



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

CRIMINAL CASE NO. 25 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

DABERIAS LUSWETI WANJALA.....ACCUSED

J U D G M E N T

The accused **DABERIAS LUSWETI WANJALA** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the offence are that **DABERIAS LUSWETI WANJALA** on the 21st day of August 2018 in Bukokholo village, Malakisi location, Bungoma West Sub-county within Bungoma County murdered **SIMEON NYONGESA**.

The case for the prosecution is that on 21.8.2018 **PW8 Simeon Situma Mukoyoni** a neighbour of the accused was in his house asleep when he heard screams Mwizi Mwizi (thief, thief). He came out. He saw the screams were from accused's home. He went there. He met 6-7 people already there. They searched for the thief but did not find him. He went back to sleep. At 5 a.m. he heard people screaming Ndio huyo (He is the one). He went out and saw people with torches near accused banana farm. He found the deceased lying down with injuries on the head. Princus told him that it is accused who had cut him. While still there he saw accused come with a knife and stab the deceased on the head twice. He called the village elder who came and called police. Police came and arrested accused from his house and also recovered the knife.

On being cross-examined by Maloba for accused he testified that when he arrived he found about 40 people at the scene and that accused stabbed the deceased in his presence the second time. He also confirmed that police recovered the blood stained knife from the house of accused.

PW7 Evans Situma Wafula testified that on material time he was asleep in his house when he heard screams from the house of accused. He went there and found accused standing outside with other people who included his brother Primus and Nick. Accused informed them that there was a person in his compound and suspect that the person was drunk and had escaped. They did not see the person and went home. At 4 a.m. he heard screams again and he went to accused's home where he found a person lying down near the banana. He found Primus there who told him that person had been assaulted by accused. The accused then came and cut the deceased again on the head with a panga. Accused then went to his house. Police came to the scene and arrested accused. They recovered a knife from the accused's house.

In cross examination he stated that while he did not see who inflicted the injuries deceased had sustained the first time, he saw accused stab deceased while still lying down the 2nd time.

PW2 Silvia Nasambu Masinde the wife of the accused was away from home on the material day attending a funeral of George Wanjala when at 5 a.m. she was informed by her mother in law, the mother of deceased that deceased had been killed. She went there and found deceased at home of Simeon. She confirmed the accused was her former boyfriend before she married the deceased and they used to quarrel of that past relationship with accused.

PW4 Joseph Nyongesa Okumu was in his house when at 3 a.m. He heard noise from outside of a person saying "Kata chini". At 4.45 a.m. he received information deceased had been beaten. He went to the scene. He found many people present and deceased lying down with injury on the head. He stated that the deceased was lying about 50-60 meters from accused's house.

PW5 John Kundu Chebani the village elder was informed by one Andorina about the screams from the house of Simeon. He went there and found deceased lying down with deep cut wounds on the head and was bleeding. He informed the assistant chief. Police were informed and came to the scene. They received information that it is accused who had injured the deceased. The police went to his house and found him. They asked him and accused admitted to having killed deceased for disturbing the accused the whole night.

PW9 Primus Sitati Wanjala the brother of the accused was in his house when he received a telephone call from accused who told him it appeared there was a person who was walking outside his house. He went there and they searched but did not find the person. They then went to sleep. After about 30 minutes he called again. He ran there and found deceased lying down near Simon's (PW8) farm. He saw the person was bleeding. The accused then came back and again stabbed the deceased on the chest. He then went back to his house. Police came and arrested accused.

PW12 No. 208475 Copl Godfrey Sifirike attached to Kohololo police post received information from Lucas that there was a person who had been assaulted. He and colleague went to the scene and found deceased with cut wounds but still alive. He received information that accused was the assailant. He was led to the home of accused whom they found present. They arrested him and took him to the station. After 3 days he accompanied the OCS and accused to accused's home. Accused led them to their father's house in a store where they recovered a panga.

PW14 NO. 225254 Copl Bernard Mulubi the Investigating Officer visited the scene on 21.8.2018 at around 6 a.m. He found the deceased with injuries. He also received a knife from the OCS which had blood stains but appeared to have been washed. The accused was arrested. On 22.8.2018 the accused led them to his home where they recovered a knife, panga, black sheet, white vest and grey trouser which he produced as exh 2-7 respectively.

PW11 Polycap Lutta Kweyu the Government analyst received

1. blood stains long sleeved shirt
2. blood stained sleeveless vest
3. grey long trouser
4. panga
5. kitchen knife
6. blood sample of deceased.

He conducted DNA analysis on the items and found that black shirt and sleeveless vest and panga were stained with human blood which matched the DNA profile of the deceased. The DNA profile on knife revealed profile of deceased and another unknown person.

