



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL CASE NO. 19 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JONATHAN KIPLIMO.....ACCUSED**

**JUDGMENT**

1. In the evening of 23<sup>rd</sup> March 2011, at Bugar Trading Centre, Joshua Chemwolo was stabbed with a sharp object. It penetrated through the 6<sup>th</sup> and 7<sup>th</sup> ribs and into his heart and lungs. He succumbed to his injuries the same night. The murder weapon was never recovered.
2. The accused on the other hand claimed that as he drove towards Bugar, he saw some stones blocking the road. It was misty or drizzling; and, he sensed some danger. He drove over the stones damaging his gear box in the process. About ten men attacked his car. They broke the rear windshield using a hoe. He went to report the matter at Iten Police Station. As he made the report, a group of people came to the crime-desk and claimed that he killed the deceased. The accused was arrested.
3. 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 23<sup>rd</sup> March 2011 at Bugar Trading Centre, Keiyo North District of the Rift Valley Province, he murdered Joshua Chemwolo Kiplagat.
4. The accused pleaded not guilty. The prosecution lined up eleven witnesses. Their testimony went as follows. PW1 was Police Constable Timothy Ngetich. At 8:30 p.m., he was manning the crime-desk with Corporal Maroko at Iten Police Station. The accused came in and reported that he had been attacked at Bugar. PW1 said the accused looked “disturbed or nervous”. PW1 knew the accused who was an Administration Police Officer attached to the D.C. Keiyo South. The accused had driven the vehicle into the Station. It was a grey Nissan Sunny B12 registration number KAR 414G. Its rear windscreen was smashed. Inside the vehicle was a *jembe* which the accused claimed was used in the attack.
5. Soon thereafter, a group of about six people came into the police station. They reported that the accused killed the deceased. They denied that they attacked the accused. As the matter seemed complex, PW1 referred it to the station commander, Chief Inspector Stephen Gichiri. The accused was taken into custody. PW1 and Inspector Gichiri visited Iten hospital the same evening where they found the body of deceased. Upon inquiring from the medical attendant, they learnt that by the time the deceased was brought to the hospital, he was dead. The body had bruises on the face; the clothes were bloodied; and there was a wound on the left side of the chest.
6. PW2 was Mark Kiprop. On the material day he was at Bugar bus stage. He was in the company of the deceased. He said the deceased wanted to travel to Delin Camp Site. It was about 6:30 p.m. He then heard a scream from 40 metres away. He rushed there. He found the deceased on the ground. He had been stabbed on the back. The deceased was speaking; he asked to be rushed to

hospital. PW2 and other people took the deceased to Iten hospital in a *matatu*. He said he did not know the accused; and, that he did not see him. I note that his evidence was markedly different from his earlier testimony on 19<sup>th</sup> September 2012 before Azangalala J (as he then was) when he testified as PW1.

7. The *matatu* conductor was PW4. On 23<sup>rd</sup> March 2011, at about 6:30 p.m., she was at the stage at Bugar Trading Centre. She heard some screams. She went there and found the deceased. He was bloodied and lying on the ground. He was not talking. PW4 was requested to take the deceased to hospital. Her driver declined; he said he was too tired. The brother of the deceased (PW5) volunteered to drive the *matatu* to Iten Hospital. The deceased was put in the car. When they arrived at the hospital, the deceased was pronounced dead. They were advised to report the matter to Iten Police Station.
8. Like I said, PW5, Amos Kipchirchir Serem, was a brother to the deceased. He was with the deceased at Bugar at 6:30 p.m. They approached the main road. He left the deceased to buy airtime. He then heard people screaming fifty metres away. He went there. He found the deceased lying on the ground next to the road. Blood was flowing from his chest. He saw a lorry at the scene. He said he did not see the accused's car until he got to the police station. He made efforts to take the deceased to the hospital. This version of evidence was strikingly different from his earlier testimony on 19<sup>th</sup> September 2012 before Azangalala J (as he then was). He had then testified as PW2. I will revisit the matter shortly.
9. PW6 was Alex Kiplagat. He also heard the screams. The screams emanated from a distance of about 20 or 30 meters away. He went there. He claimed that by that time, the body had been removed from the scene. He said someone told him the accused had assaulted the deceased. He could not recall who told him. He did not see the accused. He claimed he was drunk until the following day. He said he could not recall writing a statement to police.
10. The learned State Counsel sought leave to declare the witness hostile. I granted leave. The witness was shown his statement at paragraph 2 where he had stated as follows:

