REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL CASE (MURDER) NO. 23 OF 2015

REPUBLIC……PROSECUTOR

-VERSUS-

DERRICK LADEMA…….....ACCUSED

J U D G M E N T

1. Derrick Ladema, the Accused herein was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 1st day of March, 2015 at Kisiriri area in Narok County, he murdered **Stephen Nagol**. He denied the charge and was represented by Mr. Yenko

2. The prosecution case was as follows. The deceased resided with his wife **Grace Nakol** (**PW2**) at Enaibelbel. Both were farmers. The Accused also lived at Enaibelbel and was known to the family of the deceased. Seemingly, the deceased had visited the family farm at Lopita on 1st March, 2015. In the course of the day he had informed his wife on phone that he was on his way home. **PW2's** calls to him from 8.00pm were not picked, and he never got home. Instead, on the next day at 6.00am, he was found lying in a trench by the road side, at a place called Kisiriri, close to home. He had severe injuries to the head and also limbs.

3. The body lay in a pool of blood, with evidence of dragging and a blood trail leading to the Accused's hut by the roadside. When the Accused saw PW2 and other villagers drawing close to the hut, he escaped into a maize farm. He could not be traced therein however. The deceased was taken to Narok District Hospital but referred to Kenyatta Hospital where he died two days later.

4. Meanwhile, a fresh search commenced for the Accused. He was traced in his mother's house where he had run on seeing members of public on 4th March 2015. He shouted that "**the phone**" was in hut. But the public who had been joined by police including **APC Anthony Wahome** (**PW4**) insisted that he accompanies them to the hut. The Accused retrieved a "**Tecno**" mobile phone, wrapped in black polythene paper from his house, and handed it over to the police officers. The phone, produced as **Exhibit 1** was identified by **PW2** as the deceased's phone.

5. The post mortem examination conducted on the deceased's body by **Dr. Edwin Walong** (**PW5**) revealed that death was caused by severe head injury due to blunt force trauma. The initial assault charges laid against the Accused were withdrawn and the present charges brought against him.

6. The Accused gave a sworn defence statement. To the effect that, he is a farmer at Enaibelbel. He said that on 3/3/2015, a mob comprising of members of public came to him, threatening him and forcing him to seek refuge at his parents' home. He said he had collected the exhibited phone and kept it in his hut and that he told mob and police as much. He said the police retrieved the phone and arrested him. He

however denied that he was with the deceased, a fellow villager, on the day he was killed. He denied committing the offence.

7. There is no dispute that the deceased, his wife **PW2** and the Accused all hailed from the same village. And that, on 1st March, 2015 the deceased was away from home attending to his personal affairs, but he never returned home. That he was found, wounded, lying in a ditch early on the morning of 2/3/2015. He was taken to hospital and succumbed to the injuries on 4/3/2015. On the same day a phone belonging to the deceased was retrieved from the Accused's hut. The sole issue for determination is whether the Accused with malice aforethought inflicted the fatal injuries on the deceased.

8. The prosecution evidence in this regard is circumstantial. In **Republic -Vs- Kipkering Arap Koskei [1949] 16EACA 135** it was stated that:

> **"……..In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."**

The principles were further refined in the case of **Simoni Musoke -Vs- Uganda (1958) EA 715**– where the court citing the decision of the Privy Council in **Teper -Vs- Regina [1952] 2 ALLER 447** added that:

> **"It is also necessary before drawing the inference of the Accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."**

9. Evidence by **PW2** and a neighbor **Paul Nonkisa** (**PW3**) was that on the morning of 2/3/2015 the wounded deceased lay in a ditch by the roadside. And that, there was a trail of blood from the scene towards a hut by the road side where the Accused resided. Both stated that there was a lot of blood at the door of the hut.

10. Although there was some inconsistency as regards whether or not the villagers (particularly **PW2** and **3**) entered the hut and/or saw blood therein, both **PW2** and **3** affirmed during cross-examination the presence of blood at the door step of the Accused's hut – trailing from the trench by the road side. **PW4** when questioned about the blood trail in cross-examination stated that he did not check because he was in a rush to remove the Accused from the scene of arrest, no doubt for security reasons.

