REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 92 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MALAKWEN LIMO.....ACCUSED

JUDGMENT

[1] Before the Court is **David Malakwen Limo,** who was arraigned before the Court on **22 January 2013** on a charge of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63 of the Laws of Kenya.** The particulars set out in the Information filed herein on the **14 December 2012** are that, on the night of **5th and 6th December 2012** at **Kamngetuny Sub-location** in Nandi County he murdered **Mark Kimaiyo Serem**. The Accused denied those allegations, whereupon the Prosecution called a total of six witnesses in proof thereof. He was represented by **Mr. G.K. Okara, Advocate**.

[2] The trial opened on **19 April 2016**, when the Prosecution called three witnesses, namely, **John Cheruiyot Moi (PW1), Petro Kipchumba (PW2)** and **Simeon Chumba (PW3).** The evidence of **PW1,**the area Assistant Chief, was that he was asleep on **5 December 2012** at about 12.00 midnight when he was called by the Village Elder, **Simeon Chumba (PW3)** with information that someone had been killed at Petro's place. He proceeded there and found a crowd of people gathered at the scene; and upon entering the house of **Mercy Cherono**, he found a dead body lying on a mattress on the floor. He examined the body and noted that it had three stab wounds on the chest and stomach. He also saw a knife near the body of the deceased.

[3] PW1 further stated that he received information from **Mercy Cherono (PW4)** that the crime had been committed by **Malakwen,** the Accused Person herein; and that the said **Malakwen** had first stabbed her on the hand before entering the house in which the Deceased was before he received the fatal injuries. Accordingly, it was the evidence of **PW1** that he reported the occurrence to the Officer Commanding Station (OCS), Kapsabet Police Station; and that the Police visited the village on the same night and arrested the Accused; collected the body and took **Mercy** to Kapsabet Hospital.

[4] PW2 on his part told the Court that he was asleep on the night in question when his wife woke him up and alerted him of some screams that she had heard. In response, he woke up and went out of the house where he encountered his niece, **Mercy Cherono (PW4)** screaming heading towards his house, saying that **David**, the Accused, was killing them. He noted that Mercy had been stabbed on the land hand; and so, together they proceeded to Mercy's house; and as he approached, he saw somebody emerge from Mercy's house who he did not recognize. Upon entering the house, he found the Deceased herein lying on a mattress on the floor with stab wounds on the chest and stomach. He similarly saw a knife next to his legs which he identified to be the knife that was produced herein and marked **Prosecution's Exhibit No. 1**. He thereafter took action by reporting the matter to the Village Elder and the Police were called in to collect the body. It was his evidence that he did not know the Deceased.

[5] The evidence of **Simeon Chumba (PW3)** was that, as the Village Elder, he received a report from **PW2** that somebody had been killed. He thereupon called the **Assistant Chief (PW1)** and proceeded to **Mercy Cherono's** house where he found a dead body lying on the floor with injuries on the chest, neck and ribs. He also noted that there was a short sharp knife near the body. He added that the Assistant Chief also went to the scene and then informed the Police of the occurrence; and that the Police went to the village and arrested the Accused and collected the body. He similarly stated that he did not know the Deceased.

[6] Mercy Cherono testified as **PW4** and told the Court that she was sleeping in her house on the night of **4 December 2012** in the company of **Mark Serem,** the Deceased herein, when, at about 12.00 midnight, the Accused went there and kicked the door open and entered the house. The Accused then ordered her to light the lamp which she did. She noticed that the Accused had a knife and without saying anything, the Accused raised the knife and cut her with it on the right hand, which she had raised in self defence. She then ran out of the house and headed towards the house of **PW2** screaming for help thereby causing her to raise her right hand in defence. By the time she returned to the scene with **PW2**, the Accused had left and the Deceased was lying dead with stab wounds on the chest.

[7] The other witnesses were **David Kipkemboi (PW5)**, one of the people who identified the deceased's body for purposes of postmortem; and **PW6,** a police officer then attached to **Kapsabet Police Station** who was one of the police officers who visited the murder scene. Although the murder weapon was recovered by **PW6,** it was not produced as an exhibit; the Prosecution having failed to call the Investigating Officer in the matter despite various adjournments. It was for the same reason that the doctor who performed the postmortem on the body of the Deceased was not called.

