



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 71 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

BENJAMIN BETT.....ACCUSED

JUDGMENT

1. Early in the morning of 3rd October 2011, Robert Bor (PW1), found a lifeless body along a footpath. He trained a light on it from his mobile phone. He recognized the remains as those of *Jeremiah Kipkorir Koe* (hereafter *the deceased*). His throat was slit. He knew the deceased well as a village elder. He raised an alarm. The public milled around until 1:00 p.m. when the police collected the body.

2. There was *no* eye witness to the homicide. 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 are that on the night of 2nd and 3rd October 2011 at Kamenjeywa village in Nandi County, with others not before court, he murdered *Jeremiah Kipkorir Koe*.

3. The accused pleaded *not guilty*. The prosecution lined up *ten* witnesses. The trial opened on 15th May 2012 before Mshila J who heard the first *five* witnesses. The trial resumed before me on 21st 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. I proceeded to record the evidence of the remaining *five* witnesses.

4. As I have stated, PW1 discovered the body of the deceased along a footpath. It was at about 5:00 a.m. in the morning of 3rd October 2011. He rang the Assistant Chief, Simeon Tarus (PW2). A mobile phone belonging to the deceased was next to the body. It had been switched off. She notified the son of the deceased, Kiplagat. She gave him the deceased's mobile phone.

5. Simeon Tarus (PW2) was the area chief. His material evidence was as follows-

“I started my investigations amongst the people there. I know the accused person Benjamin Bett – married my sister – he is my brother in law. He was involved in the murder of the deceased Jeremiah Koe. I was told that accused had been arrested – got this report from police. I went to his house – house of accused – didn't find him he had run away. Others arrested were Julius Kemboi and Michael Birech Tanui.”

6. Upon cross examination, he said he did not have details about the murder. The witness confirmed he had not received any formal complaint relating to the accused person. He said that the other two suspects, *Julius* and *Michael*, were neighbours to the accused. They were released by the police.

7. PW3 was Phillip Kipngetich. He is a neighbor of the accused. He testified that the wife of the accused, Nelly, *told* him that she *heard* that the accused was involved in the murder. It is instructive that PW3 was arrested by the police.

8. PW4 was Violet Vihenda. She and four other women were conned by a man known as Vuji. She said Vuji was the same person as the accused. She identified him at the dock. The accused had led them to a *shamba* pretending he could sell them green maize. They agreed to buy the maize for Kshs 9,800. The accused asked them to pay Kshs 2000 to fuel a tractor. They spent a total of Kshs 17,000 in the process. The accused left them in search of the tractor. He disappeared into the thin air. On 8th October 2011, PW4 was summoned by the police at Songhor Police Station to record a statement. She then learnt of the murder.

9. PW5 was Police Constable Nderitu. He and PW6, Sergeant Odede, arrested the accused. They received a tip from an informer. They went to Kibukwa and found the accused standing on the side of the road talking on his cell phone. When the police alighted from their car, the accused took off. He dropped his bag and cell phone. The items were picked up by Sergeant Odede. The police gave chase but the accused disappeared into a sugar plantation. They sought for tracking dogs from Nandi hills police Station. They did not get the accused.

10. Later, at about 5:50 p.m., PW5 was standing outside the Poto Poto Police Post when he saw someone dressed like the suspect. The suspect was talking to a *boda boda* operator. He arrested him. PW5 said he confirmed that the accused was the same person they had seen earlier at Kibukwa. The accused was then transferred to Songhor Police Station. That narrative was largely corroborated by PW6.

11. PW7 was Andrew Rotich. He is a brother of the deceased. On 7th October 2011, he and Joseph Ngetich identified the body of the deceased at Nandi Hills Hospital for postmortem purposes. The autopsy was carried out by Dr. Ruto. The Republic initially called a *Dr. Emmanuel Ruto* (PW8) who was not the author of the postmortem form. The State stood him down. The report (exhibit 2) was eventually produced by Dr. Ambrose Oluoch (PW10) under the provisions of section 77 of the Evidence Act.

12. The conclusion in the autopsy report was that the death resulted from a “*severe penetrative abdominal/chest injury; and, deep neck cut wound (slit throat)*”. Dr. Oluoch also produced a report as to the mental fitness of the accused (exhibit 1). He concluded that the accused was fit to stand trial.

13. PW9 was Inspector Samuel Mandila. He was the investigating officer. On 3rd October 2011, he went to the scene. He found the body of the deceased lying in a pool of blood. He arrested some suspects. The name of the accused was mentioned as well as one *Kipchumba* (who is still at large). He said that after interrogating some suspects in the cells, the accused was implicated in the murder. He said that a boy, Kimutai, overheard the wife of accused saying the accused killed the deceased. The boy was not called to the stand, notwithstanding that he had been bonded.

14. Upon cross examination, PW9 conceded that he got his information from PW3; and, that the latter was one of the people he had arrested. He said that PW4 also implicated the accused. He said that Julius Kemboi had a land dispute with deceased. He testified that the deceased was following up on the fraud by the accused against PW4 and other women. He was aware of a formal complaint about the scam. He was not present when the accused was arrested.

