



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 4 OF 2018 [MURDER]

(CORAM: R. E. ABURILI - J.)

REPUBLIC..... PROSECUTOR

VERSUS

SAMUEL JUSTO LEMIKOKI..... ACCUSED

JUDGMENT

1. The accused person in this case is **Samuel Justo Lemikoki** a Tanzanian national and male adult of sound mind. He stands charged with the offence of murder contrary to section 203 and read with section 204 of the Penal Code. Particulars of the charge are that on the 4th Day of January 2018 at Kuoyo Beach in Mageta Island, Bondo Sub-County within Siaya County, he murdered one Dalmas Owino Oidho.

2. The accused person pleaded not guilty to the charge. The prosecution called six witnesses in support of their case. The accused person gave unsworn testimony and called no witness.

The Prosecution's case

3. **PW1 Douglas Otieno Ambinga** a male adult Christian Sworn stated in Dholuo as interpreted by Brenda a court assistant into Kiswahili for the benefit of the accused person and the court that he is a bar operator at Kuoyo Beach Mageta. His bar is called Kuoyo Bar. The witness recalled that on 4.1.2018 at or about 10.00 p.m. he was in his Bar with 3 of his customers whose names he did not know. That as he wanted to close his Bar because of his physical disability in the leg, he told his customers to leave. That as the customers were exiting the bar, one of the customers remained behind the door and a Maasai entered into the bar holding a brown rungu. That the Maasai is the watchman of the Beach and that PW1 knew him. That the said Maasai held one of PW1's customers who had remained behind telling him to go and sleep. That the accused held the said customer and hit him with a rungu on the waist and neck while leading him to the Beach side. PW1 then closed the door to the bar and went to sleep.

4. The witness further testified that the following day he heard that a body of a person had been found along the beach. PW1 went to the beach and found that it was the person (his customer) who was being beaten by Maasai the previous night at the bar. That the Police came, took away the body and they also arrested the Maasai and went away with him. PW1 identified the accused person in the dock by pointing at him and stating that he was the Maasai who was beating his customer who died.

5. On being cross-examined by Mr. Korongo advocate for the accused person, PW1 stated that he owns Kuoyo Bar. He reiterated that on the 4.1.2018 he was in the bar the whole day because that is where he lives and that at the material time which was about 10.00 p.m. he had 3 customers in the said bar. He stated that the said customers were drinking separately. He further stated that Dalmas (the deceased) went into the bar at about 9.00 p.m. and that when PW1 asked him to leave the bar, Dalmas had been drinking for about 30 minutes.

6. PW1 further stated that Maasai entered the bar when the customers were leaving. He reiterated that he knew the accused person a watchman at the Beach. He denied the suggestion by Mr. Korongo that he had called the watchman into the bar. He stated that in his statement to the police on the material incident he reported that Maasai told the customer to leave because Maasai used to tell people not to overstay in the Bar. He further stated that he was present when Maasai instructed the customer to leave. He stated that Maasai (accused person) worked for Kuoyo Beach and all people who had businesses there. The witness stated that he was present when the customer and Maasai were pushing each other and that as Maasai (Accused) pushed the customer, the customer also pushed him (Maasai). He maintained that he saw what happened and that Maasai was holding the club in his hand which he used to hit the customer around the waist and behind the neck and that the customer ran away and Lemikoki (Maasai) followed him from behind. The witness described the customer as being short but slightly bigger than the accused person.

7. PW1 further stated that when he told his customers to leave, the deceased walked out peacefully without creating any commotion, but that when Maasai hit him is when he started running away and PW1 closed the door, went to sleep and only saw the deceased the following morning at the shores of the beach at about 6.00am and dead. He also stated that he did not know whether the deceased's body had any

injuries. He did not see struggles at the scene where the deceased lay. He stated that he did not prevent Maasai (Accused) from chasing the deceased because he knew the Accused was their watchman but that he told Maasai (accused) that the deceased was his(PW1's) customer, although he did not tell the Police that he told Maasai that the deceased was his(PW1's) customer.

8. The witness maintained in cross examination that the Accused (Maasai) was employed by the Beach Association of which he, PW1 was a Member and added that as his Bar is in the Beach, Maasai was responsible as caretaker of the entire Beach.

9. **PW2 George Otieno Oyeyo** a Muslim male adult testified in Dholuo as interpreted in Kiswahili by Brenda Court Assistant that he was a fisherman from Mageta and that he does fishing at Kuoyo Beach. He recalled that on 5.1.2018 at 1.00 p.m. he was in his house. He heard as if someone was being assaulted outside. He got out of the house and saw Maasai beating someone. He identified the accused person in the dock as the Maasai and stated that he saw the accused with a rungu and two sticks. That the accused was beating Kennedy Otieno while saying that the person was new in that place. He added that Maasai was lighting a torch, and he (Maasai) told PW2 that the person he was holding was a visitor at the beach and that PW2 told Maasai (Accused) that if the person was a visitor and drunk, then they should take him to a place where he could sleep. That they took the person who was being beaten by Maasai to his (person's) house then PW2 went to his house to sleep.

