



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 18 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

BARAKA ole SUMANI *alias* KILABU OLOKUNYI.....ACCUSED

JUDGMENT

1. **Baraka ole Sumani *alias* Kilabu Olokunyi**, the accused person herein and a minor, was charged with another not before Court with the murder of **Mathayo Leisa** (hereinafter referred to as '**the deceased**') on 27/06/2018 at Rongo Township within Migori County. The accused person denied committing the offence and the case was set for hearing.
2. Five witnesses testified in support of the information facing the accused person. **PW1** was **No. 57397 PC George Gekene** attached at Kamagambo Police Station. **PW2** was **No. 107242 PC(W) Rosalia Kipchirchir** also attached at Kamagambo Police Station. **Dr. Ian Omuor** who conducted the post mortem examination on the body of the deceased testified as **PW3** whereas **No. 110447 PC Dennis Nyaraga** also attached at Kamagambo Police Station testified as **PW4**. **No. 87086 PC Thomas Mutegi Ngore** who was the investigating officer testified as **PW5**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.
3. The prosecution's case was that on the material day at around 2030Hrs **PW1** and **PW4** were among other police officers on a normal patrol within Rongo Township when they came across five Maasai men fighting around Mimosa Bar. With the help of the members of public they arrested four of them and escorted them to the police station where they booked them with the offence of affray. Among those arrested was the deceased. The police also recovered sticks and a Club at the scene.
4. On 28/06/2018 at around 0320Hrs **PW2** who was on Crime Standby was called by the Station Duty Officer and the Station's Crime In-Charge and asked to accompany a suspect to hospital as he was unwell. That, **PW2** accompanied the suspect, who was the deceased herein, to Rongo Sub-County Hospital where he died as he underwent treatment. **PW2** escorted the body to Migori County Referral Hospital Mortuary for preservation pending further police action.
5. **PW1** and **PW4** later that night were led by one **Baraka Rehema** (not a witness) to where the accused person used to work and they arrested him. The police had been informed that the accused person was among those who were fighting but escaped as the police arrived at the scene.
6. A post mortem examination on the body of the deceased was carried out on 03/07/2018 by **PW3**. **PW3** confirmed the injuries on the outside of the body and also opened the body. He confirmed bleeding under the skin with injury to the right eye. Internally, there was a black fluid in the bronchi and there was haemorrhage in the pericardium. The liver was shrunken and yellowish suggestive of livercirrosis and there was ulceration in the stomach. There was also a compound fracture on the frontal bone extending to the occipital region with a skull fracture. **PW3** opined that the cause of the death of the deceased was haemorrhage caused by livercirrosis and the antecedent cause being the blunt trauma and the head injury.
7. The police continued with investigations and at the conclusion thereof the accused person was arraigned before Court and charged with the murder of the deceased. He was prior thereto mentally assessed and found fit to stand trial and his age assessed at 17 years old.
8. During the trial, the Post Mortem Form, the Mental Assessment Form, the Age Assessment Form, the treatment notes for the deceased, the sticks and the Club were variously produced as exhibits.
9. At the close of the prosecution's case, the accused person was placed on his defence and opted to give sworn testimony. The accused person narrated how he had advanced Kshs. 1,000/= to the deceased and when he asked for the refund of the money the deceased was not keen to repay. Instead, the deceased lied that he was at Opapo shortly before the two met. When the accused person told the deceased that he was a '*mkora*' the deceased was annoyed and attacked him with the Club and a stick. The accused person escaped and reported the matter to the police. The accused person and the deceased again met in the evening where the deceased again assaulted the accused person. That, as the

deceased assaulted the accused person the other Maasai men instead attacked the deceased as he was unfair to the accused person. That was the time the police arrived and the four men were arrested as the accused person escaped.

10. The accused person produced his treatment notes as an exhibit and an X-Ray which showed the injuries he sustained. He also showed the Court the marks on his body and asked the charge to be dismissed.

11. At the close of the defence case, Learned Defence Counsel **Mr. Odondi Awino** urged this Court to find that the case was not proved as there was no eye witness who testified on what happened. The State submitted that the case was proved as required in law and asked that a conviction be entered.

12. It is now on the basis of the foregoing evidence that this Court is called upon to decide on whether or not the accused person is guilty of the offence of murder.

13. As the accused person is charged with an information of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

14. I will deal with the ingredients separately.

(i) Proof of the fact and the cause of death of the deceased:

15. There is no doubt that the deceased died. All the witnesses so confirmed. As to the cause of death, PW3 took this Court through the Post Mortem Form which he prepared after conducting the examination. He found that the deceased suffered from livercirrosis and ulcers which were the cause of the haemorrhage in the stomach alongside the blunt trauma injury as the causes of the death. PW3 explained that livercirrosis usually interfered with the body cloating system.

16. It was however not clear whether any of the three causes could independently lead to the death of the deceased.

(ii) Whether the death of the deceased was the direct consequence of any unlawful act or omission on the part of the accused person:

17. The accused person denied causing the death of the deceased. He explained the events leading to the arrest of the deceased and the others including himself and contended that it was him who had instead been badly injured by the deceased for asking for a refund of his money. PW1 and PW4 witnessed the deceased hit the accused person with a stick and a Club shortly before they arrested the deceased. PW5 also found the accused person injured when he took over the investigations of the matter in the morning and escorted him to hospital.

18. There was no eye-witness who testified that the accused person assaulted the deceased. PW5 only stated that he interrogated witnesses and recorded their statements but they left the country before testifying. The circumstances of the case were that the deceased may have been injured during the fight with the other Maasai men who came to the aid of the accused person. As said, PW1 and PW4 witnessed the deceased assaulting the accused person whereas PW5 escorted the accused person to hospital for treatment. In such a case therefore the defense of the accused person carried the day. It was not proved that the accused person was the one who injured the deceased and that the injury was fatal. It is also not clear why the other men who were arrested while fighting and were booked at the police station with the offence of affray were not charged alongside the accused person. The second ingredient is therefore answered in the negative.

19. The uncertainty caused by the possible cause of death coupled with the failure to prove that it was the accused person who injured the deceased created reasonable doubts thereby rendering the prosecution case not proved as required in law.

20. Consequently, the charge of murder against the accused person is not proved and the accused person is hereby found **NOT GUILTY** of the murder of **Mathayo Leisa**. The accused person is hereby set at liberty forthwith unless otherwise lawfully held.

21. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of March, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Odondi Awino Counsel for the Accused person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant