



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 61 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

LUTINTANOI LEREO.....ACCUSED.

JUDGMENT

1. The Accused herein, Lutintanoi Lereo is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The Information states that on the night of the 10th February, 2015 at Kamenu area Makongeni Location of Kiambu County, he murdered David Lkasin Lesukat. He denied the charge and was represented by Mr. Ireri.

2. The prosecution case was as follows. The deceased **David Lkasin Lesukat** was in the material period employed as a night guard at **Pekenya Gas Company**. He worked with in the team consisting of one **Lpalwan** and the Accused, under the supervision of **Joseph Lmebiokini Lesukat (PW1)**. The normal night shift was between 6pm and 6.00am.

3. On the evening of 10th February, 2015, all the said guards and their supervisor reported to work. Shortly after assigning roles to the guards to watch the main gate to the premises, **PW1** proceeded on an errand to purchase a torch or such item. A few employees of Pekenya Gas were still on the premises and one of them, **Patrick Ndichu Njenga (PW3)** was at 6.30pm preparing to go home when he heard people exclaim that the deceased was staggering towards the guard gate. **PW3** rushed outside and saw the deceased staggering from the direction of the guard changing room towards the guard (main) gate. The deceased collapsed just as **PW3** reached him and noted that he had a cut on the head and was bleeding. **PW3** sought assistance from a customer on site who had a vehicle. Fortuitously, **PW1** soon returned and accompanied **PW3** rushed the deceased to St. Mulumba Hospital in the customer's vehicle .

4. The deceased was referred to Kenyatta National Hospital after first aid was administered. The deceased was moved to Kenyatta hospital where he was admitted. He however succumbed to his injuries on the same night. Meanwhile, **PW1** had made a report to police at Makongeni Police Station and after transferring the deceased to hospital returned to his duty station. The Accused had disappeared from duty and did not return. On the night of 11th February, 2015, **PC Anunda (PW6)** received a report that the Accused had been arrested by members of the public. He proceeded to the scene and re-arrested him. Earlier, he and **IP Dume (PW7)** had visited the premises of Pekenya Gas and recovered a *simi* (sword) sheath (exhibit1) and a shirt (exhibit 6) all said to belong to the Accused. Upon re-arresting the Accused, **PW6** had recovered from him a *simi* (exhibit 2) identified as the property of the Accused.

5. Relatives of the deceased, including a cousin, one **Florence Lokiru (PW2)** having been notified of the death of the deceased had travelled to Nairobi and identified the body for the purpose of the postmortem examination carried out on 19/02/2015 by Dr. Wairimu at Kenyatta National Hospital. Her report was tendered in evidence on her behalf by Dr. Kanyi (**PW4**). The body bore several injuries including a 12cm laceration on the scalp with attendant fracture extending to the skull bone and brain with bleeding. There was also a compound fracture of the left ulna. The cause of death was identified to be head injury due to sharp force trauma. A blood sample taken from the deceased together with the shirt alleged to be the Accused's were forwarded to the Government Analyst Lawrence Kinyua Muthuri (**PW5**). He concluded that the DNA generated from the deceased's blood matched with the DNA generated from blood stains of the shirt (exhibit 6). The Accused was subsequently charged.

6. Upon being placed on his defence, the Accused elected to make a sworn statement to the following effect. He stated that at the material time he was working as a guard at Pekenya Gas at Makongeni. He said he worked together with the deceased and **Lpalwan** under the supervision of **PW1**. That he and his three colleagues had reported for duty at 4.00pm on the material date. There were also employees of the gas company at the premises. Presently, **PW1** left him, the deceased and **Lpalwan** to go on an errand.

7. At 7.00pm the Accused decided to go buy airtime only to return and find the injured deceased lying down and **Lpalwan** standing by. **Lpalwan** allegedly explained that the deceased had emerged from a structure nearby staggering from the injury but could not tell how it had occurred. That **Lpalwan** dispatched him to Thika to call other workers to come and help as the deceased could not stand and the supervisor had not returned and could not be reached on phone. That he decided to walk to Thika rather than take a matatu and on arriving at his destination, his colleagues told him to wait but were unresponsive to the emergency. He was eventually arrested from the said premises as he waited. He claimed that he and the deceased were friends, and he did not assault him.

8. The parties did not file submissions as directed by the court at the close of the trial. The court has considered the evidence on record. There is no dispute that the deceased, **PW1**, Lpalwan and the Accused were night guards at Pekenya Gas in the material period and had reported on duty early in the evening of 10th February, 2015.

9. It is not disputed that the said guards were all armed with simis while conducting their guard duties. That at about 6.30pm, the supervisor (**PW1**) had left the premises to go make some purchases and soon after the deceased was seen emerging from the guard changing room bearing a severe head injury and collapsed on his way to the guard gate. Further, that **PW1** and **PW3** mobilized to take the deceased to hospital. That the deceased died on the same night while undergoing treatment at Kenyatta National Hospital; that the Accused was arrested while at the Thika premises of gas company, on the next day, having left his place of work on the night of the attack on the deceased. There is hardly any dispute that the deceased died from the severe head injuries inflicted on his head.

10. The court must determine whether the Accused is the person who, of malice aforethought, inflicted the fatal injuries on the deceased. The prime witness for the prosecution should have been Lpalwan Lenatarayio because he was present at the scene and in the company of both the Accused and the deceased after **PW1** left on an errand on the material evening. He was not called as a witness, **PW7** indicating that he had left his place of work at Thika and gone to Marsabit and all efforts to trace him had failed. All the same, Lpalwan's account to **PW1** did not indicate that he saw how the deceased sustained injuries to his head. Even **PW3**, the first person to respond to the spectre of the staggering deceased, stated that he first saw the deceased staggering as he walked from the guard changing room towards the guard gate at about 6.30pm. **PW6** who was among the first officers to visit the scene, and **PW7** confirmed seeing a lot of blood in the said changing room with a trail leading to the place where the deceased collapsed.

11. The evidence tending to link the Accused with the assault on deceased is circumstantial as no witness, including Lpalwan witnessed the attack on the deceased. The key pieces of the evidence relate to the alleged disappearance of the Accused at the time when the deceased was spotted struggling to walk from the changing or guard room to the guard gate, and the sheath, simi and blood stained shirt found at the scene of attack and said to belong to the Accused.

12. In **Neema Mwandoro Ndurya v R [2008] e KLR** the Court of Appeal reiterating the probative value of circumstantial evidence and the attendant duty of the trial court, stated that:

“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R v Taylor Weaver and Donovan (19280 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.”

13. In its earlier decision in **Mwangi and Another v R (2004) 2 KLR 32**, the Court of Appeal exhorted that:

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge”

See also **Regina v Exall & Others (1866) 176 ER 850** emphasizing the view that all pieces of circumstantial evidence ought to be viewed as individual strands of a cord which when combined together, constitute a rope.

14. In the case of **Ahamad Abolfathi Mohammed & Anor. V R [2018] e KLR**, the Court of Appeal had this to say on this point:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

See also **Musili Tulo V Republic CR. APP. NO. 30 OF 2013**.

15. The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated: -

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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 the 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.”

(see also *Sawe v Republic (2003) e KLR* and *GMI v R Cr. App. No. 38 of 2011*). In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt. (See *TEPER V R [1952] ALLER 480 AND MUSOKE V R [1958] E.A 715*). In *DHALAY SINGH V REPUBLIC, CR. APP. NO. 10 of 1997*, this court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”

16. There can be no doubt that the deceased was likely injured in the guard changing room soon after **PW1** left the three guards on duty to go to the shops. Although there were workers of the gas company in the premises, including **PW3**, **PW1** stated that the guard changing room was used by the guards to keep their uniforms and to change. According to **PW1** and **PW3**, it was still daylight at the material time and one could see clearly around the 80 X 100 feet campus of the gas company. The compound was secured by a concrete perimeter wall and had a main gate manned by the night guards and another rear gate that would only be opened from inside.

