



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL CASE NO.10 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

DICKSON KIMUTAI KOECH.....1ST ACCUSED

PHILIP KIBET LANGAT.....2ND ACCUSED

JUDGMENT

1. Dickson Kimutai Koech (1st Accused) and Philip Kibet Langat (2nd Accused) were jointly charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. The Particulars of the charge were that Dickson Kimutai Koech and Philip Kibet Langat on the 19th Day of June, 2018 at Kaptebengwet location in Konoin District within Bomet County jointly with others not before court murdered JO.

2. The two Accused denied the charge before Muya J. when they took plea on 12th July, 2018. The trial proceeded before Muya J. who heard two prosecution witnesses before the trial was taken over by Dulu J. who heard 3 prosecution witnesses. I took over the trial and heard the last 3 prosecution witnesses. In this judgment therefore I am cognizant that I did not observe the demeanor of the first five prosecution witnesses. I have however carefully considered all the evidence on record as well as the submissions of the parties.

3. This being a murder case, the prosecution must prove three elements being the fact of death that the death was unlawful; that the accused were linked to the said unlawful death; and that the Accused acted with malice aforethought. The standard of proof is always one beyond reasonable doubt. See **Anthony Njue Njeru Vs. Republic (2006) 2 KLR 46; Roba Galma Wario Vs. R (2015) eKLR.**

Prosecution Case

4. The prosecution called 8 witnesses to prove their case. The prosecution case was premised on two circumstances being that the deceased was in the company of the Accused on the fateful evening, and; that blood stained clothes were recovered from the Accused's respective houses.

5. BAO (PW4) a minor testified that her parents worked in Unilever and that their family lived at Koiwa Tea Estate. That on 19th June, 2018 at about 8pm, her father arrived home with a male visitor who was dark in complexion. According to the introduction given by her father, the visitor hailed from Uyoma and worked for KK Security guards. The father handed over meat to the mother and said that they would go to the nearby bar while she cooked. That they left and never returned.

The following day, she was called out of school and taken to Kaptiye where she saw the body of her father being taken into a vehicle. She said her father was wearing a whitish coat.

6. MA (PW2) was the deceased's wife. She testified that the deceased went home at around 8.30 Pm in the company of another man whom he introduced as hailing from Uyoma and worked for KK Security. That the husband asked her to prepare meat while they visited a social hall bar nearby. That when they left her daughter (PW1) told her that the visitor looked suspicious.

7. PW2 said that she called her husband at around 9pm to inform him that the food was ready and he answered that he was coming. When he failed to arrive by 10pm, she went to the bar and asked a security officer to call him and he responded that he had not seen him. His phone also went unanswered. The following day, she reported him missing at Koiwa Police Station. She got information that a body had been found at Kaptin area. She went and saw the shoes and clothes that her husband was wearing and identified him. The body was removed to Kapkatet Hospital Mortuary where a post mortem was done. PW2 said that the visitor who was with her husband was tall and black and that he was not in court.

8. Dr. Mutai Nickson Kiplangat (PW3) testified that he conducted the autopsy and filled the post mortem report. He observed that the deceased was dressed in a brown jacket, a black pair of trousers and T-shirt which were all blood stained and torn. That the deceased had multiple chest and neck cut wounds and a cut on the head which exposed the skull. That there were multiple stab wounds in the chest abdomen, broken ribs and fractures in the skull and spinal column. He formed the opinion that the deceased died as a result of severe chest injuries due to assault with a sharp object. He produced the post mortem report (Prosecution Exhibit 1).

9. Government analyst Richard Kimutai Langat (PW4) analyzed the exhibits and prepared a report (Prosecution Exhibit 2) to which his findings were that the DNA generated from items B,X, and Z matched the DNA profile of the deceased. I shall return to his findings later on this Judgment.

