



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 130 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JOSPCHAT KIRUI.....ACCUSED

JUDGMENT

The accused **JOSPCHAT KIRUI** 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 25th day of December, 2014 at Kiplobo village in Kuresoi District within Nakuru County, murdered JULIUS KIPRONO”.

The accused entered a plea of ‘**Not Guilty**’ to the charge and his trial commenced on 11/11/2015. The prosecution called a total of seven (7) witnesses in support of their case.

PW1 SAMUEL CHUMO told the court that on 24/12/2014 he held a party in his homestead in honour of recently circumcised youths. Several villagers including the accused and the deceased attended the celebration.

At about 2.00am the accused began to be a nuisance by switching off the lights and **PW1** told him to leave. The accused left the venue and shortly thereafter the deceased also left with one ‘**Benard**’. **PW1** then heard a commotion outside. When he went out to check, he found he said ‘**Benard**’ lying on the ground with a cut on his hand. A short distance away the deceased lay bleeding heavily from a deep cut to his neck. **PW1** and others tried to rush the deceased to hospital but he died on the way.

PW6 BERNARD KIPNGENO MUTAI confirms that he was an attendee at the party hosted by **PW1**. The witness confirms that the accused was also present at the party.

At about 2.00am **PW6** left the party to proceed home. He states that as he walked home the accused came and cut him on the hand using a masai sword. **PW6** returned to the home of **PW1** where his hand was attended to. Then he went home and slept. The next day **PW6** heard that the deceased had been killed.

The matter was reported to the police who came to the scene and removed the body of the deceased to the mortuary. Upon completion of police investigations the accused was arrested and charged with the offence of murder.

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 a sworn defence in which he categorically denied having killed the deceased.

This court must now analyze the evidence on record in order to determine whether the charge of murder has been proved to the standards required in law, which is beyond reasonable doubt.

The offence of murder is defined by Section 203 of the Penal Code Cap 63, Laws of Kenya 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 is required to adduce evidence sufficient to prove beyond reasonable doubt, the following crucial ingredients of the offence

- (i) The fact as well as the cause of the death of the deceased.
- (ii) That the deceased met his death due to an unlawful act or 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 whatsoever. **PW1** told the court that he saw the deceased lying on the ground with a deep cut to his neck on the material night. Other witnesses who testified including **PW2 WESLEY KIPKURUI**, **PW3 GILBERT KETER** and **PW4 PAULINE CHELANGAT** have all told the court that they saw the deceased lying critically injured and they all assisted in efforts to rush the deceased to hospital for treatment. However unfortunately the deceased succumbed to his injuries before he reached hospital. All these witnesses who knew the deceased well identify him as '**Julius Kiprono**'.

Evidence regarding the cause of death was given by **PW5 DR. EDWARD MWANG'OMBE**, the doctor who performed the autopsy on the body of the deceased. **PW5** told the court that he saw a deep cut across the neck of the deceased, which cut extended from the jaw to the chest. Based on his examination **PW5** formed the opinion that the cause of death was '**hypovolumic shock due to severe haemorage secondary to sharp trauma to the left common carotid artery**'. **PW5** filled and signed the post mortem report which he has produced as an exhibit in the case **P. exb 1**. This was expert medical opinion evidence and was neither challenged nor controverted by the accused. I therefore find that the accused met his untimely death as a result of having been cut across the neck with a sharp object.

The next question is whether sufficient evidence has been adduced to prove that it was the accused who unlawfully cut and killed the deceased.

The prosecution have sought to rely on a statement allegedly made by the deceased in which he identified '**Josphat**' as the man who cut him. **PW1, PW2, PW3** all stated that as he lay dying the deceased told them that it was '**Josphat**' who had cut him. Thus the prosecution seeks to rely on this as a '**dying declaration**' to implicate the accused in the murder of the deceased.

Section 33(a) of the Evidence Act provides that a statement made by a dead person as to the cause of his death or as to the circumstances of the transaction which resulted in his death in cases where the cause of death of the deceased person comes into question, is admissible as evidence. However a '**dying declaration**' cannot on its own amount to sufficient evidence to implicate an accused person.

In **OLALE & OTHERS Vs REPUBLIC [1965] E. A 555** the court held that

"A trial Judge should approach the evidence of the dying declaration with necessary circumspection. It is generally speaking unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration"

Likewise in **DZOMO CHAI Vs REPUBLIC HCCRC No. 13 of 2001** it was held

"Although the court can in law solely rely on such evidence there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction"

In this case it has been alleged that the deceased said he had been injured by one '**Josphat**'. He has only given one name of his assailant. The deceased did not specify which '**Josphat**' he was referring to. It has not been shown that the accused was the only person known as '**Josphat**' in that vicinity. It must be remembered that this incident occurred at night. It was dark. There is no evidence that there were electric lights in the area. All the witnesses have testified that it was raining very heavily on the night in question. In those circumstances would the deceased have been able to make a clear and unmistakable identification of his assailant. I think not.

