



**REPUBLIC OF KENYA**

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

**CRIMINAL (MURDER) NO. 97 OF 2012**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**JULIUS METILI MPIKAS .....ACCUSED**

**JUDGMENT**

- 1. Julius Metili Mpikas (the accused)**, faced a charge of murder, contrary to S. 203 as read with S. 204 of the Penal Code, in that on the 24<sup>th</sup> January 2012 at Kilutoori Village Oloiborsoilo location within the Narok County, jointly with another not before court murdered Dennis Lemishen Sakarri.
- It was the case for the prosecution that on the night of 22<sup>nd</sup> January 2012, at about 10.00pm, the deceased was on the way to his sister's place to spend the night. He had just taken his dinner at another sister's place while in the company of the sister, a brother and a visitor and no sooner had he left the place cries and noises were heard. People rushed to the scene. They included his brother and sister. They found him lying down after being hit or shot with an arrow which was embedded in his body within the stomach area.
- The deceased was taken to the hospital where he died while undergoing treatment. A post mortem examination indicated that the cause of death was peritonitis due to perforation of stomach by sharp object. The accused and another were alleged to have inflicted the fatal injury to the deceased by shooting or hitting him with an arrow. He (accused) was eventually arrested and charged with the present offence.
- The defence case was that the accused was asleep at his home on the material night when he was awakened by screams. He proceeded to a neighbour's home where the screams were coming from and found the deceased on the ground having been shot with an arrow. Other people including a brother of the deceased were already at the scene. The deceased was injured and in pain. He was carried to a nearby road for him to be taken to hospital. Thereafter, the accused returned to his home but before reaching there screams were heard emanating from there. He arrived and found that thieves had broken into the home and stole a cow plough.
- The accused reported the incident to the police on the following day and he was asked to carry out personal enquiries but on the 24<sup>th</sup> January 2012, he was at home when he was confronted and assaulted by some people. He reported to the police but those people were not arrested. He feared for his safety and proceeded to his brother's home from where he was arrested and taken to Kilgoris Police Station where he was asked to negotiate with the brother of the deceased after it was alleged that he was responsible for shooting the deceased with an arrow.

6. The accused denied the allegation and continued to deny the same. He contended that those who testified against him in Court did not speak the truth. After the close of this case, he submitted through the learned defence counsel, **Mr. Sagwe** that the prosecution failed to prove its case against him beyond reasonable doubt and that what they (prosecution) succeeded in doing was only to prove the death of the deceased.

7. The learned defence counsel submitted that the incident occurred in the night when it was dark such that the assailant was not identified. That, no identification parade was carried out and in any event, the accused's defence was clear in that he rushed to the scene when he heard screams and found the deceased already shot and injured. He (accused) was not present at the scene at the material time of the shooting. His "alibi" was therefore not displaced.

8. The learned defence counsel contended that the prosecution did not prove that the accused was the assailant and in support of his submissions, he relied on three decisions of the Court of Appeal viz:-

(1) **Kiarie Vs. Rep (1984) KLR 739.**

(2) **Fundi Reuben Ngala Vs. Rep MSA Cr. App No. 268 of 2000,** and

(3) **Dzombo Chai Vs. Rep MSA Cr. App No. 256 of 2006.**

The learned defence counsel beseeched this court to acquit the accused.

9. In its rejoinder, the state/prosecution through the learned Prosecution Counsel, **Mr. Otieno**, submitted that the prosecution's case was proved to the required standard and although the incident occurred at night, PW 2 was categorical in saying that there was sufficient moonlight to identify the attackers. That, a need did not arise for an identification parade as PW 1 and PW 2 knew the accused and identified him by recognition.

10. Learned Prosecution Counsel further submitted that the "alibi" defence was never raised by the accused in as much as he placed himself at the scene when he stated that he was at the scene. That, he was seen by PW 1 running away from the scene while armed with a bow and arrow. That, the deceased made a dying declaration in which he stated that he was shot and injured by the accused. That, the dying declaration was confirmed by PW 4.

The learned Prosecution Counsel contended that he accused was positively identified as one of the two people who attacked the deceased and should therefore be found guilty as charged.

11. The learned defence counsel maintained that the prosecution's case was not proved beyond reasonable doubt against the accused and since PW 1 allegedly saw two people and not one, there was need for an identification parade. That, PW 4 did not establish the dying declaration as he was never told by the deceased the person responsible for the attack.

12. From the foregoing rival submissions, it is apparent that no dispute arises with regard to the cause of the death of the deceased. Indeed, evidence from the prosecution through its four witnesses i.e **Antony Sakal (PW 1), Beatrice Sakari (PW 2), Daniel Kimirata (PW 3)** and **PC James Ngunjiri (PW 4)**, proved that the deceased sustained fatal injury after being shot with an arrow. This fact was also confirmed by the accused and his witnesses i.e **Jonathan Oliambani (DW 1)** and **Joshua Leparan Nyokoi (DW 2)**.

13. The post mortem report (P.Ex 2) indicated that the deceased died from perforation of the stomach by a sharp object.

The said sharp object was an arrow whose head (P.Ex 1) was removed from inside the stomach of the deceased.

The person who aimed the arrow at and shot the deceased with it on the stomach, did so with the intention of causing him grievous harm.