11. However, **CPL Hussein Mohammed** (**PW6**) of Narok Police Station who first received the report of assault from AP Officers at Enaibelbel on 2/3/2015 travelled to the scene of the murder said in his evidence-in-chief:-

> **"I went to Kisiriri where I found that the scene was full of blood – a lot of blood with a trail leading to a house across the road. It was a grass thatched house and trail led to the door of the said house where there was more blood. House belonged to Accused who had vanished."**

12. In cross-examination he reiterated the aforegoing evidence. Unfortunately, no photographs were taken at the scene but the injuries documented on the deceased's body are consistent with severe blood loss. Apparently, the only reason why the Accused was the initial suspect was the existence of the blood at his door step, and the trail to the body of the deceased.

13. When he escaped on the first day, which he admits in his evidence, a further search was conducted. On 4th March, 2015 he ran and hid in his parents' house upon seeing an approaching group of people. He admits that he eventually led the group to his house where he surrendered the phone. His explanation is that he "**picked it up**." **PW2** in cross-examination denied that the Accused offered this explanation on arrest. The said explanation was not put to **PW3** or **PW4** both who were also present at the recovery, to

confirm or deny. Moreover, the Accused did not say where he picked the phone, relative to the scene where the injured deceased was found.

14. By his conduct, and given the proximity between his house and the scene and being a resident of the village, he was no doubt aware of the assault on the deceased. He admitted without explaining, that on the first date when a group of people accosted him, he ran away. This confirms the evidence by **PW2** that indeed the Accused ran away as the group of villagers drew close to his home. An innocent villager would have joined fellow gathered villagers in their inquiry as to what could have possibly befallen their neighbor.

15. From PW2's evidence, the group did not have a chance to interact with the Accused, who fled before they could reach him. Despite searching, he could not be found in the maize farm into which he disappeared. Again, defence allegations that he was escaping due to threats uttered by the group were not put to **PW2** or **PW3** during cross-examination by the defence.

16. One would have thought that, given these developments, the Accused would have immediately surrendered himself and the phone to the police. Instead, he hid in his parents' home and only upon realizing that he was cornered did he reveal that he had the phone and offered it to the assembled group, possibly to placate them.

17. Evidently, at this time, the group was not looking for the phone. And clearly, nobody had any clue that the Accused had the deceased's phone in his possession until he volunteered the information, and subsequently removed it from rafters in the house, according to **PW4**. **PW2** while asserting that the phone was found buried in the hut's earthen floor admitted that she did not enter the house during the search. However, she and **PW4** confirmed that the phone was soiled and wrapped in a plastic bag.

18. In the case of **Francis Kariuki Thuku and 2 Others -Vs- Republic [2010] eKLR** the Court of Appeal stated regarding evidence of recent possession of stolen property:

> **"Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the Appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of R. V. Loughin 35 Criminal Appeal 269 by the Lord Chief Justice of England and this Court's own decision of Samuel Munene Matu V Republic Criminal Appeal No.108 of 2003 at Nyeri demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within 7 days whereas in the Matu case (supra) a period of 20 days was held to be recent. We accordingly uphold the superior court's view of the law on the point. In this regard we would re-echo the decision of this court in the case of Hassan vs Republic [2005] 2 KLR 11 where as regards recently stolen goods it delivered itself thus:-**
>
> **Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver." (Emphasis supplied)**

19. And in **Odhiambo -Vs- Republic [2002])KLR 241** the Court of Appeal stated *inter alia* that:-

> **"Evidence of recent possession is circumstantial evidence which depending on the facts of each case may support any charge."**

20. The conduct of the Accused on the morning of 2nd March 2015 and on the date of his arrest speaks volumes on the state of his mind. His possession of the deceased's phone, just two days since the attack on the deceased, in the circumstances proven in this case, points to the Accused as the person who attacked the deceased, possibly with the aim of robbing him. The degree of injuries was severe and reflects an intention on the part of the assailant to maim or kill the deceased.

21. The presence of the blood trail from the nearby trench where the deceased was found in a critical

state, to the hut of the Accused close by, confirms that the Accused knew more that he was willing to admit. His explanation is vague; not explaining how and where he '**picked up'** the phone or even the date thereof. In my considered view, the vague explanation that he is an innocent finder, is undermined by his own conduct and the circumstances of the offence as proved. The defence is not believable and I reject it.

22. The inculpatory facts in this case are incompatible with the Accused's innocence and there are no intervening factors to destroy the inference of guilt on his part. In the circumstances, I find that the prosecution has proved its case beyond reasonable doubt. I do find the Accused guilty and will convict him accordingly.

Delivered and signed in Naivasha this 29th day of July, 2016.

In the presence of:-

For the DPP : Miss Waweru

For the Accused : Mr. Yenko

Accused : Present

Court Assistant : Barasa

C. MEOLI

JUGDE