



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 2 OF 2008**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**CORNELIUS KIPKOSGEI KOGO ..... ACCUSED**

**JUDGMENT**

The accused, Cornelius Kipkosgei Kogo was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 19th day of August, 2007 at Huresi Village in Nandi South District of the Rift Valley Province, murdered Julius Kiprutoh Lelei.

**THE EVIDENCE**

The prosecution called a total of ten (10) witnesses. The evidence of PW1 to 8 was taken by my predecessor, Hon. Justice A. Mshila. I then took over the conduct of the trial from the evidence of PW9 up to the defence hearing. I shall summarize the evidence as hereunder.

**PW1**, William Kimeli, a farmer from Kaburet Village testified that he was an uncle to the accused. He knew the deceased by nickname of Jepkentirot. He stated that on 19th August, 2007 he was walking on the road when he saw the accused trailing the deceased. The former walked behind the latter while holding a panga. When the accused reached where the deceased was, the deceased asked him why he was following him. The accused then struck the deceased twice with the panga. The deceased fell down wherein the accused struck him a third time with the panga.

PW1 testified that the accused then ran away indicating that he would go to the police station to report. PW1 called neighbours including an elder, the Assistant Chief and the police. Police later arrived at the scene. They told PW1 that the accused had already arrived at the Police Station with a panga.

PW1 identified the panga that the accused had used to cut the deceased. It was marked as MFI-1. He indicated that he did not know what had transpired between the accused and the deceased before the incident.

In cross-examination, PW1 stated that he heard both the deceased and the accused exchanging words. Then he heard the deceased challenge the accused to cut him. He however could not stop them quarrel as the accused was armed with a panga.

**PW2**, Simeon Kiprotich Lelei also a farmer from Kaburet told the court that the accused was his neighbour. He also knew the deceased. He testified that on the material date at about 7.30 p.m. while at a kiosk, he was informed that somebody had been killed. He proceeded to the scene and confirmed that it is the deceased who had been killed. The body lay at the scene. He was informed by one Bitok that it is

Cornelius (accused) who had killed him. Later, police arrived at the scene.

In cross-examination, PW2 stated that there were other people at the scene.

**PW3**, Magdalene Rotich Barabara told the court that on 19th August, 2009 at about 7.00 p.m., she was coming from the posho mill. On the road, she found two people quarreling. She stated that the two were Cornelius (accused) and his friend. She greeted them and went about her way. She also saw PW1 that night. At about 9.00 p.m. she heard that someone had been killed at the spot he had left the accused quarreling with his friend.

In cross-examination, PW3 stated that she did not see the accused holding a panga.

**PW4**, Augustine Kipkurgat Arap Bii testified that the accused was his neighbour. He told the court that on the 19th August, 2007 at about 9.00 p.m. he was woken up by his neighbour's children who told him that Cornelius (Accused) had killed somebody. As a Village elder, he called the police who in turn told him that the deceased had already surrendered himself at the police station. He then proceeded to the scene. The body lay at the scene. There were also many people at the scene.

In cross-examination, PW4 stated that the accused had not been charged with any other offence.

**PW5**, Joseph Kiprotich Kurgat testified that on 19th August, 2007 at about 8.30 p.m. he was informed by his children and neighbours that somebody had been killed. He went to the scene where he found PW1 and the deceased's body. The body was guarded by neighbours until the following day. The body had an injury on the left side of the head.

On cross-examination, PW5 stated that he knew the accused since his childhood. He used to drink alcohol. He was a casual labourer as a cane cutter. He stated that he also knew the deceased who also used to drink alcohol.

**PW6**, Zakayo Kimutai told the court that he was a casual labourer and used to brew local beer known as busaa. He testified that on 19th August, 2007, at about 5.00 p.m. the accused visited his home but he did not drink the busaa because he found it was finished. The deceased arrived at his home after Cornelius. Other people who had gone there left because the alcohol was finished. He said he did not see any of the persons with a weapon.

PW6 further testified that he learnt on the following morning that somebody had been killed. He proceeded to the scene where he found the body which had cut injuries on the head. Police arrived at the scene in the morning.

In cross-examination, PW6 said that he did not know why the accused killed the deceased.

