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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 113 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

PETER KIPRONO KERING.....ACCUSED

JUDGMENT

1. Peter Kiprono Kering (*the accused*), is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (*Cap. 63, Laws of Kenya*).

2. The State alleged that the accused on the 31st day of October 2010 at Atywa village in Kuresoi District within Rift Valley Province, murdered David Kipkurui Ruto (*the deceased*). In support of its case, the prosecution called eight witnesses.

3. The 5th witness was Dr. Magari Gikenyi then Medical Officer of Health of Molo District Hospital but currently of Moi Referral and Teaching Hospital (MARTH) Eldoret, Department of Engineering. Her testimony was that she carried out a Post-mortem autopsy on the body of one David Kipkurui Ruto (*the deceased*) on the 2nd November 2010 at 15.55 hours (3.55 p.m.), after the body was identified by relatives, PW4 and his father Joseph Rotich (*who did not testify as he would merely have repeated what PW4 had said*).

4. It was the Doctor's evidence that the deceased had a cut on the neck of about 4 cm with resultant haemorrhage around the cut. The deceased's major blood vessels including carotid, sub-clavian vessels and muscles were torn or cut with resultant massive haemorrhage causing mild sub-dural haemotoma on the frontal part of the head. The Doctor put the cause to ***“mild head injury and severe haemorrhage and shock caused by cutting/severance of the major blood vessel of the neck resulting into shock multisystem failure, cardiopulmonary collapse and death.”***

5. There was thus a body, and death and cause of such death. The question then becomes, who caused the injuries which gave rise to the death of the deceased"

6. The accused testified on oath, and Counsel for the accused submitted that the accused was not the cause of the injuries. According to the evidence of the accused, he hailed from Bomet County, and had at the material time been visiting with his aunt with whom he had stayed for about one month. On the material day he had been invited by a friend to have a drink and had drunk from about 9.00 a.m. to 2 p.m., and he had become drunk with local busaa drink.

7. It is at that stage, according to the accused's testimony that the deceased accosted and asked him to buy some drink for him (*the deceased*). When he replied to the deceased that he had no money to buy drinks, the deceased told him to stop boasting with his money. The accused further testified that he then decided to move away from the area, but the deceased followed him, and that when he asked the deceased why he was following him, the deceased pulled out a knife, and wanted to stab him, and a struggle ensued, and that in the course of the struggle, he pushed the deceased to the ground and went

on his way (home!).

8. However on his way, he met two people who informed him that the deceased was bleeding, and wanted to know what he had done to the deceased. He explained to them that the deceased wanted to stab him, and that he wrestled with the deceased and had thrown him on the ground and left him there.

9. Despite this, he was later arrested and taken to Keringet Police Station but insisted that they were both drunk. The knife produced in court, was not the knife the deceased had, which was short with a wooden handle. The accused denied knowledge of the origin of the knife as the deceased had a grey sweater which he was carrying on his shoulder. The accused denied having a knife and injuring the deceased, or that he wiped the knife on the grass after stabbing the deceased.

10. When cross-examined by Prosecution Counsel, the accused testified that he had been invited by a friend he knew only as "Joseph" for a drink of Busaa, not "changaa". He never knew the deceased, and they lived about three kilometres apart, and never visited each other. Though there were over twenty people at the drinking place, he only remembered Samuel Kipchirchir Torotich (PW3) with whom he used to exchange greetings as he was his aunt's neighbour, and never quarreled or had differences with him. He had no knowledge of Vincent Kibet Rotich (PW1).

11. When pressed with questions as to his knowledge and relationship with PW3, the accused maintained that he had no differences with him and that he was drunk, and that he never followed the deceased, but rather it is the deceased who followed him and that it was the deceased who was wielding the knife, and denied any knowledge of the deceased being injured on the neck. According to the accused the witnesses (*PW1, PW2, PW3 and PW6*) all lied when they testified that he stabbed the deceased.

12. The accused acknowledged that his hands were tied with ropes before being escorted to Keringet Police Station. He had never seen Leonard Kiprotich Ruto (PW3) and only learnt later that he was a Police Officer, that he had quarrelled with the said officer, and that the officer lied when he testified that he (*the officer*) had disarmed him (*the accused*). The accused maintained that he had no knife that day, and did not stab the deceased and has no knowledge of the injuries described by the Doctor, that he was drunk, he had no jacket, he wore a white shirt with a sleeveless sweater worn over it.

