



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 33 OF 2013

REPUBLICSTATE

VERSUS

LAILAI MWANIKACCUSED

JUDGMENT

1. The Accused Person, Lailai Mwanik, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that it is alleged that on the 23rd day of March 2013 at Paukavava village in Narok North District within Narok County, the Accused Person murdered Matura Mwanik (“Deceased”).
2. The Prosecution called three witnesses. The case unfolded straightforwardly.
3. The Accused Person and the Deceased were cousins, so testified Priscillah Mwanik (PW2) and confirmed by the Accused Person in his unsworn statement. Priscillah is the Deceased’s widow. According to her, on 23/03/2013 in the afternoon, she was at home in Paukavava village in Narok with her husband. Her husband went off for a drink. He came back at around 6:00pm. According to Priscillah, the Deceased was admittedly “a little drunk.” They had some muratina in their home. It was meant for a traditional ceremony the following day. The Deceased took some of it.
4. At around 6:30pm, Priscillah testified that the Accused Person came to their house. He requested for some muratina. The Deceased declined to give him some stating that it was for the ceremony the following day. Priscillah says that the Accused Person was un-amused by this rebuff. The Deceased requested her to go look outside the house and look for the sheep in the field. A little while later the Deceased joined her. The Accused Person followed suit. He was still agitated for being denied a tiple of muratina. According to Priscillah, the Accused Person was hurling insults at the Deceased as he walked away. Suddenly, he walked back towards the Deceased and pushed him to the ground. Priscillah said that the Accused Person removed his sword and warned the Deceased that he could finish him off. Then, just as suddenly, he walked off promising to come back at 9:00pm. He left towards his home.
5. Priscillah testified that the Accused Person made a second about-turn and came back for the Deceased as he was getting up. He hit him on the face with the side of the sword. When the Deceased fell to the ground, the Accused Person sat on him and slashed his neck.
6. Priscillah says she was right there as it happened. She raised alarm. An old man by the name Samson came to the scene. The Deceased was bleeding profusely. Samson helped Priscillah to lift the Deceased off the ground. The Deceased took a few steps and fell. He breathed his last.
7. On seeing this, Priscillah says the Accused Person took off – and did so with the sword he had used to cut the Deceased. According to Corporal Hussein Mohamed who testified as PW3, it was not until 27/03/2013 that the Accused Person was seen next: he presented himself to the Police and arrested and charged with the present offence.
8. Corporal Hussein testified that while on mobile patrol he received a report about a murder. He headed back to the Report Office where he found members of the public who made the report to him. He entered it on the Occurrence Book and went to the scene. He testified that he found Priscillah at the scene. He also found the Deceased laid on a bed. He had a stab cut wound on the left side of the neck. He removed the body and took it to the mortuary. He recovered no weapon at the site. Although he saw blood outside and on the bed where the body was, no photographs were taken.
9. Upon being told what had happened, Corporal Hussein went to the Accused Person’s house that night but he did not find the Accused Person. The Accused Person only re-emerged on 27/03/2017 when he presented himself to the Police.
10. Dr. Titus Ngulungu performed the autopsy on the body of the Deceased. He testified as PW1. He is a pathologist based at Nakuru

PGH. He holds a Bachelors and Masters in Medicine from University of Nairobi as well as a Diploma in Forensic Medicine and has been a medical practitioner since 2000.

11. Dr. Ngulungu testified that he conducted the autopsy on the Deceased at Narok District Hospital. He found the body of a male African adult, lean in physique. His significant findings were that the body had features of blood loss and lack of oxygen before death. There was a slash wound above left side of neck involving skin, muscles, cartilage and cervical bone. There was collapse of lung. The jugular vein and carotid artery had been severed. He also noted fractures of cervical bones. There was swelling of brain due to lack of oxygen. The doctor concluded that the cause of death was massive blood loss due to vascular injury due to slash wound on neck. This was, accordingly to him, caused by a sharp object like a machete. Dr. Ngulungu filled and signed the postmortem report which he produced as an exhibit in the case.

12. With that evidence on record, the Accused Person was placed on his defence. He elected to give an unsworn statement. His narrative was that he did not kill the Deceased. Instead, he said that the family had trumped the charges because he was an illegitimate child: his mother was married when she had already born him. As such, he said, the Mwanik family had never been accepted him as a true member of the family.

13. The Accused Person insisted that on 23/03/2013 he was weeding his potato crops until 4:00pm. He was then called by his father, Turanda Mwanik and he went to see him. Later, he said, his wife called him because one of his sheep was giving birth. He went home. The following day, he said, he learnt that the Deceased had died. He says he got a letter from the Police after three days summoning him to the Police. He says that is when he presented himself to the Police. He was then detained for 14 days and on the 15th day he was arraigned in Court. He denied killing the Deceased and said that he even went to the Deceased's home and contributed to the funeral. He denied that he ever drinks alcohol.

