



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 10 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

ABSALOM LOTIM LIMANGURA Alias

ABSALOM KIBETI KROP...ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The accused person herein is charged with the offence of *murder contrary to section 203 as read with section 204 of the Penal Code*. The particulars as contained in the information dated 26th July 2019 are that on the 19th day of May 2012 at 1700hrs at Komol Village, Chemwochoi Sub-location within West Pokot County, he murdered Samson Limangole Kaboyi.
2. On 26th July 2019, the accused took plea and denied committing the offence. Thereafter, the prosecution called 6 witnesses in support of the allegations against the accused. At the close of the prosecution case, the accused was found to have a case to answer and put on his defence. He gave sworn testimony but called no witnesses.

The Facts and the Evidence

3. The brief facts surrounding this case are that on the 19th May 2012, the family of the late Limangole Kopirpir held a meeting for the purpose of settling land disputes between the deceased herein and the third house of his father's family to which the accused belongs. After what appeared to be a successful meeting, the accused herein had his reservations about the decisions that had been made. As a result of his reservations, the accused dashed to his mother's house, and shortly thereafter came out with a bow and arrow with which he shot the deceased on the left side of the head just slightly above the left eye. The deceased fell down and died on the spot.
4. The matter was reported to the police by area chief Nelson Mesiningiro (PW4). The police arrived at the scene and removed the body to Kapenguria Hospital Mortuary where a postmortem examination was conducted before the deceased's body was released to the family for burial. After committing the offence, the accused disappeared from home and was not arrested until 17th July 2019 and subsequently charged with the offence.
5. PW1 was JOHN PKEMOI KOPIRPIR who is an uncle to the deceased and the accused herein. He testified that on 19th May 2012, he attended a land dispute resolution meeting at the home of his brother who had died and left behind three wives. He went on to state that the accused herein had destroyed the boundaries previously set demarcating the land among the deceased's three wives, hence the need for the meeting to re-demarcate the land. PW1 (John) further stated that after the meeting lunch was served at 3.00pm, but that during the lunch, the accused got up and went to his mother's house which was about 100 metres away. When the accused emerged from his mother's house, he was heard swearing that he was going to kill somebody.
6. It was John's testimony that when the deceased stood up to see what was happening, the accused shot him on the head above the left eye and he fell down and died on the spot. All the eight elders who were taking their lunch stoop up and started screaming. The accused swiftly ran away and disappeared into the bushes.

7. John also testified that he and the other elders reported the matter to the police through the area chief. He also confirmed that he was one of those who attended the postmortem examination on the body of the deceased on 30th May 2012. He identified the arrow head that was removed from the deceased's head during postmortem.

8. It was also John's testimony that in 2018, the accused returned home and threatened to kill the deceased's two wives who had fled for their lives following the deceased's death. That the accused also destroyed the windows of the houses, before he again ran away. Later, John learnt that the accused had assaulted a neighbor and had been arrested. In his concluding testimony, John stated that on 19th May 2012, the accused was between 14 – 15 years of age, and that he (John) has never had a grudge with the accused who is son to his brother. He also told the court that the accused has one brother while the deceased was his mother's only son. Even the second house had only one son.

9. In cross-examination, John reiterated his averments during his evidence in chief as he denied a suggestion by defence counsel that it was not an arrow that killed the deceased. John also denied a suggestion by defence counsel that from 2012 to 2018, the accused was around his home, and that if the accused had been around home as alleged, he (John) would have reported him to the police to have him arrested in connection with the killing incident of 19th May, 2012.

10. PW2 was ROSELYNE CHEPOKAPTUL MERIALIMA, wife to the deceased. She corroborated the testimony given by John and stated that she saw the accused shoot the deceased with an arrow as she stood outside her house. On the following day, she fled to her maternal home together with her children, but she returned to bury the deceased. PW2 (Roselyne) told the court that the accused did not attend the deceased's funeral but in 2018, after she had reconstructed her home, the accused returned home and destroyed it. She made a report to the police and had the accused arrested. It was Roselyn's testimony that the accused and the deceased were quarrelling over boundaries.