10. He stated that he knew where Kennedy lived and that they left him sleeping in his house. The witness stated that the following morning he heard people saying that someone had been found dead on the beach. He went to Peter Onyango Jaro the Secretary of the Kuoyo beach and informed him and that together they went to the beach where they found a dead body lying there. He did not identify who the dead person was.

11. PW2 then accompanied the Beach Secretary to the place where they had left the person to sleep the previous night and inquired from the people around there and were accompanied by the residents to the beach where the deceased's body was lying. That the residents stated that they were seven in number the previous night but that one of them was missing and that the missing person was the deceased. That the Secretary of the Beach reported to the Police and PW2 also went and recorded his statement at Mageta Police Station.

12. On cross-examination by Mr. Korongo Advocate for the accused person, PW2 stated that he is a fishmonger at the Beach. That he belonged to the welfare **Association and** that he knew the accused Maasai as a caretaker at the Beach, who takes care of the Boats and fishing nets at the Beach from 8.00 p.m.

13. PW2 maintained that he saw Maasai beat the person and that they were walking and the Maasai was trying to find out where the person could sleep as the person was drunk. That they were walking. PW 2 further responded that he told Maasai not to beat the person as the person was drunk and that the person being beaten was walking and talking.

14. PW2 further stated that the place where they took the deceased to sleep was a store used by beach people to sleep, was near the beach and close to where PW2 lived. He further stated that the person who was being beaten was a visitor, not a local person and that the witness knew 2 people namely Moses and Ouko, in the place where they had taken the deceased to sleep. That the said two people also identified the deceased's body. He further stated that the deceased slept before the witness left the place. That the deceased told him that Maasai had beaten him but he did not mention the injuries that he had sustained.

15. The witness stated that it was the responsibility of Maasai to ensure that people did not move near the boats and that Maasai would arrest anybody who moved close to the boats. PW2 stated that there was no struggle between Maasai and the person and that he saw the person drunk.

16. That he saw the body the following morning but he did not go to identify it as that of the person who was being beaten by Maasai (Accused) at night. He added that the body that he saw at the beach was of a different person from the person whom Maasai was beating the night before. He further stated that he heard from the Beach people that they had recovered the body in the Lake and placed it on the beach.

17. **PW3 Washington Obayo Odundo** a male Christian testified on oath that he was a fisherman in Lake Victoria at the Kuoyo Beach and was from Kuoyo village. He recalled that on 5.1.2018 at 3.00 a.m. he was in the process of fishing with Ochieng and Augustin at Kuoyo Beach. That as they fished small Mbuta fish, they saw a dead person in their fishing net so they pulled the net, and left the body of the deceased on the Beach and they ran away. That they returned after 5 minutes and removed the body of the deceased from their fishing net. That they did not know whose body it was and so they called their Association's Youth to call their Secretary who did not come until morning when he came.

18. Further, the witness testified that at about 5 a.m. in the morning, two gentlemen who said that they had been with the deceased went and told him that they knew the deceased. They went together to record their statements with the police after the body was taken away by the Police.

19. On being cross examined by Mr. Korongo advocate for the accused person, the witness stated that he went to the lake at 3.00 a.m. and that as they pulled the net they discovered the body of a dead person. That they saw his stomach was flat. That one of the young men who went there in the morning identified Otieno. That the police took away the body from the scene at 8.00 a.m.

20. On application Mr. Okachi Prosecution Counsel, and with no objection from the defence counsel Mr. Korongo, the testimony of Johannes Ochieng which was said to be similar to that of Washington Obayo PW3 his fellow fisherman was dispensed with.

21. **PW4 Ezekiel Asade Osumba** a Christian male adult of sound mind testified in Dholuo as interpreted by Brenda into Kiswahili that he hailed from Kendu Bay and was a fisherman from Kuoyo Beach. The witness recalled that on 6.1.2018 at 5.00 a.m. he was at the Beach when he received a phone call from his fellow fisherman that one of them was missing and dead. The witness went to Kuoyo Beach and confirmed that Dalmas Owino was dead. He examined the body and saw injuries on his body. He was told that a watchman at the beach,

Maasai (Accused identified) had beaten up the deceased. He informed the police who went and took away the body and arrested Maasai. He stated that Maasai was employed by the Association to take care of the beach.

22. On being cross examined by Mr. Korongo counsel for the accused person, PW4 stated that he was told that Maasai, the watchman had beaten up the deceased. That he knew Maasai as the watchman and that Maasai used to be alone. That the witness examined the deceased' body and saw injuries on the body involving a swelling on the forehead and swellings on the hand.