13. At the end of the defence evidence, Counsel for the accused made and filed written submissions and adopted the evidence of the accused that it is the deceased who followed abused and threatened to stab him when they wrestled, and he pushed the deceased to the ground and left. The counsel introduced the defence of provocation, and that the accused, if he stabbed the deceased at all, it was all in self-defence. Counsel also asked the court to consider that both the deceased and the accused were drunk, and that since the charge of murder, cannot hold, the accused be acquitted forthwith.

14. The accused has maintained that he did not stab the deceased, so the question of causation of the fatal injury still needs to be answered. The Prosecution Counsel maintained that the death of the deceased was caused by the injuries caused or inflicted by the accused. What was the evidence"

15. It was the evidence of PW1 that the deceased found him and two other colleagues Samuel (PW3), Eric (PW2) and Leonard (PW4) while they were eating some potatoes, and begged for some, but he was informed that the potatoes were finished. A little later the accused joined them, and that is when the deceased inquired of the accused why he was following him. The deceased left but the accused followed him, and a little later PW1 saw the accused take out a knife "Kibenito" from his trouser pocket and stab the deceased on the neck, with one wound to the right side. They three of them ran to assist

the deceased but that he was already dead. The accused just stood there, he did not run away. He wiped the knife on the grass, and they feared approaching him until Leonard (PW3) came and arrested the accused and had him subdued and taken to the Keringet Police Station.

16. PW2 corroborated materially the evidence of PW1, but added that when the deceased asked the accused why he was following him the accused informed him that he (the deceased) had disturbed him, and that as the deceased left, the accused took out a knife (Pexh.1), and stabbed the deceased, and that he called Leonard (PW3) when he saw the accused stab the deceased, who collapsed and fell to the ground.

17. When cross-examined by Counsel for the accused the only thing he heard from the deceased was the question why the accused was following him, to which the accused answered that the deceased had been disturbing him, and that the deceased had walked about 50 metres when he saw the accused stab him on the left shoulder, and that thereafter he cleaned the knife on the grass as he PW2 called Leonard (PW3), an Anti-Stock Theft Unit (ASTU) Officer who rushed to the scene and disarmed the accused, by snatching the knife from him. PW2 emphasised that they were not drunk to the point of not knowing what they were doing.

18. PW3 corroborated the evidence of PW2, that PW2 had called him to the scene of stabbing of the deceased by the accused, that he rushed to the scene, and arrested the accused whom he knew as Kering and took away the knife from him, and arrested and escorted him to Keringet Police Station, leaving the body of the deceased at the spot where he had been stabbed and fallen to the ground. PW3 corroborated the accused's own statement that he had come to visit a relative in the area, and all he established as a cause of the stabbing was that the accused and the deceased had disagreed at some drinking place.

19. When cross-examined by counsel for the accused PW3 stated that he found the accused standing about 10 metres from where the deceased had fallen, holding the knife (Pexh1) by the handle and blood-stained from the handle to the tip thereof, fresh blood, and found the deceased in a state of shock. He did not find the accused either drunk or smelling of alcohol, and neither did he resist arrest.

20. PW6, received the murder weapon from his colleague Cpl. Kioko Mutunga who had been given by PW3, and did not doubt the origin of the knife, and denied Defence Counsel's contention that some statements had been recorded in the course of trial.

21. PW2, reiterated his evidence when he was re-called with leave of court even after the prosecution had closed its case. He did not hear the accused and the deceased exchange any words, the accused went as if he was passing the deceased and stabbed him. *"I saw the accused take out a knife from his trouser pocket"*, and denied counsel's suggestion that he had been instructed to come and lie in court, there was no dispute, he did not hear any words, and never saw the deceased try to stab the accused and confirmed that his statement was recorded the next morning after the event. They stood still they did dare to move near the accused. He did not run away. He stood, and many people accompanied them to the Police Station.