14. The question for determination by the Court is whether on the evidence tendered the Prosecution has established the charge of murder beyond reasonable doubt. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

15. To successfully gain guilty verdict in murder charge, the Prosecution therefore is required to tender sufficient proof of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

16. On the other hand, malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died 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.
- c. Intent to commit a felony.
- d. 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.

17. From my narration of the evidence above, it is quite clear that the first element of the offence of murder was well established. There was the death of the Deceased which is not disputed. Dr. Ngulungu produced a post-mortem report which was not disputed. The oral evidence of Priscillah and Corporal Hussein established as much.

18. The next question is whether the death was caused by the unlawful acts of the Accused Person. The real question here is whether the Prosecution's narrative is believable or whether the unsworn statement of the Accused Person introduced any reasonable doubts to it.

19. Priscillah gave what seems to me to be candid and straightforward account of what happened. She was an eminently credible witness. Her account is plausible. She remained unshaken on cross examination. And her account of the injuries was borne out by Dr. Ngulungu and the Post-mortem report. I believe her story.

20. The Defence attacked the Prosecution theory on two main accounts. First, the Defence argues that it is fatal that Samson, the only other person at the scene of crime, was not called as a witness. Second, the Defence argues that it is also fatal that the murder weapon was not produced. In this regard, the Defence relies on **R v John Peter Omugaka [2006] eKLR** and **R v Jonathan Gitari M'Mithiaru [2014] eKLR**.

21. On the issue of the murder weapon, the Defence mistakes our decisional law. The Prosecution can perfectly establish a murder charge even in the absence of a murder weapon provided that the Court is satisfied on other evidence that the weapon did in fact exist at the time the murder was committed. This was the holding in **Karani v Republic (2010) 1 KLR 73** where the Court said:

The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in

several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.

22. In the present case, the widow of the Deceased, who was the only eye witness to the murder gave cogent and clear evidence that the Accused Person was armed with a sword which he used to slash the Deceased. That evidence was credible and I believe it. It is accentuated by the evidence of Dr. Ngulungu who testified that the body of the Deceased bore injuries which were likely caused by a sharp object like a machete.

23. Was it fatal that Samson did not testify? I do not think it was. Our decisional law is that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case. See *Donald Majiwa Achilwa & 2 Others V Republic [2009] eKLR* and *Bukenya & Others Vs Uganda (1972) EA 549*.

24. However, in this case, it cannot be said that the Samson was an essential and necessary witness for the Prosecution. By the testimony of Priscillah (PW1), she screamed when the Accused Person slashed her husband. It was only then that Samson came to assist. As such, Samson was not an eye witness to the murder and was not an essential witness. As the Court of Appeal stated in *Keter V Republic [2007] 1 EA 135*, “*The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.*”

25. What about malice aforethought? This was amply demonstrated by the testimony of Priscillah. She testified that the Accused Person was, at all times, the aggressor. He insulted the Deceased; then pushed him to the ground; he then sat on him; and ultimately removed his sword from the sheath and slashed his neck. All the while, the Deceased, who was drunk, did not offer any resistance or formidable struggle. It is clear that the Accused Person acted with at least the intention to badly injure the Deceased if not to kill him. Indeed, he uttered the words that he would finish the Deceased just before the deadly attack. There are no circumstances or context that disclose the existence of either the defence of provocation or self-defence. What we have is the naked, gratuitous unleashing of deadly violence on a hapless victim. That is enough to constitute the necessary *mens rea* for murder.

26. The Accused Person’s defence is one of denial laced with an alleged motive for framing him: that the family of the Deceased was against him because he was an illegitimate child. To support his theory, the Accused Person offered that he took himself to the Police Station pursuant to summons issued by the Police but that he was detained for 15 days before being charged. That alleged factual detail thrown in to increase the authenticity of the narrative easily proves false: the Deceased, even by the Accused Person’s own account, died on 23/03/2013 and, again by the Accused Person’s own account, he was arrested on 24/03/2013. This would mean that he stayed in custody until around 07/04/2013. In truth, however, the Accused Person was brought to Court on 02/04/2013; and he was arrested on 28/03/2013.

27. Yet another aspect makes the Accused Person’s defence implausible: he says he remained in his home on 23/03/2013 after visiting his father and being called to attend to a sheep that was lambing. He says he was at his house the following day as well. However, Corporal Hussein testified that they went in search for the Accused Person on 23/03/2013 after the incident and could not find him at his house. Lastly, the Accused Person’s own theory (that he has been framed because he is an “illegitimate” child) is undermined by his own supposed account of what happened on the material day. He says he went to visit his father who had called for me because they had a traditional betrothal ceremony the following day. This would be hardly a gesture from a father who evinces hatred for a son for being an “illegitimate” child.

28. In the end, therefore, after considering all the evidence tendered in the case, the irresistible conclusion is that it is the Accused Person who murdered the Deceased. Consequently, I hereby reject his defence. I find the Accused Person guilty of the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. Accordingly, I convict him under section 322 of the Criminal Procedure Code.

Dated and delivered at Nakuru this 30th day of May, 2019.

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JOEL NGUGI

JUDGE