



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**CRIMINAL CASE NO. 8 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS.**

**ALEX CHEREN LAIKONG alias BOI JOSTO alias BOIYO JARMIN .....ACCUSED**

**COLLINS KIBET KINYOIKIE alia KOLO.....ACCUSED**

**BENARD NDIEMA KIBUS alia BENA.....ACCUSED**

**HARUN KWEMOI CHEREN.....ACCUSED**

**KELVIN KWEMOI MANJAWERA alia PAULO.....ACCUSED**

**ELIUD JUMA NDIWA.....ACCUSED**

**PATRICK KIBET KIRUI alias BOY BOY.....ACCUSED**

**GIBSON KWEMOI KIRUI alias TENGWER.....ACCUSED**

**JUDGMENT**

The Accused (1) **ALEX CHEREN LAIKONG** alias **BOI JOSTO** alias **BOIYO JARMIN** (2) **COLLINS KIBET KINYOIKIE** alias **KOLO** (3) **BENARD NDIEMA KIBUS** alias **BENA** (4) **HARUN KWEMOI CHEREN** (5) **KELVIN KWEMOI MANJAWERA** alias **PAULO** (6) **ELIUD JUMA NDIEA** (7) **PATRICK KIBET KIRUI** alias **BOY BOY** (8) **GIBSON KWEMOI KIRUI** alias **TENGWER** were charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code; **The particulars of the offence are that;** At unknown dated between the 10<sup>th</sup> day of February, 2017 and 15<sup>th</sup> day of February, 2017 at Chesokwo Shamba System in Mt. Elgon Forest of Cheptais Sub-county within Bungoma County, Murdered **JEREMIAH KHAEMBA MWELESIA.**

The case for the prosecution is that on 9.2.2017 Pw1 Benard Nalianya was at the home of his father In-law Jeremia Khaemba when at 6 a.m. he went to fetch water from a water point. While there a group of people came and asked him where his land was. He told them he was a visitor. They asked him where Mzee (deceased) was. He showed

them where he was about 10 metres away. They demanded for a mobile phone from deceased. One of them cut the deceased on the head with a panga. The deceased started bleeding from the head. He went there and asked him why they were beating the deceased. They turned on him and started cutting him. He ran away to the water supply centre and informed the Administrative Police Officers. He was taken to Chekaki Police Patrol base and then to Cheptais Hospital. Later he learnt that deceased had died. On 26.2.2017 he attended an identification parade where he identified accused 6 and accused 4 and accused 1. In an Identification parade conducted on another date he identified accused 7, and 3, 8, and 5.

Pw2 GM and minor child of Benard was with his father when people came and asked where deceased was. They went to where the deceased was and hit him with fists and clubs on the back. They then cut him with a panga. He then ran away to the water supply where he reported to the Administration police officers. He was later called to the police station and attended an identification parade where he picked Accused 5, 6, 7 and 1.

Pw3 IP. Okembi attached to Kapsokwony Police Station received information that deceased body had been recovered. He went with family members to the scene. They found the body of the deceased which had injuries on the left leg. The scene of crime officers took photographs of the scene. The body was moved to Referral Motuary where later a Post Mortem was conducted. Pw13 David Kimengich a Clinical officer attached to Cheptais Hospital Examined Pw1 Benard Nalianya and found he had been assaulted as he had a cut wound on left ear, tenderness on back with restricted movements of the neck. Pw.15 Dr. Harun Ombongi produced a Post Mortem form that was filed by Dr. Hezbon Wafula; on 22.2.2017. The body had a scar wound on chest, bruises on left and right fore-arm, deep cut on left hand, and fracture of right tibia. He formed opinion that cause of death was due to brain injury due to blunt head injury.