11. ANN CHEYECH (Ann) testified as PW3. She is a daughter to the deceased. She did not see the accused shoot the deceased, but when she came out of the house after she heard screams, she found the deceased lying on his back, dead. Ann also testified that when she and her mother later Roselyn returned home to try and reconstruct their lives, the accused and his brother destroyed their house.

12. NELSON KAMARINYANG MESININGIRO, the then Chief of Chemwochoi Location testified as PW4. On 19th May 2012, he received a call at about 3.00pm concerning the death of the deceased. He rushed to the scene and found deceased lying dead on the ground. He informed the police at Kapenguria Police Station who later went to the scene and removed the deceased's body to Kapenguria District Hospital Mortuary. It was Nelson's testimony that from the day of the incident, the accused remained at large until 2019 when he (Nelson) got news that the accused had been arrested. It was also Nelson's testimony that he had no personal grudge with the accused.

13. PW5 was Dr. JACOB RUTO NANG'OLE Deputy Medical Superintendent Kapenguria County Referral Hospital. He is the one who presented the post mortem report on behalf of Dr. Fred Kiptoo dated 30th May 2012. The report revealed that at the time of the post mortem examination, the deceased's body was decomposed and not well preserved and had an arrow embedded in the head just above the left eye. The arrow head had gone 5" into the skull, piercing into the left temporal part of the brain. There was subdural haematoma. Dr. Ruto testified that apart from the injury caused by the arrow, the deceased's other body systems were normal. The postmortem report was produced as Pexhibit 2. In the opinion of the doctor the cause of death was cardiorespiratory arrest due to penetrating head injury causing subdural haematoma.

14. The last prosecution witness was number 80205 Police Constable Evans Agumba Waguda who testified as PW6 and was the investigating officer in this case. PC Waguda recollected receiving instructions from OCS Kapenguria Police Station on 17th July 2019 concerning the arrest of the accused. After digging through the archives at the station, he confirmed the incident as recorded in OB No. 28 of 19th May 2012 under case file number 840311/2012, which file had been opened pending arrest of the accused.

15. PW6 also testified that he recovered an arrow head from the store. The same was produced as Pexh. 1. PW6 also told the court that after recovering the postmortem report, he was able to contact Dr. Kiptoo who did the postmortem examination on the body of the deceased and took the postmortem report to him for certification. The accused thereafter was arrested. He also looked for and found the witnesses.

16. During cross examination, PW6 testified that the accused was arrested from his home. The witness stated that he was not aware of any traditional LAPAI or compensation ceremony involving accused and deceased who were step brothers.

Case to Answer

17. At the close of the prosecution case the parties made no submissions on whether or not the accused had a case to answer. After carefully considering the evidence on record, the court ruled that the accused had a case to answer for the murder of the deceased. He was accordingly put on his defence.

The Defence Case

18. The accused gave sworn evidence. He called no witnesses. While admitting that he shot the arrow which killed the deceased, the accused stated that he did so in self defence. His side of the story is that on the material day, he was sent away from school because of outstanding school fees. On arrival at home, he found his mother, Esther Limangole who told him she had no money and asked him to go to Samson, the deceased and ask for the money. He testified that when he approached the deceased, the deceased told him that he (Samson) was going to kill him so that he could inherit the whole of their father's land. On hearing that threat, the accused said he ran away for fear of his life, as the deceased was armed with a panga and a spade. He stated he ran to his mother's house, and came out with a bow and arrow so he could protect himself in case the deceased attacked him. The accused stated that as he came out of his mother's house, he saw the deceased coming towards him. Fearing that the deceased would attack him, the accused shot the arrow, with the view of scaring him, but the arrow hit the deceased on the head, as a result of which the deceased died.

19. The accused stated further that after shooting the deceased, he accused ran away to his maternal uncle's home in Kacheliba where he stayed until 2015 and in January 2017, he got a job with Lavington Security as a Security Guard attached at Kitale High Court. In April 2019, his contract with Lavington Security ended and he returned home. On 16th July 2019, he was arrested in connection with an assault case. Later he was charged with murder which he denied.

