



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 130 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

PETER LONGURO ARAPO.....1ST ACCUSED

SELINA LENAONTERE2ND ACCUSED

JUDGMENT

The two accused persons **PETER LONGURO ARAPO** (hereinafter referred to as the 1st accused) and **SELINA LENAONTERE** (hereinafter referred to as the 2nd accused) are jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

***“On the 10th day of December, 2008 at Kisima Trading Centre in Samburu Central District within Rift Valley Province jointly murdered GRACE AUYOROT AKAI.*”**

Both accused persons entered a plea of ‘Not Guilty’ to the charge. Their first trial commenced on 6/7/2009 before **Hon Justice David Maraga** (as he then was). The Honourable Justice Maraga heard a total of eight (8) prosecution witnesses and placed both accused persons to their defence. However before the defence case could be heard, the trial Judge declared a mistrial on 3/12/2010 and ordered that the case begin *de novo* before a difference Judge. Thus on 5/5/2011 the second trial began before Hon. Justice Roselyne Wendoh who heard all nine (9) prosecution witnesses and on 24/6/2014 placed both accused persons on their defence. Once again Hon. Justice Wendoh only recorded the defence of the first accused, when she was transferred to the Meru High Court. I therefore took over the case and recorded the defence of the 2nd accused only.

The brief facts of the prosecution case according to the witnesses was that the 1st accused was married to the deceased known as ‘Grace’. At the same time the 1st accused cohabited nearby with the 2nd accused who was his second wife/lover. Not surprisingly this situation led to much domestic strife. Neighbours in the Kisima area of Samburu where the three lived testified that there were frequent quarrels between them. On 10/12/2008 at 8.00pm **PW1 ISABELLA LEAMO, PW2 SUSAN LEPAREEN, PW3 CHRISTINA CHEPKURU PW4 DORIS MALKA and PW5 ELIJAH LEPARIEM** all of who were neighbours to the accused persons report having heard a commotion at the house which the 1st accused shared with his wife ‘Grace’ (the deceased). All five (5) prosecution witnesses gave a consistent narration of events. They state that at about 8.00pm they heard the 2nd accused quarrelling, shouting

abusing the 1st accused and throwing stones at his door. The 1st accused had packed her belongings and was threatening to return to her parent's home. She was demanding to be given her blanket which was still in the house. The neighbours did not bother to intervene because as they told the court it was normal for that family to quarrel. Later on it came to light that the deceased was dead. Neighbours came out to find the deceased lying dead outside her home.

PW3 told the court that at that time the 2nd accused came to her house, she appeared to be in shock and asked for a cup of water. **PW3** gave her the water. The 2nd accused then hid under the bed in an attempt to evade the irate crowd that was by now baying for her blood. Later some members of public came and removed the 2nd accused from under the bed and handed her over to the police. Both accused persons were arrested by police in connection with the death of deceased. Upon conclusion of police investigations both were arraigned in court and charged with the offence of murder.

At the close of the prosecution case each accused was found to have a case to answer and was placed onto their defence. The 1st accused gave a lengthy sworn statement in which he denied having any relationship with the 2nd accused and also denied having murdered the deceased. The 2nd accused on her part gave an unsworn statement in which she insisted that the 1st accused was her husband but she too denied any involvement in the death of the deceased. This court must now analyse the evidence on record to determine whether the charge of murder has been proved beyond reasonable doubt as required by law.

The offence of murder is defined by Section 203 of the Penal Code as follows:

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

In order to prove the offence of murder the prosecution must therefore adduce evidence to prove the following

- i. The fact and cause of death of the deceased
- ii. Proof that the deceased met his death due to an unlawful act or omission on the part of the accused
- iii. Proof that said unlawful act or omission was committed with malice aforethought

The fact of death of the deceased is not in any doubt. Several witnesses have testified to having seen the body of the deceased lying outside the house. The witnesses who all knew the deceased well identify her as '**Grace Akai**'.

Aside from the fact of death of prosecution is also required to prove the **cause** of that death. It must be shown/proved that the deceased died due to an act of culpable homicide. Any possibility that the deceased may have expired due to illness or natural sources must be completely ruled out. The proper way to prove the cause of death would be by way of evidence from a pathologist or doctor who conducted an autopsy on the body of the deceased and by production of a Post-Mortem report as an exhibit.

In the case of **CHENGO NICKSON KALAM Vs REPUBLIC [2015] eKLR** the Court of Appeal held that

“..... Save in very exceptional cases..... it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post mortem examination report of the deceased”

This is where the present case runs into problems. As stated earlier this trial had been commenced twice before Judges other than myself. I have had to rely on typed copies of the proceedings in preparing this judgment. The first proceedings were before **Hon. JUSTICE MARAGA** (as he then was) and the doctor

gave evidence as **PW7**. However these proceedings were declared a nullity and the trial commenced '**de novo**' before **Justice Roseline Wendoh**. The typed copy of the proceedings before Justice Wendoh are missing the evidence of **PW7** and **PW8**. In an attempt to retrieve this evidence I did peruse the hand-written record, but I discovered that pages 62 to page 70 of the hand-written record are missing from the file and that is why that part of the record could not be typed. The missing part of the record contains the evidence of **DR. JOHN KURIA** who testified as **PW8** and **PW7** who was a civilian witness. The fact that certain pages were missing was only discovered **after** both accused persons had testified and the defence had closed their case. As such the option of re-opening the trial by invoking Section 150 of the Criminal Procedure Code for purposes of recalling the doctor to testify is ruled out. The court had allowed a period of close to four (4) months to enable our registry search for the missing pages. However the search proved fruitless. The missing pages were never traced.

Therefore as matters stand there is no evidence from a medical doctor to prove the cause of death of the deceased.

I have pondered on whether to order a retrial in this case. However the circumstances persuade me that such an order would greatly prejudice the accused persons. Firstly the loss of part of the record can only be attributed to the Judiciary who have custody of the file at all times. The accused persons ought not to pay for lapses in our record keeping systems. Secondly the accuseds have been in custody since 2008 when the matter first came to court (a period of eight (8) years). They have already endured two trials. To subject them to a third trial would be a serious injustice and would violate their rights to an expeditious trial as guaranteed by Article 50(2) (e) of the Constitution. For these reasons, I am not inclined to order a retrial in this case.

I find therefore that no evidence exists to prove the cause of death of the deceased. This is a critical ingredient of murder. I therefore find that notwithstanding the other evidence available the charge of murder has not been proved. I enter a verdict of '**Not Guilty**' and I acquit both accused of this offence. Each accused is to be set at liberty forthwith unless they are otherwise lawfully held.

Dated in Nakuru this 29th day of July 2016.

Mr. Wambeyi for accused

Ms Rugut for DPP

Maureen Odera

Judge

29/7/2016