



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 37 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

SHADRACK KIPROBON.....ACCUSED

JUDGMENT

1. The day was 13th June 2010. The accused was high on *busaa* and *chang'aa*. Witnesses said he was brandishing a modified double edged *slasher*. He met John Kipserem (PW5) on the road. Without any warning or provocation, he stabbed him on the back. As he tried to fend off further attack, the accused cut him on both hands. PW5 ran for dear life. The same fate befell Eliud Melly (PW1). The accused asked him for Kshs 100. He declined. The accused cut him on the leg.

2. *Benjamin Rugut* (the deceased) was not as lucky. He was popularly known as "*five five*". His lifeless body was found along a road in Kombe village. It had a stab wound on the stomach. He had bled copiously. It explained his blood-soaked clothes. The police were alerted and took the remains to the Kapsabet District Hospital morgue. They also took PW1 and PW5 to the same hospital for treatment.

3. There was *no* eye witness to the murder. But the accused *confessed* to the police that he stabbed the deceased in *self defence*. The Republic brought information to the High Court charging the accused with *murder* under section 203 as read with section 204 of the Penal Code. The particulars are that on 13th June 2010 at Kombe Sub-location, Kombe Location in Nandi Central District of the Rift Valley Province, he murdered *Benjamin Rugut*.

4. He pleaded not guilty. The prosecution lined up *ten* witnesses.

5. PW1 was Eliud Melly. He was in the company of Milton Kiprop (PW2). They ran into the accused along the road. He demanded Kshs 100 from them or "*he slashes away [their] hearts*". He grabbed them but they managed to free themselves. He said it was dark. Milton managed to escape from the scene.

6. As PW1 was running away, he met a man nicknamed "*five five*" (the deceased). The deceased asked him to slow down. As they walked they met the accused the second time. He demanded money from PW1. PW1 resisted. The accused hit him on the leg with a sharp object. PW1 took off leaving "*five five*" behind. A fellow villager, Koech, escorted him home. On the way, he found "*five five*" lying on the ground. He was injured. Police officers later came in a vehicle and took PW1 to hospital. The body of "*five five*" was in the police vehicle.

7. Upon cross examination the witness denied that he told Milton (PW2) that the deceased was killed by the accused. He also denied that the deceased and Milton had attacked and robbed the accused of KShs 2000.

8. That evidence was largely corroborated by Milton Kiprof (PW2). The witness said the accused was holding a *panga* or *machete* at the time. He identified the *slasher* in court (exhibit 1). He said the accused chased after him but could not catch up. PW2 went home and hid there. After some minutes Eliud (PW1) arrived with another villager, Koech. He said the deceased was slightly drunk when he met him at about 6:30 p.m. On cross examination, he said he knew the accused. He hails from the village. Although it was a “bit dark” he was able to see the *panga*.

9. PW3 was Michael Busienei. He is a brother of the deceased. On 13th June 2010 at about 8:00 p.m., he was asleep. He heard some shouts. He stepped outside. He found a neighbour, Jennifer Tirop. She told him that the deceased was stabbed at Kombe Trading Centre. When he reached there he found the deceased lying on the ground. He was already dead. He accompanied the police to the homestead of PW1. He said that when the accused was arrested, he had a sword (exhibit 1). He said the accused attempted to stab him but the police overcame him. Later, he identified the body of the deceased for postmortem purposes.

10. PW4 was the area chief. On 13th June 2010, he received a report of the murder. He went to the scene. He found the body lying on the side of the road. It was near the house of David Keter. He was told by members of the public that the accused had stabbed three people. He summoned the police. He accompanied them to Kimutai’s house where the accused was arrested.

11. PW5 was John Kipserem Limo. On 13th June 2010, at about 7:30 p.m., he was heading home. He met the accused. The accused was carrying a slasher with a black handle (exhibit 1). As they passed each other the accused stabbed him on the back. It caught the witness unawares. He raised his hand to protect himself. The accused cut him on both hands. The witness displayed his scars to the court.

12. PW5 screamed and ran off to his brother’s (Peter’s) house. His brother’s wife took him to a clinic. As he was undergoing treatment, police officers arrived. There was a body inside their car. PW5 did not examine the body. The police told him it was the body of Benjamin Rugut (deceased). On cross examination, he said he did not know the accused before the incident; and, that they had no disagreement. He denied he was drunk. He knew the deceased by the nickname “55”.

13. PW6 was Police Constable Ngugi. He and a colleague, P. C. Salim, went to the scene. They found the deceased lying on the side of road. He was dead. The body had a stab wound. The scene was about 10 kilometers from Kapsabet Police Station. The public was milling around the scene. While at the scene, PW6 received information that the accused had stabbed two other people; Eliud Melly (PW1) and PW5. They took the body of the deceased. They passed by the clinic where PW5 was being treated. They also went to Eliud's house. They took PW1 and PW5 to Kapsabet Hospital for treatment.

