



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL CASE NO.14 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSES**

**BENJAMIN KEMBOI YANO.....ACCUSED**

**JUDGEMENT**

1. The accused has been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 4<sup>th</sup> day of August 2018 at Mugula village within Elgeyo Marakwet county murdered EDWIN MAIYO.

2. The state called 4 witnesses after the accused denied the offence. Their evidence can be summarised as hereunder.

**3. PW1 DR ALEX BARASA** from Mount Elgon hospital produced the post mortem report on behalf of Dr. Okumu who carried out the exercise. He found that the deceased suffered several stab wounds in the body and the cause of death was severe haemothorax due to assault. He produced the same as an exhibit P1.

**4. PW2 JOEL KIPLIMO MAIYO**, the brother to the deceased and a cousin to the accused testified that he was called in the evening of 4<sup>th</sup> August 2018 and told that the deceased had fought with the accused and that he had been stabbed. He went to the scene and found him already dead. He attended the post mortem where he identified the body.

**5. PW3 JENIFFER ROTICH** the mother of the deceased testified that on 4<sup>th</sup> August 2020 she was in the deceased house where she had gone to demand her money. The accused told Erick to go out as well as the deceased but he refused.

6. The accused went to the bedroom and he had him shout that he had died.

She said that she did not see him being stabbed. He only heard him saying that he had been stabbed. They screamed and people came. When cross examined he said that they were 5 in the house and that he did not see him being stabbed.

**7. PW4 ERICK WEKESA** testified that the deceased and the accused were his neighbours. He said that on 4<sup>th</sup> August 2018 he was at the accused home taking changaa. Shortly the accused arrived and thereafter the deceased too came. They both sat on the bed and spoke in Marakwet language which he did not understand.

8. The accused took a knife and stabbed the deceased three times. These were on the neck twice and the mouth. He said that he removed the knife from his pocket. He then took off although the accused did not want to stab him.

9. He said on cross examination that though it was dark, there was light from *D-light* solar and he could see both the deceased and the accused. He said that he was already drunk and that the deceased did not scream.

10. On re-examination he said that although he was drunk he saw the knife being removed and the accused stabbing the deceased.

11. When placed on his defence, the accused gave unsworn evidence denying the charge. He narrated how on 4<sup>th</sup> August 2020 he arranged the work for his two wives including the brewing of changaa. He also said that he took his children to weed potatoes till 11am.

12. He began taking changaa at around 1pm when he also received other customers who included the deceased and the witnesses herein. He said that at around 8.15pm the deceased quarrelled with pw4 and they fought. Pw2 told them to stop and he decided to go and report at the chief's place which was about 2km away.

13. When he arrived there he was placed in the cells and he woke up hungry and cold. He was told that he had killed his brother whose body was in the land cruiser. He was brought to Kapcherop police station and later charged. He said that he did not know what happened as he was drunk.

### **ANALYSIS AND DETERMINATION**

14. The parties complied with this courts direction that they file written submissions. The learned state counsel submitted that the prosecution had established all the ingredients of murder. He said that the cause of death was proven by the post mortem report which was consistent with the witness statements.

15. That the injuries caused to the deceased was inflicted by the action of the accused. The action of taking out a knife to stab him clearly constituted malice aforethought.

16. The counsel for the accused basically relied on the defence of intoxication. She said that the accused had taken a lot of changaa which was being brewed in his place and that for that reason he did not know what was taking place. He was only awoken the following day at the chief's office where he spent the night.

17. The fact that the accused was with the deceased and pw2 and 4 is not in dispute. There is sufficient evidence from the two witnesses that the accused stabbed the deceased thrice. The said injuries were very consistent with the findings of the pathologist.

18. There was no issue of the nature of light since there was a solar light courtesy of a *dlight* solar as well as the torches. The witnesses as well as the deceased did not indicate that there was such problem of identification because of lack of light. It appears that all of them including the deceased had been taking alcohol for some time together.

19. The accused has raised a defence of intoxication in his unsworn evidence. His counsel submitted that because of the changaa he had taken he did not know what he was doing and that he found himself in the cells at the chief's camp.

20. This line of argument is untenable for the simple reason that the same was an afterthought. There is no evidence during the substantive hearing that the issue of intoxication was raised including cross examination. In other words, there was no question directed by the defence to the prosecution witnesses regarding the extent of the accused intoxication.

21. Furthermore, the issue raised by the accused was on his unsworn defence and he could not be cross examined over the same. If he was serious and truly wanted to rely on this line of defence he should have given a sworn evidence to afford the state to cross examine him. For now, the same has no probative value.

**22. Section 13** of the Penal Code relating to intoxication as a defence states as follows;

**(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**

**Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—**

**(2) (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**

**(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**

**(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code ([Cap. 75](#)) relating to insanity shall apply.**

**(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.**

**(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.**

23. Clearly the accused cannot enjoy this line of defence for the reason provide under paragraph 2(a) above. The intoxication was self-created and self-induced and he cannot blame anybody.

24. The court of appeal in **KUPELE OLE KITAIGA V. REP (2009) eKLR, CR 26 OF 2007**, stated on one mounting defence of intoxication that;

**“A clear message must also go out to those of the appellants’ ilk who deliberately induce drunkenness as a cover up for criminal acts. Unless a plea of intoxication accords with the provisions of section 13 of the Penal Code it will not avail an accused and does not avail the appellant in this particular case.”**

25. For the above reasons this court is satisfied that the accused maliciously caused the death of the deceased. He knew that stabbing the deceased on the neck would fatally injure him and indeed it caused his death. The prosecution did discharge its mandate. All the ingredients of murder were proved and the accused is hereby found guilty of murdering the deceased herein under the provisions of Section 203 of the Penal Code.

26. Orders accordingly.

**Dated at Kitale this 11<sup>th</sup> day of December 2020.**

**H K CHEMITEI**

**JUDGE**



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