



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL CASE NO. 60 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DANIEL MWOMOLE ADEBE.....ACCUSED**

**JUDGMENT**

1. This is a *murder* most foul. The accused is a *step-brother* of the deceased. The underlying motive was a dispute over ancestral land. The deceased, *Janet Olesia*, was apprehensive of her security. She had hired two *Turkana* men to secure her home.

2. It was a deceptive guarantee: On 12<sup>th</sup> April 2010, the *accused* and some *accomplices* stormed her home. They were baying for her blood. They were shouting: *Leo ni leo! Tunataka kichwa ya Janet*. Loosely translated -*Today is the day! We want the deceased's head*. They overpowered the two guards; and, attacked the deceased with a *rungu*, metal bar, *panga* and an axe.

3. According to one witness (PW2), the accused inserted some sticks or arrows into her privates. The deceased bled profusely. The police found her lying in a pool of blood in the kitchen. She was taken to a number of hospitals. She succumbed to death on 6<sup>th</sup> October 2010 at Webuye District Hospital. It was approximately *six months* from the date of the attack.

4. The accused was at first charged with a minor offence in *Eldoret Criminal Case 920 of 2010*. Following the death of the deceased, the Republic brought information to the High Court charging the accused with *murder* contrary to section 203 as read with section 204 of the Penal Code. The particulars being that on 6<sup>th</sup> October 2010 at Makutano village, Matakusi Sub-location, Lugari Location, Lugari District of the Western Province, he *jointly* with others *not* before the court murdered *Janet Olesia Singer*.

5. He pleaded *not guilty*. The prosecution called *four* witnesses. The first witness was *Ainea Vutziriri* (PW1). He testified that on 12<sup>th</sup> April 2010 he was at the home of the deceased, Janet. It was at about 7:00 p.m. He was in the company of James and Julius, the two *Turkana* guards. Simon Mudasia (PW2) was also present. PW1 heard some people approaching saying: "*Leo ni leo*". James and Julius came out to find out about the matter. Daniel Mwomole Adebe (the accused) hit Julius. PW1 said the other attackers were Felix Alati, Roken Rubia, Charles Isua and Henrieta (mother of the accused). He said that all the attackers were his neighbours.

6. The attackers flushed out the deceased from her house. They chased after her. The deceased ran towards a neighbour's house, thirty metres away. The house belonged to Adisa. Adisa locked the door before the deceased could gain ingress. The accused, Roken Rubia, Felix Alati, Isua and Henrieta

attacked the deceased with a *panga*, *rungus* and an axe. PW1 testified that the sun was setting; and, there was still some light. He said he was close to where the attack occurred.

7. PW1 testified that the deceased was screaming. PW1 rushed to Milimani Police Station to report the matter. He also called the Officer in Charge Turbo Police. He returned to the scene with the police. The deceased had been moved from Adisa's door and placed in her kitchen. She was bleeding. He said she had been cut four times on the head; and, on the elbows. They took her to Webuye Hospital. She was transferred to the ICU at Moi Teaching & Referral Hospital. She was later transferred back to Webuye Hospital where she succumbed to her injuries.

8. On cross examination, PW1 said he was a *fundi* working for the deceased. The attack started as they were having tea at 7:30 p.m. He said there was still some light from the setting sun; and, that one could see up to a distance of about 20 to 30 metres. He was inside the house of the deceased.

9. The door to the main house faced the gate. PW1 said he saw three people: Felix Alati who was wielding a *panga* on the right hand; Daniel Mwomela (accused) who had a *Somali* sword with a club head; and, Roken Rubia who had a piece of metal on his right hand. He said that Daniel Mwomela hit the deceased; or, stabbed her with the metal rod on the head three times. Felix used the *panga* to cut a big section of the scalp. Roken was encouraging the attackers saying, "*wapewe*". Then Charles Isua emerged with an axe and cut the deceased on the back of the neck.

10. PW1 admitted that in his statement to the police he said the assailants were shouting "*Leo ni leo*" and not "*Wapewe*". He said the two *Turkana* guards were overpowered by the assailants. He said there were about ten attackers but he did not identify the rest.

