



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NUMBER 53 OF 2019

-VERSUS-

REPUBLIC

..... ODPP

VERSUS

KEVIN CHEPKWONY.....

ACCUSED

JUDGEMENT

1. The Accused is charged with **Murder Contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the information relating to the charge state that on 27th September 2019 at Sachoran Trading Centre in Sirikwa Location, Kuresoi North Subcounty, within Nakuru County he murdered Richard

Koech Rotich. The Accused entered plea of “Not Guilty
“to the offence.

PROSECUTION EVIDENCE

2. The prosecution’s case as presented through 3 witnesses is that on 27th September, 2019 at around 9.00 p.m. PW1 was conducting sales at his bar called Digital Bar in Sirikwa. The Accused and the deceased, both of whom he knew as his customers, were enjoying drinks in the bar together with other customers. The Accused’s brother called Hillary was among the revelers and lay on the floor very drunk. The Accused is said to have moved to stand beside his brother and slapped the deceased. According to PW1, the Accused did not appear drunk at the time.
3. After slapping the deceased, the Accused and the deceased got out of the bar. The said Hillary got up and left the bar too. PW1 told the Court that he did not know what went on outside the bar. He later learnt that the deceased had been badly injured.

4. PW2 is the case Investigating Officer who was then based at Sirikwa Police Station. He testified that on 12th November, 2019 at around 4.00 p.m the deceased's sister called **Eunice Chepkorir** reported the deceased's death to the station. Earlier on 21st October, 2019 the same person had lodged a complaint at the station to the effect that the Accused assaulted the deceased on 27th September, 2019. One **John Cheruiyot** was reported to have witnessed assault on the deceased. PW2 further testified that on 13th November, 2019 the Accused surrendered to the police.
5. **Dr. Titus Ngulungu** (PW3) conducted postmortem examination of the deceased body on 14th November, 2019 at Nakuru Level 5 Hospital. The examination report he tendered in evidence shows that the body was dehydrated and emaciated. There was evidence of medical intervention, probably during the deceased's treatment. Extensive pneumonia was observed in the respiratory system. The Pathologist opined that the cause of death was acute pneumonia caused by blunt

trauma to the abdomen. It was explained that such injury or an infection could cause the condition.

6. The Accused was put on his defence after close of the prosecution evidence. By sworn evidence, he told the court that the deceased was his friend and neighbour. The Accused confirmed that he was at PW1's bar on the material evening. He took some drinks until 9.30 p.m. when he left for home. He denies meeting the deceased in the bar that evening. The Accused further confirmed that his brother (Hillary) was also in the bar in the fateful evening.
7. The Accused continued to testify that three days later the deceased's sister visited him and informed him of the deceased's ill health and that he was receiving treatment at Molo Sub-County Hospital. He visited his friend at the Hospital who complained of an ailment in the chest the doctor diagnosed as pneumonia. The Accused said he contributed to the deceased's medical costs.
8. On 12th November, 2019, the Accused added, he received a call informing him of the deceased's demise. That call was followed by another claiming that he was

responsible for the death. That day at 5.00 p.m. he went to Sirikwa Police Station but a Police Officer there told him that they were not looking for him. That same evening, however, the Officer Commanding the Station summoned him back to the station where he was arrested and later charged with murdering the deceased.

9. The Accused reiterated this denial of the charge saying that he had no motive of killing his friend.

ANALYSIS AND DETERMINATION

10. I have perused the evidence proffered and written submissions of the Prosecution and Defence Counsel in relation to the charge facing the Accused. The sole issue for determination is whether the prosecution has proved beyond reasonable doubt that the accused murdered the deceased, actuated by malice aforethought.
11. There is no direct evidence linking the accused to the death as none of the witnesses testified to seeing the accused commit the offence. Determination of the case therefore wholly depends on circumstantial evidence. In **Mwangi vs Republic (Criminal Appeal No. E054 of**

2023) [2024] KEHC 3113 (KLR) 15 March 2023)

(Judgment) this court explained that for circumstantial evidence to be reliable it must be inconsistent with the accused person's innocence.

12. In the case of **Ahamad Abolfathi & Another vs Republic (2018) eKLR** also cited by the Prosecution and Defence Counsel, it was elaborated that;

“Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence.”

13. In a much older case (**Republic vs Taylor, Weaver & Donoram (1928) Cr. Application R 21**), it was observed that;

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics.

It is no derogation from evidence to say that is circumstantial.”

20. In the often-quoted case of **Sawe vs. Republic (2003)**

KLR 364, it was stated that circumstantial evidence must satisfy three tests, namely; -

“the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

21. As in the case of **R vs Kipkering Arap Koskei (1949)**

EACA 135, the prosecution must also show that there existed in-culpatory facts that were incompatible with the innocence of the accused and incapable of any explanation upon any other reasonable hypothesis other than that of guilt.

22. **Section 206 of the Penal Code** provides that malice aforethought is proven by one or more of the following circumstances; -

- a. **Intention to cause death or do grievous harm whether the death actually occurs or not.**
- b. **Knowledge that the act or omission causing death will probably cause the death or grievous harm to a person, whether the death is actually caused or not.**
- c. **An intention to commit a felony.**
- d. **An intention by an act or omission to facilitate flight or escape from custody of any person who attempts to commit a felony.**

23. The prosecution does not have to prove the motive for commission of any crime, and neither is the evidence of motive sufficient by itself to prove commission of a crime by a person who possesses the motive {(see **Case law in Robert Onchiri Ogeto vs Republic (2004) KLR (1a)**}.

DETERMINATION

24. PW1 stated that the Accused slapped the deceased in his bar before the two got out of the bar. It is not shown what part of the deceased's body the Accused slapped.

It is not known what transpired between the Accused and the deceased when they got out of the bar.

25. The deceased's sister named as **Eunice Chepkorir** who reported the deceased's assault to the police didn't testify to explain circumstances leading to the assault and subsequent death. Neither did the said **John Cheruiyot** who was alleged to be an eye witness.
26. Circumstantial evidence relied upon by the Prosecution is therefore weak and insufficient to convict the Accused. It cannot be ruled out that the deceased's pneumonia could have been caused by infection which is one of the possible causes of the condition as per PW3's evidence.
27. In the result, I concur with Defence submissions and find that the Prosecution failed to prove the charge beyond reasonable doubt. The Accused is acquitted of the charge pursuant to the provisions of **section 215 of the Criminal Procedure Code**. Any bond security in the court's custody is discharged.

J. M. NANG'EA, JUDGE.

Judgment delivered this 23rd Day of April, 2026 in the presence of:

The Prosecution Counsel, Mr. Wakasyaka.

The Defence Counsel, Mr. Mongeri

The Accused, present.

The Court Assistant, Mr. Ng'eno.

J. M. NANG'EA, JUDGE.

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