23. On application by Mr. Okachi and with no objection from the defence counsel the evidence of **Peter Onyango** who was present in court was dispensed with on account that his evidence is similar to that of **PW4 Ezekiel Asade**.

24. **PW5 No. 40928 Snr. Sergeant John Ruto** a male Adult Christian of sound stated on oath in English interpreted in Kiswahili that he was the investigating officer in this case and that when the incident happened he was in-charge of Mageta Patrol Base. He was now based at Siaya Police Station.

25. The witness recalled that on 5.1.2018 at about 9.30 a.m. he was in the Mageta Police Patrol Base together with other officers when one Ezekiel Asade a fisherman went and reported that a body of one of his casual employees, a fisherman Dalmas Owino Oidho aged 20 years was retrieved by other fishermen on the shores of Lake Victoria.

26. PW5 in the company of PC Francis Musili proceeded to the scene accompanied by the Reportee and on arrival they found the deceased's body lying near the water. They observed that the deceased had a deep cut on the head which was swollen, that he was hit by a blunt object; and that blood was oozing from the mouth and nose. The police investigated the matter and discovered that a person named Samuel Justo Lemikoki had been guarding boats of fishermen at the shores of the Lake. That the said Samuel Justo Lemikoki a Maasai had had a quarrel with fishermen on 4th and 5th January 2018 and especially with deceased and he hit the deceased several times using a rungu and some sticks while chasing the deceased towards the Lake. The witness and his colleagues recovered a short Maasai (club) Rungu and two sticks, one long and one short which items were all produced in evidence as P.Ex 1 (a) 1 (b) and 1(c).

27. PW5 further stated that they interrogated the watchman accused person herein whom they found at Kuoyo Beach and that he told them that he had been given instructions to ensure that nobody accessed that area. After investigations they arrested the suspect and took the body of the deceased to Bondo Mortuary. PW5 witnessed the post mortem conducted on the deceased's body. He identified the post mortem report dated 9.1.2018 on the deceased Dalmas Owino Oidho as PMFI 2. They escorted the suspect to Usenge Police Station and charged him with the offence. The witness identified the accused person in the dock as the person they arrested in connection with the alleged murder of the deceased.

28. On being cross examined by Mr. Korongo advocate for the accused person, PW5 reiterated that he was the in charge of Mageta Patrol base and the investigating Officer in this case. Further, that the accused person alleged to be a watchman in that area. That from the information he gathered the accused person had been instructed to clear everybody from the area. That after investigating the matter, PW5 found that the accused person was not employed at the Beach but that he was only holding fort for another Maasai who was away but that he never found out about the Maasai who was supposedly to be the watchman.

29. The witness further stated that the fishermen at the Beach told him that the Accused was chasing everyone from the beach and that the accused quarreled with other fishermen before chasing the victim. Further, that some witnesses told him that the Accused chased them from the Beach not to interfere with the boats and that he beat up the deceased after chasing him from Douglas Kiosk (Pub) area into the Lake. He further testified that he was informed that the accused found the deceased hiding at the boats and beat him up. The witness also stated that he took a statement from George Otieno Onyango but was not aware that the said George Otieno Onyango testified that he and the Accused person took the deceased to a place to sleep. The witness could also not tell if the Accused was an employee of the Association.

30. He stated that he found the Accused at the beach carrying the two sticks (exhibits) and the Rungu. That the accused gave PW5 the sticks and the Rungu. PW5 denied a suggestion by Mr. Korongo advocate that he was lying to the Court.

31. He stated that he escorted the Accused to the OCS and on being shown the investigations file, the witness stated that he could see the Accused person's statement in the investigations file where, when interrogated he admitted chasing the deceased with sticks and rungu but he did not mention sticks and rungu in his statement.

32. The witness also stated that he discovered that George Otieno and Owino Oidho lived near the beach. That he never established that the deceased was drunk and that he was found straying in the bar. He admitted that the Beach has people throughout fishing but denied being told that they saw the deceased's body being thrown into the water.

33. On being reexamined by Mr. Okachi prosecution counsel the witness stated that they found the Accused at the beach holding a rungu. That they interrogated him and he led the police to where the sticks (exhibits) were found.

34. On being asked by the court PW5 stated that Douglas told them that the Accused used the Rungu to hit the deceased. That the sticks were found after interrogations but that they found the Rungu on the Accused.

35. **PW6 Dr Felgona Kabibi** a Medical officer, Bondo Sub county Hospital testified in English as interpreted in Kiswahili that she was a Medical Doctor, Bachelor in Medicine. That she had worked with Dr. Ochieng Willis who carried out a post mortem on the deceased's body but was out for training and was therefore not able to attend court but that she was conversant with his handwriting.

