



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 99 OF 2014
REPUBLIC PROSECUTOR
VERSUS
PAUL KIPKOECH ROTICH ACCUSED
JUDGMENT

The accused faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 18th day of September, 2014 at Olkokwe Trading Centre in Mogotio Sub-County within Baringo County murdered EVANS KIPKOECH KETON”

The accused pleaded ‘**Not Guilty**’ to the charge and his trial commenced on 28/10/2015. The prosecution led by the learned State Counsel called a total of seven (7) witnesses in support of their case.

The evidence of the prosecution witnesses was that on 18/9/2014 at about 7.30pm a group of young men were playing cards in a room at the Olkokwe Trading Centre. The deceased was one of the men engaged in the card game. The accused came into the room and took the cards effectively stopping the game. The accused demanded to know who had accused him of stealing a lantern. The deceased responded that it was true, accused had stolen a lantern. The two began to quarrel. A struggle ensued in which the deceased picked up the lantern in the room and threw it at the accused. The lantern broke and the room went dark. The broken pieces of the lantern were produced in court as exhibits **P.exb 1**.

At this point some of the witnesses ran out of the room. **PW4 KIBUSA KIBIWOTT** who was the chairman of the card playing team told the court that when the lantern was thrown he ran and stood outside the room. There was a light by the pool table outside which enabled him to see. He saw the accused and deceased struggle. **PW4** then saw the accused pull out a knife. Then he saw the deceased fall to the ground. **PW4** moved towards the two and hit the accused with a cup he was holding. The accused ran away.

A crowd gathered and the deceased was rushed to a nearby clinic. He unfortunately died on the way to hospital. The following day the accused surrendered himself at the police station and was placed in cells. He was eventually charged for the murder of the deceased.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied having stabbed and killed the accused.

This court must now analyze the evidence on record with a view to determining whether the charge of murder has been proved beyond reasonable doubt. The offence of murder is defined by Section 203 of the Penal Code in the following terms

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

The prosecution must therefore establish (prove) the following key ingredients beyond a reasonable doubt in order to satisfy the charge of murder

- i. Proof of the fact as well as the cause of death of the deceased
- ii. Proof that the deceased met his death as the result of an unlawful act of omission on the part of the accused
- iii. Proof that said unlawful act or omission was committed with malice aforethought.

On the question of the death of the deceased there can be no doubt. **PW1 FRANCIS KETON** a brother to the deceased stated that upon being alerted that his brother had been stabbed, he and others got a motor bike to rush him to hospital. **PW4** said that he saw that deceased was bleeding from a wound in the chest. After the death of the deceased **PW1** did attend at the mortuary and identified the body to the doctor for autopsy purposes. He gives the name of the deceased as **‘Kipkoech Keton’** (the deceased herein).

PW5 DR. DANIEL WAINAINA testified regarding the cause of death of the deceased. **PW5** confirms that on 23/9/2014 he did perform an autopsy on the body of the deceased. Upon external observation **PW5** noted a deep penetrating cut wound on the left side of the chest. Upon internal examination he noted that the left diaphragm and left lung had been penetrated causing massive bleeding. **PW5** opined that the cause of death was due to **“a single stab by a sharp object resulting in massive bleeding and lung injury”** the doctor filled and signed the post-mortem report which he produced as an exhibit in the case. **P.exh 4**. This was expert medical evidence which has neither been challenged nor controverted by the defence. I therefore find that the deceased met his untimely death due to a single stab wound to the chest.

Having proved the fact and cause of death the prosecution must go further and tender evidence to prove that it was the accused who by an unlawful act or omission caused the death of the deceased.

As stated earlier this incident occurred at a trading centre. There were many people about and the deceased was part of a group of youths who were in a room playing cards. It is evident that the game was taken very seriously in the area as they even had a chairman for the card players’ team.

PW2 PHILEMON TARUS, PW3 EVANS NDERITU, PW4 KIBUSA KIBIWOTT and PW6 SAMUEL KIMULWO were all part of the group who were playing cards. All the above witnesses give the same narration of the events of that day. They state that the accused came into the room where they were playing and took the cards thus stopping the game. The accused demanded to know who had accused him of stealing a lantern. A quarrel ensued when deceased said it was true accused had stolen the lantern. The accused abused the deceased and the two began to scuffle. All these witnesses give consistent evidence and their narration is consistent in all material aspects. Although the incident occurred at night ie 7.30 pm there was a lantern in the room (obviously the youths would not have been playing cards in the dark) which enabled them to see the accused when he came in.

