



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL CASE NO. 51 OF 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MAXWELL KIPLAGAT CHIRCHIR.....ACCUSED**

**JUDGMENT**

1. *Patrick Shiuma* died on 11<sup>th</sup> September 2009 at the Moi Teaching and Referral Hospital. He had been admitted into the intensive care unit *three days* earlier. On the day he was taken to the hospital, the police found him *inside* the house of the accused. His clothes were dusty; his body was swollen; and, had extensive scratches. Blood was oozing from his nose and mouth.

2. The village elder (PW3) testified that the accused *told* him that he had beaten up the deceased. The accused denied it. He called a witness to confirm that they were on his farm. He said a mob of between ten to fifteen people was chasing the deceased. The accused's version of events was that the deceased fell outside his gate; and, that he took him into his house for assistance.

3. The Republic brought *information* to the High Court charging the accused with *murder* contrary to section 203 as read with section 204 of the Penal Code. The particulars of the *amended charge* are that on 7<sup>th</sup> September 2009, at around 3:00 p.m. at Cheplaskei village, Saruyot Sub-location, Kipchamo Location, Wareng District of the Rift Valley Province, he murdered Patrick Shiuma.

4. On 21<sup>st</sup> October 2010, the accused pleaded *not guilty* to the *amended charge*. The prosecution called *five* witnesses. The evidence of the *first* witness was taken by Mshila J. The trial resumed before me on 23<sup>rd</sup> July 2014. I explained to the accused his rights under section 200 (3) of the Criminal Procedure Code. He elected to proceed from where my predecessor had left the matter. At the close of the evidence, I found that that the Republic had established a *prima facie* case. The accused elected to give sworn testimony. He called *one* witness.

5. The first State witness was Daniel Shiuma Wapata. He did not witness the murder. On 23<sup>rd</sup> September 2009 he attended the postmortem examination of the deceased at Moi Teaching and Referral Hospital Eldoret. He was accompanied by a police officer from Kiambaa Police Station; and, his sister, Joyce Muteshi.

6. The autopsy was carried out the same day by Dr. Maina Ndiang'ui of Moi University School of Medicine (PW2). He testified that the body had multiple superficial bruises. There was bleeding under the skin on the arms. He said that it was an indication of defence wounds. There were fractures of the 3<sup>rd</sup> and 4<sup>th</sup> ribs. The brain was swollen and bleeding. He formed the opinion that the death was due to bleeding in the brain as a result of a blunt trauma. He produced the postmortem form (exhibit 1).

7. PW3 was a village elder, Alfred Kipngetich Taitai. On 7<sup>th</sup> September 2009, he got a call from *Talam*. He told him that someone had been assaulted. He decided to go there. On the way, he met *Maxwell Kiplagat* (the accused). The accused told him “*Ni mimi nimempiga*” [I am the one who has beaten him]. PW3 found other people at the scene. The victim was still alive. He was lying down. He had been beaten with sticks; and, there was smell of medicine. The sticks were next to the body. He identified the sticks in court.

8. PW3 instructed some youths to get the accused. He called Kiambaa Police Station. The police came later at 10:00 p.m. and took the deceased to Moi Teaching and Referral Hospital. He said the accused told him that the deceased had entered his house; and, that is why he beat him. Upon cross examination, he clarified that the victim was lying outside the house of the accused. He did not speak with the victim.

9. PW4, Vaiza Chepkorir was stood down due to a discrepancy in her names. She was formally known as *Joyce Muteshi Shiuma*. It would seem she converted to the islam; and, changed her identity. She did not return to the stand.

10. PW5 was Police Constable Michael Kithome. A report from the village elder (PW3) was received by the police on 7<sup>th</sup> September 2009. PW5 was then based at Kiambaa Police Post. The report was first made to Inspector Mwamboze. PW5 and other officers went to scene. They found the accused in his room together with deceased. The deceased could neither talk nor open his eyes. He was groaning. The accused told them that the deceased rushed into his compound; and, he thought he was a thief. The accused started beating him. PW5 found a long stick (exhibit 2). He said that the accused used the stick to beat the deceased.