The accused being put on defence gave Sworn evidence. Accused 1 Alex Chereng Lakong testified that he was at the centre on 1.4.2017 when he was informed that the OCS wanted to speak to him. He went there and was arrested and charged with the present offence. He testified that at time of alleged offence he was at home and did not see anything. Accused 2 Collins Kibet Kinyoike testified that between 10-15 February 2017 he was at home. On 23.2.2017 some people came and wanted to buy vegetables from him. They went to the market and entered a bar. On the way at the market he was arrested by Police Officer who took him to the Police station. He was later charged with present offence. Accused 3 Benard Ndiema Kibos testified that on 23.3.2017 he was herding his cattle when Police officers arrested him and took him to the police station where he was charged with present offence. Accused 4 Harun Kwemoi Cheren testified that between 10.2.2017 and 15.2.2017 he was building his house on 24.2.2017 he was arrested at police Road block while carrying iron sheets which police alleged were smuggled. He was taken to the Police Station and later charged with Present offence. Accused 5 Kelvin Kwemboi Majawera testified that on 24.2.2017 he went to Chepkube where he sells groundnuts. Police came and arrested him. They took him to the police station where he was charged with present offence.

Accused 6 Eliud Juma Ndiwa testified that on 23.2.2017 he went to a club to drink alcohol. He then saw people start running away; from police officers. The officers arrested him and took him to the police station. He later participated in the Identification parade where Pw1 picked him. Accused 7 Patrick Kibet Kirui testified that on 2.2.2017 he was at Chepkube where he was informed by his sister that his brother had been arrested. His brother is Accused 8 Gibson Kwemboi. He went there to check him and was arrested by the OCS. He was taken to Identification parade where he participated. Accused 8 Gibson Kwemboi Kirui was on 2.3.2017 at a bar up to 8 p.m. when he decided to go home. On the way he was arrested and taken to the police station. Later he participated in an identification parade.

At the close of the prosecution and defence case both parties filed respective submissions. Mr. Oimbo for state submitted that all the ingredients of the offence of Murder were proved; he submitted that the prosecution proved the fact of death by the production of the Post-Mortem form by Dr. Ombongi what also indicated the cause of death. He submitted that identification was done by the evidence of Pw1 and Pw2, and the evidence of the

identification parade. Finally he submitted that the testimony on the assault on the deceased demonstrated malice aforethought.

M/s Chunge for accused 1-6 submitted that the prosecution evidence was contradictory and untruthful. Counsel submitted that there was no positive identification of the accused and that the identification of the accused and that the identification parade were unreliable as its integrity was doubtful. Counsel submitted that the prosecution case is built around mob justice and that there was total failure by the prosecution witnesses to identify the accused and consequently the prosecution has failed to establish a case of murder against the accused.

Mr. Were for Accused 7 and 8 submitted that while there were only 2 eye witnesses, the court should take Judicial Notice that visibility at 6 a.m. is not clear, that the evidence of the eye witnesses was not consistent, and was contradictory. Counsel submitted that the Identification parade were null and void. He submitted that the prosecution failed to call a crucial witness Harun Wanjala who was present when the attack occurred. Finally he submitted that an important suspect Willy Boiyo was now arrested.

The accused are charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Codes.

***Section 203 penal code provides: Any person who of malice aforethought causes death of another person by unlawful act or omission is guilty of murder.***

***Section 204: Any person convicted of murder shall be sentenced to death.***

It is now settled that in an offence of Murder the prosecution must prove the ingredients of Murder. The standard of proof is beyond reasonable doubt.

The ingredients of the offence of Murder which the prosecution must prove are (1) the fact of death and caused of death (2) Malice aforethought (3) positive identification of the accused as the person who committed the offence.

In Lodwar High Court, ***Republic Vs. Joseph Ekai Lomongin [2018] eKLR*** this court stated that in an offence of murder the prosecution must establish the three ingredients of the offence;

- 1) The killing or fact of death of the deceased;***
- 2) Existence of malice aforethought or mens rea and***
- 3) The unlawful act or omission on the part of the accused the actus reus.***
- 4) That it is the accused who inflicted the injury.***

In the present case Pw15 Dr. Harun Ombongi produced a Post-mortem report prepared by Dr. Hezbon Wafula who conducted the Post-mortem on 22.2.2017. His findings were that the deceased had deep cut wounds on left hand, open fracture on right tibia and there was bleeding into the brain. He formed an opinion that the cause of death was due to bleeding into the brain. Secondly blunt head injury. The evidence of Dr. Ombongi therefore established the fact and cause of death of the deceased.