10. No. xxxx C.I Felix Mutua (PW5) was the lead investigator in the case. He received a call from Sgt. Nachongo of Kaptebengwet AP Camp that there was a body in the tea plantation. He dispatched a team of four officers to the scene and later directed them to take the body to Kapkatet mortuary. PW5 visited the scene and interrogated informers who pointed to four suspects, two of whom were later charged. PW5 testified that upon arrest the 2nd Accused led him and three other officers to his house where they conducted a search. They found a blood-stained white jacket (MFI 3 (a)), a black trouser (MFI 3(b)) and a white short trouser MFI 3(c) all blood stained. The 2nd Accused then led the officers to the house of the 1st Accused. The 1st Accused opened the door for them and upon searching they recovered a blood stained white trouser (MFI (d)).PW5 stated that he handed over investigations to PC Gitonga after dispatching the exhibits to the Government chemist for analysis.

11. PW6 was one Christopher Kiplangat Kosgei also known as Engineer. He recalled that he worked with Wesley Bett and Samuel Ngetich on 19th June 2020 and that when the workshop closed at 7.30pm, they each went their way. He went to Kwa Kbaki” bar at Kaptebengwet shopping Centre. He went to eat at Starehe hotel where he found Wesley and Samuel Ngetich then returned to the bar. While at the bar Wesley saw something in Kimutai’s (1st Accused) trouser and when he asked him what it was, he responded that “it is my security.” Wesley and Samuel then left and he also left later. The following day, he learnt that a body had been found in a tea farm and when he went to see, he identified him as Jakob who was one of the people who had been in the bar the previous evening. In cross examination, PW6 stated that he did not see the 1st and 2nd Accused kill the deceased and denied having told the police that he had overheard Lily and Mercy arguing over the death of Otieno (deceased). He also denied having seen the Accused with a knife on the eve of the incident.

12. Maritim Richard Kiprotich (PW7) was a security guard at Kaptebengwet and was on duty on 20th June,2018 at around 9pm. He told the court that one Christopher Kiplangat Koske asked to be escorted and he used his torch to light the way for him to his house. That the said Christopher told him that Philip (2nd Accused) and Kimutai (1st Accused) were among the people who killed Mn (the deceased). That the two and other people were in the bar with the deceased the previous night. He wrote the names on a piece of paper and gave it to the chief. On cross examination, the PW7 said that he did not see the deceased being killed.

13. No.xxxx PC Tirus Gitonga (PW8) testified that C.I Felix Mutua requested him and other officers to attend the scene. They found a cedar post with blood stains. They cut it to two pieces. He prepared the Exhibit Memo on 3rd July,2018 with the blood samples marked as follows: Deceased – (C),Dickson Kimutai Koech (D), Philip Kibet Langat (E),Dennis Kipkoech (F),Lily Chepkemoi (G), and Cynthia Chelangat (H). The clothing items were: Black jacket with name Kapekendo (recovered from house of Philip Kibet – (W)Shorts from house of Philip Kibet – (X), long black trouser from house of Philip Kibet – (Y) and a blood stained white shirt from house of Philip Kibet (Z).

14. PW8 stated that he escorted the items to Government Chemist for analysis. He produced them as follows:

Exhibit Memo (Exhibit No. 3), Cedar post – (Exhibit No. 4A), Cream trouser – (Exhibit 4B), Jacket (kape) – (Exhibit 4C),White shorts – (Exhibit 4D)Black trouser – (Exhibit 4E), and White shirt – (Exhibit 4F), PW8 stated in cross examination that he was not present when some of the exhibits were recovered from the house of the Accused.

15. The court found that the prosecution had established a prima facie case against the Accused and each was put on their defence.

The Defence Case

16. The 1st Accused Dickson Kimutai Koech stated in his sworn defence that he was a power saw operator and had gone to work with the 2nd Accused on 19th June,2018 between 5am and 5pm. That after work they visited Mwangaza bar then Amani Bar where they also met Samuel Ngetich and Christopher nicknamed Engineer (PW6). That Wesley asked him what was in his (1st Accused’s) pocket and he responded it was a measuring tape and spanner. That he left bar at around 8.30pm and the following day he learnt that Julius who was at the bar the previous evening had been killed.