14. Under S.203 of the Penal Code, any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder and under S.206 of the Penal Code, malice aforethought exists where there is an intention to cause the death or to do grievous harm to any person.

It would suffice for this court to hold that the person who shot the deceased with an arrow had the necessary intention to cause his death and therefore guilty of murder.

15. The question arising in this case is whether the accused was positively identified as the person or one of the persons who attacked and fatally injured the deceased with an arrow.

The evidence suggested that the attackers were two in number. It may therefore be presumed that they acted in concert and with a common intention to kill the deceased.

16. Under S.21 of the penal Code:-

***“Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.***

In the present case, it would not matter whether the arrow was “fired” at the deceased by any one of the two attackers. As long as they were together at the material time and scene with a common purpose to cause grievous harm to the deceased they both committed the offence of murder.

17. On the alleged identification of the accused as one of the attackers, the relevant evidence was that of Antony (PW 1) and Beatrice (PW 2) but this was based on the fact that the deceased after being shot with an arrow and was injured and in pain told them separately that he was shot by the accused and another person called James.

In effect, these two witnesses evidence of identification was derived from the alleged dying declaration by the deceased.

18. The police officer (PW 4) also alluded to the deceased telling him while in hospital and in great pain that he was shot with an arrow by the accused and a Turkana hearsboy called James.

Daniel (PW 3) only testified with regard to alerts by way of screams made from the accused’s homestead. He confirmed as stated by the accused that the homestead was invaded by thieves who stole a cow plough. He could not tell how the deceased was injured and by whom.

19. Suffice to say that there was no direct identification of the accused whether or not by recognition as the person or one of the person who shot the deceased with an arrow and fatally injured him. The fact that he was seen near the scene of the incident no sooner had the incident occurred was not sufficient evidence to link him to the offence as he clearly stated in his defence and supported by his witnesses that he was one of the many villagers who rushed to the scene to answer the distress calls emanating from there. His “alibi” defence only applied in so far as it related to being at the scene at the actual time the deceased was shot and injured.

20. Even Antony (PW 1) and Beatrice (PW 2) stated that they saw the accused at the scene only after the deceased had been shot and injured.

They did not see him injuring the deceased but implicated him on the basis of the alleged dying declaration which if credibly corroborated could provide indirect evidence of identification of the accused as the person responsible for the death of the deceased.

However, the suggestion coming from the evidence of Antony (PW 1) was that he may not have heard the deceased making a dying declaration.

21. He (PW 1) seemed to have mentioned the accused merely because he was at the scene of the incident and also because he (accused) alleged while intoxicated that he had hit a wrong person. This was a day after the fact. The witness (PW 1) also alluded to a dispute between him and the accused over a plot of land. Incidentally, the two were in-laws meaning that the deceased was an in-law of the accused.

Most important, the witness (PW 1) indicated that he heard from the police that the deceased said that he was shot and injured by the accused. He (PW 1) said that the deceased talked to the police when he was alive and gave a statement.

22. The witness (PW 1) also alleged that the accused made a statement to the police and alleged that he had killed a thief.

The police officer (PW 4) indicated that the deceased told them that he was shot by the accused but that that statement was not recorded as the deceased was in great pain.

In essence, the evidence by Antony (PW 1) with regard to the alleged dying declaration was not credible.

23. As for Beatrice (PW 2), she stated that she found the deceased lying down and asked him what had happened. He told her that he was hit with an arrow by the two people standing there. These two people happened to be the accused (Julius) and one Mosaru.

Beatrice (PW 2) alleged that the deceased in particular mentioned the accused and when she confronted him as to why he had attacked the deceased, he allegedly remarked that “that is what men do”.

24. In cross examination, Beatrice (PW 2) alleged that the accused was in the company of one Demwari. She also admitted that the accused and others who had gathered at the scene helped in carrying the deceased to the road to be taken to hospital. One wonders, if the accused had indeed attacked the deceased as allegedly stated by the deceased, would he have assisted to have the deceased taken to hospital? Would he have waited at the scene for the deceased to implicate him? Would he have accepted the offence in the presence of the deceased’s sister (PW 2) and a multitude of people who had gathered at the scene? Would he not have taken off from the scene to avoid being caught and perhaps being lynched by an irate mob of people?

25. Similar to the evidence of Antony (PW 1) with regard to the dying declaration, the evidence of Beatrice (PW 2) in that regard is also not credible and so is the evidence of the police officer (PW 4) who did not record the alleged dying declaration yet the deceased allegedly told him that he was shot and injured by the accused. If the deceased could not record his alleged dying declaration because he was in great pain then, most likely than not he could not utter any word to even state that he was shot and injured by the accused.

26. In sum, the evidence by Antony (PW 1), Beatrice (PW 2) and the police officer (PW 4) failed to credibly establish and prove that the deceased made a dying declaration in which he identified the accused as the assailant. It would therefore follow that the prosecution failed to provide credible direct or indirect evidence linking the accused to the murder of the deceased and hence, discharge its burden of prove.

The accused is clearly entitled to a benefit of doubt. He is therefore found not guilty as charged and is acquitted accordingly.

**[Delivered and signed this 30<sup>th</sup> day of June 2016]**

**J.R. KARANJAH**

**JUDGE**