



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 74 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

NICKSON KIPCHIRCHIR RUTO..... ACCUSED

JUDGMENT

The accused **NICKSON KIPCHIRCHIR RUTO** 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 31st day of July, 2013 at Banita in Rongai District within Nakuru Country, murdered RONALD KIPRONO KORIR”

The accused entered a plea of ‘**Not Guilty**’ to the charge. His trial commenced on 22/10/2015. The prosecution led by the learned State Counsel called a total of five (5) witnesses in support of their case.

The background of the case is that the accused and the deceased were well known to each other. The accused had hired the deceased to build a house for his mother. On 31/7/2013 the two were taking a meal in a hotel run by one **ALFRED OUMA PW3** at Machine Centre. **PW2 EDWIN KIPROTICH** was also in the same hotel taking lunch. **PW2** told the court that whilst in the hotel, the accused received a phone call from his brother. **PW2** who was a Kalenjin and could understand the language being spoken says he heard the caller enquire about the progress of the house. At that point the deceased shouted that he will not build the house. The accused then got up and hit the deceased on the head with a rungu. The deceased fell down bleeding. The accused then picked up a plastic chair and aimed it at the deceased. The chair hit a post and broke.

PW2 rushed out of the hotel to seek help for the deceased **PW4 DANIEL KIPRUTO KITOR** was a *boda boda* rider who was called after the incident. He rushed to the hotel and carried the deceased on his motor bike to hospital. The deceased was treated and his wound was stitched and bandaged. **PW4** then returned the deceased to his house. Later that same day at about 6.00pm the deceased passed away.

At the close of the prosecution case the accused was found to have case to answer and was placed onto his defence. He gave an unsworn defence in which he denied the offence of murder. 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 as follows by Section 203 of the Penal Code.

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

In order to prove the charge of murder the prosecution must tender evidence to prove the following ingredients of the offence, beyond reasonable doubt

- (1) Proof of the fact as well as the cause of death of the deceased.
- (2) Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused
- (3) Proof that said unlawful act or omission was committed with malice aforethought.

PW2 told the court that he saw the deceased being hit on the head. **PW1 DAVID SERONEY** was a brother to the deceased. He told the court that after being informed of the incident he rushed to the home of the deceased where he found him lying dead inside his house. These witnesses who knew the deceased well identified him as **‘Ronald Kiprono Korir’**.

Evidence regarding the cause of death was tendered by **PW5 DR. DANIEL WAINAINA** the doctor who performed the autopsy on the body of the deceased **PW5** stated that upon examination of the body he noted a cut wound on the left temporal region of the head. Upon an internal examination **PW5** noted a linear fracture of the skull with bleeding into the cranial cavity. As a result of his examination **PW5** concluded that the cause of death was **‘Head injury with skull fracture following blunt force trauma’**. The doctor filled and signed the post-mortem report which he produced in court as an exhibit **P. exb 2**. This was expert medical opinion evidence and was neither challenged nor controverted by the defence.

It is not lost on this court that the deceased did not die immediately at the scene of the assault. He was in fact treated in hospital and his wound stitched and bandaged. He died a few hours later at home. The question then is whether it was the blow to the head or some intervening factor which led to the death of the deceased. I note that the deceased died on the same day *ie* 31/7/2013 a few hours after he had been assaulted. As such it would be safe to conclude that given the short time span it must have been the assault which led to his death. The doctor’s evidence was clear that the cause of death was blunt force injury to the head. Under cross-examination by defence Counsel **PW5** clarified that

“It is not unusual for one to be hit on the head and to die much later due to slow bleeding into the brain”.

I therefore find that the direct and proximate cause of the deceased’s death was the blow to the head and there is no evidence of any later intervening act which caused this death.

The next question is whether it was the accused who struck the fatal blow that killed the deceased. **PW1** who was a brother to the deceased did not witness the incident. He only arrived at the deceased’s home much later in the evening.

PW2 EDWIN KIPROTICH told the court that he did witness the incident as he was in the same hotel with the accused and the deceased. **PW2** told the court that on the material day at 1.00pm he was in the hotel taking his lunch. The accused who was also in the hotel received a phone call. The conversation was conducted in Kalenjin a language which **PW2** understood. He heard the caller ask the accused if their mother’s house had been built. The deceased who was the man the accused had hired to build the house began to shout saying that he would not build the house. **PW2** then says that he saw the accused get up and hit the deceased on the head with a rungu. The deceased fell down. The accused also picked up a plastic chair which he aimed at the deceased. However the chair hit a post in the hotel and broke. The broken plastic chair was produced in court as an exhibit **P. exb 1**.

PW3 ALFRED OUMA was the owner of the hotel where the three men were taking their lunch. He told the court that he did not witness the actual assault as he was in the kitchen. **PW3** confirms that on that day

both the accused and the deceased were in his hotel taking lunch. He had served the two their meal and returned to his kitchen. Whilst in the kitchen **PW3** heard a commotion of people shouting. Since the people were quarrelling in Kalenjin language he could not understand what was being said. Then **PW3** heard a loud bang and he rushed out of his kitchen to check what was amiss. He found the deceased lying on the ground, with a broken plastic chair next to him and the witness also saw the accused placing a *rungu* back into the waist of his trouser. **PW3** identified the broken chair **P. Exb 1**.

The testimony of **PW3** corroborates that of **PW2** in all material respects. The fact that **PW3** saw the accused returning the *rungu* into his clothing confirms that this was the *rungu* which the accused had used to hit the deceased.

