witnessed the presence of the accused and the deceased at the place. Later on at the same night, at about 1.00 p.m the accused urged PW-6 to assist him carry a luggage. The luggage turned out to be the deceased. He was helped to carry him upto a junction where accused told PW-6 to leave them and go home. PW-6 left them. When the day came the deceased was found in a shallow hole dead. Later when a Baraza was called to find out the suspect, the accused told PW-2 not to state that he saw him at Chebiemit on Friday. The evidence by these 3 witnesses was not shaken by the defence during cross examination. None of them had a grudge against the accused and their evidence was therefore honestly offered. It shows the accused was at the scene the night the deceased met his death. He had motive to kill him as he had been witnesses by PW4 assaulting the deceased with a stick outside Kokwet bar. There was ample electric light which enabled him to see. He knew both very well before and his evidence is of recognition. The deceased at the time was drunk and lying on the floor. The last person to be seen with the deceased alive was the accused. He was seen by PW-6. PW-6 helped him carry the deceased upto a road junction where accused ordered PW-6 to leave them and go. The deceased had not reached home and the reason why the accused ordered PW6 to leave is suspect. He was out to no good given the circumstances. The only reason why the accused told PW-2 not to state in the baraza that he was at Chebiemit on Friday, was to conceal the murder of the deceased.

Though no witnesses saw him strangling the deceased, the available circumstantial evidence points irresistibly to his guilt. It is incompatible with his innocence and incapable of explanation upon any other hypothesis than that of his guilt.

His defence of alibi is an afterthought. He was seen on the material night by three independent prosecution witnesses. He never covered his defence during cross examination of the witnesses and is just a well-crafted story in which his father made an attempt to buttress hoping it will hoodwink the court in saving his son. The truth however is well laid and settled. The accused murdered the deceased. He is accordingly convicted of the offence of Murder, contrary to *Section 203* as read with *Section 204* of the *Penal Code*.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 1st day of November, 2018

In the presence of:-

Mr. Njihia who is holding brief for Mr. Miyienda for the appellant

Ms. Oduor for the state

Ms Ann - Court assistant

Ms. Oduor:-

We have no previous records. He is a first offender.

Mr. Njihia:-

He is remorseful. He prays for leniency. He has been in custody till 2011. I pray the court considers all this in passing sentence.

COURT:-

I have weighed the mitigation. However it is also important to consider that in the offence an innocent life was lost. The accused is sentenced to serve 25 years imprisonment.

Right of Appeal 14 days.

SIGNED

S.M GITHINJI

JUDGE

1.11.2018