



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO. 23 OF 2015**

REPUBLIC.....STATE

VERSUS

SAMMY LEKAI.....1<sup>ST</sup> ACCUSED

PETER LEKUDAYO.....2<sup>ND</sup> ACCUSED

JAMES LODIANGA.....3<sup>RD</sup> ACCUSED

**JUDGMENT**

The three accused persons namely **SAMMY LEKAI** (hereinafter referred to as the 1<sup>st</sup> accused) **PETER LEKUDAYO** (hereinafter referred to as the 2<sup>nd</sup> accused) and **JAMES LODIANGA** (hereinafter referred to as the 3<sup>rd</sup> accused) are jointly charged with **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.** The particulars of the offence are that

***“On the 28<sup>th</sup> day of March, 2015 at about 9.30pm at Athinai Estate in Rongai sub-county within Nakuru County murdered DAVID KINGORI WAMBUA”***

All three accuseds pleaded ‘**Not Guilty**’ to the charge and their trial commenced at the High Court in Nakuru on 12/11/2015. The prosecution led by the learned State Counsel called a total of six (6) witnesses in support of their case.

The prosecution case is that on the evening of 28/3/2015 at about 8.30pm a group of men were in the house of **PW2 MARGARET AKURU** in Mogotio drinking chang’aa. The 1<sup>st</sup> accused began to raise the volume on the radio in the house. The deceased who was also drinking there told the 1<sup>st</sup> accused to stop increasing the volume. A quarrel erupted between the two men which quarrel led to a scuffle. The 1<sup>st</sup> accused held the deceased by the tie and the men began to fight. Other patrons removed the 1<sup>st</sup> accused from the house.

Shortly thereafter the 1<sup>st</sup> accused returned and challenged the deceased to go outside to fight with him. The deceased got up and left the house. A short while later the deceased was found lying critically injured on the road outside. A motor bike was called to rush him to hospital but he unfortunately succumbed to his injuries and died.

**PW1 RASHID MLONGO OMUSI** told the court that he was one of the patrons drinking in the house of

**PW2** on that day. After the deceased left the house **PW1** continued drinking. A few minutes later he also got up to leave. As he walked home **PW1** heard someone crying in pain. He checked and found deceased lying on the ground with blood coming out of his noses. The deceased informed **PW1** that he had been beaten by the Lekai (1<sup>st</sup> accused) Lekundoi (2<sup>nd</sup> accused) and Londianga (3<sup>rd</sup> accused) **PW1** called the brother of the deceased.

**PW3 JAMES KIMERICH WAMBUA** the father to the deceased told the court that on the night in question at about 9.00pm the 1<sup>st</sup> accused came to his home carrying two sticks. The 1<sup>st</sup> accused informed **PW3** that he had fought his son (deceased) and promised to deal with the deceased the next day.

Following the death of the deceased the matter was reported to the police who swung into action and commenced investigations. The 3 accused persons were eventually arrested and charged in court.

At the close of the prosecution case this court acquitted the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. The 1<sup>st</sup> accused however was found to have a case to answer and was placed onto his defence.

The 1<sup>st</sup> accused gave an unsworn defence in which he denied having assaulted and/or killed the deceased. This court must now analyze the evidence on record with a view to determining whether the charge of murder has been proved beyond reasonable doubt.

The offence of murder is defined as follows by Section 203 of the Penal Code Cap 63, Laws of Kenya

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

The prosecution must adduce sufficient evidence to prove the following three crucial ingredients of this offence.

- 1) Proof of the fact as well as the cause of death of the deceased
- 2) Proof that the deceased met his death as a direct result of an unlawful act or omission on the part of the accused
- 3) Proof that said unlawful act or omission was committed with malice aforethought.

In this case the fact of the death of the deceased is not in any doubt. Several witnesses who include **PW1** and **PW2** testified that they found the deceased lying on the path outside bleeding from the nose and mouth. **PW4 DANIEL KARIUKI NAMBUA** was an elder brother to the deceased who rushed to the scene and attempted to take the deceased for medical treatments. Both **PW4** and **PW3** the deceased's father later identified the body for purposes of the autopsy. All these witnesses who knew the deceased person well identify him as **‘David King’ori Wambua’**.

Evidence regarding the cause of death was tendered by **PW5 DR. TITUS NGULUNGU** a pathologist attached to PGH – Nakuru who conducted the autopsy on the body of the deceased. **PW5** told the court that he noticed extensive swelling and bruising over the scalp of the deceased as well as defence injuries to his hands. **PW5** formed the opinion that the cause of death was **“severe head injury attended by brain contusion raised ultra-cranial pressure and subdural haematoma caused by multiple blunt trauma to the head consistent with fatal assault”**. **PW5** filled and signed the post mortem report which he produced as an exhibit in the case. **P.exb 1**.

From this evidence I find as a fact that the deceased met his untimely death due to a brutal attack to his person.

After proving the fact and cause of death the prosecution is required to adduce evidence sufficient to prove that it was the 3 accused persons who unlawfully assaulted the deceased and caused his death.

**PW1** testified that on the material night when he left the drinking den and as he walked home he came across the deceased lying on the ground groaning in pain. **PW1** claims that the deceased told him that he had been assaulted by the three accused persons.

The prosecution thus seeks to rely on this alleged statement as a dying declaration made by the deceased identifying his attackers. However a dying declaration on its own cannot amount proof of guilt. There must exist other independent evidence to corroborate this dying declaration.