[8] In his defence, the Accused told the Court that he went about his routine duties on **4 December 2012** up to about 9.30 p.m. when he closed work and went to Florida for refreshments. He had his alcoholic drinks up to about 10.00 p.m when he left for his home and slept. At about 4.00 a.m., he was awoken by police officers who arrested him and took him to the police station where he was asked whether he knew **Mercy Cherono**. According to him, he was still at his place of work when the Deceased was allegedly killed. He denied having killed the Deceased and stated that the last time he was with **Mercy Cherono** before his arrest was on **30 May 2012.**

[9] Section 203 of the **Penal Code**, **Chapter 63** of the **Laws of Kenya,** pursuant to which the Accused was charged provides that any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder. Thus, the ingredients that the Prosecution needed to show are: the fact of death; that the death was caused by the Accused by an unlawful act; and malice aforethought on the part of the Accused Person. This was succinctly stated in **Republic vs. Andrew Omwenga [2009] eKLR,** thus:

> **"...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 that death.**
>
> **(b) That the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought."**

[10] There is no dispute as to the fact of death of **Mark Kimaiyo Serem**, the Deceased herein. There was credible evidence by **PW5** in whose company he was on the night of his death that the Deceased died on the night of **5 December 2012** of stab wounds. **Petro Kipchumba (PW2)** in whose home the murder incident took place said he went to the scene with **PW5** and found the Deceased lying dead on a mattress on the floor of **PW5's** house. The Village Elder **(PW3)** and Assistant Chief of the area **(PW5)** also visited the scene on the night of **5th December 2012**. They both testified that they found the dead body of the Deceased lying on a mattress on the floor; and that the Police were then called in, who thereafter collected the body. **PW6** confirmed that they collected the Deceased's body of **Mark Kimaiyo Serem**, from the scene and took it to Kapsabet Mortuary. **PW5** was one of those who were present when the postmortem was conducted and he too confirmed the death of the Deceased. I therefore entertain no doubt at all that **Mark Kimaiyo Serem**, the Deceased herein, died on the night **5thDecember 2012** and that this fact was established beyond reasonable doubt.

[11] Having so found the pertinent issue to resolve is what caused the death of the Deceased. In this respect, evidence was adduced by **PW1, PW2, PW3, PW4** and **PW5** that the deceased died as a result of multiple stab wounds that were inflicted on his chest and abdomen. They found the murder weapon at the scene near the leg of the deceased; a fact confirmed by **PW6**. That evidence was entirely uncontroverted; the Accused person having raised an *alibi*. Accordingly, whereas the cause of death is best proved by expert medical evidence, it is now trite that where the evidence is plain, as to the cause of death, a finding of fact in that regard can be made notwithstanding that the Postmortem Form was not produced, as was the case herein. Hence, in ***Ndungu v. Republic [1985] KLR 487***, it was held that:

> ***"Of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of the death would be so obvious that the absence of a postmortem report would not necessarily be fatal..."***

*[12] Similarly in **Dorcas Jebet Keter & Another vs. Republic [2013] eKLR** where the body of the deceased could not be traced for purposes of postmortem, the Court of Appeal held that:*

> **"It is however important that even in such cases the court recognized the principle that there are cases where death can be established without medical evidence. In this case, the body itself was not recovered so that it would have been futile for a medical expert to even be called upon to give evidence on body he never saw; a body that never reached his clinic or mortuary for examination all because it was not there. In our view, in such cases once the evidence, circumstantial or otherwise leaves no doubt in the mind of the court that death did occur but the body was disposed of in one way or the other probably to destroy evidence and defeat justice, a court of law, properly directing its mind to the law and seeking to do justice cannot abdicate its duty to ensure justice.**
>
> **To do so would send the wrong message to the criminals that so long as they get rid of the body, the court would be emasculated and would do nothing in the pretence that no medical evidence was availed establishing the cause of death. We think, every case must be decided on its own merit but where evidence is overwhelming that the deceased has died at the hands of a suspect, then even in the absence of a postmortem report, the court can still convict..."**

[13] By parity of reasoning, the same principle would, to my mind, apply to situations where the expert witness, for one reason or another, fails to avail himself or herself to testify, as was the case herein. There is uncontroverted evidence that the Deceased died of stab wounds to his chest in a matter of minutes; granted the quick action taken by **PW2** and **PW5** to respond to the misfortune that confronted them on the night in question. Indeed, in his defence, the Accused conceded that Mark Serem died, save that, from his standpoint, he had nothing to do with it.

[14] The next issue to resolve is the question whether the Prosecution proved beyond reasonable doubt that the Deceased died as a result of

the unlawful act of the Accused person; and if so, whether he committed the unlawful act with malice aforethought. It was the contention of the Prosecution, through **PW4,** that the Deceased was stabbed to death by the Accused. From the evidence placed before this Court, the incident took place at around 12.00 midnight on the night of **5 December 2012**. **PW4** had, admittedly gone to sleep and it was dark. She was also the only identifying witness. Hence, the Court must bear in mind the duty to **"...examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."** (See **Wamunga vs. Republic [1989] KLR 426).** As to the manner of such examination is to be conducted, it was held in **R. vs. Turnbull & Others [1973] 3 AllER 549,** thus:

