



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO. 8 OF 2017

REPUBLIC.....RESPONDENT

VERSUS

LERIONKA KOIRRAG.....ACCUSED

JUDGEMENT

1. The accused is charged with the murder of Stephen Simatuk, which is expressed to be contrary to section 203 as read with section 204 of the Penal Code (Cap.63), Laws of Kenya. He pleaded not guilty. The state called 7 witnesses in support of the charge.

2. The evidence of Samuel Olorobel (PW 1) was that in the night of 11/4/2014, he heard someone say: “Why are you slapping me?” He went there to enquire. He then met 2 people, one on the ground who turned out to be the deceased, and the other one who turned out to be the accused person. His further testimony was that although it was night time, there was moonlight. He further testified that the accused asked the deceased as to why he was assaulting him (the accused) for nothing. He also saw blood on the face of the deceased. He then took a rungu from the accused and threw it away. The rungu was put in evidence as exhibit 1. The deceased sounded like a person who was drunk and he requested members of the public who had gathered around to take him to hospital. As a result, he was taken to a local hospital and subsequently he was transferred to Narok Referral Hospital and thereafter to Kenyatta National Hospital, where he died while undergoing treatment.

3. Furthermore, the evidence of PW 1 is supported by that of Kilesi Ole Mpusia (PW 2). According to PW 2, he saw the accused assaulting the deceased using a rungu 3 times. He also testified that there was moonlight. It was also his evidence that the accused threw away the rungu in the course of fighting with the deceased.

4. There is further supporting evidence of Anthony Koigaga, who saw the deceased slap the accused person. He further testified that the accused then went to Ntulele after fighting the deceased person.

5. The prosecution also called Lydia Wanjiru (PW 5), who identified the body of his deceased brother to the doctor who carried out the Postmortem examination. Dr. Ben Owino Midia (PW 6) performed a postmortem examination on the body of the deceased. His findings were as follows:

§ He found that the deceased was of good nutrition, lean and 170 centimetres in height.

§ He found a surgical scar on his abdomen

§ He found internal dissection which revealed pus in the abdomen. It was his opinion that the cause of death was due to peritonitis. He then put in evidence the postmortem report as exhibit 2.

6. The defence of the accused through his unsworn statement was that he was in a club at Mosiro centre, where he was drinking beer labelled ‘All Sopp’s’. After that he left for his home at about 7.00 p.m. While enroute, he saw people gathered on the road. He went near them and saw an injured male person lying down. Thereafter those people including himself dispersed and he also proceeded to his home. A week later, he learnt of the death of the deceased.

7. He continued to testify that he heard rumours connecting him with the death of the deceased. As a result, he became worried. Because of the worries, his brothers and his brother in-law accompanied him to Ntulele police station, where he surrendered, who then transferred him to Narok police station. He surrendered to the police because he feared for his own life; because the family of the deceased were likely to seek revenge against him. He was then taken to the High Court at Nakuru and charged with this offence.

8. Subsequently, he was then transferred to the High Court at Naivasha. After that, he was transferred to the High Court at Narok. He did not call any witnesses in his defence.

9. Counsel for the accused filed written submissions. He cited the case of *Nzuki v. R (1993) KLR 171*, in which the Court of Appeal held that before an act of an accused can be termed as murder, the following must be proved.

“a) an intention to cause death

b) an intention to cause grievous harm

c) where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. It does not matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”

He also cited the case of *Daniel Muthie v. R, Criminal Appeal No. 218 of 2005*, which in turn cited the case of *R. v. Lawrence Mukaria and Another (2014) eKLR* in which the Court of Appeal while considering what constitutes malice aforethought, observed that the cutting of a deceased person with a panga several times by the appellant constituted malice aforethought because the act of cutting the deceased person on the head with a sharp instrument, would cause death or grievous harm to the victim. The court also observed that in those circumstances, malice aforethought was observed in terms of section 206(b) of the Penal Code. Counsel submitted that in the instant case the prosecution have failed to prove any pre-meditation because in his view the deceased was the aggressor. It was his submission therefore that the accused acted in the heat of passion. It was also his submission that the accused person was provoked, because the deceased slapped him.