11. PW5 said the body of the deceased was swollen; it had scratches; and, blood was oozing from the nose and mouth. His clothes were dusty. He took the deceased to Moi Teaching and Referral Hospital Eldoret. At first, he preferred a charge of *assault* on 9<sup>th</sup> September 2009. Two days later, the deceased died. He withdrew the charge; and, substituted it with one for murder. Upon cross examination, he said that the stick was inside the room; next to where deceased was lying. He said the deceased and the accused were in the same room. He did not find anyone else in compound.

12. The accused gave sworn evidence. He protested his innocence. He denied that he fought with the deceased. He said the deceased was being chased by a crowd of people; and, that he fell outside his gate. He said the following-

*“On 7.9.2009 at 3:00 p.m., I was cultivating on my shamba with Evans Kiprotich and Joseph Ewaton, (my workers). I heard screams from far. I saw someone run into my compound towards the kitchen. I stopped him. I did not know him. He was drunk and bleeding. I asked him to leave. At my gate he fell down. There were people who had chased him but they did not enter my compound. They were 10 or 15. I did not recognize any as they were far. I went for the village elder, Taitai (PW3). He lives 800 meters away. He came to the scene. I went to Cheplaskiei Centre to get a vehicle to take the person who had fallen at my gate. It was then 6:00 p.m. I could not afford to hire the vehicle. I went back home at about 6:30p.m. I found neighbours around the deceased.*

*“The village elder called the police from Kiambaa. Since it was raining, I and Ewaton carried the deceased to my worker's house. I gave him milk. The neighbours had left. I went to my room to await the police. At 11:00 p.m. the police came and I showed them the deceased. He was unconscious. I accompanied the police to Moi Teaching & Referral Hospital. He was admitted. I was arrested and detained at Kiambaa. I was charged with assault on 8<sup>th</sup> September 2009.....*

*“PW3 was lying when he said I told him I had beaten deceased. I do not know the ‘Tallam’ PW3 referred to. Police found me in my house. I am the one who asked PW3 to call the police. I did not use the sticks produced in court. The police picked the sticks from my kitchen. When police came I was with Ewaton. My family was away. That is the truth.”*

13. Upon cross examination, he conceded that the deceased was removed from a room inside his house. He denied that he told PW3 he beat up the deceased; or, that he accompanied him back to his house. He said that he did not escape; that he instead went to Cheplaskei to fetch a vehicle. He denied that he was arrested by some youths. He said the sticks (exhibit 3) were removed from his kitchen. He said that PW5 did not tell the truth about the location of the sticks. He denied that he beat up deceased inside his house or compound.

14. The accused's sole witness was Joseph Ewaton (DW2). The accused had *not* mentioned him in the statement to the police. DW2 said he was in the farm with the accused when a crowd of ten people chased someone towards their farm. He said the person fell down at the gate. He was bleeding. He said that the accused went to Cheplaskei Centre to fetch a vehicle to take the person to hospital. He did not get a vehicle. He did not return until 5.00 p.m. or 6.00 p.m. He said the deceased was not talking. He said that the accused requested him to assist the deceased. They took him into the kitchen. They tried to give him some milk.

15. Upon cross examination, he conceded that it is quite a distance from the *shamba* to the house of the accused; and, that the accused left the farm at some point. He said the deceased did not have any tablets or medicine. He said the deceased did not ask for water. By the time police arrived at the scene, DW2 had left.

16. I have considered the evidence. I have also considered the written submissions by the learned Prosecution Counsel filed on 25<sup>th</sup> October 2016; and, those by the defence filed on 8<sup>th</sup> December 2016.

17. 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*. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person. Section 206 of the Penal Code defines it as follows;

*“206. 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.”*

18. The death of the deceased is beyond question. On 23<sup>rd</sup> September 2009, PW1 identified the body for postmortem purposes. The cause of death is also known. The autopsy was carried out by Dr. Maina Ndiang'ui of Moi University School of Medicine (PW2). He testified that the body had multiple superficial bruises. There were defence wounds. There were fractures of the 3<sup>rd</sup> and 4<sup>th</sup> ribs. The brain was swollen and bleeding. He formed the opinion that the death was due to bleeding in the brain as a result of a *blunt trauma*. From the defence wounds, there was a struggle between the deceased and his assailant. It was an *unlawful* homicide.