17. (1st Accused) stated that on 25th June, 2018 he was woken up at 5.30 am by unknown people who after confirming that his name was Kimutai proceeded to search his house then asked him to accompany them. He said he was wearing a black pair of jeans. He denied that he was wearing a white trouser. Cross examined, the 1st Accused stated that he knew the deceased Julius before the incident. He insisted that nothing was taken from his house after the search. That there were no blood-stained clothes in his house and that he never came into any contact with the deceased.

18. Philip Kibet Langat (2nd Accused) testified as DW2. In his sworn statement he told the court that he worked with the 1st Accused on 19th June,2018 and around 6 pm they kept their equipment at Yebees Petrol Station and he proceeded home. That Dickson (1st Accused) later called and he joined him at Mwangaza hotel. At Amani Bar they met Wesley, Christopher (Engineer) Julius Macho nne (deceased) and others. That he left the bar alone at 8.10pm leaving behind Dickson Kimutai (1st Accused) and other people. That in the morning the 1st Accused passed by his house and they went to work. They learnt around 10.00am that someone had been killed. That he was arrested on 24th June,2018. That on 25th June,2018 the police escorted him to his house and conducted a search but they did not take away anything. He

stated that the clothes which PW5 talked about were not recovered from his house. Cross examined, the 2nd Accused admitted that he led the police to the 1st Accused's house. He said that he knew Richard Kiprotich Maritim (PW7) who worked as the watchman of Kaptebees Petrol station stating that the said Richard gave false testimony.

19. The Accused called two witnesses in their defence. Petro Chepkwony (DW3) testified that he spent the night of 24th June, 2018 at Dickson's (1st Accused's) house and that the first Accused was wearing a black jeans trouser and a black flowered T-shirt. That they were woken up at 5.00am by people who asked who Dickson was and arrested him. DW3 said that the people searched the house but did not carry away anything. In cross examination he stated that one cannot sleep with a pair of jeans on as it is heavy clothing.

20. DW4 Leonard Siele told the court that he was in the house of Philip Kibet (2nd Accused) in the morning of 25th June, 2018 when he was woken up by four people who asked him his name. That they told him to sit down while they proceeded to search the house. That they left with nothing. DW4 said that he later learnt that the 2nd Accused had been arrested. He said he didn't know whether the 4 persons were police officers or not.

Analysis and Determination

21. For a charge of murder to succeed, the prosecution must prove the fact of death; that the death was caused by the unlawful act or omission of the accused, and that the accused acted with malice aforethought. The standard of proof is one beyond reasonable doubt.

See: **Miller vs. Ministry of Pensions (1947) 2 All Er,372, Sawe v. Republic 2003 KLR 354.**

Death of the deceased

22. There is no doubt that the deceased died on the night of 19th June, 2018. There was evidence from his wife PW2 that he had gone home with a visitor after work and asked her to prepare a meal while they went to the local pub. When he failed to return she went to look for him and did not find him. There was also evidence from PW6 and PW7 that he was seen at Kwa Kibaki bar that evening. Besides, the 1st and 2nd Accused admitted in their sworn defences that the deceased was at Kwa Kibaki bar that evening. According to the evidence of PW2 and PW6 the deceased's body was found in a tea farm the following morning.

23. Dr. Mutai (PW3) who conducted the autopsy found that the deceased had suffered multiple deep cut wounds all over the body and had fractured ribs, skull and spinal column. He testified that the deceased died of severe injuries due to assault with a sharp object. The P3 form (Prosecution Exhibit 1) detailed the fatal injuries.

24. I accepted the expert evidence of PW3 on the cause of death. There was no reason to doubt it and it accorded with the evidence of the witnesses who had seen the body. I therefore found both the death and cause thereof proved beyond reasonable doubt. It was an unlawful and painful death.

Whether the 1st and 2nd Accused were linked to the unlawful death of the deceased.

25. The Prosecution submitted that its case was based on circumstantial evidence provided by PW1 and PW2 that the deceased had gone home in the company of a strange tall man whom he introduced as a colleague and left together for a nearby pub. That PW6 had seen the two accused having a confrontation with the deceased on the material date. The Prosecution also submitted that collective evidence of what PW3, PW4, PW5 and PW8 showed that the deceased's clothing was recovered from the house of 1st Accused and the forensic evidence linked the two accused to the offence.

