



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CRIMINAL CASE NO.2 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**LOYALAN NACHUKUL.....ACCUSED**

**JUDGMENT**

The accused person is charged with the offence of murder contrary to Section 203 as read with section 204 of the Penal Code. The particulars of the offence are that the accused on the 24<sup>th</sup> day of March 2018 within Marsabit County, murdered ECHUMA NGUINGUI.

Five witnesses testified for the prosecution. **PW1 DK** was twelve years old and a class six pupil. On 24.3.2018 at about 7.00pm his uncle informed a certain lady that she had promised to leave his plot. The lady started crying and went to call the accused. The accused went to the scene, removed a knife and stabbed her uncle who is the deceased. The deceased tried to block and was hit on the finger. The accused then stabbed the deceased on the neck. The accused's brother by the name Yakal who is a Kenya Police Reservist (KPR) went to the scene and told the appellant to leave. Yakal had a rifle and shot on the air. There was moonlight at that time. PW1 was with the deceased together with PW2. The accused was at his home when the deceased talked to the woman by the name Lerai. Lerai was living on the deceased's plot.

**PW2 BE** was 15 years old and a class 8 pupil. The deceased is her uncle. On 24.3.2018 at around 7.00pm she was with PW1. The deceased was passing through his plot where Lerai was living. The deceased reminded Lerai that he had promised to leave his plot when she gets her own plot. Lerai started crying and went to talk to the accused. The accused went to the scene and hit the deceased with a rangu on the head. The deceased went for a stick but the accused hit him with a knife. The accused then sat on a stone while holding his head. They screamed. People went to scene and wanted to lynch the accused. Ekai who is the accused's relative shot on the air. The accused had his knife tied to his waist when he went to the scene. According to PW2 the entire incident took less than five minutes. The deceased went to his house and took a stick before he was cut with the knife.

**PW3 EKAL NACHODO** is a Kenya Police Reservist. His father is related to the accused's father. On 24.3.2018 at about 7.00pm he was in his house when he heard screams from neighbours. He went to the scene and found the deceased had already been killed. He was told it was the accused who had killed the deceased. The deceased had a cut wound on the neck. PW3 had a gun. He heard that the accused had escaped. Police went to the scene between 7.30pm to 8.00pm and took the deceased's body. The following day he called the accused on phone and he said he had visited a manyatta. PW3 went with Police officers in a vehicle and arrested the accused at about 2.00p.m some 14 kilometres away. They recovered a knife and a stick from the accused. He was given the accused's number by his (accused) wife.

**PW4 Senior Sergeant TIMOTHY SEWA** was based at the Loiyangalani Police station. The case was reported the same evening. On 25.3.2018 Police officers went out with KPR officers and went to arrest the accused. They found the accused sleeping under a tree. The accused had a knife in his waist and a mobile phone. **PW5 PC JASSAN KARANJA** was based at the Loiyangalani Police station. He investigated the case. It is his evidence that on 24.3.2018 at around 7.00pm the accused disagreed with his friend over a plot. The accused stabbed the deceased who passed on. PW5 went to the scene with other Police officers. The accused had ran away. The victim was at the scene. The deceased had a stab wound on the neck. The accused called his friend and asked to be sent food. That is how he was traced through his mobile phone number 0711540884. A knife was recovered from the accused after he was arrested. He talked to PW1 and PW2 who had witnessed the incident. The deceased's body was taken to Marsabit hospital mortuary. A Post mortem was done on 24.3.2018. The knife recovered from the accused had no blood stains. PW5 took the knife to the Government analyst but was told the knife had been washed. According to PW5, he was informed it is the accused who started the fight.

The accused tendered sworn evidence. He comes from Loiyangalani. On 24.3.2018, a Saturday, he was at home at about 8.00pm. The deceased went to his plot and started abusing him. There was a woman from accused's family who was building a fence. The woman closed the fence and the deceased asked the woman why she was closing the fence. The deceased wanted to beat the woman. He heard screams and went closer. He saw the deceased and the woman exchanging words. He told the woman to leave which she did. He asked the deceased why he was quarrelling yet the plot did not belong to him. As he turned heading to his house he heard something hitting him. He was hit with a fimbo and fell down. The accused also had a stick(fimbo) and he hit the deceased. The deceased ran to his house while he too went to

his house. The deceased went back with a knife and a stick. People warned him that the deceased was outside his house while armed. He came out and met the deceased at the door. They struggled and he managed to take away the knife. In the process the deceased was injured and he fell down. He became scared and he was also feeling pain at the back. He went away. The woman from his family who was closing the gate is Lerai. He was later arrested and charged with the offence of murder. He had never had any problem with the deceased. He had no intention of killing the deceased. The incident occurred at night and he can't tell which side of the deceased sustained injuries.

Mr. Kiogora, counsel for the accused submitted that the prosecution failed to discharge its burden of proof to the required standard. PW1 and PW2 are alleged to have been at the scene yet their evidence contradicts each other. Lerai was mentioned but was not summoned. The evidence that a club was used to hit the deceased is not proved as the club was not produced. The offence was committed at night and the conditions were not favourable for identification. The defence evidence explains what transpired.