All the witnesses testify that they were present when a quarrel ensued between the accused and the deceased. The deceased threw the lantern in the room at the accused. The room was then plunged into darkness. At that point **PW2** and **PW3** and **PW6** all ran out of the room. **PW4** however stated that he ran to the door of the room and stood there watching events unfold. **PW4** told the court that there were security lights outside where other people were playing pool enabling him to see what was happening. **PW4** saw the accused pull out a knife and he shouted **“Ako na kisu” ‘He has a knife’** to warn others. He then saw the accused move towards the deceased who was lying on the ground and heard the deceased

say '**Amenidunga**' ie '**He has stabbed me**'. **PW4** then hit the accused with a cup which he was holding and the accused jumped over the deceased and ran away. **PW4** looked down at deceased and saw that he was lying in a pool of blood.

PW4 gave clear and cogent evidence. He gave a very precise narration of what occurred. I have no doubt that he was able to see the events clearly. **PW4** remained unshaken under cross-examination by defence counsel. He is categorical that he saw the accused brandishing a knife and immediately thereafter he saw the deceased lying in a pool of blood.

PW2, **PW3** and **PW6** all were all present when the incident occurred. Although they did not actually see the accused plunge the knife into the deceased, they all confirm that the accused and deceased were engaged in an altercation. They all heard the deceased say '**Amenidunga**' after which the accused ran away. Although the accused did not name the accused, it is clear that the person who stabbed the deceased was the man whom he was fighting with who was the accused. He could not have been referring to any other person. The fact that the accused ran away leaving the deceased mortally injured is also evidence of a guilty mind. The witnesses all state that the accused removed the two jackets he was wearing, threw them to the ground and took to his heels. The two jackets were later recovered by police at the scene and were both produced as exhibits. **P.exb 3(a) and (b)**.

In his defence the accused concedes that he was involved in an altercation with the deceased on the material day. He however denied having stabbed the deceased. The accused claims that after he heard deceased say '**Amenidunga**', he ran away and went home to sleep. I find it hard to believe that if the accused had not committed any unlawful act he would ran away leaving his jackets behind and simply go home to sleep. The more natural reaction would have been to stay around, find out who had stabbed the deceased and possibly participate in seeking help for the injured man. The accused goes on to state that even the next day he did not bother to find out what had happened to the deceased. He simply woke up and went about his duties as a boda boda operator. As I stated earlier the accused actions are a clear indication of a guilty mind.

From the evidence of the witnesses, I find that it was the accused who fatally stabbed the deceased. The prosecution witnesses were consistent in their evidence. They all saw the accused and identify him as the man who was fighting with the deceased. The accused was well known to them and they were able to positively identify him by way of recognition. I am satisfied that the *actus reus* for the offence of murder has been proved beyond reasonable doubt and I so find.

The next question is whether the *mens rea* for the offence of murder has been proved. *Mens rea* is described in law as malice aforethought. The prosecution must prove that the accused acted with pre-meditation in stabbing the deceased to kill or grievously injure the deceased. From the evidence of the eyewitnesses it is clear that the accused did not launch a totally unprovoked attack on the deceased. The two had minutes earlier been engaged in a quarrel and the deceased had pointed at the accused as a lantern thief. Moreover it was the deceased who threw the first blow so to speak in that it was the deceased who first assaulted the deceased by throwing a lantern at him. The force of the throw broke the lantern. The two began to struggle and in the course of the struggle the accused pulled out his knife and stabbed the deceased.

Section 208(1) of the Penal Code defines provocation as follows:

“The term “provocation” means and includes except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.....”

In this case the deceased provoked the accused in two ways. Firstly by calling him a thief in the hearing and presence of other persons. Secondly by throwing a lantern at the accused, with the very real

possibility that the lantern could have burst into flames and inflicted serious burns to the accused.

As I earlier stated the accused did not launch an unprovoked attack on the deceased. The deceased acted first. The accused retaliated. This reaction could be said to have been excessive however I find that the accused acted in the heat of the moment. Section 207 of the Penal Code provides that

“When a person who unlawfully kills another under circumstances which, but for the provisions of this Section would constitute murder does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined (by Section 208) and before there is time for his passion to cool, he is guilty of manslaughter only”

Given the circumstances of this case I find that the accused acted due to provocation. He acted in the heat of the moment before there was time for passion to cool. In so acting he caused the death of the deceased. I acquit the accused of the charge of murder and instead I substitute a conviction for the offence of manslaughter contrary to Section 202 of the Penal Code.

Dated and Delivered in Nakuru this 6th day of February, 2017.

Mr. Ngamate for Accused

Mr Chigiti for State

Maureen A. Odera

Judge