11. The version of events was largely corroborated by PW2, *Simon Mudasia Ombuya*. He was also employed by the deceased. On 12<sup>th</sup> April 2010 he was at the main house with PW1 and the two guards. The deceased was inside the house. He testified that the accused entered the compound with Rubia. Rubia was saying "*Wapewe*". He said Rubia gave a knife to the accused. The accused's brother, Felix; and, their mother, Henrieta, came to the scene. They overpowered the two guards and attacked the deceased.

12. Some Administration Police officers came to the scene. They said it was family dispute. He claimed that prior to the attack the accused and Felix had said they would kill the deceased. He said that in March 2010, the deceased confided in him "*that this land will take me to the grave*". He said that the deceased told him that her brothers thought she was taking away their land. PW2 testified that the accused held the deceased on the neck; and, inserted sticks into her private parts. He said the accused had a knife. His mother was shining a light on the deceased from a torch.

13. Upon cross examination, PW2 said that the accused had a knife. It was a long kitchen knife. He used the arrows abandoned by the *Turkana* guards to invade her private parts. He said that Felix had a piece of metal; a metal bar 3 feet long.

14. PW3 was *Dr. Wambasi Mutolo*, an Assistant Director of Medical Services at Webuye District Hospital. She produced a postmortem report made by her colleague *Dr. Munyendo*. The autopsy was done at Webuye Hospital on 22<sup>nd</sup> October 2010. The body was identified by Geoffrey Mugeru and Joram Kisiwi. According to the post mortem form, the injuries included multiple bruises; two cut wounds on the right parietal area both extending to posterior region; and, four "*decubitus ulcers, gluteal, deep (up to muscles) ranging 3 to 6 diameters*". In the opinion of the pathologist the cause of death was-

*"Pulmonary failure due to pulmonary embolus resulting from prolonged immobilization which was in turn caused by severe head injury inflicted by a blunt object with sharp edges."*

15. The last witness was Police Constable Peter Ngunje (PW4). He and some colleagues were alerted of the offence by the Administration Police Officers. They found the deceased on her kitchen floor. Blood was oozing from deep cuts on the head and back. She was still alive. They first took her to Lumakanda

Hospital. They were referred to Webuye District Hospital. The deceased was later transferred to Moi Teaching & Referral Hospital.

16. He testified that the accused was initially charged with *creating a disturbance*. When the deceased died, PW4 re-arrested him and charged him with *murder*. He said the accused had previously made threats to the deceased. Upon cross examination, he said that did not recover any weapons at the scene; and, he did not have the *OB* for the previous case. He said that one of the brothers of the accused implicated in the attack was still at large.

17. When the accused was placed on his defence, he made a *sworn statement*. He protested his innocence. He said the deceased was his step-sister. He said he could not have killed the deceased on 6<sup>th</sup> October 2010 because he was in custody at Eldoret Prison. The matter related to an assault on PW1 in November 2009. He claimed that PW1 holds a grudge against him. He said his bond in the other case was cancelled on 22<sup>nd</sup> June 2010. On 28<sup>th</sup> October 2010, the criminal case was dismissed. He said that one of his sisters, Everlyne, told him that the deceased was killed by unidentified people.

18. The learned defence counsel filed written submissions on 2<sup>nd</sup> November 2016. The learned Prosecution Counsel delivered her final submissions on 12<sup>th</sup> March 2017. I have paid heed to the evidence and the rival submissions.

19. Section 203 of the Penal Code provides that-

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

20. There are *three* key ingredients that *must* be present to complete the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

21. From the evidence, there is absolutely *no* doubt about the death of the deceased. The body was identified by Geoffrey Mugeru and Joram Kisiwi. PW4, Police Constable Peter Ngunje, was also present. The post mortem form recorded multiple bruises; two cut wounds on the right parietal area both extending to posterior region; and, four “*decubitus ulcers, gluteal, deep (up to muscles) ranging 3 to 6 diameters*”. In the opinion of Dr. Munyendo, the cause of death was-

*“Pulmonary failure due to pulmonary embolus resulting from prolonged immobilization which was in turn caused by severe head injury inflicted by a blunt object with sharp edges.”*

22. From the injuries, I entertain *no* doubt that the death was *unlawful*. The deceased died on 6<sup>th</sup> October 2010, about six months from the date of the attack. The accused is thus properly charged with *murder*. The only live question now is whether the accused, of *malice aforethought*, killed the deceased. To answer that question, I have to establish whether the accused was *positively identified* as one of the people who attacked the deceased on 12<sup>th</sup> April 2010. The accused was a neighbour of PW1. He knew him well. On the material date at about 7:00 p.m., he was at the house of the deceased.