During the course of the hearing some confusion arose as to whether the deceased was hit with a *rungu* or a chair. **PW2** and **PW3** both stated

that the accused hit the deceased on the head with a *rungu*. This *rungu* was never recovered as the accused pocketed it after the incident and then left the hotel.

PW6 PC PETER MUTHIGA however seemed to imply in his evidence that the deceased was struck with the plastic chair. **PW6** explained to the court that he was **not** the investigating officer. The investigating officer was one **Corporal Ogetto** who **PW3** explained had passed away in 2012. **PW3** was one of the officers who went to the scene and collected the body of the deceased. This witness confirmed that he did **not** record the statements of the witnesses. As such he was not apprised of the full facts of the cases. More importantly **PW6** did not himself witness the assault on the deceased.

PW2 was the eye witness. He gave a clear account of what he saw. **PW2** stated that the accused first hit the deceased with the *rungu* and thereafter he tried to hit the deceased with the plastic chair. The chair hit a pole in the hotel and broke. He remained unshaken under cross-examination action by defence counsel. The testimony of **PW2** regarding the events at the hotel was properly corroborated by **PW3** who saw the accused pocketing the *rungu*. The incident occurred in broad day-light. It was 1.00pm and the witnesses were all in the hotel taking their lunch. **PW2** was close enough to the accused and deceased that he could hear their conversation.

PW2 was an independent witness. He was at the venue on his own. He was not aligned to either the accused or the deceased. He had no reason to slant his testimony one way or another. I find that **PW2** was a truthful and an honest witness who was merely stating what he himself had observed. I am inclined to take the account given by **PW2** and **PW3** as the correct account of the events of that material day.

PW4 DANIEL KIPRUTO was the *boda boda* operator, who ferried the deceased to hospital. He told the court that on the way to hospital he enquired from the deceased what had happened to him. The deceased told **PW4** that he had been hit by '**Kipchirchir**' the accused herein. This statement by the deceased to **PW4** would amount to a '**dying declaration**'. The deceased identified the person who had fatally injured him shortly before his death. Whilst this dying declaration would not on its own serve to implicate the accused in this statement, taken together with all the over evidence available, serves to make a compelling case that it was the accused who assaulted the deceased.

In his defence the accused readily admits that he was involved in an altercation with the deceased in the hotel on the material day. The accused also admits that he struck the deceased although he claims that he hit the deceased with the plastic chair. However for the reasons stated above I find that the accused actually struck the deceased on the head with a *rungu*.

From the evidence on record I am satisfied that it was the accused who fatally struck the deceased. Therefore the *actus reus* for the offence of murder has been proved beyond reasonable doubt.

The last ingredient of a murder charge requiring proof is the '**mens rea**' or the mental element of the offence. '**Mens rea**' is described in law as '**Malice aforethought**' and is defined as follows by Section 206 of the Penal Code.

“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 harm is caused or not, or by a wish that it may not be caused

(c)

(d)”

In his defence the accused claims that he acted due to provocation by the deceased. The accused claimed that the deceased abused him saying that he (the accused) was sleeping with his own mother. **PW2** who was present at the scene and who was able to understand the Kalenjin language the two were speaking did not mention any such abuse. **PW2** only stated that the deceased did begin to shout at the accused saying that he would not build the house he had been hired to put up. Counsel for the accused did not during cross-examination put it to the witness that the deceased had abused the accused in this matter. I am sure that if indeed such vile abuses had been hurled at the accused, he would not have failed to mention that fact to his advocate. I find that this defence is merely an afterthought and a fabrication by the accused in an attempt to explain his attack on the deceased. I therefore find that no such abuses were uttered to the accused and reject the defence of provocation. The accused further claimed that after hitting the deceased it was he who called for the boda boda to take the deceased to hospital and the accused even claims that it was he who paid the deceased’s medical bill of Ksh 200/=. None of these claims is supported by the evidence on record. **PW2** says it was he who went out to search for transport to take deceased to hospital. **PW3** confirms this position. **PW4 DANIEL KIPRUTO** was he *boda boda* operator who took the deceased to hospital. He told the court that it was **PW2** who called him. **PW4** made no mention at all of the accused.

The accused has not shown the court any receipt to prove that he paid the medical bill for deceased. **PW1** the deceased’s brother did not mention that accused paid the hospital bill nor did defence counsel put this to **PW1**. Thus these are nothing more than a series of lies by accused seeking to paint himself in a good light.

Whilst it is true that the deceased may have shouted telling the accused that he would not build his mother’s house, this did not warrant the accused to attack the deceased in the manner that he did. The words uttered by the deceaseds did not amount to abuse. The deceased was unarmed and there is no indication that he made any attempt to assault the accused. The accused launched a brutal attack on an unarmed man. In hitting the deceased on the head with the rungu the accused clearly intended to kill or at the very least cause grievous harm to the deceased. I am satisfied that malice aforethought in terms of Section 206(1) of the Penal code has been proved.

Based on the foregoing, I find that the charge of murder has been proved beyond reasonable doubt and I accordingly convict the accused of the same.

Dated and Delivered in Nakuru this 5th day of May. 2017.

Mr.Wanga holding brief for Ms Njeri

Mr. Chigiti for State

Maureen A. Odero

Judge

Mr. Motende – Treat as 1st offender.

Court - Mention 31/5/2017 for mitigation. Accused to remain in custody.