14. PW6 received information from one Kipngetich that the accused was hiding in Kimutai’s house. PW6 and other officers went there. They broke into the house. The house was about 500 meters from the scene of the murder. It was a one roomed house. They found the accused inside. He was violent and resisted arrest. The police had to shoot in the air; and, it took about ten men to subdue the accused.

15. The police recovered the *slasher* under the bed. The witness said it had some blood at the tip. On 17th June 2010 PW6 attended the postmortem examination at Kapsabet Hospital Mortuary. The body was identified by relatives. On cross examination, he said there was no evidence of a struggle at the scene of the murder. There were no broken bottles as alleged by the accused. He said the accused was drunk and violent.

16. PW7 was Assistant Superintendent of Police Samuel Gathirwa. At the material time, he was the O.C.S Kapsabet Police Station. On 13th June 2010, the accused was booked into custody. He spoke to the

suspect. It became apparent that the accused was making a confession. PW7 stopped him. He told the accused he could only record the statement in the presence of a relative. On 15th June 2010 Mr. Stephen Koech came to visit the suspect. He was a first cousin to the suspect. PW7 briefed him. The cousin chose to be present at the recording of the statement.

17. Learned counsel for the accused objected to production of the statement. I conducted a *trial within a trial* to determine admissibility of the statement. PW7 testified that he sent P.C. Rotich to bring the suspect to his office. He asked the suspect whether he knew Stephen. He was affirmative; and, he indicated he was comfortable with the presence of his cousin. The suspect was cautioned. He then made the statement in *Nandi* which was translated into English by P.C. Rotich. The statement was recorded in English. The accused and his cousin Stephen Koech were present throughout.

18. PW7 then read over the statement to the accused. He asked him whether he had any corrections. He had none. The accused then signed the statement. PW7 prepared a certificate. A certificate of translation was also made and signed by P.C. Rotich. He clarified that the cousin, Stephen, did not sign the statement. He confirmed that when he took the statement, he was of the rank of Chief Inspector of Police.

19. Upon cross examination, the witness clarified that he took the statement on 15th June 2010 and not 17th June 2010. He said the accused was arrested on 9th June 2010. He said the demeanor of accused was normal. The accused had no visible injuries. He said he neither threatened the accused nor gave him any promises.

20. That evidence was largely confirmed by Police Constable Rotich (PW8). He read over the entire statement back to accused in *Nandi*. He confirmed that a relative Stephen Koech was present. He said that neither the accused nor Stephen raised any objections. He said that no threats or promises were made to the accused. He said the accused had no visible injuries; and, never sought an adjournment of the session.

21. For considered reasons on the record, I ruled that the confession was taken in *accordance* with section 25A of the Evidence Act. It was thus *admissible*. It was marked as exhibit 2. In the material part, the accused stated-

“While walking at around 8:00 p.m., I heard one by the name Kipketer alias ‘five five’ behind me leaving [sic] towards me. He called me by name and on catching up with me, he requested me to give him a cigarette. I gave it to him and we both sat down and each of us smoked a cigarette. Kipketer borrowed Kshs 50 from me but I refused. On refusal, Kipketer smashed a beer bottle against a tree and it broke. He then used the bottle to stab me on the right thigh. Due to the rage, I stabbed him with a slasher”

22. PW10 was Police Officer James Kamau. He was then the officer in charge of the crime desk at Kapsabet Police Station. William Kemboi, the Asstant Chief Kombe village, called him. He informed him that there was a murder in the village. He and two other officers went to the scene. It was at Kombe village.

23. They found the body of the deceased lying by the roadside. There was a stab wound on the stomach; his clothes were soaked in blood. The accused was not at the scene. He, the two officers and members of the public arrested the accused at Kimutai’s house. They recovered the slasher. It had been modified into a double edged slasher. The handle was made of rubber material (exhibit 1)

24. PW9 was Dr. Brenda Chepkoech. She produced the postmortem report carried out by her colleague, Dr. Langat. The autopsy was done on 17th June 2010 at Kapsabet District Hospital. The opinion of the pathologist was that the death resulted from *“penetration by a sharp object through the stomach leading to internal haemorrhage.”*

25. PW10 interrogated a number of persons. They included John Kipserem (PW5), Eliud Melly (PW1)

and Milton Kiprop (PW2). He said Eliud was stabbed on leg. He said Eliud went to house of Benjamin Rugut to seek assistance. I noted on the record that the witness had poor memory. He sought to refresh his memory from some notes. It took him nearly *five minutes* to do so.

26. Upon cross examination he said the accused looked normal or sober when he was arrested. He said there was no broken bottle at the scene. He said the accused was very violent at the time of the arrest; and, it took about ten people to effect the arrest. That marked the close of the Prosecution's case.