*“I remember at 7.00 p.m., on 23.3.2011.....at stage one person KAR 414G in a grey car came, a person stopped the car. He had a knife, he stabbed deceased on back. He went back to car and went towards Iten.....deceased fell on ground. I know accused.”*

11. The witness retracted the statement. The statement was marked for identification (MFI 3). I noted on the record that the witness had a *shifty gaze; and, he seemed drunk*. PW7, Patrick Kiprop, was also declared a hostile witness. Upon cross-examination by the learned State Counsel he denied the contents of his statement to the police (MFI 4). In that statement, he had stated-

*“I remember 23.3.2011 at 7.00 p.m. me and Alex Kiplagat, Edwin Kiplimo Chirchir, Mark Kiprop and Joshua (deceased) were at stage at Kapsowar waiting to board a matatu to Kuswa.....lorry came going to Bugar. KAR 414G saloon tried to overtake the lorry. The saloon was about to hit deceased. Deceased asked ‘why do you want to hit me’. Driver came out (accused) stopped, came out and stabbed him with a knife. ....returned to his car and left.....it was not dark, I could see. We screamed..... People came..... We took him to Iten Hospital. I know accused by name.”*

12. He now denied that he saw the accused or the vehicle he was driving. I noted on the record that he was *hesitant* in giving answers or *evasive*. Upon further examination by learned defence counsel, he disowned the signature on the statement and its contents. I will again revisit this aspect of evidence.
13. PW3, Edwin Kiplimo, also responded to the screams. He said he was drunk and never got to where the screams were emanating from. At first, he said he did not recall recording a statement with the police that evening at 10:30 p.m. When he was shown the original statement and his signature, he conceded that it was his statement. From his demeanor, I recorded that the witness seemed *unsettled and hiding something*. He denied seeing the motor vehicle driven by the accused. He said he did not see the accused on 23<sup>rd</sup> March 2011.

14. PW8 was Dr. Connie Ongeti. She conducted an autopsy on 30<sup>th</sup> March 2011 at Iten Hospital Mortuary. The body was identified by PW10, the father of the deceased. The head of the deceased was bloodied; there was a bruise of 2 to 3cms diameter on the forehead. There was blood in the mouth and nose cavity. The back had a penetrating stab wound measuring 4 cms by 1.5 cms between 6<sup>th</sup> and 7<sup>th</sup> ribs and into the heart and lungs. In the opinion of the pathologist, the cause of death was severe internal haemorrhage secondary to a penetrating stab injury to the heart and lungs. She produced the postmortem report (exhibit 1).
15. PW9, Chief Inspector Ngetich, is a gazetted scene of crimes officer. He produced a series of photographs of the motor vehicle registration number KAR 414G at the police station; and, of the body of the deceased taken at the mortuary (exhibit 2). The photographs were taken on 23<sup>rd</sup> March 2011. He also produced the accompanying report (exhibit 3).
16. PW11, Police Corporal Ndambuki, was the investigating officer. He testified that the deceased is related to PW2 and PW5. He learnt from the two that the accused had abruptly stopped his vehicle, alighted, pursued the deceased and stabbed him on the back and left shoulder with a sharp object. He called the scenes of crime officer who took photographs of the car and the body of deceased. The police did not get the murder weapon. On 24<sup>th</sup> March 2011 PW11 recorded all the witness statements except that of Francisca Wanjiku (PW4). He testified that the accused claimed he had encountered a road block set up by robbers. PW4 told the investigating officer there was no such road block. PW11 did not interview the accused's passenger, Kipchumba. He said the accused declined to call Kipchumba.
17. Upon cross-examination by Mr. Marube, learned counsel for the accused, the witness said that PC Ngetich and Inspector Gachiri initially handled the matter. He conceded that he was not in the Reports Office on 23<sup>rd</sup> March 2011; and, that he took over the matter formally on 24<sup>th</sup> March 2011. He never visited the scene. He saw the *jembe* inside the accused's vehicle at the police station. He removed it and kept it at the station. He clarified that his evidence was based on what the witnesses told him. He said the complainants came to station about 15 minutes after accused made a report at the station.
18. He was of the view that PW2, PW3, PW5, PW6 and PW7 would be lying by saying they saw nothing at the scene. He said he conducted the inquiry in *Kiswahili* and translated it into English. He said the witnesses came to the police station voluntarily. He said he wrote his original statement on 26<sup>th</sup> March 2011. He denied altering it.
19. He said that on 29<sup>th</sup> June 2015 he had not given the statement to the prosecuting counsel but the statement was in the original police file. He agreed that that was an error on his part. He conceded that he initially indicated that the injury was on the chest. He had canceled that sentence. The statement given to the prosecuting counsel showed the cancellation. He did not follow up on the damage to the accused's motor vehicle. That marked the close of the prosecution's case.
20. When the accused was put on his defence, he denied committing the offence. He elected to give sworn testimony. He said-