Aside from this '**dying declaration**' there exists no corroborative evidence either placing the accused at the scene of the attack or positively identifying the accused as the one who inflicted the fatal injuries on the deceased. No other witness saw the accused attack the deceased at all.

PW1 told the court that he did not see who cut the deceased. He only heard a commotion outside after the deceased, the accused and Bernard **PW5** had left his homestead. **PW1** said he went out to check and found **PW6** nursing a cut wound on his hand. They heard the sound of a man groaning in pain nearby and upon checking found the deceased lying a short distance away having been fatally injured. Neither **PW2**, **PW3** or **PW4** witnessed the events leading to the attack of the deceased and none of these witnesses is able to state with certainty that it was the accused who cut the deceased across the neck.

The prosecution witnesses have all mentioned one '**Bernard**' as the one who told them that it was accused who cut the deceased. The said '**Bernard**' testified as **PW6**. He told the court that the accused stabbed him shortly after they left the party. However **PW6** made no mention of having seen the accused attack or kill the deceased **PW6** stated that after the attack on his person by accused. He (**PW6**) went back to the home of **PW1** where his hand was bandaged. Thereafter he went home to sleep. He only learnt the following day that the deceased had been killed. He did not see who killed the deceased. **PW6** states in his evidence that

"I was told that accused killed the deceased"

PW6 reiterated under cross examination that

“I did not see accused kill the deceased. I was only told this “

PW6 has not mentioned the names of the persons who gave him this information. This remains hearsay evidence which is not admissible an evidence against the accused.

The fact that the accused had attended the same party with the deceased, the fact that **PW6** identified the accused as the one who attacked him and cut his hand all these form a basis for ‘suspecting’ that it was the accused who may have also assaulted and cut the deceased. However in the absence of any direct or tangible evidence implicating the accused in this murder suspicion will not suffice. In **SAWE Vs REPUBLIC [2003] KLR 364** the Court of Appeal held as follows

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt. As this court made clear in the case of MARY WANJIKU GICHIRA Vs REPUBLIC Criminal Appeal No. 17 of 1998 (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence”

In the present case I find that the evidence being relied on is that a pure suspicion.

The testimony of **PW7 INSPECTOR DANIEL OOKO**, who was the investigating officer served only to muddy the waters and added more confusion into the case. **PW7** claimed that he recovered a sword, the weapon which was allegedly used to inflict the fatal injuries on the deceased. No other witness made mention of having seen any sword at the scene. This sword had no blood stains. If indeed it had been injured to cut the carotid artery of the human being (which is a major artery) then the sword ought to have been drenched in blood.

In his evidence **PW7** claimed that his investigations revealed that accused and deceased had fought at the party **PW1** made no mention of any fight or disagreement between the two men nor did any of the other witnesses who attended the party. **PW7** goes onto stated in his evidence

“A scuffle ensued in which the accused cut the deceased”.

Under cross-examination **PW7** says

“The host Samuel Chumo witnessed the scuffle”

The said Samuel Chumo who was the host testified as **PW1**. At no time did he mention in his evidence having witnessed a scuffle between the accused and the deceased much less having seen the accused cut the deceased. **PW7** went on to state under cross-examination that

“The other victim Bernard saw the accused hack the deceased”.

PW6 who was ‘Bernard’ stated categorically that he did **not** witness any attack on the deceased.

PW7 went on to state that he established that during the party the accused who was armed with a sword was chasing people away. This is a blatant lie. None of the witnesses who attended that party mentioned anything of the kind. Indeed **PW1** the host told the court that it was he who chased the accused away as he was being a nuisance by switching off the lights. It is quite evident that **PW7** was not an honest witness. He contradicted the evidence of several prosecution witnesses. **PW7** was out to colour his evidence in order to implicate the accused in this murder.

On the basis of the evidence tendered before me, I am unable to find with certainty that it was the accused who cut and killed the deceased. The prosecution have failed to prove the *actus reus* of the offence of murder beyond reasonable doubt. In the circumstances the charges cannot hold. Accordingly I enter a verdict of ‘**Not Guilty**’ and I acquit the accused under Section 306(2) of the Criminal Procedure Code. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 16th day of June, 2017.

Ms Kerubo for accused

MAUREEN A. ODERO

JUDGE