36. The Postmortem report was done on 9.1.2018 at 15.21Hours by Dr. Willis Ochieng. He made a general observation of the body of a male person of black African race named Dalmas Onyango Oigo approximately 20 years with adequate nutrition, well built, 22 cm height. The body was well preserved. External appearance – 2 bruises on the head – right and left zygomatic rea, Left measuring 3 cm. The right

measuring 2 x 6 cm. On the forehead was a cut wound of 2 cm in length sutured. The chest wall 6th intercostal space were bruises, anterior abdominal wall had 3 x 5 cm bruise. The lungs had massive bilateral haemothorax – collection of blood in the tissues of the lungs. No fractures of sculp. There was Haematoma on the temporalis muscles. The brain had increased intracranial pressures. Spinal cord and spinal column were not exposed.

37. The Mortician's medical opinion was that there was hypoxia due to massive bilateral haemothorax probably caused by trauma by a blunt object. She produce the autopsy report as an exhibit No 2.

38. On being cross examined by Mr. Korongo advocate for the accused person PW6 responded that the bruises alone could not cause death. That the injury on the anterior chest wall caused collection of blood in the lungs but that there was no penetration of the chest. That it was limiting to give a time frame of the injuries as the body was already preserved.

39. The defence counsel submitted a no case to answer. He submitted that the Prosecution had not proved their case to warrant the Accused to be placed on his defence. It was submitted that PW2 testified that in as much as the Accused person was in contact with the deceased, they took the deceased where he slept. That the Accused persons was not the last person to be seen with the deceased.

40. That the investigating officer produced alleged weapons used by the Accused persons but the said sticks were never linked to the Accused person and that they were picked the following morning.

41. On the alleged club used by Accused person, it was submitted that it was common for a Maasai man to walk around with a club hence no motive can be proved.

42. Further submission was that there were conflicting evidence of whether the Accused was employed as a watchman or whether he had no bearing at his place of work as per the testimonies of see PW1 and PW5. That the Accused only moved the deceased from the place of business. That the Accused and one of the witness left the deceased at the place where he went to sleep. That the prosecution should have called the persons who lived where the deceased was send to sleep.

43. It was further submitted that the deceased was a well-built while the Accused is small in body. That the prosecution failed to lead events that led to the murder of the deceased. That the alleged weapon used should have been produced. Mr. Korongo urged the court to acquit the accused person at that stage.

44. Mr. Okachi Prosecution Counsel left it to court to determine whether the accused person had a case to answer or not.

45. The Court ruled that the accused person had a case to answer.

Defence case

46. The accused person gave unsworn evidence and called no witness.

47. He testified as DW 1 and stated that he was Samuel Justo Lemikoki, from Tanzania. That he came to Kenya in April 2017 and was doing business, selling Maasai shoes and traditional herbs for one year. He stated that in January 2018 he was selling his wares in Mageta, Lake Victoria while moving around. He recalled that on the named date of 4.1.2018, he was in Mageta selling the said shoes from 7.00 a.m. up to late evening and went to go sleep in a rental house nearby.

48. The following morning at about 8.00am, he was awoken by a person who called him "Maasai" and the person left. When he got out he saw many people at the Beach. He proceeded there and on arrival he was asked whether he knew the person whom they pointed out to him, being the deceased who was near the beach and he told them that he did not know the deceased. It was then that he was arrested by Police Officers.

49. According to the accused person, there used to be another Maasai who left. The people started screaming and he was escorted to Mageta Police Station. He denied that he had worked as a night watchman at the beach. He further denied ever assaulting anyone as alleged. On the rungu produced in Court he stated that it was his and that he had it when he was arrested. He added that it was taken from his he denied ever having the sticks which were produced before Court as exhibits.

50. He denied knowledge of the murder of the deceased and denied knowing any of the witnesses who testified in Court as he was just going about his own business of selling shoes from January 2017. He denied knowing the time that people used to go to the lake to fish. He denied killing anyone or the deceased Dalmas.

51. On being cross examined by Mr. Okachi Prosecution Counsel, the accused person stated that there was a Maasai in the area but he left the previous year on 25.12.2017. He maintained his denial and stated that he was never employed as a watchman in the area. He also denied fighting with Dalmas the deceased on the material night. He further denied using a rungu to assault the deceased B\Dalmas on the material night. He denied knowing the deceased Dalmas or any other person at Mageta Beach.

Submissions

52. The defence counsel filed written submissions reiterating that the prosecution had not proved its case against the accused person beyond reasonable doubt and that the prosecution evidence was insufficient to prove murder. Further, it was submitted that the prosecution case was contradictory.

53. On the part of the State, Mr. Okachi submitted relying on the Prosecution witnesses' testimony in Court and maintained that the evidence demonstrated that the Accused herein was involved in the murder of the deceased. That the exhibits produced placed the Accused at the scene of murder.