23. The door to the main house faced the gate. PW1 saw three people: Felix Alati who was wielding a *panga* on the right hand; Daniel Mwomela (accused) who had a *Somali* sword with a club head; and, Roken Rubia who had a piece of metal on his right hand. PW1 was emphatic that the accused hit the deceased; or, stabbed her with the metal rod on the *head three times*. Felix used the *panga* to cut off a big section of the scalp. Roken was encouraging the attackers saying, “*wapewe*”. Then Charles Isua emerged with an axe; and, cut the deceased on the back of the neck.

24. The evidence of PW1 must be treated with *caution*. He had grievances with the accused. PW1 was the complainant in an unrelated assault case against the accused in November 2009. The case was

dismissed on 28<sup>th</sup> October 2010. But I have considered that PW1 *knew* the attackers *well*. They were *neighbours*. He said there was light from the *setting sun*, and, one could see 20 or 30 metres away. He was positioned where he could see the attack on the deceased. Furthermore, his evidence was *corroborated* in all material particulars by PW2. In addition the attack went on for nearly *half an hour*.

25. I have reached the inescapable conclusion that the accused was positively identified by PW1 and PW2 as one of the assailants. That is evidence of *recognition*; stronger evidence than that of identification. See Wamunga v Republic [1989] KLR 424, Republic v Turnbull & others [1976] 3 All ER 549, Obwana & Others v Uganda [2009] 2 EA 333.

26. The next key question is whether the accused had *malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person. Section 206 of the Penal Code defines it as follows;

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

(a) *an intention to cause the 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.”*

27. There was an underlying land dispute. PW2 testified that the deceased *told* him that her brothers thought she was taking away their land. The accused was clearly identified as one of the attackers. He used a long kitchen knife or *Somali sword* with a club head to attack the deceased. He also used the arrows abandoned by the *Turkana* guards to invade her private parts. The deceased suffered serious injuries; and, succumbed to them *six months* later. I find that the accused had a clear *intention to cause the death of; or, to do grievous harm* to the deceased. It was a *premeditated* attack. He was of *malice aforethought*.

28. Our criminal justice system puts the *burden of proof* entirely upon the shoulders of the prosecution. Woolmington v DPP [1935] AC 462, Bhatt v Republic [1957] E.A. 332. Does the defence set up by the accused create any doubt about his complicity in the murder? The claim by the accused that he was in prison custody on 6<sup>th</sup> October 2010 is diversionary: that is the date when the deceased finally *died*. The material date is 12<sup>th</sup> April 2010.

29. It was on 12<sup>th</sup> April 2010 when the accused and his accomplices assaulted the deceased. On the date of the attack, the accused was *recognized* by PW1 and PW2 as *one* of the attackers. I accordingly do not believe the defence set up by the accused. The accused had a clear *motive*: He and his siblings were aggrieved by the deceased's possession of a share of their father's land.

30. The naked truth is that the accused viciously assaulted the deceased on 12<sup>th</sup> April 2010. This is borne out by the evidence of PW1, PW2 and the autopsy report. The attack occurred outside the house of Adisa. The action was *premeditated* and *unlawful*. The deceased succumbed to those injuries *six months* later on 6<sup>th</sup> October 2010. The accused killed the deceased with *malice aforethought* as defined in section 206 (a) of the Penal Code.

31. When I juxtapose the defence put forth against the prosecution evidence, the defence is *hopeless*. It

leaves *no iota of doubt* about his culpability. I find *no hypothesis* that exonerates him. On the totality of the evidence of the witnesses called by the Republic, I find that the charge is *proved beyond reasonable doubt*.

32. The upshot is that the accused, *of malice aforethought, caused the death of Janet Olesia Singer by an unlawful act*. It must follow as a corollary, that the accused is culpable of *murder*. I accordingly enter a finding of *guilty*. The accused is hereby *convicted*.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 25<sup>th</sup> day of April 2017.

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

Accused.

Mr. Miyienda for Mr. Chepkwony for the accused.

Ms. Mumu for the Republic.

Mr. J. Kemboi, Court Clerk.