



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NUMBER 65 OF 2016**

**REPUBLIC.....ODPP**

**VERSUS**

**JOHN WAWERU.....ACCUSED**

**J U D G M E N T**

1. The accused John Waweru was charged with murder **Contrary to Section 203 as read with 204 of the Penal Code**. That on 8<sup>th</sup> November 2016 at Olunguruone Township Kuresoi South Sub County within Nakuru County he murdered Andrew Lang'at.
2. The prosecution called seven (7) witnesses.
3. The case for the prosecution is that on 8<sup>th</sup> November 2016 **PW1 Kiplangat Arap Koech**, the father to the deceased **received a report from a man** who came from Olunguruone to the effect that his son had been tripped by a police officer and had fallen down and injured his head. He sent his son **Joel, PW2** to the shopping centre to check on his brother.
4. According to Joel Lang'at, the deceased Andrew was his younger brother, he said **that one boy whose name he could not recall told him** that his brother Andrew had been pushed by Waweru and had fallen on the road.
5. He proceeded to the scene and found his brother Andrew seated by the road side. Andrew was drunk. Joel noticed that he had minor bruises. He suggested that he take him to hospital but Andrew said he was not badly injured and he would just go home. He him what had happened. The deceased told him he had just found himself lying on the road side *"nilijistukia tu nikiwa chini"*. The deceased then hired a motorbike and went home.
6. The next day Joel was called by a nephew to go see the deceased. He went and found the deceased by roadside, he was panting and could not talk. They took him to Olunguruone Hospital. PW1 was informed and he also went there. He found him admitted in hospital and on a drip. He was transferred to Tenwek Hospital. There a scan was done and they were referred back to Olunguruone hospital. He died on the way and they reported at Olunguruone Police Station.
7. According to Joel, *"Later, I heard people complaining that deceased had been drinking with Waweru."*
8. On cross examination Joel said that the boy who reported to him said that the deceased had been fighting with another whom he did not name. That he himself did not witness the fight. That he noted small bruises on the deceased's face, did not see any blood on the road where he found the deceased. That the deceased told him he was drunk and just found himself on the road. That people at the shopping centre named Waweru saying that he was with the deceased, that he himself did not know whether deceased was pushed or fell due to drunkenness.
9. PW1 said that when he saw the deceased at the hospital he was bleeding from the nose and mouth.
10. **PW3 John Cheruiyot** was the village elder, who broke the news of death of the deceased to the parents of the deceased. His evidence on how the deceased died; *"We were told that a police officer pushed the deceased and he fell and hit his head."* He did not name the person who told them, or where this person came from or how this person came to know this.
11. **PW4 No. 69903 Sgt. Arandi Mosota** was a police officer at Olunguruone Police Station. He testified that on 10<sup>th</sup> November 2016 while at the police station, some ten (10) people came there and reported the death of a man who had been assaulted by a police officer. He confirmed in the OB that such a report had been booked in the OB. He went to the house of the officer PC John Waweru, arrested him, and escorted him to the police station, from where he was later transferred to Molo Police Station for his own safety.

12. These four (4) witnesses were heard by Hon Lady Justice M. Odero. The matter landed in my docket on 26<sup>th</sup> September 2019. I heard PW5, 6, 7.

13. **PW5 Dr. George Biketi** from Nakuru Provincial General Hospital Annex Hospital conducted the autopsy on 11<sup>th</sup> November 2016. He testified that deceased Andrew Lang'at was 36 years old, 6.1 ft. tall, He found a deep cut wound on occipital scalp, extending to the skull, with a blood clot, skull fracture. There were bruises on both wrists. He determined the cause of death to be severe head injury due to blunt trauma to the head. On cross examination he said the trauma was as a result of direct impact with a blunt object which could have been wood or metal; that from the shape of the wound, it was a blunt object, the force used caused the fracture and the clot. He could not tell time of death. That bruises on wrists could have been signs of struggle. That if the deceased had fallen, one would not have expected injuries on other parts of the body. That the deceased had injury on left eye, both wrists and this ruled out a fall. He said he could not rule out a fight.