17. From the circumstances described by witnesses, it appears unlikely that the deceased was attacked outside the guard hut by an intruder, as it appears that even **PW3** was drawn out by the comments of other gas employees that the deceased was staggering. **PW3** immediately went outside and confirmed this report. He and **PW1** assisted the deceased into a customer’s vehicle and he was escorted to hospital. **PW1** was categorical that when he returned to the workstation after 30 minutes on his errand, he only met **Lpalwan** trying to help the deceased and was joined by employees of the gas company including **PW3**, and that the Accused was nowhere to be seen, and did not return to work at all that night.

18. **PW3** testified that after hearing his colleagues’ comments:

“I got out and saw deceased proceeding from direction of the guard changing room at parking towards guard gate.... I rushed forward and got to him as he collapsed. I saw he had a deep cut on the head. We rushed him to St. Mulumba Hospital. I was with supervisor and one other guard. Supervisor came as I was at the spot and joined me..... I was the first to arrive (where deceased fell). There was another guard at the guard house. I was with other fellow employees..... The assailant had apparently fled; the fellow guard was at the guard gate.”

19. This second guard must be **Lpalwan** and the narrative appears to be in line with the evidence of **PW1** concerning his findings upon return. If indeed the Accused was at the scene with **Lpalwan** assisting the deceased before **PW1**’s arrival, there ought to have been two guards- **Lpalwan** and the Accused. There is no evidence that **Lpalwan** ever left the workstation prior to the arrival of **PW1**.

20. Despite the foregoing narrative, the defence never suggested to **PW3** during cross-examination that in the initial stages, the Accused was also present with **Lpalwan** assisting the deceased. Moreover, if as the Accused asserted in his evidence, he returned to the workstation having stepped out at 7.00pm to find the deceased already hurt, and conversed with **Lpalwan**, **PW3** would have seen him, and given the sequence of events **PW1** would have found him at the scene.

21. The timing and sequence of the transaction do not admit the return of the Accused at all after 7.00pm. His departure appears to be contemporaneous with the sighting of the injured deceased staggering outside the changing room. The Accused’s explanation concerning his departure lends credence to the prosecution evidence that he actually left the scene once and never returned. He claimed that **Lpalwan** dispatched him to Thika – a distance well over a kilometer from Makongeni to seek help from colleagues there. There is evidence by **PW3** that he, the other guard (read **Lpalwan**), and other gas company workers immediately got involved and started mobilizing to take the deceased to hospital, and soon were joined by **PW1**.

22. It makes no sense at all that **Lpalwan** would have dispatched the Accused to Thika for help. The Accused, in his own words elected to walk to Thika rather than take a matatu whose fare was a mere kshs. 10/- and that on arriving at Makongeni, he had remained there for hours despite the fact that his alleged colleagues did not seem interested in his alleged report. Why then did he not return to assist **Lpalwan**, or at least back to work as he was still on night duty? There is no reasonable explanation for his tarrying at Thika where he was eventually arrested on the next day.

23. Section 111 of the evidence Act provides that:

“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity”.

24. The undisputed fact is that the Accused was on duty on the material night. He left at about the time of the sighting of the deceased, injured walking from the changing room. He never returned to work. The onus is on the Accused to explain why and where he went away at such a crucial time, abandoning his night duty an hour after it began. His explanation defies logic and confirms that indeed he had escaped from the premises. Why?

25. **Lesiit J in Republic v. Nicholas Ngugi Bangwa (2015) e KLR** relied on the Court of Appeal case of **Ernest Abang’a alias Onyango V Republic CA NO. 32 OF 1990**, where the Court had observed that:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person Accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect” (emphasis added).

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an Accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available”.

26. The Accused’s explanation evidently capitalizes on the failure by the prosecution to call Lpalwan as a witness but in the circumstances of this case the Accused’s disappearance strongly points to him as the person who attacked the deceased and thereafter fled the scene. Apart from the fact that the Accused’s explanation for his absence is ridiculous, his conduct of staying away until arrested indicates a guilty conscience that renders his attempt to cast suspicion on Lpalwan unsustainable. Indeed, Lpalwan assisted the deceased initially with **PW3** and later with **PW1** when he returned.