54. It was further submitted that the doctor who performed an autopsy said the deceased died as a result of being hit with a blunt object on the chest and that therefore the prosecution's case was water tight and proved beyond reasonable doubt. It was further submitted that from the evidence of the witnesses, the Accused was a guard to one of the beach owners and he was seen confronting the Accused person on the day that the body of the deceased was found. That the Accused knew that a rungu is dangerous and could result into fatal injuries if used on a person. In addition, it was asserted in submission that the Accused was the last person to be found and seen to be in company of the deceased before he was found dead. That the injuries were contagious and continuous from the time the Accused started beating up the deceased. That the Accused knew that the deceased would die as a result of the injuries inflicted.

Analysis, Findings and Determination

55. For the Prosecution to secure a conviction on the charge of murder, three elements against an Accused person must be proved. Those ingredients are:

(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.

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

56. The death of the deceased has been proved by the PW6 Dr Feligona Kabibi a Medical officer, Bondo Sub county Hospital who testified and produced a Postmortem report dated 9.1.2018 at 15.21 hours by Dr. Ochieng Willis at Bondo Sub county Hospital, who carried out a post mortem on the deceased's body but was out for training and was therefore not able to attend court but she was conversant with his handwriting.

57. According to the Doctor, the deceased's body which was said to have had 2 bruises on the head – right and left zygomatic area, Left measuring 3 cm, the right measuring 2 x 6 cm. On the forehead was a cut wound of 2 cm in length sutured. The chest wall 6th intercostal space were bruises, anterior abdominal wall had 3 x 5 cm bruise. The lungs had massive bilateral haemothorax – collection of blood in the tissues of the lungs. There was Haematoma on the temporalis muscles. The brain had increased inter cranial pressures. Spinal cord and spinal column were not exposed. The Mortician's medical opinion on the cause of death was that there was hypoxia due to massive bilateral haemothorax probably caused by trauma by a blunt object.

58. Accordingly, I find that there was proof 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

59. PW1 Douglas Otieno Ambinga the proprietor of Kuoyo Bar confirmed that the deceased was his customer and that the previous night before his demise, he had been at PW1's bar when the accused went and chased the deceased and other customers to leave the bar as it was past bar time. The witness recalled that on 4.1.2018 at or about 10.00 p.m., he was in his Bar with 3 of his customers whose names he did not know. That as he wanted to close his Bar because of his physical disability in the leg, he told his customers to leave.

60. That as the customers were exiting the bar, one of the customers remained behind the door and a Maasai entered into the bar holding a brown rungu. That the Maasai is the watchman of the Beach and that PW1 knew him. That the said Maasai held one of PW1's customers who had remained behind telling him to go and sleep. That the accused held the said customer and hit him with a rungu on the waist and neck while leading him to the Beach side. PW1 then closed the door to the bar and went to sleep.

61. The witness further testified that the following day, he heard that a body of a person had been found along the beach. PW1 went to the beach and confirmed that it was the person (his customer) who was being beaten by Maasai the previous night at the Kuoyo bar. That the Police came, took away the body and they also arrested the Maasai and went away with him. PW1 identified the accused person in the dock by pointing at him and stating that he was the Maasai who was beating his customer who died.

62. On being cross-examined by Mr. Korongo advocate for the accused person, PW1 reiterated his testimony. There was no contradiction in his evidence in chief. He maintained that Maasai entered the bar when the customers were leaving. He reiterated that he knew the accused person, a watchman at the Beach. He denied the suggestion by Mr. Korongo that he, PW1 had called the watchman into the bar.

63. He stated that in his statement to the police on the material incident he reported that Maasai told the customer to leave because Maasai used to tell people not to overstay in the Bar. He further stated that he was present when Maasai instructed the customer to leave. He stated that Maasai (accused person) worked for Kuoyo Beach and all people who had businesses there. The witness stated that he was present when the customer and Maasai were pushing each other and that as Maasai (Accused) pushed the customer, the customer also pushed him (Maasai). He maintained that he saw what happened and that Maasai was holding the club in his hand which he used to hit the customer

around the waist and behind the neck and that the customer ran away and Lemikoki (Maasai) followed him from behind. The witness described the customer as being short but slightly bigger than the accused person.

64. PW1 further stated that when he told his customers to leave, the deceased walked out peacefully without creating any commotion, but that when Maasai hit him is when he started running away and PW1 closed the door, went to sleep and only saw the deceased the following morning at the shores of the beach at about 6.00am and dead. He also stated that he did not know whether the deceased's body had any injuries. He did not see struggles at the scene where the deceased lay. He stated that he did not prevent Maasai (Accused) from chasing the deceased because he knew the Accused was their watchman but that he told Maasai (accused) that the deceased was his(PW1's) customer.

65. The witness maintained in cross examination that the Accused (Maasai) was employed by the Beach Association of which he, PW1 was a Member and added that as his Bar is in the Beach, Maasai was responsible as caretaker of the entire Beach.