19. The key question then is whether the accused perpetrated this heinous act. I am alive that the legal burden of proof lay throughout with the prosecution. See *Woolmington v DPP* [1935] AC 462, *Bhatt v*

Republic [1957] E.A. 332, Abdalla Bin Wendo and another v Republic (1953) EACA 166, Kaingu Kasomo v Republic, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).

20. There was *no* eye witness to the homicide. But there are a number of facts that *link* the accused to the crime. To start with, the deceased was found by the police *in* one of the rooms *in* the house of the accused. Secondly, exhibit 2, a wooden stick, suspected to have been used to assault the accused was found in the premises. Thirdly, on 7<sup>th</sup> September 2009 PW3, a village elder, was on the way to the scene. He met the accused who told him “*Ni mimi nimempiga*” [I am the one who has beaten him]. The accused in his defence conceded that he met with PW3 on the way. He said PW3 lived about 800 metres from his residence. PW3 found the victim when he was still alive. He was lying down. He had been beaten with sticks; and, there was smell of medicine. The sticks were next to the body.

21. Fourthly, the accused told PW5 that when he saw a mob chasing the deceased, he got the impression he was a thief. That is why he beat him up. The accused admitted that he saw a mob of 10 to 15 people chasing the deceased. He ran from his farm towards the gate. He said-

*“I saw someone run into my compound towards the kitchen. I stopped him. I did not know him. He was drunk and bleeding. I asked him to leave. At my gate he fell down. There were people who had chased him but they did not enter my compound”.*

22. I observed the demeanor of the accused and his witness. I did not believe the accused or DW2. I will explain. First, the accused admitted that the deceased entered his compound. He did not know him. He asked him to leave. He says that the deceased then fell at his gate. DW2 said the deceased “*tried to escape and fell*”. The accused could not identify any of the ten or fifteen people chasing the deceased. I believe PW3’s evidence. He said that soon after the attack, the accused told him that *he* is the one who assaulted the deceased. It is also in tandem with the evidence of PW5 that the accused assaulted the deceased because he presumed him to be a thief. The story of a *mob* chasing the deceased is a *creation* of the accused to *mask* the assault.

23. I also did not also believe the evidence of his *worker*, Joseph Ewaton (DW2). I will again explain. First, the accused did *not* mention *Ewaton* in his original statement to the police. Secondly, DW2 conceded in cross examination, that there was *quite a distance* between the *shamba* of the accused and the house; and, that the accused left the farm at some point. He said the deceased did not have any tablets or medicine. He said the deceased did not ask for water. The accused said it was raining; and, that is why he took the deceased into his house. The evidence of PW3 showed it was not raining. The accused left the deceased in his house and went to Cheplaskei allegedly to get a vehicle to take the deceased to hospital. He did not return until after 6:30 p.m. The accused said that when the police arrived he was with Ewaton (DW2). DW2 on the other hand stated that by the time the police arrived at the scene, he had already left. In short, the defence set up by the accused was hollow and a sham.

24. The truth is that the accused viciously assaulted the deceased on 7<sup>th</sup> September 2009. This is borne out by the autopsy. The attack occurred in the compound or house of the accused. The action was *premeditated* and *unlawful*. The deceased succumbed to those injuries three days later. There was thus *malice aforethought* as defined in section 206 (a) of the Penal Code.

25. When I juxtapose the defence put forth against the prosecution evidence, the defence crumbles. I have analysed the discrepancies between the evidence of the accused and his sole witness, DW2. The entire defence is a red herring. The story of an imaginary mob chasing a thief is a pitiable attempt to mask the assault on the deceased by the accused.

26. I have reached the conclusion that the entire corpus of *circumstantial* evidence points *irresistibly* and *exclusively* to the guilt of the accused. See R v Kipkering arap Koske & another 16 EACA 135 (1949), Sawe v Republic [2003] KLR 364. The chain of events is *complete*; and, I find *no* hypothesis that exonerates the accused. On the totality of the evidence of the witnesses called by the Republic, I find that the charge was *proved beyond reasonable doubt*.

27. The upshot is that the accused, *of malice aforethought, caused the death of Patrick Shiuma by an unlawful act*. It must follow as a corollary, that the accused is culpable of *murder*. I accordingly enter a finding of *guilty*. The accused is hereby convicted.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 17<sup>th</sup> day of January 2017.

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

Accused.

Mr. Misoi for the accused.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.