20. During cross examination, the accused denied that he had acquired a new identity card in an effort to conceal his true age. He also denied that his other name was Absalom Lotim Limangura. In answer to a question by the court, the accused testified that he was issued with his national identity card on 14th February 2017, and that that was before he got employed by Lavington Security Company. The accused also testified that the prosecution witnesses were all liars when they told the court that it was him (accused) who attacked the deceased for no apparent reason. He reiterated his evidence in chief that he killed the deceased in self defence as he never intended to kill him. The accused also stated that during his stay in Kacheliba, he continued with school until he completed class 8. Finally, the accused stated that he was about 16 years old when the incident occurred.

The Law and Issues

21. The offence of murder is defined under **sections 203 and 206 of the Penal Code**. For the prosecution to prove the charge of murder against the accused, it must prove first that someone died under unlawful circumstances and two prove the cause of the death. Finally, the prosecution must prove that the accused is the one who caused the death and that he did so with malice aforethought. So, in the present case, the issue that presents itself for determination is whether the prosecution has proved beyond reasonable doubt that the deceased died and what the cause of death was and whether it is the accused herein who unlawfully caused that death and that he did so with malice aforethought.

Analysis and Determination

22. There is no doubt in this case that the deceased herein died instantly after being struck with an arrow that was fired by the accused. The prosecution evidence is to that effect and so is the defence evidence. The medical evidence given by Dr. Jacob Ruto Nang'ole, PW5, confirmed that a postmortem examination was conducted by Dr. Fred Kiptoo on 30th May 2012 at the Kapenguria District Hospital. During the post mortem, it was established that an arrow head was embedded in the deceased's head just above the left eye. According to the report that was the only injury on the body of the deceased, save that the arrow had pierced into the left temporal part of the brain; resulting in subdural haematoma. The cause of death was given as cardiorespiratory arrest due to a penetrating head injury causing subdural haematoma.

23. The only challenging issue is whether the accused killed the deceased in self defence as alleged. The accused's side of the story is that he acted in self defence when he shot the arrow that hit the deceased on the head just above the left eye, killing him instantly. He explained that the deceased, who was allegedly armed with a panga and a spade threatened to kill him so that he (deceased) could inherit the whole of their father's land. He denied any knowledge of a family meeting on the material day.

24. The prosecution on the other hand told the court that on the material day the family held a meeting attended by members of the family and other elders to re-establish boundaries which had been destroyed by the accused. The meeting was attended by the accused and his mother, among other people. The area Assistant Chief William Lolilom Lotem also attended the meeting.

25. According to John Pkemoi Kopirpir, PW1, the meeting ended peacefully at 3.00pm and lunch was served. As the group was eating the accused left for his mother's house and soon after he was heard shouting "**Leo leo nitaua mtu**" which words when translated mean, "**Today today I shall kill somebody.**" According to PW1, when the deceased heard the accused shouting he stood up to see what was happening and it was during that moment that he was shot with an arrow.

26. PW2, Roselyne Chepokaptul Merialima confirmed PW1's testimony as to the meeting, the lunch and the shooting. PW2 added that the accused became angry with Samson when the latter told him during the meeting that his (Samson's) boundary had not extended into the accused's land. PW2 also testified to the fact that when the accused eventually returned home long after the shooting incident, he destroyed her house, forcing her to make a report of the incident to the police.

27. PW4, Nelson Kamarinyang Mesiningiro testified to the fact that after shooting the deceased, the accused ran away from home and remained at large for a very long time.

28. From all the above evidence I am satisfied that there was a family meeting on the material day and that the accused, together with his mother attended the said meeting. Having so found did the accused act in self defence when he shot the deceased?

29. Section 17 of the Penal Code Cap 63 Laws of Kenya stipulates that:-

"17. Subject to any express provisions of this Code, or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law."