**PW7**, Police Constable Joseph Kiptoo from Berer Police Station testified that on 19th August, 2007 at about 8.30 p.m. while at work, he received a call from one Geoffrey who informed him that someone had been killed at Kaberer Location. He in turn informed the OCS. Later in the night, the accused surrendered himself at the Police Station. He told him that people were after him because he had hacked somebody by the name Chepkendiot. The accused was then armed with a panga. He placed him in the cells.

PW7 identified the panga in court. On the following day, the accused was handed over to Songhor Police Station which investigated the matter.

On cross-examination, PW7 said that he did not ask the accused why he killed the deceased. But he stated that the accused told him he could not comprehend why he cut the deceased.

**PW8**, Police Constable Benson Kanzika of Nandi Hills Police Station but based at Berer Police Post testified that on 15th August, 2007 he was given a post mortem form by the OCPD to take to Dr. Aoko

Onyango of Nandi District Hospital who in turn conducted the post mortem on the body of the deceased in his presence.

**PW9**, Senior Seargent Samson Wasenge then serving at Berer Police Post testified that on 19th August, 2007 he was told by PC Joseph Kiptoo (PW7) that he had received a call from members of public and informed of a murder incident. He later learnt that the accused had surrendered himself to the Police Station. On interrogating him, he (accused) told him that he was seeking refuge at the Police Station because, after committing the murder, members of the public wanted to lynch him. The accused also told him that he had hacked the deceased after both differed after drinking changaa. On the following day, himself and colleagues went to the scene, collected the body and took it to Nandi District Hospital Mortuary. He produced the panga (MFI-1) as P. Exhibit 1.

In cross-examination, PW9 stated that the accused presented himself at the Police Station looking drunk. He did not however disclose to him why he had differed with the deceased.

**PW10**, Doctor Kebar David produced the post mortem form on behalf of Doctor Aoko Onyango who had performed the post mortem. He had worked with the said Dr. Aoko Onyango for three years at Nandi District Hospital. The post mortem form showed that the deceased's head had a circumferential cut wound with an open skull fracture. The brain matter was liquified and was infested with magots. The cause of death was due to severe head injury.

PW10 also produced the medical examination report (P3 form) in respect of the accused (P. Exhibit 1) in which it was indicated that the accused had been examined and found fit to plead.

The accused gave a sworn statement of defence in which he denied having committed the offence. He stated that he spent the day on 19th August, 2007 cutting firewood. At about 5.00 p.m., he received a call from one William Kimeli Bitok who informed him that one Musa had resurfaced after he had gone underground. Bitok asked him to go to report to the police. At Burer Police Post he met an officer called Kiptoo who told him that police did not have a vehicle for their mobility. At about 8.00 p.m., PW9 told him an accident had occurred at Kabureti and asked officer Kiptoo to lock him up in the cells. On the following day he was escorted to Songhor Police Station where he remained for two months. It is there that the O.C.S told him that he had killed somebody. Although he denied killing anybody, he was remanded for another one month. Police forced him to admit that he had killed. He refuted the evidence of all prosecution witnesses save for that of PW2. He stated that he knew the deceased although he was not his neighbour.

In cross-examination, the accused admitted that on the fateful day he had panga which was his tool for cutting sugar cane. He also admitted that he went to the Police Station while carrying a panga, but added that he had only gone to report that he had been assaulted by Musa Kitur in May, 2007. Musa had fled to Kericho but had resurfaced in August, 2007.

In re-examination, he reiterated he went to the Police Station with a panga which he had used to cut sugar cane.

### **EVALUATION OF EVIDENCE**

There is no dispute as to the fact of the death of the deceased. PW1, 2, 4, 5, 6 and 7 were at the scene of the crime and they all saw the lifeless body of the deceased. PW10 did produce the post mortem form on behalf of Doctor Aoko Onyango who did the post mortem. Doctor Aoko Onyango ascertained the cause of death as severe head injury.

The question that then follows is whether it is the accused who killed the deceased.

PW1 witnessed the accused hacking the deceased to death. Before the accused struck the deceased, he had followed him while armed with a panga. When the deceased looked back, he saw the accused following him. Upon asking him why he was following him, it is then that the two appear to have had a

brief exchange and the accused struck the deceased twice with the panga he was holding. When the deceased fell down, the accused struck him a third time and fled leaving him for the dead.