26. Finally, the Prosecution submitted that the 1st and 2nd Accused had failed to discharge the burden imposed on them by Section 111 (i) of the Evidence Act.

27. The defence submitted that none of the prosecution witness saw the two accused kill the deceased. That the prosecution did not bother to trace the tall man who was said to have been with the deceased that evening. That the circumstantial evidence was too weak. They relied on the Case of **Mwangi & Anor Republic (2004) 2 KLR 32.**

28. On the forensic evidence provided by the prosecution the defence submitted that the evidence of the blood stained clothing from the home of the accused was not credible. They urged the court to find that the charge of murder had not been proved to the required legal standard.

29. It is true as submitted by both parties that the evidence tendered by the Prosecution was circumstantial. I will therefore analyse it in accordance to the principles set out by the predecessor court of appeal in the case of **R.v. Kipkering Arap Koske & Another, 16 EACA 135 as follows: -**

'(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) 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.'

30. It is not disputed that the deceased and the two Accused were at Kwa Kibaki bar on the eve of the incident. This was stated by Prosecution Witnesses and also admitted by both accused. The Prosecution witnesses however did not state the time the deceased left the bar and with whom.

31. The deceased's family members, daughter (PW1) and Wife (PW2) told the Court that the deceased was in the company of a stranger described as a "tall black man." However, no attempt was made to show whether the "tall black man" was the 1st or 2nd Accused or someone else. Indeed, PW2 told the Court that the tall black man who had left the house with her husband was not in court meaning that neither the 1st nor 2nd accused fitted her description of the man who was with her husband that evening and whom her daughter correctly suspected to be suspicious.

32. It is apparent from the evidence of both the Prosecution and the defence that there were many people in the bar that evening. They were named by the 1st accused as Samuel Ngetich, Engineer (PW6), Wesley, Gilbert, Cpl Sitienei, Lily, Deborah Cherotich, Kiptoo, Julius (the deceased) and another tall person. Any of these persons could have harmed the deceased. The deceased could also have been attacked by any other person after he left the bar. Indeed, none of the prosecution witnesses said that they saw the two accused attack the deceased. According to the evidence of PC Titus Gitonga (PW8), the police took blood samples from the two accused, Dennis Kipkoech, Lily Chepkemoi, and Cynthia Chelangat meaning that these were some of the people who were in the bar that night and who were treated as suspects.

33. PW6 Christopher Kiplangat Kosgei alias Engineer told the Court that while at "Kwa Kibaki" bar he had spotted something (Implying a weapon) in Dickson's (1st Accused's) trouser and when he inquired, the 1st Accused answered "It is my security". He also testified that Lily and Mercy were arguing but he did not know what they were arguing about. In cross examination, he disputed he had told the police that the two were arguing over the death of Otieno (the deceased). He also denied having seen the 1st Accused with a knife or having earlier stated that he had been threatened by the Accused.

34. The evidence of PW6 was the closest that came to identifying or linking the Accused to the killing. However, he appears to have recanted his evidence and no attempt was made by the prosecution to have him declared a hostile witness to enable them cross-examine him on his earlier statement. His evidence therefore waned in probative value.

35. The Prosecution submitted that 'from the account of PW6 the two Accused persons were seen in a conversation with the deceased a money related issue. The said conversation was confrontational in nature and later on the deceased's lifeless body was found in a nearby plantation.'

36. I have closely looked at the evidence of PW6 on record. There is no record of testimony to the effect that he saw or heard the accused confronting the deceased over money. While it may be possible that he stated that in his statement to the police, the same was not captured in his testimony on oath in court. This being a court of record and further being a criminal trial, this court can only go by the record and what was stated on oath by the witness. As earlier observed, PW6 was a hostile witness and ought to have been cross-examined by the prosecution on his statement to the police.

37. In the end, the only Circumstantial evidence so far is that the deceased and the accused were in the same bar on the material night. The evidence of PW6 that the 1st Accused had a knife was not corroborated by any other witness and there was no further evidence from the civilian witnesses.

38. I now consider the forensic evidence given by Government analyst Richard Kimutai Langat (PW4) already set out *in extenso* earlier in this judgment.