14. **PW6 No. 91820 PC Charles Kitheka** accompanied PW4 in arresting the accused.

15. **PW7 No. 218719 IP Fredrick Juma** was attached to Olenguruone Police Station at the material time. On 9<sup>th</sup> November 2016 an assault report was booked at 14.10 hours involving a police officer and a member of the public. On 10<sup>th</sup> November 2016, it was reported that the victim had succumbed to his injuries. The OCS ordered the arrest of the officer concerned, and he was arrested and escorted to Molo Police Station.

16. PW7 recorded also suspect's statement under inquiry. He later escorted him to Nakuru where he was charged with murder.

17. On cross examination he said he was the actual investigating officer and later handed over to CI Opudo, the OCS. He said that in his statement under inquiry the accused confirmed that he had been on a drinking spree with the deceased and that they ate lunch together. The deceased got drunk and engaged in a fight with others, that the accused went to separate them, that deceased fell on his back and hit his head. Others ran, he went back to the bar to seek assistance but found deceased had been taken away.

18. The prosecution closed its case.

19. Pursuant to the court's Ruling of 3<sup>rd</sup> August 2020 I heard PW8, No. 237467 IP Norah Chelimoh the Officer in Charge Ole Nguoruone Police Station. She testified that indeed there was an assault report made on 9<sup>th</sup> November 2016 by two (2) brothers Rono and Cheruiyot at 1410 hours that their brother was attacked by a person known to them as Waweru, a police officer. The Report was booked by PC (W) Waiganjo, that the reportees needed police assistance. The following day a report was made that the said brother had died while on his way to hospital, that he had been treated at Olenguruone Hospital, then Tenwek Mission Hospital, from where they were sent back to Olenguruone Hospital. From her testimony, the assault report was never investigated, no statement were recorded, and nothing in the Occurrence Book to show that there was an eye witness to the alleged assault.

20. The prosecution then closed its case. The accused was put on his defence. The accused requested for different counsel and the prayer was granted. Mr. K. Mbugua came on record for the accused.

21. In his unsworn statement of defence the accused told the court that at all material times he was No. 95887 PC John Waweru attached to Olenguruone Police Station. He denied the charge of Murder of Andrew Lang'at alleged to have been committed on 8<sup>th</sup> November 2016. He conceded that he and the deceased were known to each other, and on the material date they shared drinks and a meal at Sotet Bar and Butchery in Olenguruone Township. They then moved to another bar, Kapchorwa Bar where they drunk till 5.00 p.m. They parted ways when Andrew said he needed to go home to check whether his cows had been milked. However their paths crossed again briefly when accused went to buy airtime on his way back to Malo Malo Bar, and in fact a tout by the name of Kaproa even met them and asked why they were so happy. Accused left deceased talking with Kaproa, went to Malo Malo Bar, took his beer, and later went home to camp.

22. The following day, in the evening when he came back from the shopping centre, he learned from his colleague PC Waiganjo that two (2) brothers had been there looking for him because they heard that he Waweru had been with their brother (the deceased) in town the precious day, that this brother had been hospitalized, was not talking and they had wanted some money.

23. The day after this his colleagues arrested him from his house and escorted him to Molo Police Station where they informed him that he had been arrested because he had murdered someone. An IP Juma took down his statement and he told him what he had told the court. The following day he was taken to court and charged with this offence. He told the court that when PC Waiganjo told him that the deceased was in hospital his only wish was for the police to hear from the deceased as to what had happened. He told the court that the deceased would have told the police the truth. He denied that there was any conflict between him and the deceased to warrant the charges facing him. He urged the court to acquit him.