66. PW2 George Otieno Oyeyo a fisherman from Mageta recalled that on 5.1.2018 at 1.00 p.m. he was in his house. He heard as if someone was being assaulted outside. He got out of the house and saw Maasai beating someone. He identified the accused person in the dock as the Maasai and stated that he saw the accused with a rungu and two sticks. That the accused was beating Kennedy Otieno and that he was saying that the person was new in that place. He added that Maasai was lighting a torch, and he (Maasai) told PW2 that the person he was holding was a visitor at the beach and PW2 told Maasai (Accused) that if the person was a visitor and drunk, then they should take him to a place where he could sleep. That they took the person who was being beaten by Maasai to his house then PW2 went to his house to sleep.

67. He stated that he knew where Kennedy lived and that they left him sleeping in his house. The witness stated that the following morning he heard people saying that someone had been found dead on the beach. He went to Peter Onyango Jaro the Secretary of the Kuoyo beach and informed him and that together they went to the beach where they found a dead body lying there. He did not identify who the dead person was.

68. PW2 then accompanied the Beach Secretary to the place where they had left the person to sleep the previous night and inquired from the people around there and were accompanied by the residents to the beach where the deceased's body was lying. That the residents stated that they were seven in the night but that one of them was missing and that the missing person was the deceased. That the Secretary of the Beach reported to the Police and PW2 also went and recorded his statement at Mageta Police Station.

69. On cross-examination by Mr. Korongo Advocate for the accused person, PW2 stated that he is a fishmonger at the Beach. He belonged to the welfare Association BMV. He knew the accused Maasai as a caretaker at the Beach, who takes care of the Boats and fishing nets at the Beach from 8.00 p.m.

70. PW2 maintained that he saw Maasai beat the person and that they were walking and the Maasai was trying to find out where the person could sleep as the person was drunk. That they were walking. PW 2 further responded that he told Maasai not to beat the person as the person was drunk and that the person being beaten was walking and talking.

71. PW2 further stated that the place where they took the deceased to sleep was a store used by beach people to sleep, was near the beach and close to where PW2 lived.

72. He further stated that the person who was being beaten was a visitor, not a local person and that the witness knew 2 people namely Moses and Ouko, in the place where they had taken the deceased to sleep. That the said two people also identified the deceased's body. He further stated that the deceased slept before the witness left the place. That the deceased told him that Maasai had beaten him but he did not mention the injuries that he had sustained.

73. The witness stated that it was the responsibility of Maasai to ensure that people did not move near the boats and that Maasai would arrest anybody who moved close to the boats. PW2 stated that there was no struggle between Maasai and the person and that he saw the person drunk.

74. That he saw the body the following morning but he did not identify it as that of the person who was being beaten by Maasai (Accused) at night. He added that the body that he saw at the beach was of a different person from the person whom Maasai was beating the night before. He further stated that he heard from the Beach people that they recovered the body in the lake and placed it on the beach.

75. PW3 Washington Obayo Odundo a fisherman in Lake Victoria at the Kuoyo Beach from Kuoyo village recalled that on 5.1.2018 at 3.00 a.m. he was in the process of fishing with Ochieng and Augustin at Kuoyo Beach. That as they fished small Mbuta fish, they saw a dead person in their fishing net so they pulled the net, and left the body of the deceased at the Beach and they ran away. That they returned after 5 minutes and removed the body of the deceased from their fishing net. That they did not know whose body it was and so they called their Association's Youth to call their Secretary who did not come until morning when he came.

76. Further, the witness testified that at about 5 a.m. in the morning, two gentlemen who said that they had been with the deceased went and told him that they knew the deceased. They went together to record their statements with the police after the body was taken away by the Police.

77. On being cross examined by Mr. Korongo advocate for the accused person, the witness stated that he went to the lake at 3.00 a.m. and that as they pulled the net they discovered the body of a dead person. That they saw his stomach was flat. That one of the young men who went there in the morning identified Otieno. That the police took away the body from the scene at 8.00 a.m.

78. On application by Mr. Okachi Prosecution Counsel, and with no objection from the defence counsel Mr. Korongo, the testimony of Johannes Ochieng which was said to be similar to that of Washington Obayo his fellow fisherman was dispensed with.

79. PW4 Ezekiel Asade Osumba a fisherman at Kuoyo Beach recalled that on 6.1.2018 at 5.00 a.m. he was at the Beach when he received a phone call from his fellow fisherman that one of them was missing and dead. He went to Kuoyo Beach and confirmed that **Dalmas Owino** was dead. He examined the body and saw injuries on his body. He was told that a watchman at the beach, Maasai (Accused identified) had beaten up the deceased. He informed the police who went and took away the body and arrested Maasai. He stated that Maasai was employed by the Association to take care of the beach.

80. On being cross examined by Korongo counsel for the accused person, PW4 stated that he was told that Maasai, the watchman had beaten up the deceased. That he knew Maasai as the watchman and that Maasai used to be alone. That the witness examined the deceased' body and saw injuries on the body involving a swelling on the forehead and swellings on the hand.