*"I was a senior police officer, National Police Service. On 23<sup>rd</sup> March, 2011, I was travelling from Nyaru to my home. I was driving past Nyaru Centre. At around 7:30 p.m. at Bugar Market, it was misty; a little rain. Some stones had been placed on the road. Because the route is crime-prone, I did not stop. I run over the stones.*

*"I saw ten men coming towards me. They broke the rear windshield with a jembe; also the headlight. My gear box was damaged by the stones. I used a shortcut and reported the matter to Iten Police. Thereafter, as I recorded my statement, the same criminals reported that one of them was killed. They said it was me. I was then charged. I did not commit the offence. I did not stop at the roadblock or have a confrontation with the people. The complainants are not my relatives. When I was attacked I was with Patrick Kipchumba. He is a saw miller. I am not able to call him. He is in Kakamega. I did not commit the offence".*

21. Upon cross-examination, he denied that he nearly ran over the deceased. He denied alighting from

- his vehicle or stabbing the deceased. He denied that his car was damaged after he stabbed the deceased. He said he saw 8 or 10 attackers but did not recognize them. He conceded that he assumed it was the same attackers who came to make a report at Iten Police Station.
22. The learned State Counsel did not make final submissions. The learned defence counsel filed submissions on 18<sup>th</sup> April 2016. I have paid heed to those comprehensive submissions. I have also considered the oral and documentary evidence.
23. 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*.
24. 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.”*

25. The death in this case is not disputed. Doubt is removed completely by the evidence of the pathologist, PW8. The cause of death is also known: it was from severe internal haemorrhage secondary to a penetrating stab injury to the heart and lungs. That is clear from the uncontroverted postmortem report (exhibit 1). I am accordingly satisfied that the deceased died from an *unlawful* act.
26. The key question then is whether the accused, of malice aforethought, killed the deceased. I will start with identification. The offence occurred at night at about 7:00 or 7:30 p.m. From the account of the accused, it was drizzling and misty. It was at a busy bus stage at Bugar. The accused said that-

*“Some stones had been placed on the road. Because the route is crime-prone, I did not stop. I ran over the stones”.*

27. PW2, PW3, PW5, PW6 and PW7 all denied seeing the accused; or, his car at the scene; or, seeing the accused stab the deceased. On the face of it, there is no *direct* identification; or, an eye witness account. But there is very strong circumstantial evidence. For starters, none else other than the accused *confirmed* he was at the scene; that he saw an illegal road block; and, drove over the stones damaging his gear box in the process.
28. Although the accused claimed he did not stop, his evidence betrays him. He said he saw 8 or 10 attackers approaching the car; hit the rear windshield with a *jembe*; and, damaged the headlights. When he got to the police station, the *jembe* was still on the back seat. It can be seen clearly from the photographs (exhibit 2). From the photographs, the right hand side headlamp is damaged and muddy. If the car did not stop, how was it attacked from the front and the back? It is possible but I find it highly improbable. I also doubt that the accused clearly identified his attackers. It was dark. It was misty. I am fortified because the accused testified that it is the *same* criminals who came to