PW15 PC Lesila Lapono testified how accused led to his home where they recovered the items at his father's house, who had moved them as people wanted to burn accused's house.

PW16 Joseph Bahati Kenya took a statement under inquiry from the accused. Mr. Maloba objected to the production of the statement saying its recording did not comply with the requirements of a confession under Section 25(a) (1) of the evidence act. In view of the objection the court directed that a trial within a trial was taken.

PC Ben Onyango testified how the suspect was taken to court at Sirisia for extension of detention orders and that he had no injuries, had been fed well and did not complain of any mistreatment. PC Laporas testified how he took him the DCIO who later asked him to accompany the accused to his home as he had volunteered to show them the murder weapon. PW16 Bahati Kenga the superintendent of police testified how the accused was brought to his office to record a statement under inquiry. They communicated in Kiswahili which accused was conversant with. He administered the caution and he elected to make the statement. The accused then made the confession.

The accused gave evidence in the trial within a trial where he testified that he recorded the statement while with the DCIO alone in his office and that acting on information he gave to the DCIO about the whereabouts of the panga he led him to his home where he found the property had been moved to his father's house where they recovered the panga. He said he was answering questions put by the DCIO and that he signed it. He confirmed that while in cells his fellow cellmate called Ian Kones hit him and he screamed and police came to his rescue. None of the police officers assaulted him.

I considered the evidence of trial within a trial and found that the accused did voluntarily make the statement without any undue influence or force or assault by police officers. The statement was admitted in evidence.

The accused upon being placed on his defence elected to give sworn evidence. He testified that on 21.8.2018 he was asleep in his house when at 12 a.m. he heard a person hit the roof of his house with a stick. He went to the door and saw a basin he had put outside had been thrown away. He suspected there was a person outside. He called his brother who came but they did not see him. They went back to their houses but accused hid in a pit latrine and kept watch. He then saw the person again and he raised an alarm. The person ran away. He went back to sleep and later heard noise from home of Simon. He went there and found the deceased lying down. He tried to stab him but the knife missed him. He went back to his house. Later assistant chief and police officers came to his house and arrested him. He confirmed that he was angry with the deceased and wanted to stab him because he deceased had disturbed him the whole night.

The accused called DW2 Jasper Wanjala his father as his witness. He testified that on material day he had heard screams he came out but did not see where the screams were from. He went back to sleep. The next day his wife told him accused had killed the deceased. He went there and saw the deceased. Police told him to remove accused property from accused's house and he kept them at his house. After 3 days police officers came with accused and he showed them where he had kept his property. They took a panga from where he had kept accused's property.

Mr. Malabo for accused filed written submissions. He submitted that the prosecution must prove all the ingredients of murder beyond reasonable doubt. Counsel submitted that the fact and cause of death is not in dispute. The only issue in contention is whether it is the accused who committed the unlawful act which caused the death. Counsel submitted that the prosecution relied on circumstantial evidence which was evidence of suspicion which cannot be a basis of a conviction.

The accused is charged with the offence of murder contrary to Section 203 of the Penal Code. Section 203 of the Penal code defines murder as the unlawful killing with malice aforethought. The principle elements of murder are the causing of death of another person by an unlawful act or omission with malice aforethought. To prove the offence, the prosecution must prove beyond any reasonable doubt that the accused person unlawfully and with malice aforethought caused the death of the deceased.

In Republic -vs- Omwenga 2009 EKLJ Maraga J (as he then was) held:

:It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission- there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of the death, (b) That the accused committed the unlawful act which caused the death of the deceased and (c) That the accused had the malice aforethought.”

The prosecution is under obligation in a criminal trial to prove the ingredients of the offence. The legal doctrine of criminal justice is that an accused person under Article 50(2) (a) of the constitution has the presumption of innocence in his favour guaranteed in the bill of rights unless the contrary is proved by the state beyond reasonable doubt. That burden of proof is well settled that it's the state that bears the responsibility at all times. The well-established jurisprudence on this doctrine that the accused's guilt rests on the prosecution to prove the charge beyond reasonable doubt can be traced way back to the cases of Woolmington Versus DPP 1935 AC 462 and also Miler Versus Minister of Pensions 1942 AC. Whereas in the latter case Lord Denning stated on this phrase of beyond reasonable doubt as follows: **“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”**

The burden is upon the state to prove beyond reasonable doubt that the accused is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the accused's guilt, but it does not mean that an accused's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the accused's guilt, after you weighed and considered all the evidence.

An accused must not be convicted on suspicion or speculation. It is not enough for the state to show that the accused is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces and leaves no reasonable doubt.