39. PW5 Chief Inspector Felix Mutua was then D.C.I.O in Konoin Sub County office testified that he arrested the 2nd Accused and placed him in custody. That the 2nd Accused led police officers to his home at Kaptegemet township where upon search they recovered a blood stained jacket MFI 3 (a), black trouser MFI 3 (b), and; white short trouser MFI 3 (c). From the 1st Accused's house they recovered a white blood stained trouser.

40. An Exhibit Memo (Exhibit 3) forwarded the clothing as well as blood samples of all the suspects and the deceased to the Government Chemist for analysis.

41. Government analyst Richard Kimutai Langat (PW4) received 12 exhibits on 3/7/2018 under the escort of PC Titus Gitonga (PW8). Upon analysis he found as follows: the cedar post (A) did not generate any DNA profile; Cream trouser (B) and white short (X) were heavily stained with human blood; and

Jacket (W) had no visible stain while shirt (Z) was moderately stained with human blood. PW4 concluded that: -

(i) The blood stains from the white long trouser (Item B), the jacket (Item W), and White short (Item X) and white shirt (Item Z) matched the DNA profile of JO (deceased).

(ii) The blood stains from the black long trouser (Item Y) belonged to an unknown male person.

(iii) The blood stains from Dickson Koech, Philip Langat, Dennis Ngeno, Lily Chepkemoi and Cynthia Chelangat had no genetic relationship with the submitted items.

42. From the forensic analysis above, the DNA profiles generated from Item B, being a white long trouser recovered from Dickson Kimutai's

house; Item W (jacket marked Kapekode) recovered from Philip Kibet's house, white short item X (recovered from Philip Kibets house) and Item Z (White shirt recovered from Philip Kibet's house), all matched the DNA profile generated from the blood sample of the deceased marked Item C. The conclusion be drawn is that the 1st and 2nd accused came into contact with the deceased in the course of the injury hence the blood of the deceased being found on their respective clothing.

43. I considered the 1st and 2nd Accused's defence. Both denied having played any role in the death of the deceased. They disputed that the exhibits subjected to DNA analysis were theirs. That the police did not recover any clothing items listed in the Exhibit Memo from their respective houses. They called DW3 and DW4 who were said to have been present when the police searched the houses of the 1st and 2nd Accused who stated in their respective testimonies that the police did not take anything away after the search.

44. The collective defence of the 1st and 2nd Accused and their 2 witnesses was a mere denial. They did nothing to prove that the incriminating items recovered from their houses were not recovered from there at all and did not belong to them. I particularly observed the demeanor of DW3 and DW4 and formed the opinion that they were coached witnesses and were not truthful.

45. However, it was not upon the accused to prove their innocence but for the prosecution to prove their guilt beyond reasonable doubt. The prosecution would have settled the issue of recovery of the incriminating clothing items by producing an inventory signed by the officers and the suspects or any of the witnesses present. At the very least, an Investigation Diary would have shown their investigative activities including the recovery of the disputed items. Failure to prove recovery breathes life into the accused's otherwise unbelievable defence and raises doubt in the mind of the court as to whether or not blood stained clothes were recovered from the respective houses of the Accused and subsequently when and how the blood of the deceased found its way into the clothes in question.

46. I have come to the conclusion that the Prosecution evidence creates a very strong suspicion that the 1st and 2nd Accused were the persons who attacked and killed the deceased. However, the said evidence does not meet the legal standard of proof beyond reasonable doubt. Consequently, the benefit of the doubt shall go to the Accused. As stated by the court of appeal in **Sawe Vs Republic 2003 KLR 354**: -

“ The suspicion may be strong but this is a game with clear rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt. suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”

47. Consequently, the 1st and 2nd Accused are acquitted for insufficiency of evidence. Each is set at liberty forthwith unless otherwise lawfully held.

Judgement delivered, dated and signed at Bomet this 31st day of January, 2022

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the 1st and 2nd Accused, Ms. Chemutai for the 1st and 2nd Accused, Mr. Muriithi for the Prosecution, and Kiprotich (Court Assistant).