- report the incident at Iten Police Station. The persons who came to the station were about six. They were in the *matatu* that had ferried the deceased to the hospital. They included the conductor (PW4).
29. There are then the retracted statements. When this trial first opened on 19<sup>th</sup> September 2012 before Azangalala J (as he then was), PW2 and PW5 testified as *PW1* and *PW2* respectively. The two had then admitted on oath that they were at the scene; and, they witnessed the attack on the deceased by the accused. When the trial started *de novo* before me, they departed from their earlier testimony: they now claimed that they did *not* see the accused, his car or the attack on the deceased. PW3 and PW6 on the other hand claimed they were drunk.
30. In their earlier statements to the police, PW6 and PW7 stated that the accused's vehicle was overtaking a lorry and nearly hit the accused; or, it made a splash on people at the stage. The deceased protested. They said the accused alighted; pursued the deceased; and, stabbed him on the back. The accused then returned to his car and drove off towards Iten.
31. The retracted statements are of course of little *probative* value. The evidence of PW6 and PW7 is in turn *unreliable*. See generally *Tuwamoi v. Uganda* [1967] E.A 84, *Lubogo v. Uganda* [1967] E.A 440. I am also alive to the provisions of section 163 (1) (c) of the Evidence Act. The credibility of PW3, PW6 and PW7 has been impeached by *proof* of their *former* statements which are *inconsistent* with their sworn evidence before me. It remains a guess why they changed their testimonies.
32. But that does not rest the matter. In the interests of justice the Court invites the Office of the Director of Public Prosecutions to investigate the matter further for possible offences including, but not limited, to perjury. Why would PW5 tell Azangalala J (as he then was) that his mother and the accused's mother are sisters; and, then turn around and say that he does not know the accused (who would then be a first cousin)? The accused himself testified on oath that the complainants were *not* his relatives. Why did PW2, PW3, PW6 and PW7 retract their earlier statements or testimonies?
33. From the totality of the circumstantial evidence, the chain of events links firmly and completely with the guilt of the accused. Fifteen or so minutes after the accused first reported the attack at Iten Police Station, a group of six people including PW2, PW4, PW5 and PW7 came into the station and reported that *Jonathan Kiplimo* had stabbed *Joshua Chemwolo* to death. That was clear from the evidence of Police Constable Ngetich (PW1). PW1 said the accused looked "*disturbed or nervous*" when he first reported the attack. The evidence of PW1 is largely backed up by the evidence of the investigating officer, Corporal Ndambuki (PW11). The accused confirmed he *was* at the scene of the crime. He had a clear opportunity to kill the deceased. It amounts to further corroboration. See *Opo v Republic* [1976-80] 1 KLR 1669, *Armstrong Kisuya v Republic*, Eldoret, High Court, Criminal Appeal 88 of 2011 [2016] eKLR.
34. I have reached the conclusion that the deceased was driving his car registration number KAR 414G towards Bugar. At Bugar Trading Centre he ran over some stones. It was drizzling and misty. PW5 confirmed that he saw a lorry at the scene. That tallies with the evidence of the investigating officer and PW1. The deceased complained that the accused nearly ran him over. It remains unclear the point at which the accused's car was damaged; but he alighted from the car. He pursued the deceased and stabbed him in the back with a sharp object. That was corroborated further by the pathologist (PW8). The attack was unlawful. The attack was meant to cause *grievous harm or death* of the deceased. *Malice aforethought* is thus established. The evidence does *not* point to the culpability of anyone else *except* the accused.
35. The entire corpus of *circumstantial* evidence points *irresistibly* and *exclusively* to the guilt of the accused. 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"*

36. Granted those circumstances, I have found that the defence set up by the accused is far-fetched and a red herring. He denied alighting from his car or stabbing the deceased. I am alive that 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). From the totality of the evidence of the PW1, PW4, PW5, PW8, PW9, and PW11 I find that the prosecution proved the charge *beyond reasonable doubt*.
37. Like I stated earlier, the identity of the accused was *never* in doubt; he was at the *locus in quo*; he confirmed he ran into an illegal road block; and, that he was attacked by eight or ten people at Bugar. PW4 denied there were stones on the road. PW1 said the area is not prone to crime as alleged by the accused. There is *no* credible evidence that the accused acted in *self-defence*. The *entry point* of the wound was from the *back*. I am satisfied that the accused is the one who stabbed the deceased at the back with a sharp object. The pathologist testified that there was a penetrating stab wound measuring 4 cms by 1.5 cms between the 6<sup>th</sup> and 7<sup>th</sup> ribs and onwards into the heart and lungs. In the opinion of the pathologist, the cause of death was severe internal haemorrhage secondary to a penetrating stab injury to the heart and lungs. It matters little that the murder weapon was not found. There was no legal *justification* for the attack upon the deceased. The twin elements of *actus reus* and *malice aforethought* were present.
38. In the end I am satisfied that the prosecution *proved* beyond reasonable doubt that the accused, *of malice aforethought caused the death of Joshua Chemwolo by an unlawful act*. It must follow as a corollary, that the accused is culpable of murder. I accordingly enter a finding of *guilty*. The accused is hereby convicted.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 10<sup>th</sup> day of May 2016.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

Accused.

Mr. Marube for the accused.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court clerk.