In this case the post mortem report revealed that the deceased succumbed to injuries sustained on his head which could have been inflicted by a panga. PW7, PW8 and PW9 testified that they found the deceased already lying on the ground. From their testimony, it is PW9 who arrived at the scene first. According to PW9, he found the deceased body lying on the ground and when the accused arrived at the scene, the accused stabbed the deceased on the left side of the chest before he was stopped and chased away. This version of events is however contradicted by narration given by PW7 who testified that when he got to the scene he found PW9 standing next to the body of the deceased with a torch. He testified that it was at that point that the accused had attacked the deceased and that the accused arrived with a panga slashed the deceased, went away and came back with a knife and stabbed the deceased.

The accused in his defence in explaining the event of the material night stated:

“They went away and I went to the pit latrine and kept watch. After 30 minutes I saw the person. I raised an alarm. Her an away. I did not follow him as I was afraid. I went into the house and stayed there. I then heard him hit the door. I screamed. I heard the dogs of Simon come and the person ran away. I went into the house. I then heard people say “Kaa chini”. After a short time, I heard the cow making noise. I went to the cow shed and found one cow was missing. I heard people at home of Simon. I went there and on arrival I found a person lying down. I tried to stab him but the knife missed him. I went back home and found the cows in the maize farm. I took it to my home. After a short time, I heard assistant chief Barasa and village elder and Joseph Okumu and officers come to my home. It was now 4 a.m.”

In a detailed statement to Bahati Kenga the superintendent of police the accused narrated:

“After about five minutes of silence, I thought he had left but he suddenly hit my window and it opened. I therefore screamed for help several times and my neighbours came and he ran away. We searched for him using torches but we did not see him. I had also called my brother Brimas and he had also come. When people left, I checked on my cows and found that one cow had been untied and I tied it again. I decided to arm myself with a panga and went to sit strategically near my toilet about 15 meters from my house just to see if this person will come back again and I decided to leave the door open. After about two minutes, I saw someone coming very fast. I flashed my torch as he was about to get into my house and I raised the alarm again and he ran away again. I decided to call my brother again and I changed my position and went to sit at an open place. I had a knife in my hip pocket and a panga in my hand. After a while he came again and this time I was determined to tackle him. I ran to where he was and as he tried to run away, I chased him and cut him with the panga that I was holding and he fell down. As he struggled to lift himself up, I removed the knife and stabbed him. He was wearing a jacket and that is what made the knife to bend. By this time neighbours had come and I returned the panga to the house and threw it there and kept the knife behind the table. I went back to where the man had died but I found so

many people had gathered and I decided to go to my house. I remained outside the house till dawn. I saw them turning him and identified him as pastor Melu which is his nick name. They also called his relatives and a lot of people came. Aps from Bukokholo also came and found me in my compound. They arrested me, took me to my house and tried to search for the panga but they did not see it because it was still dark and I did not show them. They took me to their camp and they locked me there. I was picked by police officers from the camp in a vehicle and taken to Malakisi police station here I spent the night. Today 22.8.2018 at about 11.00 a.m., I took police officers to my house because I wanted to show them the panga which I used to Kill Simon. I found my father had removed my items yesterday and taken them to his house. I took the officers to my father's house and I removed the panga from where my items had been kept and gave it to the officers voluntarily. I also wish to state that sometimes during the month of June 2018, Simon attacked me from behind and we fought. He was claiming that he had bared me from going to that area. There has been a rumour that I have a relationship with his wife, I wish to state that the relationship was there but this was long time even before she got married, and she was not in my house on that night of 29th August 2018 as alleged.”

From the evidence of the witnesses I am satisfied that the accused is the person who stabbed the deceased who sustained the injuries from which he died.

In a charge of murder, the prosecution must prove besides the unlawful act that the accused had intention or malice aforethought. Section 206 defines malice aforethought as:

Section 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- c. an intent to commit a felony;**
- d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

PW1 Dr. Ombongi produced a post mortem report prepared by Dr. Hezbon Wafula who performed the post mortem. From the post mortem the injuries were on the head with several cut wounds leading to the fracture of the skull. The accused even when deceased was lying down with injuries again stabbed him on the chest. The parts of the body targeted were vulnerable. The head and chest, and the intention can be discerned was to cause death as it happened in this case. I find that malice aforethought has been proved in this case.

Considering all the evidence I am satisfied that the prosecution has proved the charge of murder contrary to Section 203 as read with Section 24 of the Penal Code. I therefore find accused Daberius Lusweti Wanjala guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

DATED AT BUNGOMA THIS 30TH DAY OF MARCH, 2022

S.N RIECHI

JUDGE