10. Furthermore, counsel for the accused cited the case of *Roba Galma Wario v. R (2015) eKLR* where the Court of Appeal cited the case of *Mohammed Omar & 5 others (2014) eKLR* and the case of *DPP v. Morgan (1975)2 ALL ER 347*, in which the Court of Appeal held that the essential element of self defence is that the accused should believe that he was being attacked or was in eminent danger of being attacked and that such a belief should be based on reasonable grounds. Counsel submitted that the accused reacted after being attacked by the deceased person.

11. Finally, counsel cited the case of *Okwany & Another v. R (2005)1 KLR 833* in which the Court of Appeal held that there was provocation where the deceased confronted the accused and another person, armed with a rungu and uprooted crops from a disputed portion of land, which the accused had planted. In those circumstances, the court found that the conviction for murder could not be sustained and it therefore reduced the charge to one of manslaughter.

12. In the light of the totality of the evidence for both the prosecution and defence and the submission of counsel for the accused, the following are the issues for determination:

1. Whether or not the accused was positively identified as the person who struck the deceased with a rungu
2. Whether or not the alibi defence of the accused was disproved.
3. Whether the evidence adduced disclosed murder or manslaughter.

13. Issue No. 1

The offence was committed at night. The evidence of Samuel Olorobel was that there was moonlight during that night. He recognized the deceased as the person who was lying down. He also recognized the accused as the person who was standing. He grabbed the rungu from the accused which he then threw away. Additionally, he recognized the voice of the accused as the person whom he heard saying: “*You have slapped me.*” When he went close to him, the accused told him that the deceased had slapped him. This is evidence of recognition, since PW 1 knew the accused before. The evidence of PW 1 is supported by that of Kilesi Ole Mpusia, who also saw and recognized the accused as the person who struck the deceased 3 times using a rungu. He has also testified that there was moonlight. He further testified that by the time he arrived at the scene, he found the fighting was ongoing.

14. Furthermore, the evidence of PW 1 and PW 2 is supported by that of Anthony Koigaga (PW 4). PW 4 testified that the accused told him that it was the deceased who had slapped him. I believe the evidence of PW 1 and PW 2 that they positively recognized the accused as the person who inflicted the fatal strikes on the deceased using a rungu.

15. It is important to point out here that all the prosecution witnesses testified before another High Court (Meoli, J.). Additionally, it is equally important to point out that it is only the accused who testified before me.

16. Furthermore, I believe the evidence of PW 4 that the accused told him that it was the deceased who had slapped him. In the circumstances, I find that the accused was positively identified as the person who struck the deceased using a rungu. Their identification of the accused is free from any mistake or error since it appears they knew the accused before this incident and there was also moonlight.

17. Issue No. 2

The unsworn statement of the accused shows that his defence was that he is not the person who inflicted rungu injuries on the deceased person. It was his testimony, that at 7.00 p.m., he was going home. While on the way home, he saw people gathered on the road. He further stated that when he went near them he saw an injured male person lying down. Shortly thereafter all those people dispersed including himself who then proceeded to his home. This clearly shows that his defence is that of an alibi since he arrived at the scene of crime and found the deceased injured and was lying down. In view of the recognition evidence of the prosecution witnesses (PW 1 and PW 2), I find that his defence of an alibi has been disproved. I therefore find that he was at the scene of the attack and that he was the person who struck

the deceased with a rungu.

18. Issue No. 3

The evidence tendered shows that it is the deceased who slapped the accused person. The accused told his brother (PW 4) that the deceased slapped him. There is evidence of PW 1 and PW 2 to the effect that they found the accused and the deceased fighting. From the totality of this evidence, I find that the deceased was the aggressor. I further find that the accused was provoked by the deceased person and that at the heat of the moment, he took a rungu and struck the deceased 3 times.

19. The evidence of the doctor who performed the post mortem examination is that the deceased died of peritonitis – that is the infection of the abdominal cavity. I find from that evidence that it is the accused who caused the death of the deceased person. In the circumstances, I find that the totality of the evidence discloses manslaughter contrary to section 205 of the Penal Code. I therefore find him guilty of the offence and I hereby convict him accordingly.

Judgement read in open court this 13th day of February, 2018 in the presence of Mr. Mukofu for state and Mr. Onduso holding brief for Mr. Mongeri for accused.

J. M. Bwonwonga

Judge

13/2/2018