This was the ruling of the Court of Appeal in the case of **DZOMBO CHAI Vs REPUBLIC Mombasa Criminal Appeal No. 256 of 2006**, where it was held

***“A statement by a dead person as to the cause of his death or as to the circumstances of the transaction which resulted in his death in cases in which the cause of death of the person comes into question is admissible under Section 33 as of the Evidence Act. Although the court can in law solely rely on such evidence there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction”*** (own Emphasis)

In respect of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons no other or corroborative evidence existed to implicate them in the attack on the deceased. Nobody saw the two quarrel or fight with the deceased at all. Nobody saw them follow the deceased out into the night. For this reason I found that no prima facie case had been established against the 2<sup>nd</sup> or 3<sup>rd</sup> accused and I acquitted them both under Section 306(1) of the Criminal Procedure Code.

I will now proceed to consider the evidence as against the 1<sup>st</sup> accused. Back to the ‘**dying declaration**’ **PW1** claims that when the deceased made this statement to him he was lying gravely injured on the ground outside the house of **PW2**. It must be remembered that both men were drunk, having spent much of the evening imbibing chang’aa. **PW1** made no mention of any source of light where the deceased lay. Indeed **PW1** told the court that he had to shine the light from his mobile phone on the injured man to be able to see and identify that it was the deceased. **PW1** made no mention of electric light or moonlight at the scene where the deceased lay. How then was the deceased able to see and identify his attackers given his intoxicated state and the darkness prevailing at the time.

Further it is only **PW1** who claims to have heard the deceased name any person(s) as his attackers. Strangely enough **PW1** states that although the wife of the deceased was called and came to the scene, he did not tell her what the deceased had divulged to him. This is indeed strange. If the deceased had given **PW1** the names of the persons who assaulted him, I have no doubt that **PW1** would have relayed this information to others who came to the scene more especially the wife of the deceased. **PW2** and **PW4** both of whom saw the deceased told the court that the deceased was unable to talk to them at all. In the circumstances this court cannot put much store in this ‘**dying declaration**’.

The prosecution witnesses told the court that the 1<sup>st</sup> accused had fought with the deceased inside the chang’aa den. After the 1<sup>st</sup> accused was force out of the house, he returned and challenged the deceased to meet him outside for a fight. The deceased then got up and went outside. There is no witness who saw what if anything transpired between the two men after they left the house. No witness saw the 1<sup>st</sup> accused assault the deceased. By the time **PW1** and **PW2** went to the scene the deceased was lying on the ground alone. The first accused was not spotted anywhere in the vicinity.

These facts clearly lead to a ‘**suspicion**’ that it was the accused who assaulted the deceased. However it has been held severally that suspicion alone no matter how strong, cannot form the basis for a conviction. In the case of **SAWE Vs REPUBLIC [2003], KLR 364**, the Court of Appeal held

***“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt..... suspicions however strong cannot provide a basis for inferring guilt which must be proved by evidence”***

**PW3** the father to the deceased told the court that on the material night the 1<sup>st</sup> accused came to his home armed with two sticks, looking for deceased. **PW3** went on to state that the 1<sup>st</sup> accused told him that he had fought with the deceased and vowed to teach him a lesson the following day. **PW3** did not himself witness any fight between the accused and the deceased. Indeed he did not at any time see the two together.

Firstly if the 1<sup>st</sup> accused had assaulted the deceased and left him lying by the road side, why then would he go to search for deceased at his father's home. Secondly the 1<sup>st</sup> accused could very well have been referring to the fight which occurred between the two inside the house of **PW2**, which fight was witnessed by **PW1** and **PW2**. The deceased was not fatally injured after that fight. The evidence is that he walked out of the house himself. **PW7 PC(W) SARAH POKOSHI** the investigating officer also cited this admission by the 1<sup>st</sup> accused that he fought the deceased as the basis for charging the 1<sup>st</sup> accused with the offence of murder. This statement would amount to a '**confession**' which must be taken in terms of Section 25 'A' in order to be admitted by the court as proof of guilt. The accused was not cautioned and his rights were not explained to him before **PW6** took his statement. **PW6** who was not a Police Inspector was not authorized to record any confession from the suspect.

The prosecution seeks to rely on circumstantial evidence to prove their case. In the case of **JUDITH ACHIENG Vs REPUBLIC [2009]eKLR** the Court of Appeal held that

***"It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy three tests***

***1) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established***

***2) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused***

***3) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and none else"***

I find that this standard has not been met. There were no witnesses who saw what happened after deceased left the drinking den. Nobody saw 1<sup>st</sup> accused assault the deceased. **PW5 PC(W) SARAH POKOSHI**, who investigated the case claimed that she interviewed a sister in law of the deceased who claimed to have witnessed the fight between the 2 men. **PW2** who was the said sister in law told the court that she did not witness any fight outside the house. Her evidence contradicts that of **PW6**. The deceased was found lying injured on a public open road. Any other person could have attacked him. The identification of 1<sup>st</sup> accused through a purported dying declaration cannot be relied upon given that the place was dark and the deceased had been drinking. **PW6** also stated that when the police arrested the 1<sup>st</sup> accused he had injuries on his person providing that he had been involved in a fight. No proof of such injuries was availed to court. The 1<sup>st</sup> accused was not examined by a doctor. No P3 form has been produced to show the nature and extent of injuries which he had. The onus was on the prosecution to prove each aspect of the charge beyond doubt. At no time does the burden even shift to require that an accused person prove his innocence.

I find that this case has not been proved beyond reasonable doubt. I acquit the 1<sup>st</sup> accused of this charge of murder. The 1<sup>st</sup> accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Nakuru this 24<sup>th</sup> day of February, 2017.**

Mr Magata for Accused

Mr. Chigiti for State

**Maureen A. Odero**

**Judge**