22. It is clear from the evidence both of the prosecution that the accused stabbed the deceased to death. The degree and extent of the stabbing as described by the Doctor (PW5), clearly showed that the accused did not merely intend to cause the deceased grievous bodily harm, but such grievous bodily harm that would be fatal to the deceased. The major blood vessels including carotid subclavian vessels and muscles had been cut with resultant haemorrhage with mild subdural haematoma on the frontal part of the head-resulting in the cutting/severance of the major blood vessels of the neck resulting into shock,

multisystem failure cardiopulmonary collapse and death.

23. Counsel for the accused attributed the killing to drunkenness by both the accused and deceased. PW4 a Police Officer, a member of the elite Anti-Stock Theft Unit of the Kenya Police, stated categorically that the accused neither appeared drunk nor smelt of alcoholic. So factually, there was a remote chance of the accused being drunk. In any event under Section 13 of the Penal Code, intoxication does not constitute a defence to any criminal act, and is in any event only available to an accused under the following circumstances -

1. that the accused was so drunk that he did not know the act or omission complained of was wrong or that he did not know what he was doing, and

2. that the state of intoxication was caused without his consent by the malicious or negligent act of another person, or

3. that person charged was by reason of intoxication insane, temporarily or otherwise at the time of such act or omission.

24. None of these conditions were established by evidence. The defence of intoxication is therefore not available to the accused.

25. Counsel for the accused also suggested that the deceased provoked the accused. For the defence of provocation to hold under Section 207(1) of the Penal Code, the accused must establish the stabbing of the deceased which caused his death was caused by sudden provocation and before there was time for his passion to cool down. Provocation as defined under Section 208(1) is an act which is likely to deprive the person provoked of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

26. The only evidence of provocation offered, is that of the accused himself, that the deceased asked him for a drink, and that when he informed the deceased that he had no money, the deceased told him to stop "boasting" with his money. I am not sure what the word "boasting" means in this context, but I think it means, that the accused should not be "stingy" with his money. Without any other evidence, except that of the accused, and the victim being dead, it is not prudent to take the accused's words or testimony at its face value. I think it is a defence to catch at straw by a drowning man to save himself.

27. But even if the benefit of such derogatory words were to be given to the accused, his assault upon the deceased cannot be regarded as "sudden" in the manner envisaged under Section 207 of the Penal Code. From the evidence the stabbing of the deceased occurred much later after both the

accused and the deceased had left the drink house.

28. The deceased had left first and met PW1-PW3 who had finished a meal of potatoes and had none left to give to the deceased who had asked for some. Perhaps a little later the accused followed the deceased, and he being apprehensive, asked the accused why he was following him. The accused replied that he had been disturbing him. When the deceased left PW1-PW3 – the accused followed him, plunged a knife upon the deceased's neck, severing all the vital vessels carrying blood to the head, and severing the muscles holding the neck, resulting in massive haemorrhage which caused the deceased shock and eventual cardiopulmonary arrest and death.

29. The operative words for the defence of “provocation” is sudden, “in the heat of the moment” which would make a reasonable person to lose self-control – in the words of Tundal CJ -

“The question is whether there had been time for the blood to cool, and for reason to resume its seat ... in which case the crime would amount to lawful murder” - in R vs. HAYWARD (1833) 6c & p 157.

The question is whether such a period of time had elapsed as would be sufficient to enable the mind to recover its balance. Per Hannon J in R vs. SELTEN (1871) 11 COX CC 674 and R vs. BRALL [1995] Cr. L. R. 39 & R vs. IBRAHIM [1981] 74 Cr. App. 154.”

30. It seems to me that there was time for reason to find its seat, and for blood to cool down between the time the deceased made the derogatory remarks “*stop boasting with your money*” and the time the accused found the deceased with PW1-PW3 and the deceased walking away, and the accused sneaking behind, to stab him so viciously and inflicting the deceased with such injury that can only be described as “*grievous harm*” - harm which amounts to a maim or dangerous harm – harm which endangers life”.

31. In this case, it is clear from the prosecution evidence that the accused's sole aim was to kill the deceased. He acted most unreasonably. He committed murder contrary to Section 203 of the Penal Code and I find him guilty and convict him accordingly.

I invite counsel to address the court pursuant to Section 329 of the Criminal Procedure Code on why the accused should not be sentenced in terms of Section 204 of the Penal Code.

It is so ordered.

Dated, signed and delivered at Nakuru this 5th day of December, 2014

M. J. ANYARA EMUKULE

JUDGE



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