27. When the accused was placed on his defence, he tendered an *unsworn* statement. I will reproduce it *in extenso*-

"I am a farmer. On 13th June 2010; it was a Sunday. I was not working. I woke up at home; then went to take busaa until 10:00 a.m. and returned home. After lunch, I went to take changaa until 4:00 p.m. I then went to a bar and drunk until 6.00 p.m. I went to the shopping Centre until 7:30 p.m. I bought some household goods and went home.

"I met three people at a corner. I was smoking. The three asked me for Kshs 50. I told them to come for it at home. They insisted on Kshs 50. They grabbed me and threw me into a water logged ditch. I asked them why? They hit him on the head and threw me onto a barbed wire fence. They stole my Kshs 2000 and ID card. They beat me. I went to my friend's house, Kimutai. He was not there. I opened [the] door. I slept there.

"At night I was beaten by police. I was arrested and taken to Kapsabet Police. I was taken to hospital. I slept at the station without clothes. I was later given a jacket.

"The three people who had initially attacked me included 'five-five' who is the deceased. I never spoke to him. I do not know PW1. I did not have a knife or slasher. I did not stab PW1 and PW2. All I had was a paper bag from the shop. I never saw PW5 (Kipserem). I do not know who killed deceased."

28. That marked the close of the defence case. I have carefully appraised the evidence. I have also taken into account the final submissions by *Mr. Marube*, learned counsel for the defence, filed on 15th March 2017. The learned Prosecution Counsel opted *not* to make any submissions.

29. 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.

30. From the evidence, there is absolutely no doubt about the death of the deceased. Michael Busienei (PW3) is a brother of the deceased. He identified the body for postmortem purposes at Kapsabet District Hospital mortuary. PW6 also attended the postmortem examination on 17th June 2010. The opinion of the pathologist was that the death was due to *penetration by a sharp object through the stomach leading to internal haemorrhage*.

31. Police Constable Kamau (PW10) said the body had a stab wound on the stomach; and, the clothes worn by the deceased were soaked in blood. From the injuries described by PW10 and PW9 (the pathologist) I entertain *no* doubt that the cause of death was *unlawful*. The only live question now is whether the accused, of *malice aforethought*, killed the deceased.

32. From the evidence, it is clear that there was no eye witness to the murder. The first question would be *identification*. PW1 and PW5 knew the accused. He lived in the village. PW1 and PW2 said it was *dark*. But he and PW2 were able to see the accused. He testified that the accused hit him on the leg with a sharp object. PW1 took off leaving the deceased behind. PW5 was also attacked by the accused at about 7:30

p.m. The accused was carrying a *slasher* with a black handle (exhibit 1). As they passed each other the accused stabbed him on the back.

33. Under ordinary circumstances, the identification would have been in doubt. But the gap is *sealed* completely by the *confession* made by the accused. I found that *all* the conditions precedent and antecedent to making a confession or admission under section 25A of the Evidence Act were fully met. There were eight reasons for my decision. First, the accused was *cautioned* in the *Nandi* language of the nature of the statement. Secondly, the accused had no visible injuries, and, the details in the P3 form were not brought to the attention of PW7. Thirdly, I was satisfied that the statement was not recorded by coercion or any promises to the accused. Fourthly, the words spoken by the accused were translated directly by P.C. Rotich to Chief Inspector Gathirwa who took down the statement. Fifthly, at the material time Superintendent Gathirwa had the *rank* of *Chief Inspector of Police*. Sixthly, the translator, P.C. Rotich, made a certificate of translation. Seventh, the accused was in the company of an *independent witness* or relative Stephen Koech who understood *Nandi* language and was present throughout the recording. Eighth, the statement was read back to the accused and agreed with it. He signed it. The statement was also signed by Chief Inspector Gathirwa.

34. The accused confessed that he *stabbed* the deceased (“*five five*”) with the *slasher*. That corroborates the evidence of PW1, PW2 and PW5 on *identification*. It also erases *all* doubts that the accused is the person who delivered the mortal wound. However, the accused stated in the confession that he acted in *self defence*. He said the deceased smashed a beer bottle against a tree and used it to stab him on the thigh. The accused reacted by stabbing the deceased with the slasher.

35. 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). Once the accused pleaded *self defence*, the burden was on the Republic to *disprove* it.

36. In this case, I find the allegations of *self defence* to be gibberish. I have three reasons. First, there was *no* evidence that the *accused* was *stabbed* with a broken bottle on the thigh. Secondly, there is the clear evidence of PW1. When PW1 was running away from the accused, he met a person locally known as “*five five*” (the deceased). He asked him to slow down and accompany him. They ran into the accused again. He demanded money from PW1. PW1 resisted. He testified that the accused hit him on the leg with a sharp object. PW1 then took off leaving the deceased behind. There was no evidence that the deceased was the *aggressor*.