#### **Accused's Submissions**

24. In his submissions counsel pointed out that the deceased's father testified that he had received a report that his son had been tripped by a police officer had fallen down and injured his head. This man was never identified, never called as a witness by the prosecution, this man did not give any particulars of the police officer who allegedly tripped the deceased. That it was alleged that a certain unnamed boy had told the deceased's brother one Joel Lang'at that the deceased was pushed by one Waweru, and that he fell on the ground. This boy's identity was never given, neither was his testimony presented to court. That this Joel's testimony was to the effect that when he spoke to the deceased, the deceased told him that he just found himself on the ground and did not mention the accused person in connection to finding himself in that state. It was his testimony that he did not know whether his brother had been pushed to the ground or he just fell down by himself. That the village elder told the court that he and others were told that deceased was pushed by a police officer, however he did not identify who the teller was and who he was with when they received the information. Neither did he disclose who the police officer who was being accused by the unidentified informant was.

Similarly the testimony of PW4 the officer who received the initial assault report did not reveal much of the detail of the alleged assault. Who reported? Whether their statements were recorded and what they said.

That the post mortem report evidence that the deceased was hit with a blunt object was untenable because no witness had mentioned any blunt object.

25. Finally that even when the court sought clarity on the alleged assault the evidence of PW8 did not reveal anything, as the prosecution did not call the police officer who was assigned to investigate the alleged assault.

26. After the summary and analysis counsel urged the court to find that the prosecution had failed to prove the charge against the accused to proceed to acquit him.

### **Analysis and Disposition**

27. I have carefully considered the evidence before me, the submissions by counsel. The charge of **Murder** is set out under **Section 203 as read with 204 of the Penal Code Cap 63 Laws of Kenya.**

#### **“S. 203. Murder**

**Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**

#### **S. 204. Punishment of murder**

**Any person convicted of murder shall be sentenced to death.”**

The prosecution must prove:-

- 1) That a person died
- 2) The death was unlawful
- 3) The death was caused by the accused with malice afterthought as provided for under **Section 206 of the Penal Code;**

**“S. 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.”**

28. In this case it is not in doubt that Andrew Lang’at is deceased. The post mortem states; **“that the circumstances of death are that on 8<sup>th</sup> November 2016 along Olenguruone Kiptagich Road the deceased was assaulted by the suspect and later died on the way to Tenwek Hospital. The date and time of death are indicated at 1900 hours on 11<sup>th</sup> November 2016. Cause of death was “Severe head injury due to blunt force trauma on the head.”**

On examination the pathologist observed;

- Cut wound on the occipital scalp about 3 x 2 cm long. Deep extending to the skull.
- Cut wound with a blood clot left supra orbital region
- Bruised wrists bilaterally

- Internally he found a skull fracture subdural hematoma on the occipital region

Hence there is no doubt that the deceased did not die of natural causes.

29. The main issue is was death caused by the accused person?

30. It is evident from the prosecution witnesses and the accused person that the accused and the deceased were known to be buddies of sorts, they drunk together, and shared a meal. The question is whether there any evidence that the accused had any reason at all to cause the death of the deceased?

31. In addition to the evidence that the Andrew died of an unnatural cause the prosecution must prove beyond a reasonable doubt that his death was caused by the accused person and with malice aforethought as defined by law.

32. The PW1, PW2 and PW3 all said what they heard. Each of them said he was told by another, unnamed person that the accused had something to do with the deceased's fall; that the accused had tripped or pushed the deceased to the ground. However none of the alleged eye witnesses testified that he or she saw the accused person was in a fight with the deceased, or the accused person pushed him and tripped him to the ground.

33. In addition the pathologist was of the view that the injuries on the deceased were inflicted and that had he been in a fall, there would not be the other injuries that he found.