Mr. Mwangangi, Prosecution Counsel, urged the Court to look at the circumstances prior to and after the offence. There was a dispute relating to a plot. PW2 testified on what transpired. The incident took some time and it was easy to distinguish who was the victim and who was the perpetrator.

The issue for determination is whether the prosecution proved its case against the accused beyond reasonable doubt. The prosecution evidence is that the deceased was enquiring from a lady by the name Lerai why she had not vacated his plot. Lerai started crying and went to inform the accused. The accused was seated at his home. He went to the scene and stabbed the deceased with a knife on the neck.

The defence evidence is not very much different from the evidence of PW2. According to PW2 the accused hit the deceased with a fimbo first. The deceased went to his house and picked a stick before the injury to the neck was inflicted. PW2 was older than PW1. The accused's evidence is that he was at his home. He heard the deceased quarrelling with the said Lerai who is his relative. The accused asked Lerai to leave. He asked the deceased why he was quarrelling yet the plot is not his. The deceased hit the accused with a stick and he fell down. He responded by hitting the deceased with a stick which he had. According to PW2, the deceased went to his house before he was stabbed. The evidence does not show that the deceased was stabbed at his house. It is PW2's evidence that the deceased went to his house and took a stick. The appellant testified that the deceased went to his home and went back with a knife and a stick. He was warned that the deceased was armed.

The Prosecution evidence is that the incident occurred at about 7.00pm. PW1 testified that there was moonlight. The appellant estimated the time as 8.00pm. During his investigations **PW5 PC Jassan Karanja** was informed that the deceased and the accused were friends. They disagreed over a plot. The accused's defence is that he struggled with the deceased. The deceased was the one armed with a knife. PW2 testified that the accused had a knife in his waist.

The totality of the evidence is that the accused did not stab the deceased out of any malice. The accused was at his house when he heard the deceased exchanging words with Lerai. There is evidence from PW2 that the deceased entered his house and took a stick. PW2 does not explain further what the deceased did after he came out with a stick. It is possible that it is the deceased who was armed with a knife. It is equally possible that it is the accused who had the knife. The evidence is summarized by the investigation officer that the two disagreed over a plot.

According to the accused he struggled with the deceased and managed to take away the knife. Although the accused's position is that in the process of struggling the deceased was injured, I am satisfied that it is the accused who stabbed the deceased. This was after the two confronted each other. It could be true that the deceased first hit the accused with a stick. The two fought and the accused stabbed the deceased with a knife. It is proved beyond reasonable doubt that it is the accused who caused the deceased the fatal injuries. The accused admit that during their struggling the deceased was injured.

The next issue is whether the accused had malice aforethought when he inflicted the fatal injuries. Section 203 of the Penal Code states as follows:-

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

Section 206 defines malice aforethought as follows:-

***Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-***

- a) An intention to cause 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.***

The postmortem report indicate that the deceased sustained one cut wound on the neck. In the case of **NJERU –V- REPUBLIC (2006) 2 KLR, 44**, the Court of Appeal held as follows:-

***A killing of a person, could only be justified and excusable where the action of the accused which caused the death was in the***

***course of averting a felonious attack and no greater force than was necessary was applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.***

Since the accused was at his house and only tried to intervene between the deceased and Lerai, I do find that the accused did not have any intention of killing the deceased. The injuries were inflicted while the two were fighting. There was no malice aforethought.

Was the accused acting in self defence. It is the accused's evidence that the deceased went to his house while armed with a knife and a stick. They struggled and he took the knife from the deceased. It is my view that even if the accused was the one armed with the knife, there was need for him to defend himself. The incident occurred at about 7.00pm and it is clear that the deceased was equally ready to attack the accused. The deceased must have been annoyed by the accused of going to the defence of Lerai. The deceased went to his house and collected a stick ready for battle. It is possible that the deceased was also armed with a knife. The accused had no malice aforethought and had only intended to find out what was going on between the deceased and Lerai. The stabbing came in by way of self defence.

In the case of **MUNGAI –V- REPUBLIC (1984) KLR 85**, the Court of Appeal held as follows on the issue of self defence:

**1. It is a doctrine recognized in East Africa that the excessive use of force in the defence of a person or property, whether or not there is an element of provocation present, may be sufficient for the Court to regard the offence not as murder but as manslaughter R –V- Ngolaile s/o Lenjaro (1951) 18 EACA 164; R v Shaushi (1951) 18 EACA 198**

**2. While there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered –Palmer v Reginam [1971] 1 All ER 1077.**

Given the evidence on record, I am satisfied that the accused had no intention of killing the deceased. There is no evidence that there was a grudge between the deceased and the accused. According to the investigations officer (PW5) the two were friends. It is my finding that the accused acted in self defence and that the force used by the accused was reasonable given the circumstances of the case.

In the end, I do find that the prosecution has not proved the charge of murder against the accused. However, the accused is found guilty of the lesser charge of manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code and is accordingly convicted of that offence.

**DATED, SIGNED AND DELIVERED AT MARSABIT THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2019**

**S. CHITEMBWE**

**JUDGE**