81. PW5 No. 40928 Snr. Sergeant John Ruto the investigating officer received information from Ezekiel Asade and he in the company of PC Francis Musili proceeded to the scene accompanied by the Reportee and on arrival they found the deceased's body lying near water. They observed that the deceased had a deep cut on the head which was swollen, that he was hit by a blunt object; and that blood was oozing from the mouth and nose. The police investigated the matter and discovered that a person named Samuel Justo Lemikoki had been guarding boats of fishermen at the shores of the Lake. That the said Samuel Justo Lemikoki a Maasai had had a quarrel with fishermen on 4th and 5th January 2018 and especially with deceased and he hit the deceased several times using a rungu and some sticks while chasing the deceased towards the Lake. The witness and his colleagues recovered a short Maasai (club) Rungu and two sticks, one long and one short which items were all produced in evidence as P.Ex 1 (a) 1 (b) and 1(c).

82. PW5 further stated that they interrogated the watchman accused person herein whom they found at Kuoyo Beach and that he told them that he had been given instructions to ensure that nobody accessed that area. After investigations they arrested the suspect and took the body of the deceased to Bondo Mortuary. He also witnessed the postmortem on the deceased's body.

83. On being asked by the court PW5 stated that Douglas told them that the Accused used the Rungu to hit the deceased. That the sticks were found after interrogations but that they found the Rungu on the Accused.

84. Therefore, on proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused person, as stated hereinabove, PW1 saw the accused person carrying a rungu which he used to beat and chase the deceased from the bar belonging to PW1. PW2 also witnessed the accused beat a person at the beach. He did not view the body of the deceased to confirm whether he is the person he saw the accused person assault the previous night.

85. PW5 investigated the case and established that the accused person was at the beach on the material night chasing strangers and that he had a rungu and sticks which he used to assault the deceased.

86. The police investigated the matter and discovered that a person named Samuel Justo Lemikoki had been guarding boats of fishermen at the shores of the Lake. That the said Samuel Justo Lemikoki a Maasai had had a quarrel with fishermen on 4th and 5th January 2018 and especially with deceased and he hit the deceased several times using a rungu and some sticks while chasing the deceased towards the Lake. PW5 interrogated the watchman accused person herein whom they found at Kuoyo Beach and that he told them that he had been given instructions to ensure that nobody accessed that area.

87. The accused person in his defence denied being at the beach. He also denied being employed by the Association to guard the Beach. He denied all allegations levelled at him by the prosecution witnesses who claimed that he was seen the previous night chasing and beating the deceased using the rungu and or the sticks which were recovered from him. He claimed he was a business man selling shoes and had no knowledge of who the deceased was.

88. However, this court finds that there was direct evidence from the prosecution witness No 1 showing that the accused was seen hitting the deceased with a rungu at the chest, waist and head while chasing him from the Kuoyo Bar and from the beach later that night of 4th and 5th January 2018.

89. PW1, 2, 3 and 4 all knew the accused person as Maasai who was their caretaker at the beach and that he had instructions to chase people from the Beach. In my humble view, there is no mistaken identity as to who the accused person was to all the prosecution witnesses who associated with him as their caretaker at the beach. If anything, it was the deceased who was said to be new at the beach helping PW2 to fish.

90. The above evidence leaves the Court with no option but to make reasonable deductions from the available direct and circumstantial evidence taking into consideration the fact that the Accused being a person of interest may have been economical with the truth to save himself. In **Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20** it was held:

“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 of evidence, to say, it is circumstantial.”

91. I have also considered the injuries suffered by the deceased. According to the postmortem report by Dr Willis Ochieng, the deceased had 2 bruises on the head – right and left zygomatic area, left measuring 3 cm and the right measuring 2 x 6 cm. He had a cut wound on the forehead of 2 cm in length, sutured. There were bruises on the chest wall 6th intercostal space, anterior abdominal wall had 3 x 5 cm bruise. The lungs had massive bilateral haemothorax – collection of blood in the tissues of the lungs. There was also Haematoma on the temporalis muscles. The brain had increased inter cranial pressures. The Mortician's medical opinion on the cause of death was that there was hypoxia due to massive bilateral haemothorax probably caused by trauma by a blunt object.

92. All the witnesses who saw the accused hit the deceased say he used a rungu. The rungu that was produced in court as an exhibit had no

blood stains and neither was it taken for forensic examination. However the Doctor was clear that the deceased's death was due to hypoxia due to massive bilateral haemothorax probably caused by trauma by a blunt object. The injuries that led to the death of the deceased were internal and in the chest area. Blood accumulated in the chest leading to hypoxia. Although the defence took issue with non-production of a murder weapon, failure to produce a murder weapon especially where the accused was not arrested in the act of assaulting the deceased is not fatal to the prosecution's case as the accused person had an opportunity to hide the murder weapon before he was arrested.