27. There is uncontroverted evidence that the deceased suffered a deep penetrating cut to the head that extended to his face and ear and was caused by a sharp object. **PW1** and **PW6** stated that on his arrest, the Accused had a sword concealed in his waist while its sheath had been left behind at the guard changing room. These items (**exhibit 1 and 2**) were identified by **PW1** as the personal weapons of the Accused. Under cross examination, **PW1** was unshaken on this score. He stated that while the employer had supplied the guards with one *simi* for use in their work, the sheath and *simi* exhibited in court were the personal weapons of the Accused.

28. It appears that all the guards on duty on the material night were traditional men of Samburu ethnic extraction among whom the carrying of a personal weapon such as clubs and simis is common. Therefore, owning such a personal and distinct weapon is normal. The witness **PW1** could tell from the bright decorative pattern of the sheath **exhibit 1** that it was the Accused’s sheath. He cited distinguishing features between the Accused’s *simi* and the one issued by their employer.

29. The court is persuaded that **PW1** was familiar with the Accused’s *simi* and sheath and satisfied the sheath and *simi* exhibited herein were indeed the property of the Accused. And even though the *simi* not submitted for analysis, there is every likelihood that the Accused unsheathed his *simi* in the guard changing room before slashing the deceased. He thereafter fled with the *simi* but left the sheath behind in the changing room where it was subsequently found. Thereafter, he had plenty of time to destroy any marks of blood on his *simi*.

30. However, regarding the presence of the deceased’s blood on the shirt, **exhibit 6** recovered near the guard changing room, there was no conclusive evidence that it belonged to the Accused, but the finding corroborates other evidence regarding the scene of the attack on the deceased.

31. The deceased was slashed with a *simi* on the head, and so severely that the cut traversed the scalp, cracked the skull and penetrating into the brain. The cut measured 12cm in length and the pathologist (**PW4**) explained that the space between the skull and brain measures about 2 – 3 cm and that evidence of bleeding and clotting revealed that the injury reached/affected the brain. Whoever inflicted this injury on the deceased had the intention to kill him or cause grievous harm in the terms of section 206 (a) and (b) of the Penal Code. The force used, choice of weapon and body target of blow and actual injury inflicted make that apparent. See **R v Tumbere s/o Ochen [1945] 12 EACA** as cited with approval by the Court of Appeal in **Joseph Wanjohi Ndung’u v. Republic [2020] eKLR**,

32. As regards motive, the Court of Appeal stated in **Libambula v R [2003] KLR 683** that:

“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person (see Section 8 of the Evidence Act). Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.” (Emphasis added). See also section 9(3) of the Penal Code and **Choge v R (1985) KLR 1.**

33. On the proven facts of this case, it is safe to conclude that the deceased and Accused were alone in the guard changing room when the Accused attacked the deceased who, apparently tried to fend off the attack but sustained a hand fracture on the right hand discribed in the postmortem report as a defence injury. It is not clear from the proven facts as to what provoked this attack. There may well have been a quarrel between the two men who according to **PW1** hailed from the same clan. In any event, the facts disclosed indicate that the deceased barely had a fighting chance and was badly injured and perhaps left for dead but managed to walk out of the changing room after the assailant fled.

34. . Reviewing all the facts of the case, I am satisfied that the Accused is the person who inflicted severe injuries on the deceased using a *simi* before escaping. The proven facts displace the Accused's explanation and point unerringly to his guilt. There are no circumstances in this case, given the sequence and timing of events, to weaken the inference that the Accused, and only him attacked the deceased and then fled, escaped, abandoning his duties. I am satisfied that the prosecution evidence meets the required standard and find the Accused guilty and convict him as charged.

DATED AND SIGNED ELECTRONICALLY ON THIS 16TH DAY OF MARCH 2021.

C. MEOLI

JUDGE

DELIVERED AND SIGNED AT KIAMBU ON THIS 23RD DAY OF MARCH 2021.

M. KASANGO

JUDGE

In the Presence of:

..... **for Prosecution**

..... **for Accused**

Accused present

Court assistant.....