The other issue the prosecution must prove is that it is the accused who inflicted the injuries that caused the death of the deceased. Pw1 testified that while at the water point a group of people came and asked him where their farm extended to. He replied that he was a visitor. They then went to where the deceased was and cut him. He went there and they turned to him and started cutting him. He decided to run away. This witness attended an

Identification parade conducted by Chief Inspector David Kamadi where he picked Accused 1, 2, 3, 4, 5 as the person who were in the group that attacked him and the deceased.

Pw2 GM a minor and grandson of the deceased was at the deceased's home when he saw a group of about 10 people. They went to where the deceased was and attacked him with fists and clubs and then cut him with a panga. He stated he saw them well when they asked him questions about the children. In the Identification parade conducted by David Kamadi he identified Accused 2, 3, 4, 5 and on the one conducted by IP Cleophas Kimaru he identified Accused 7 and 3.

The issue be the second ingredient of the offence of murder is the identification of accused as the persons who inflicted the injuries. M/s Chunge for Accused 1-6 submitted in her written submissions that the accused were not positively identified. Counsel submitted that the identification parade conducted where accused were pricked by the witnesses was utterly flawed and the integrity of the exercise was abused by the officers who conducted the parade. Counsel submits that it had not been shown that the members of the parade were of same height and complexion as the suspects.

Mr. Were for Accused 7 and 8 submitted that the two eye witnesses testified that the offence occurred at 6 a.m. when visibility is not clear. He further submitted that there was contradiction in their evidence as to the type of weapon carried by each of the accused person.

The issue of positive identification of the accused as the person who committed the offence is crucial in Criminal trial, as the finding of guilt is and punishment is attributable to the person. In this case 2 witnesses testified that they saw the accused being in a group that attacked the deceased. Each of the accused in his defence denies being at the scene or even attacking the deceased. The issue of positive identification is therefore crucial.

In *Wamunga Vs Republic* 1989 KLR 424; the Court of Appeal stated

**Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.**

The integrity of positive identification is enhanced by factors such as the light and source of light, the intensity, the duration of the observation, the position of the person observing in relation to the suspect, whether there are any special features noted on the suspect.

In the present case both Pw1 and Pw2 testified that it was around 6 a.m. when they had started embarking on normal chores of fetching water and preparing meal; the court would take judicial notice that 6 a.m. was bright enough for a person to see. The prosecution secondly relied on the identification parade conducted where the accused were picked by the two eye witnesses. All the 8 accused except accused 6 were picked by the 2 witnesses. Accused 6 Eliud was only picked by Pw1 and not Pw2.

The value of an identification parade as a tool of evidence has been subject to several court decisions in;

11. **John Mwangi Kamau v. Republic (2014) e KLR** where the Court of Appeal held as follows:

***“15. Identification parades are meant to test the correctness of a witness’s identification of a suspect. See this Court’s decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DWI, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB.***

*No. 45 of 24/6/2003; the assailants' were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-*

*“A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”*

16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure" In *Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008* this Court faced with a similar situation expressed itself as follows:-

*“As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL’s case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness ‘SHOULD’ be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.*

*In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.”*

17. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence. On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court’s observations in *David Mwita Wanja & 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-*

*“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwangi s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -*

*“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly*

*be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”*

*Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:*

*“6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -*

.....

*(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;*

.....

*(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;”*

Though attacked by the defence Counsel that the identification parade lacked integrity and of no probative value, I find that the parade was conducted procedurally. The accused was each positively seen by the eye witnesses at the scene and picked at the identification parade as the person in the group that attacked the deceased. Their defence that they were not at the scene has been displaced by evidence of the two witnesses who place them at the scene of the crime.

I am therefore satisfied that the prosecution has proved its case beyond reasonable doubt. I find Accused 1, 2, 3, 4, 5, 6, 7 and 8 guilty of the offence of Murder Contrary to Section 203 as read with Section 204 of Penal Code and convict him accordingly.

Dated and Delivered at **BUNGOMA** this **27<sup>th</sup>** day of **Nov**, 2019.

**S.N.RIECHI**

**JUDGE**



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