15. When the accused was paced on his defence, he made an *unsworn statement*. He protested his innocence. He said he is a broker in the business of green maize. He said he thought he was to answer charges of obtaining by false pretences. He was surprised to be charged with murder. He said the witnesses merely suspected him. He knew the deceased. He said they had no dispute. He denied killing the deceased. He admitted that he ran away at Kibukwa when uniformed police alighted from a private car. He said he had no idea why the other suspects, including Michael Tanui and Robert Kipkemei were released.

16. The learned defence counsel filed written submissions on 2nd March 2017. The learned Prosecution

Counsel elected *not* to file final submissions. I have paid heed to the evidence and the defence submissions.

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.”

18. There are *three* key ingredients that *must* be present to complete 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.

19. From the evidence, there is absolutely *no* doubt about the death of the deceased. The body was identified by Andrew Rotich. He is a brother of the deceased. On 7th October 2011 he and Joseph Ngetich attended a postmortem examination at Nandi Hills Hospital. The autopsy was carried out by Dr. Ruto. From the injuries on the body of the deceased, I entertain *no* doubt that the death was *unlawful*. The postmortem report produced by PW10 states that the cause of death was a “*severe penetrative abdominal/chest injury; and, deep neck cut wound (slit throat)*”.

20. The only live question now is whether the accused, of *malice aforethought*, killed the deceased. From the evidence, it is clear that there was no *eye witness*. The entire case for the prosecution is built upon *circumstantial evidence*. In *R v Kipkering arap Koske & another* 16 EACA 135 (1949) the court held-

“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.”

21. The evidence tending to implicate the accused was from *three* key witnesses: The first is PW2. He is the area Chief. He testified that the accused-

“Was involved in the murder of the deceased Jeremiah Koe. I was told that accused had been arrested – got this report from police”

22. There are a number of legal and evidential issues from that testimony. First, it amounted to *hearsay*. Secondly, during cross examination, the witness admitted that he did not have firsthand information about the murder. The Chief also confirmed that he had not received any formal complaints on the accused person. He also said that the other two suspects, *Julius* and *Michael*, were arrested and later released by the police.

23. The second witness who implicated the accused was PW3, Phillip Kipngetich. He is a neighbor to the accused. He testified that the *wife* of the *accused*, Nelly, *told* him that she *heard* that the accused was involved in the murder. That is classic hearsay. Nelly Cheptoo, the wife of the deceased) *failed* to take the stand. It also telling that PW3 was initially *arrested* by the police.

24. The third witness who pointed a finger at the accused was PW9, Inspector Samuel Mandila. Upon cross examination, he conceded that he got his *information* from PW3; and, that the latter was one of the people he had arrested in connection with the homicide. PW9 testified that a boy, Kimutai, *overheard* the wife of accused saying the accused killed the deceased. The boy was not called to the stand, notwithstanding that he had been bonded. Again, it is pure hearsay.

25. The other incriminating evidence is the conduct of the accused: he ran away when PW5, Police Constable Nderitu, and PW6, Sergeant Odede, tried to arrest him at Kibukwa Centre. The accused disappeared into a sugar cane plantation. He was arrested later at 5:50 p.m. by PW5 near Poto Poto Police Post.

26. Finally, there is the evidence of PW4, Violet Vihenda. She and four other women were the victims of an elaborate scam by a man known as *Vuji*. She said *Vuji* was the same person as the accused. When she first complained to the police, it was in relation to the accused obtaining money by falsely pretending he could sell her and her friends green maize. She learnt of the murder from the police. The nexus is an allegation by PW9 that the *deceased* was following up on the complaint by PW4.

27. The accused flatly denied killing the deceased. He was of course not forthright. His shifty demeanor was quite telling. I did not buy his story. But the accused may have lied; he might have held some cards close to his chest; or, he might have concealed some vital information. There are lingering *suspicions* that he killed the deceased; or, had a hand in his death. But they remain just that. The entire case hangs on a very thin strand of circumstantial evidence. Unfortunately there is no *compelling* circumstantial evidence pointing *irresistibly* and *exclusively* to the culpability of the accused. See *R v Kipkering arap Koske & another* 16 EACA 135 (1949).

28. Quite apart from the denials by the accused, he is entitled under our Constitution; and, the Criminal Procedure Code to remain *mute*. See *Republic v Henry Kiplimo*, High Court, Eldoret, Criminal Case 43 of 2006 [2015] eKLR. In the end there are manifest gaps in the evidence that leave some *doubt* whether the accused is the *one* who perpetrated this heinous crime. I remain alive there *were* other suspects; some still at large. Our criminal justice system puts the *burden of proof* entirely upon the shoulders of the prosecution. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.

29. The evidence in this case has *not* reached the threshold of *proof beyond any reasonable doubt*. In short, there is *no* concrete evidence *linking* the accused to the *murder*. I would then *not* say that *all* the elements of the charge of *murder* have been laid out; or, at any rate that the accused *killed* the deceased with *malice aforethought*. The accused person is hereby *acquitted*.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 16th day of March 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Mr. Isiji for Ms. Chepkurui for the accused.

Ms. R. Karanja for the Republic.

Mr. J. Kemboi, Court clerk.