37. On the contrary, it is the accused that stabbed PW1, PW5 and the deceased. There was *no* evidence of *provocation* in all the cases. The accused was on a murderous streak. Thirdly, from the evidence of PW6 and PW10, the two police officers, no broken bottle or bottles were found at the scene. The accused had confessed that the deceased smashed a bottle against a tree and used it to stab him. From an evidential and legal standpoint, the Republic has *disproved* the fact that the accused acted in *self defence*. See *DPP v Morgan* [1975] 2 All ER 347, *Beckford v Ford* [1987] 3 All ER 425.

38. Let me also get some other matters out of the way. First, I do *not* believe the accused’s story that PW1, PW2 or PW5 attacked him or stole Kshs 2,000 from him. On the contrary, it is the accused who demanded money from PW1, PW2 and PW5. He stabbed PW1 and PW5 without any provocation or warning. His *confession* gives him away.

39. Secondly, I accept that the accused was thoroughly *drunk*. He had been drinking *chang’aa*, *busaa* and other substances for the better part of the day. But it was *self-induced* intoxication. I am doubtful that it would, on its own, have afforded a defence to the charge. See *Kupele ole Kitaga v Republic*, Court of Appeal, Nakuru, Criminal Appeal 26 of 2007 [2009] eKLR.

40. That leaves the question whether 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.”

41. I stated earlier that that the accused was thoroughly *drunk*. He had been drinking *chang’aa*, *busaa* and other substances for the better part of the day. He attacked PW5 as they were passing each other. They had no grievance. It was a *sudden* and *unprovoked* attack. The same may be said of the attack on PW1 and PW2. The accused demanded Kshs 50 from PW1. It was not forthcoming. He cut him on the leg. There is *no* evidence that the deceased provoked the accused. I have already found that the accused did *not* act in *self defence*.

42. But a combination of all those factors casts *doubt* whether the accused *intended* to cause grievous harm or kill the deceased. There is no doubt that he caused actual *grievous harm*. That would have brought him within section 206 (b) of the penal code-*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*.

43. But what about his *mental* condition? There is clearly no *motive* for the attack. Of course, the prosecution was *not* obliged to prove motive. But its absence casts some of doubt on the *intention* of the accused. The prosecution is obliged to *prove* the *intention*.

44. I have considered the decision cited to me by *Mr. Marube*, learned counsel for the defence, in *Nzuki v Republic*, Court of Appeal, Nairobi, Criminal Appeal 70 of 1991 [1993] eKLR. In that case, the accused walked straight into a bar, pulled out the deceased without uttering a *single* word, and stabbed him to death. The court found those facts to be *unnerving*. It held-

“No doubt the prosecution is not obliged to prove motive, but just as its presence can greatly strengthen the case for the prosecution, so its absence can weaken it. See the case of *R v Sharmal Singh s/o Pritam Singh: Sharmal Singh s/o Pritam Singh v R (PC)*, [1962] EA 13 at page 17 letter C. In the instant appeal, there was a complete absence of motive. The offence with which the appellant was charged, tried and convicted was committed in an environment of beer drinking and dancing to the music from a juke box. Except for the appellant’s bare statement in his unsworn testimony that on the material date at 7.00 pm he was drinking beer at Beehive Bar, there is absolutely nothing on the record of the superior court from which it can be implied that the appellant had any one of the intentions outlined above when he unlawfully assaulted the deceased as is set out above with fatal consequence. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the superior court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and that the same had been discharged to its satisfaction in view of the circumstances under which the offence in question was committed. Having not done so, and having regard to the environment in which the offence preferred against the appellant was committed as is mentioned above, we are uncertain whether or not malice aforethought, a necessary ingredient of the offence of murder, was proved against the appellant beyond any reasonable doubt. In the absence of proof

of malice aforethought to the required standard, the appellant's conviction for the offence of murder was unsustainable. His killing of the deceased amounted only to manslaughter."

45. The circumstances in the present case are chillingly similar. I thus find on the evidence that the accused *killed* the deceased; but he *lacked* the requisite *mens rea* for *murder*. See also *Raphael Kimasi v Republic*, Court of Appeal, Nyeri, Criminal Appeal 61 of 2013 [2014] eKLR. It follows as a corollary that the charge of murder has not been laid out. On the evidence, the law and the precedents, the accused is liable for *manslaughter*. I accordingly *substitute* the charge of murder with the *lesser* but *cognate* offence of *manslaughter*. The accused is hereby *convicted* of *manslaughter* under section 205 of the Penal Code.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 2nd day of May 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Mrs. Chelashaw holding brief for Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.