34. It is also evident that these alleged eye witnesses did not record statements with the police

35. PW 7 spoke about an assault report having been made in the OB of the police station. It is on the basis of this report that the accused was later arrested upon the death of the deceased. However the only prosecution evidence with regard to this report was the persons who made the report reported were brothers of the deceased who stated that he was last seen with the accused, was now in hospital and was not talking. The record will show that the alleged that the assault happened during day, because PW2 said he found his brother at 5.00 p.m. A report was made to the police but this report was not investigated. Questions remained unanswered; who were the eye witnesses. Were they interviewed? Statements taken? Where did the alleged assault take place? Evidence surrounding the alleged assault though very crucial to this case was not presented to court. There is no evidence that the scene was visited, or the complainant visited by the police. It is not clear who made the assault report, It was not PW1 or PW2, neither was it the deceased, so who did? Who were the eye witnesses to the fight?

36. The only firsthand evidence availed to court is that of the deceased's brother Joel, who spoke to his brother the day of the alleged fight. He told the court that his brother told him he just found himself on the ground. He did not tell him about a fight, he did not tell him anyone had pushed him neither did he name the accused as his assailant.

37. The deceased was married with a wife and children. That evening he went home, and spent the night. He had nephews around him including those who went to call Joel the next day. None of these members of his family say that he deceased at any time mentioned that he was in a fight with anyone, leave alone the accused. Or that the accused had pushed him.

38. There are so many questions that were left hanging in this case, such that the only evidence on record is that the deceased fell, on his head and injured the back on his head.

39. The pathologist put forth a theory that it may have been metal or wood that could have caused the injury, but no evidence that any weapon was used to hit the deceased. The consistent evidence on record, is that he fell and hit his head on the ground.

40. It is also noteworthy that the PW2 did not notice any cut wound and the head at the scene, he only saw the minor bruises, which begs the question, if indeed the deceased had a deep cut wound at the back to his head when the brother saw him, would he have let him to go home? Because the description of injury given by the doctor on post mortem and the injuries noticed by PW2 at the scene where he found his brother on 8<sup>th</sup> November 2016 at 5.00 p.m. are not consistent. Could PW2 have missed the deep cut wound on the back of his brother's head?

41. The reason for the arrest of the accused is that he was the last person seen drinking with the deceased before the deceased was found seated at the road side by his brother. It was also alleged that he was the one who pushed the deceased to the ground. He was the suspect for this reason.

42. The accused person gave an account as to how he spent his time with the deceased up to the time they parted ways. His account was uncontested. It remains clearly believable in the light of the case for the prosecution. The record will show that this court, wary that the prosecution was keeping the evidence on the investigation of the alleged assault from the case, and in the interests of justice, sought to have the same availed to court. It was not there.

The court was left with the circumstantial evidence that accused person was the last person to be seen with the deceased before he was found on the side of the road with the injuries on the head. And the accused was the key suspect of having caused the injuries on the deceased either accidentally or deliberately.

However it is now settled that no suspicion can amount to proof of a criminal charge see **Joan Chebichii Sawe vs Republic [2003] eKLR** where it was held:

***If that be the case, then the evidence does not irresistibly point to the appellant to the exclusion of all others within the meaning***

of *R v Kipkering arap Koske & Another* 16 EACA 135 where it held, inter alia, that:-

**“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt”.**

***In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of *Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported)*, suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge’s view that the prosecution had proved its case against the appellant beyond any reasonable doubt.***

43. It was the duty of the prosecution to prove their case beyond a reasonable doubt. The prosecution established that the deceased died, of unnatural causes, but it is my finding and holding that that death was not caused by the accused person.

44. Having found that, I find that the charge against the accused must fail, he is not guilty, the charge is dismissed and accused accordingly acquitted.

**DATED, SIGNED and DELIVERED** virtually this 18<sup>TH</sup> day of **AUGUST, 2021.**

**MUMBUA T. MATHEKA**

**JUDGE**

**In the presence of:**

Edna CA

Accused: Present

For state: Ms. Mumbe

For accused: Mr. K. Mbugua