30. In the case of *Republic -vs- Simion Owour Otieno – Migori HCCR Case No. 23 of 2015 [2017] eKLR*, the court at Migori cited the Court of Appeal decision in *Ahmed Mohamed Omar & 5 others -vs- Republic [2014] eKLR* in which the Court of Appeal stated the following regarding the defence of self-defence:-

"The common law position regarding the defence of self defence has changed over time. Prior to the decision of the House of Lords in DPP -vs- MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self defence not only that the accused believed that he was being attacked but also that such belief was based on reasonable grounds. But in DPP -vs-

MORGAN (Supra) it was held that:-

“.....if the appellant might have been laboring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellant’s belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”

31. Further to the above definition the courts have held that if self-defence is raised as an issue in a criminal trial the same must be disproved by the prosecution, the reason for this being that it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In essence therefore the prosecution is under a duty to prove that the violence used by the accused was unlawful. As was held in *Republic –Vs- Williams [1981] 3 ALL ER 411*,

“In case of self-defence, where self-defence or the prosecution of crime is concerned, if the jury come to the conclusion that the defendant believed or may have believed, that he was being attacked or that a crime was being committed or that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant’s alleged belief was mistaken, and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been laboring under it, he is entitled to rely on it.”

32. In *Sinaraha Baya -vs- Republic [2019] eKLR* the Court of Appeal sitting at Mombasa referred to its earlier decision in *Victor Nthaga Kiruthu & Another -vs- Republic [2017] eKLR* in which it summarized the relevant principles on the defence of self-defence as follows:-

i. Self-defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one’s family or one’s property from the real or threatened attack. Self-defence is therefore a justification in the application of force recognized by the common law.

ii. The law generally abhors the use of force or violence, but there are instances when a person is justified in using reasonable amount of force in self-defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.

iii. It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self-defence. It is sufficient if he apprehends an attack and uses force to prevent it.

iv. The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.

v. What amounts to reasonable force is a matter of fact to be determined from the evidence and the circumstances of each case.”

33. Applying the above principles to the present case, I find and hold that the defence of self-defence is not available to the accused. I also find and hold that the defence of self-defence was raised by the accused as an afterthought as it never took centre stage during cross examination, and further that there was neither a real nor threatened attack either to the person or property of the accused. I also find and hold that this purported defence of self-defence is a lie concocted by the accused in an effort to escape liability for his criminal act.

34. The prosecution has proved, and in my considered view, beyond reasonable doubt, that the accused had destroyed boundaries earlier established by the family to mark out the three portions of the land among the three wives of the deceased’s and accused’s father. There is evidence to show that the accused attended the said meeting at the conclusion of which he left in a huff as he was angry with the decisions that had been made. The evidence shows that when he left the meeting and while others were eating the accused went straight into his mother’s house and picked up a bow and an arrow. The accused himself also confirmed this fact. As he came out he announced loudly that he was going to kill somebody and in a very short time, the deceased fell and died with an arrow head embedded in his head. This evidence is uncontroverted. This therefore means that the accused intended to kill the deceased or cause him grievous harm. Further the fact that he shot the deceased with an arrow was sufficient to prove that the deceased could not survive the attack.

35. I also find and hold that if indeed the accused shot the deceased in self-defence, there would have been no reason for him to run away and remain in hiding until he thought people had forgotten the incident. His action of running away is a clear indication that he knew that what he had done was wrong, unlawful and unjustified.

36. For all the above reasons, I find the accused ABSALOM LOTIM LIMANGURA alias ABSALOM KIBET KROP guilty of the murder of SAMSON LIMANGOLE KABOYI on the 19th day of May 2012 and convict him accordingly.

37. It is so ordered.

Judgment delivered, dated and signed in open court at Kapenguria on this 29th day of July, 2020

RUTH N. SITATI

JUDGE

In the Presence of

M/S Kiptoo ADPP for State

M/S Bartilol holding brief for Lowasikou for accused

Mr. Wycliffe Juma – Court assistant