> **"...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"**

[15] In the light of the guidelines aforementioned, I have carefully considered the evidence of identification given by **PW4** with a view of determining whether it is reliable and free from error. Here is what **PW4** had to say in this connection:

> **"...On 4.12.2012 at 8.00 p.m. I was in my house with MARK SEREM. We ate and slept. At 12.00 midnight David (accused) came and kicked the door and it opened. He said I put on the lamp. He did not speak. He had a knife. I lit a koroboi (tin lamp). He raised the knife. I raised my right hand. He cut me. I screamed and run out to Kipchumba's house. Kipchumba is a brother of my father. By the time we returned, we found he had stabbed Mark Serem on the chest...Mark Serem was not breathing. The injury was on the chest...When we returned to the house the accused had left..."**

[16] It is manifest from the foregoing excerpt of the evidence of **PW4** that there was sufficient time, light and space for **PW4** to see and recognize the Accused before she ran out of the house to seek for help. She had lit a lamp at the instance of the Accused, a person well known to her before this occasion. She was thereafter confronted at close range by the Accused, who was armed with a knife. She then raised her hand in defence and was stabbed on the right hand before the ran out of the house screaming. It is manifest therefore that **PW4** was indeed in a position to see and recognize the Accused. **PW2** confirmed that **PW4** immediately told him that they had been attacked by **David**, the Accused; and that as he approached **PW4**'s house, he saw someone emerge from the said house but was unable to recognize him. It was thus on the basis of **PW4's** evidence that the Police arrested the Accused on that very night.

[17] In my careful consideration, the evidence of **PW4** is credible and free from error, granted the conviction and immediacy with which she passed on the information to her uncle, **PW2.** It is to be noted that the two had been lovers, and that the evidence in this regard was uncontroverted. Thus, the evidence of **PW4** was that of recognition which has been accepted as being more reliable than the evidence of identification of a complete stranger. This point was made clear in the case of **Anjononi & Another vs. Republic (1980) KLR 59** thus:

> **"...This was however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other."**

[18] It is not lost on the Court that, from her evidence, **PW4** did not see the Accused stab the Deceased and that for this reason, **Mr. Okara**, Learned Counsel for the Accused, submitted that:

> **"...with the exception of PW4 who happens to be the ex-lover of the accused, none of the other witnesses who testified in court saw the accused enter or leave PW4's house. It is therefore difficult to rely on the evidence of PW4 as the only eye witness given the fact that she was also the ex-lover of the accused..."**

[19] However, as indicated herein above, what was placed before the Court was circumstantial evidence, in respect of which it was held in **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135,**by the Court of Appeal for Eastern Africa thus:

> ***"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."***

[20] And, as pointed out herein above, there is credible evidence that the Accused attacked PW4 in her house at night, stabbed her on the right hand; and that she ran out leaving him with the Deceased as she went to alert her uncle of their predicament. PW2 woke up and responded immediately and he confirmed that as he approached the house of PW4, he saw someone emerging from the house. In the circumstances, I take the view that the inculpatory facts are incompatible with the innocence of the Accused as they are incapable of explanation upon any other hypothesis than that of his guilt. Indeed, the circumstantial evidence adduced against the Accused completely displaces his alibi defence and squarely places him at the scene of crime; and I so find. There can be no doubt from the circumstances that the act of the Accused in stabbing the Deceased was completely unwarranted as it was unlawful; and therefore reprehensible.

[21] On whether the Accused had malice aforethought when he committed the unlawful act of stabbing the Deceased to death, it is the law that what needs to be proved by the Prosecution is any of the circumstances set out in **Section 206** of the **Penal Code.** That provision states thus:

> ***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.

[22] In the case **Nzuki vs. Republic [1993] KLR 171** the Court of Appeal had occasion to interpret the above provision and it held that:

"...murder is the unlawful killing of a human being with malice aforethought. 'malice aforethought' is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result...Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused:

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii)Where accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in one of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."

[23] Consequently, in the case of ***Daniel Muthee vs. Republic Criminal Appeal No. 218 of 2005 (UR)*** it was held that:

"When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code."

[24] The manner in which the Accused stormed the house of **PW4** and proceeded to inflict multiple stab wounds on the Deceased clearly shows that his intention was to cause the death of the Deceased or to otherwise inflict grievous harm on him. He certainly knew that there was a risk of death or grievous harm ensuing from his acts and proceeded to stab the Deceased not just once but severally without any lawful excuse.

[25] It is for the foregoing reasons that I find all the ingredients of the Charge of Murder Contrary to **Section 203** as read with **Section 204** of the Penal Code proved against the Accused beyond reasonable doubt. He is accordingly found guilty and is hereby convicted thereof pursuant to **Section 306(2)** of the **Criminal Procedure Code**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF MARCH, 2019

OLGA SEWE

JUDGE