



REPUBLIC OF KENYA
IN THE HIGH COURT KENYA AT ELDORET
CRIMINAL CASE NO. 47 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

PAUL KIBET MUTAI.....ACCUSED

JUDGMENT

INTRODUCTION.

Paul Kibet Mutai was the accused herein was charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 9th day of July, 2007 at Kaplamai village in Nandi south District of the Rift valley province murdered Simion Kipsang Chirchir.

THE EVIDENCE

The Prosecution's case is that both the accused and the deceased were good friends and worked together as security guards in Tinderet Division. According to **PW1, James Kibii Tanui** a shopkeeper, on 8th July 2007 at about 7.30pm he was at his shop when the accused approached him and asked him if he had seen the deceased. The accused was carrying a spear in his hand. He told the accused that he had not seen Kipsang the deceased. The accused walked away after telling PW1 that he would kill him (deceased). Fifteen minutes later, the deceased went to the kiosk and asked PW1 if had seen the accused. He told him that he had gone to kiosk but left but was asking where he was. On the next day PW1 learnt that the deceased had been killed. He visited the scene at about 4.00 p.m. where he found the deceased's body lying with visible blood on the chest.

PW2, Joel Kipyego Mutai was a farmer at Tinderet Division Chemamul Village. His testimony was that on a date he did not state at about 6.00 p.m. as he was going to the shop to buy medicine he met both the accused and the deceased wrestling as if they were playing. The deceased had pinned the accused on the ground. After he asked them whether they were fighting, the deceased rose up and walked away. The accused also immediately left the scene while running towards his house. PW2 walked away towards his house and he stood outside his house for about an hour. Thereafter, he retired to bed. On the next day which was a Monday the accused's brother one Kipkorir informed him that the deceased was lying somewhere on the ground. This was about 6.30a.m. He proceeded to the scene where he confirmed that the deceased had died. The body had a wound on the chest. He returned home and informed his father of the incident. Thereafter, he sent his children to inform the chief. He accompanied the chief to Songor Police Station where the report was made. The police then visited the scene and took away the body to Nandi Hills Hospital Mortuary.

PW3, Gladys Chebet also hailed from Tinderet. She testified that on the 9th July 2007 at about 7a.m. both the deceased and the accused worked in her farm as casual labourers until 3pm. Her evidence was that they both related quit well. On the following morning she heard screams of a man. Together with other family members they rushed to the scene where they found the deceased had already died. The body lay in the farm of the family of the accused.

In cross examination PW3 clarified that she was not certain of the date that the deceased and the accused worked in her farm. All that she recalled was that the deceased died a day after he left her house.

PW4, Robert Kiprotich Chirchir was a younger brother to the deceased. He witnessed the postmortem of the body of the deceased being done on 11th July 2007.

Both **PW5 Corporal Henry Otieno Micha** and **PW6 Richard Kiptum** Superintendent of Police investigated the case. Both worked at Songor Police Station. PW6 was the then OCS of the Police Station. According to PW5, the death of the deceased was reported to the police station by one Wilson Ruto who was a grandfather of the deceased. Together with the OCS they visited the scene where a pair of grey sandals believed to belong to the accused were recovered. He produced them in court as exhibit. He was also present when the post-mortem exercise was done on 11th July 2007 by a Doctor Aoko Onyango. Others in attendance were Robert Chirchir (PW4) and Paul Mutai. He further testified that other exhibits were recovered from the scene, being 3 arrows, one bow, and a spear head which were taken to the police station by the members of the public. He produced them as evidence.

In Cross examination PW5 confirmed that the deceased's Grandfather did not witness the murder.

PW6 who also visited the scene in corroborating the evidence of PW5 testified that the body lay at a location away from the murder scene. He together with his colleagues traced the murder scene at a distance of about 500 metres from where the body lay. The murder scene was a disturbed spot which is where a pair of sandals was recovered. He recorded the statements of the prosecution witnesses. He further stated that the accused was initially arrested by members of the public who handed over to Administration Police who in turn took him to Songor Police Station. His further evidence was that after interrogating the accused, the accused told him that the deceased wanted to kill him with an arrow. In self defence the accused took away the arrows the deceased had and stabbed him (deceased). Both the bow and the spear were recovered at the scene of murder.

PW7, Doctor Daniel Kemboi from Nandi Hills District Hospital, produced the postmortem form that had been filled by Doctor Aoko ONyango who previously worked in the same hospital for five years. He was familiar with her handwriting. The postmortem was done on 11th July, 2007. It indicated that the deceased had a stab wound on anterior left chest. There was haematoma on the anterior chest wall. The left lung had collapsed. There was also laceration on the left upper lobe of the left lung measuring 6 centimetres long. The conclusion was that the cause of death was respiratory arrest due to left haemothorax and laceration of the left lung.

PW7 in addition produced a P3 form in respect of the accused person. It had been filled by a Doctor Ongeru of the same hospital whose handwriting and signature PW7 was familiar with. His evidence as shown in the p3 form was that the accused had multiple bruises on the head, face and left chin. The left hand also had some bruises. The injuries were about three days old. The degree of injury was assessed as harm. A blunt object was used to inflict the injuries. The accused was also assessed as fit to stand the trial.

After the prosecution closed its case the court ruled that the accused had a case to answer. He was accordingly put on his defence. He gave an unsworn statement of defence. He stated that on the 9th of July, 2007, he spent half of the day with the deceased where they worked at the home Chebet. At 1p.m. they each went their ways. At 6.00 p.m. he reported at his usual place of work at Tinderet Estate in Nandi Hills where he worked as a security officer. He returned home on the following morning. On 11th July, 2007, he worked as usual from evening and returned home on the following morning. As he approached

his home he was confronted by a group of people who were accompanied by the chief and they all wanted to arrest him on claim that he had murdered the deceased. He denied he had anything to do with the death of the deceased. The chief asked him to accompany him to the police station (Sogor) where he was informed that he had murdered the deceased. He was held in custody for five months and thereafter charged accordingly. His further defence was that he related very well with the deceased who was his longtime friend and was therefore shocked to be associated with his death.

Both the prosecutor and the defence did not make any submissions both at the close of the prosecution's and the defence cases. The court was urged to rely on the evidence on record.

EVALUATION OF EVIDENCE

From the summary of the prosecution's evidence it is clear that none of the prosecution witnesses saw the accused killing the deceased, or do an act that may have led to the death of the deceased. The very remote evidence that linked the accused to the death of the deceased was the evidence of PW2. His evidence was that he saw both the accused and the deceased wrestling. However, when he confronted both with the question as to whether they were fighting, none answered him and instead each left their way. He thereafter never saw any of them but heard on the following day that the deceased was dead. He in fact visited the scene at 6.30 a.m. and saw the body of the deceased. PW1 indicated that when the accused was at his kiosk he was carrying a spear. He was shown a spear by the prosecutor which he stated was shorter than the one the accused was carrying while he was at his kiosk. In this respect he testified as follows;

"I see a short spear in Court. The one I saw was longer. It was about 2 metres. I cannot tell whether this one in court is the head of the spear I saw."

From that statement it is clear that the exhibit that was produced in court purportedly as the murder weapon could not have been the same spear which the accused was carrying on the date the deceased was killed. Furthermore, at the time PW2 saw the deceased and the accused wrestling, the accused was not carrying a spear. Indeed, after a short while he separated with the deceased. It is therefore extremely difficult to conclude that it is the accused who killed the deceased with the spear he was seen with by PW1.

The other piece of evidence tending to link the accused to the death of the deceased was the evidence of PW5, 6 and 7. Their evidence regarded the recovery of the sandals, spear, bows and arrows from the scene of the crime. According to the three witnesses, the sandals belonged to the accused. Unfortunately, none of them told the court why they thought that the sandals were of the accused person. For instance, it was never said that the accused used to wear the said sandals. There was also no evidence from a close relative of the accused who would have confirmed the relationship between the sandals and the deceased person. So then, who was the source of the information that the sandals undoubtedly belonged to the accused? The court, based on the evidence on record, is unable to unravel that mystery. At the best, the police ought to have subjected the sandals, bow, spear and arrows to a DNA analysis with a view to establishing whether the accused could be linked to them. The omission of such vital evidence was a total blow to the prosecution case.

Again, PW6 who was the investigating officer alluded that the accused admitted to having killed the deceased in self defence. The statement, per se, amounted to an admission. However, the same was not reduced in writing into a confession that would be admissible as evidence. Hence, PW6's words were a mere hearsay piece of evidence which the court cannot rely on.

It follows then that the police merely charged the accused on account of circumstantial evidence. Such evidence can only stand the test of the law if there is no other coexisting circumstances which would weaken or destroy the inference that it is the accused who murdered the deceased. Further, the inculpatory facts must be incompatible with the innocence of the accused and be incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused. In the case of **Alex Miseki Wambua Vs Republic (2008) e KLR** the Court of Appeal while expounding on the principle as cited in

the case of **Simoni Musoke Vs R (1958) E.A, 715** which cited with approval from the privy council decision in **Teper –Vs- R (952) ac (480 at P.489)** stated as follows:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

In **Prosecutor V John Ndungu Njoki & Another [2012] e KLR High Court at Nakuru murder Case 112 of 2007**, the learned judge R.P.V Wendoh J. stated as follows;

“The Court of Appeal has re-affirmed the above position in the recent case of Peter Moate Obero & Gideon Kamau Mburu v Republic, Criminal Appeal No. 177 of 2008 (Mombasa) when the court said:-

“It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of he accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before drawing the inference of the accused’s guilt for circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference... with those safeguards in place circumstantial evidence is as good as any direct evidence which is tendered and accepted as to prove a fact.”

Needless to say, from my above analysis of the evidence, it is clear that the circumstantial evidence brought forth against the accused cannot meet the threshold to nail him. Although he gave an unsworn statement of defence whose elasticity could not be tested by way of cross examination, it is trite that the burden of proof solely lies with the prosecution to prove their case beyond all reasonable doubt. They failed to meet this threshold. What is available is purely evidence based on suspicion, and suspicion can never found a conviction against an accused person. Let me emphasize that in as much as there is no direct evidence against the accused, the manner in which the investigations were done was shoddy. The police did not seem to be keen to piece up evidence that would pass the test of the law. As a result, I would not hesitate to say that this is a good case in which the accused must go free.

In the premises, I find that the prosecution did not prove that it is the accused who murdered the deceased and did not discharge their burden in proving their case beyond all reasonable doubt. I find him not guilty of the offence of murder contrary to Section 203 of the Penal Code and I acquit him accordingly.

DATED and DELIVERED at ELDORET this 13TH APRIL, 2016.

G. W. NGENYE - MACHARIA

JUDGE

In the Presence of :-

1. Mr. Mitey holding brief for Mr. Misoi for the accused
2. M/s Mokuu for the State