



**IN THE COURT OF APPEAL
AT NAKURU**

CORAM: O’KUBASU, AGANYANYA & NYAMU, J.J.A.

CRIMINAL APPEAL NO. 38 OF 2010

BETWEEN

GEOFFREY KIPKEMOI BOR APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kericho (Ang’awa, J) dated 15th March, 2010

in

HCCRC NO. 8 OF 2009)

JUDGMENT OF THE COURT

The appellant, **GEOFFREY KIPKEMOI BOR**, was charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence being that:

“GEOFFREY KIPKEMOI BOR: on the 25th day of January, 2009 at Singorwet village in Bomet District of Rift Valley Province, murdered DAVID KIPKORIR LANGAT.”

The appellant pleaded not guilty and his trial commenced on 27th January, 2010, before Ang’awa, J. The learned judge heard the evidence of eight prosecution witnesses and at the close of the prosecution case found that the appellant had a case to answer. When the appellant was put to his defence he chose to remain silent.

The summary of the prosecution case was that on 25th January, 2009, the deceased, the appellant, Ronald Kirui (PW 1), Matthew Chirchir (PW 2) and Wesley Langat (PW 3) were drinking at the home of one Stephen between 3 and 6 pm. A fight broke out and the deceased was heard saying, *“I have been stabbed”*. Everybody ran out on hearing the deceased say that and none of the prosecution witnesses testified that he saw the appellant stab the deceased. In his evidence in chief, PW 1 stated *inter alia*:

“I never witnessed anything else”.

In the course of his testimony, Chirchir (PW 2) stated:

“A fight broke out. I never saw him being stabbed. A fight broke out I never saw Langat being stabbed”.

And lastly, Langat (PW 3) concluded his evidence in chief as follows:

“It was in the evening when a person had been stabbed. It was 6.30pm. I came to know who was stabbed but I did not see him being stabbed. His name is David Langat.”

The learned judge considered the evidence adduced by the prosecution and came to the conclusion that the appellant was guilty as charged.

In convicting the appellant the learned judge in a judgment delivered on 24th February, 2010 at Kericho stated:

“12. The death of the deceased occurred as proved by the medical doctor PW 5 Isaac Berich. On examination of the body he found a cut wound on the body with the edges being sharp and regular. There is the respiratory, thorax swerving the iota. The cause of death being massive hemorrhage cardiac arrest from the stab wounds.

13. The person who caused the death of the deceased was the accused person. The witness PW 2 and 3 were frightened after seeing the quarrel and death of deceased who cried out “I have been stabbed” PW 1 saw the accused. All three seated together drinking with the accused and deceased stated (sic) a quarrel arose. The assistant chief on receiving information of the death occurring was informed it was the accused who committed the offence.

14. This court is satisfied that malice aforethought has been established. That the accused indeed murdered the deceased.

15. he is found guilty as charged and convicted of the offence before court.”

The learned judge called for the probation officer’s report which was produced in which community based rehabilitation was recommended. Despite that recommendation the appellant was sentenced to death.

It is the foregoing that has given rise to this appeal which came up for hearing on 19th April, 2011.

Mr Rugut, the learned counsel for the appellant, submitted that the conviction was based on hearsay evidence. He further submitted that the trial court never made any findings on mental fitness of PW 1 and PW 3 as these people had been drinking from 3pm to 6.30 pm when the fight broke out. Finally, Mr Rugut submitted that the probation officer’s report was never considered by the trial court.

As this is a first appeal, the law requires us to revisit the evidence afresh and analyse it, re-evaluate it and come to our own conclusion but always keeping in mind that the trial judge had the benefit of observing and hearing the witnesses and giving allowance for that – see ***OKENO VS R [1972] E.A. 32***. Having done so and having considered the submissions by Mr Rugut and taking into account the fact that the learned State Counsel has conceded the appeal, we have the following to say.

This was a case in which the deceased was stabbed at a drinking session where the appellant was one of those at the scene. Prosecution called three witnesses (PW 1, PW 2 and PW 3) who were at the scene. None of these testified that he saw the appellant stab the deceased. Indeed, the learned State Counsel conceded the appeal on the ground that no witness saw the appellant stab the deceased.

We agree with the learned trial judge that the root cause of this case is excessive drinking but the law requires that a criminal charge must be proved beyond reasonable doubt. The appellant was one of those who were drinking with the deceased. When the fight broke out the deceased merely cried, *“I have been stabbed”*. He never mentioned who had stabbed him. We fail to understand how the appellant came to be identified as the one who had stabbed the deceased. In the circumstances we have no alternative but to allow this appeal.

Accordingly, the appeal is allowed, the conviction quashed and the death sentence set aside. The appellant is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru this 9th day of June, 2011.

E. O. O’KUBASU

JUDGE OF APPEAL

D. K. S. AGANYANYA

JUDGE OF APPEAL

J. G. NYAMU

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR