



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CRIMINAL CASE NO.8 OF 2015**

**REPUBLIC**

**VERSUS**

**PATRICK LEWATITAI alias SAPU**

**JUDGMENT**

The accused is charged with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code Cap. 63 Laws of Kenya. The particulars of the offence are that the accused on the 6.11.2015 at Sereta village within Loyangalani sub-county in Marsabit County murdered **IMPAI LOKIDENYE**.

Ten (10) witnesses testified for the prosecution. **PW1 KUNTES LEKENIT** is a security officer in the office of the local Member of County Assembly. On the 6.1.2015 at about 8.00p.m he heard many people screaming. He went out and saw a crowd. Some people were crying. He saw someone lying down outside a house. It was the deceased. She had a cut wound on the left side of the head near the ear. The ear had been cut into two. She was bleeding profusely. He called the Doctor at South Horr who sent then an ambulance. On arrival at the hospital the deceased was declared dead. He was told that the accused was fighting with his wife and the deceased tried to intervene. In the process she was cut with a sword. They looked for the accused and arrested him. They took him to South Horr Police station.

**PW2 SAFARI LEMONGIN** on the 7<sup>th</sup> of Nov. 2015 at about 6.00p.m he got information that someone had been killed in South Horr. On the 12.11.2015 they got information that the accused had been seen in the hills. They looked for him and arrested him. They recovered a sword from him. They took him to South Horr Police station. **PW3 GLORIA NASIEKU** was at home on 6.11.25 at 6.00pm. The accused's home is about 30metres from hers. The accused started beating his children. The accused's wife went out of the house and the accused followed her. The wife had asked him what he was doing with the children. The accused's wife (PW4) is her sister. The accused's wife raised alarm and their mother responded. The accused cut the deceased

**PW4 RASIN EKARAN** testified that on the material day the accused went home drunk. They are not officially married. He started making noise and beating her child. She went out to find out why he was beating the child. The accused wanted to beat her. He hit her on the back with a club and she ran away. Her mother went there and before she could talk the accused cut her on the head using a sword which he had on his waist. The deceased was taken to Catholic mission hospital but passed away on arrival at the hospital. It is her evidence that the accused had the habit of beating her and the children. The deceased and the accused were relating very well. The accused had been summoned several times by the elders for beating her and the children. The accused then fled with the sword. He was later arrested and charged with the offence.

**PW5 FRANCIS EKARAN** is the deceased son and a brother in-law to the accused. On 6.11 2015 at about 7.30p.m he got a phone call that his mother had passed on. He went home and found a crowd outside PW4's house. The deceased was lying down in a pool of blood. They called for an ambulance and took her to hospital but she was pronounced dead on arrival. On 9.11.2015 a postmortem was conducted at Maralal hospital. He was present when the postmortem was done. They looked for the accused and managed to arrest him. He was taken to the Police station. They recovered the sword from the accused.

**PW6 PC POLYCENE OUMA** was stationed at the Marsabit Police station. He escorted the accused to Marsabit County hospital for Mental assessment. **PW7 PC FRANCIS KAURA MWANGI** was stationed at the South Horr Police Post. PW4 reported the case at the station on the 7.11.2015 at 9.30am. He went to the local dispensary where the deceased had been taken for treatment. The deceased has already passed on. They took the body to Maralal hospital mortuary. On 14.11.2015 at about 2.30p.m the accused was arrested by members of the public and taken to the Police station. He was assisting with the investigations.

**PW8 CPL ALBERT MWARABU** was stationed at the North Horr Police station but was in charge of the South Horr Police post. The case was reported on the 7.11.2015 at around 9.30am they went to the hospital where the deceased was and found that she had already passed on. The deceased had a deep cut on the left side of the head across the left ear. The nurse on duty told them that the deceased had died on arrival. He went to the scene and investigated the case. The accused escaped after stabbing the deceased. The accused was later arrested and charged

with the offence. The incident occurred at about 7.00pm.

**PW9 PC JARSON KARANJA** produced the sword which was alleged to be the murder weapon. It is his evidence that PW8 was transferred to Mombasa and when he testified the sword was not produced. He does not know how the sword was taken to the Police station. **PW10 DR. STEVE MAKORI SERETI** is stationed at Marsabit County Hospital. He produced a postmortem report that was conducted by Dr. Kuria at Maralal District hospital. Dr. Kuria's whereabouts is unknown. The deceased had a cut wound on the head measuring 4x4cm. The wound was deep upto the skull. The brain matter was exposed. The skull was fractured. The doctor concluded that the cause of death was cardiopulmonary arrest due to shock caused by the head injury.

The accused gave sworn testimony. He stated that he was a herder before he was arrested. On the 6.11.2015 he was at home in the morning. He went to the fora. He gave his mother in law Ksh.5000/= to buy food for the children. He had chased away his wife. He slept at the fora. In the morning people went to the fora and told him that the police were looking for him. He went home and found Police officers. One officer by the name Lenkuyo told him that he had killed someone. He was arrested and taken to Loyangalani Police station. He stayed there for 6 days and was later brought to Marsabit. He had chased away his wife as she had infected him with gonorrhoea. He had found his wife with another man and they fought. They have four children with his wife. He was not living with his wife and he had chased her away. The knife that was produced in court is not his. He was living in the same compound with his mother in law. It was his mother in law who was taking care of their four children. He denied that he assaulted his child by the name Lucia. It is his evidence that the contention by his wife that he wanted to assault her is not true. When he fought with the man who was with his wife he suffered an injury on his left hand. He has no parents. It is his evidence that he did not run away.

Mr. Biwott counsel for the accused submit that the prosecution has not proved its case beyond reasonable doubt. The murder weapon is not known. At times it was referred to as a knife while other witnesses referred to it as a Samburu sword. The alleged murder weapon was not subjected to forensic examination to find out if the accused's finger prints were present or whether the deceased's blood was on the knife.

Mr. Chirchir, Counsel for the state, submit that the evidence point at the accused. It is the accused who killed the deceased. The accused was not provoked. There was moonlight. The accused was well known to PW4. The murder weapon was identified by PW4. The accused ran to the forest with the murder weapon and was later arrested with it. There was no need to subject the murder weapon for forensic examination.

The Prosecution evidence does establish that **Impai Lolkidenye** died on the 6<sup>th</sup> of November 2015. The issue for determination is who killed the deceased. According to the prosecution, it is the accused who killed the deceased. PW4's evidence is that the accused went home and started beating children. She saw the accused beating his children. She also saw the accused following his wife.

The defence evidence is that the accused gave money to his mother in law and went to the fora. People went to arrest him at the fora. He denied committing the offence.

It is the evidence of PW4 that the accused assaulted the deceased with the sword and ran away. The deceased was killed and the postmortem report does confirm that the deceased suffered serious head injuries that were caused by a sharp object. PW3 and PW4 saw the accused that evening. This is someone they were living with. PW4 is the accused's wife and according to the accused they have four children. It cannot be held that it was someone else who went to the homestead and started beating the children and also killed the deceased. The evidence does point at the accused. I am satisfied beyond any doubt that it is the accused who assaulted the deceased with a sword and in the process killed her.

Counsel for the accused contend that the alleged murder weapon

was described differently and was also not subjected to forensic examination. It is not a requirement that in a murder case the murder weapon must be found. What is important is proof that the accused is the one who committed the offence. One can as well use his hands and strangle his victim. In such case the murder weapon will be the bare hands which may not be subjected to forensic examination.

Part of the prosecution evidence is that the accused was fighting with his wife. According to PW4, she was not fighting with the accused. It is the accused who hit her with a club. The accused went home that evening and started beating the children. Even if the accused and his wife were fighting, I am satisfied that it was the accused who started beating his wife. There was no provocation on the part of PW4. All what PW4 did was to find out why the accused was beating the children. There was no provocation. The accused's evidence is that he was not present when the deceased was killed.

In the case of **KIOKO V REPUBLIC, (1983) KLR 289** it was held that:-

**It is the duty of the trial judge to deal with alternative defences that emerge from the evidence which might reduce the charge to manslaughter even though they are not put forward by the defence.**

The accused introduced the issue of having found his wife with another man and having chased away his wife. While PW4 was testifying, she was not asked whether she was living with the accused or not or whether she was found with another man. This contention is just but an afterthought. Even if it was true that the accused found PW4 with another man with whom they fought, that has nothing to do with the deceased's death. The incident, if it did happen, cannot be said to have provoked the accused.

PW4 testified that the accused went home drunk and started beating the children. Can it be said then that the accused was intoxicated? Section 13 of the Penal Code states as follows: -

**13(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**

***(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission***

***was wrong or did not know what he was doing and –***

***(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or***

***(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.***

***13(4) Intoxication shall be taken into account for the purposes of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.***

The accused did not offer the defence of intoxication. However, since it was said that the accused was drunk, the court has to consider whether the accused was responsible for his action. Did the accused know what he was doing.

Given the evidence on record, I do not find that the accused was at the time he committed the offence so much intoxicated that he was temporarily insane and did not know what he was doing. We do not know what the accused had drunk. He went home alone and started beating his children. Why didn't he start a fight where he was drinking. The accused knew what he was doing. I do find that the defence of intoxication is not available to the accused.

The evidence show that PW4 screamed. The deceased responded to the screams. According to PW4, the accused had no bad relationship with the deceased. That alone cannot make the accused innocent. He is the one who brutally assaulted an innocent woman who did not attack him. The accused has to be held responsible for his actions. The deceased did not attack him. All what she was doing was to intervene between the accused and his wife. She did not provoke the accused.

Malice aforethought is the core ingredient of the offence of murder. It is not required that for malice aforethought to be established, one must have had a long period of planning to commit the murder. If the action which leads to the murder is triggered by provocation, then the offence is taken as that of manslaughter. Section 206 of the Penal Code defines malice aforethought. Malice aforethought is established if there is knowledge that the action will cause death or grievous harm. The accused had a sword wrapped in his waist. He removed the sword and cut the deceased on the head. The attack was so vicious that it fractured the skull and exposed the brain matter. The accused had the intention of causing grievous harm. He could have just threatened the deceased instead of attacking her. The deceased was not a threat to the accused. The accused knew what he was doing. He ran away to the forest after committing the offence. He knew that his action could have caused death.

I do find that the prosecution has proved its case beyond reasonable doubt. It is the accused who killed the deceased. The defence evidence does not raise any doubt on the prosecution case.

The accused is hereby found guilty of the offence of murder Contrary to **Section 203** as read with **Section 204** of the Penal Code and is convicted of that offence.

**Dated, Signed and Delivered at Marsabit this 29<sup>th</sup> day of May 2018**

**S. CHITEMBWE**

**JUDGE**