93. From the foregoing, I am satisfied that the Prosecution has proved beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which involved hitting the deceased with a rungu (club) which constitutes the 'actus reus' of the offence.

(c) On Proof that the said unlawful act or omission was committed with malice afterthought,

94. The prosecution witnesses who saw the accused assault the deceased were clear that the accused was authorized by the Beach Association to chase strangers from approaching the boats and the beach at certain hours. The accused person was therefore chasing strangers from the beach and away from the boats and premises. The said witnesses also testified that the deceased was a new person in the beach.

95. The accused person vehemently denied being at the scene of the crime. He denied going to Kuoyo Bar and chasing or beating the deceased in a bid to chase him from the bar. He denied beating the deceased on the material night. The accused denied assaulting the deceased. He did not plead provocation.

96. The question, therefore, is whether the accused had malice aforethought to kill the deceased.

97. Section 203 of the Penal Code provides:-

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

98. Section 206 defines malice aforethought as:

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.
- d.

99. From the evidence of PW1, the deceased did not fight with the accused when the accused chased him from Kuoyo Bar. The deceased was however said to have been drunk and there is evidence that he was resisting being chased from the Bar. On the same night, the deceased is said to have been escorted to a room (store) to sleep and it is not clear what time the deceased left the said room and engaged with the accused person at the beach, when he was seen being chased by the accused person after which the deceased was found dead and in the Lake.

100. Section 17 of the Penal Code provides that the use of force in the defence of person or property shall be determined according to the principles of English Common Law. In the case of *Roba Galma Wario –vs- Republic [2015] eKLR*, the Court of Appeal cited with approval the case of *Mohammed Omar & 5 Others [2014] eKLR* and the case of *DPP v Morgan [1975] 2 ALL ER 347* where it was held that:-

“The essential element of self defence is that the Accused believed that he was being attacked or in imminent danger of being attacked but this belief should be based on reasonable grounds.”

101. From the evidence on record, this court infers that the accused person who was assigned by the Beach Association to ensure the safety of the boats used for fishing by fishermen at the beach was in the course of his duties keeping away from the beach the people he considered to be strangers when the deceased who was in a drunken state. The deceased appeared drunk as per the evidence of PW1 and may have resisted the intrusion by the accused. The accused in the process used a rungu to chase the deceased and hit the deceased using a rungu which inflicted fatal injuries on him, as demonstrated by the postmortem report that the deceased sustained blunt injuries on his chest.

102. Section 203 of the Penal Code provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder and Section 204 provides for Punishment of murder to be death.

103. From the evidence adduced, it is clear that the accused person was positively identified as having found the deceased at Kuoyo Bar and having chased him therefrom. It was further proved that the accused was seen chasing the accused at the Beach and that he used a rungu to hit him. The injuries sustained by the deceased were consistent with being caused by a blunt object.

104. Albeit the accused claimed that he never met the deceased and that he did not know the people at the beach, the witnesses who testified were clear that they knew him as the caretaker at the beach and that he was holding brief for another Maasai who was away.

105. I have no doubt in my mind that the accused was positively identified as the person who assaulted the deceased on the material night. In addition, although counsel for the accused submitted in contention that there were discrepancies in the evidence of witnesses for the prosecution, the discrepancies if any were minor and not material to vitiate the trial herein.

106. Although some witnesses were not sure whether the person they escorted to go and sleep on the material night was the deceased person, there was no contrary evidence that it was the deceased who had been seen being assaulted and chased by the accused person on the material night.

107. Nonetheless, the prosecution must prove malice aforethought. In this case, although there is *actus reus* on the part of the accused person, I am unable to find that the prosecution established malice aforethought beyond reasonable doubt on the part of the accused person who encountered the deceased person who was new in the area. I find that there was no evidence to demonstrate a premeditated intention to cause grievous harm or to kill the deceased.

108. The question is therefore whether a person who unlawfully kills another albeit unintentionally, should be acquitted.

109. The law safeguards life and generally abhors taking away life except to the extent authorized by the Constitution or other written law.

110. From what is stated herein above, the Prosecution has succeeded in proving that Accused caused the death of the deceased through an unlawful act. Accordingly, I invoke and exercise the powers conferred on this Court by Section 179 (2) of the Criminal Procedure Code and find and substitute the charge of murder with manslaughter and hold that the Accused **Samuel Justo Lemikoki** is guilty of the lesser offence of manslaughter contrary to Section 202 (1) as read with Section 205 of the Penal Code Cap 63 Laws of Kenya and he is hereby accordingly convicted as by law established.

Dated, Signed and Delivered in open court at Siaya this 25th Day of March, 2019.

R.E.ABURILI

JUDGE

In the presence of:

Mr. Okachi SPPC

Mr. Korongo Counsel for the accused

CA: Brenda and Modestar