Although the accused distanced himself from the scene of the crime, his defence is further rebutted by the evidence of PW3 who said she met him in the company of a friend quarreling at the scene. She was to learn on the following day that somebody had been killed at the scene.

Of course the culprit was the deceased. And as PW1 stated, both the accused and deceased had had an exchange before the latter was struck to death, then PW3 could not have concocted her story. The evidence of PW1 and 3 squarely places the accused at the scene.

PW7 and 9 further corroborated the evidence of PW1 that the accused was at the material time armed with a panga. The accused actually told the two witnesses that he had surrendered himself at the Police Station because he had killed somebody and members of the public wanted to lynch him. He went to the Police Station with a panga which panga was identified by PW1 as the one he cut the deceased with. This is the same panga that he handed over to the police.

Therefore, the accused's contention that he had not used the panga to kill anyone was a total lie. His defence was only a calculated move to ouster the words he told the police. That scheme has not favoured him because the evidence that he was the culprit is too overwhelming.

Besides, according to the post mortem report, the deceased died of head injuries occasioned by a cut. That then seals the prosecution's case that it is the accused who killed the deceased. After all, PW1, 2, 4, 5, 7 and 9 saw the head injury. I am in the circumstances left without doubts that the accused killed the deceased.

As to whether the accused possessed malice aforethought, it is clear that he had exchanged words with the deceased after which the latter dared him to cut him - **"if you want to cut me cut me"**. It then leads me to determine the question as to whether the accused acted under provocation.

Provocation is defined under Section 208 of the Penal Code as follows:-

***"208. (1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.***

***(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.***

***(3) A lawful act is not provocation to any person for an assault.***

***(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.***

***(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality. "***

Provocation is therefore that which arouses anger or animosity of a person prompting the person to act in a heat of passion.

The facts of the case may lead the court to conclude that the accused was not, per se, provoked to commit

the offence. This is so because one, he had trailed the deceased before he reached where he was. Two, he was at that time armed with a panga. Three, although the deceased dared him to cut him, he did not only strike him once but three good times. And to demonstrate he intended to finish the deceased, when the deceased fell down after the second blow, he struck him a third time and fled.

I then ask, why was the accused trailing the deceased while armed? The conclusion I arrive at, is, because he intended to do harm to him.

Moreover, I take cognizance of the fact that the deceased was not armed. So even if the deceased had dared him to cut him, one slash would have sufficed. But he cut until the deceased became helpless. Such action by the accused can only be construed to have been actuated by malice. He knew that after striking the deceased several times, actual harm, and probably death would result.

Under the above circumstances, one would probably conclude that the accused possessed malice afterthought.

But again, the Court of Appeal has observed that once provoked, a person may react to that provocation with an act which he will do until the anger subsides – See the case of **CHIVALSI & ANOTHER -VS- REPUBLIC (1990) e KLR – COURT OF APPEAL SITTING IN MOMBASA IN CRIMINAL APPEAL NO. 77 OF 1989**, the Court said:-

***“In Elphas Fwamba Toili -Vs- R (un) Eldoret Criminal Appeal No. 305 of 2008, the Appellant after a quarrel with his inherited wife, picked a panga and proceeded to cut her head. She died from the injuries. The Appellant was convicted of murder and sentenced to death. On appeal the Judges expressed themselves thus:***

*“We find it difficult to appreciate why the learned Judge of the superior court came to a conclusion that a man provoked and acting on a spur of the moment cannot inflict several injuries upon his victim. In our view, once a person is provoked and starts to act in anger, he will do so until he cools down and starts to see reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals.”*

***The charge was reduced to manslaughter. See also the Judgment of the predecessor of this Court in REX -VS- NGOILALE S/O LENJARO (1951) VOL. XVII EACA, 164.***

I would then, not also find it difficult to conclude that the accused herein acted under the heat of passion after being provoked by the deceased to cut him. His anger may have risen to such levels that probably, he wanted to satisfy that which the deceased threatened him to do.

As such, I am faced with doubts as to exactly what was in the mind of the accused when he attacked the deceased. I shall as a result, give him the benefit of doubts and find him guilty of the offence of manslaughter under Section 202 of the penal Code and I convict him accordingly.

**DATED and DELIVERED at ELDORET this 9th day of October, 2014.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Misoi for the Accused

Mr. Mulati for the State