



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL CASE (MURDER) NO. 56 OF 2015
(Formerly Nakuru HC.CR.C. 74 of 2014)

REPUBLIC.....PROSECUTOR

-VERSUS-

LEISE MINCHILEI.....ACCUSED

J U D G M E N T

- 1) The Accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on 14th June, 2014 at Naikarra Location in Narok South within Narok County he murdered **James Minchilei**. The Accused denied the charge and was represented by Miss Mogere.
- 2) The prosecution case through twelve witnesses is that the Accused and his step brother/close relative were residents of Naikarra. Their homes were close together in the same homestead. On the evening of 14th June 2014 the Accused, the deceased and a close neighbour **Sopoika Saidimu (PW3)** were in a bar at Naikarra Trading Centre. They spent most of the night together drinking alcohol and chewing Miraa. They left to go home at about 2.00am. On the way, some argument arose between the deceased and the Accused, the latter asserting that the deceased's wife was a "prostitute". The two men drew swords, ready to fight, but **PW3** intervened. Thereafter, the Accused rushed ahead leaving the deceased and **PW3** behind.
- 3) The deceased had just gotten home when he was called outside by the Accused. He stepped out. Before long, the deceased's wife **Noomeshuki Enole Minchilei (PW1)** heard the deceased scream. She went out to inquire. She found the deceased lying on the ground with a spear from the body lodged in his throat. She screamed for help as the Accused pulled out the spear and proceeded into his house. **PW3** also rushed to the homestead and noted the body of the deceased at the homestead entrance. With other neighbours he remained at the home awaiting the arrival of the Police.
- 4) **APC Kiprono Tingoi (PW6)** and **Sergeant Julius Kipury (PW7)** of Naikarra Police Post were the first officers summoned to the scene by the Assistant Chief, arriving at 6.30am. They found the deceased's body in a pool of blood. **PW1** led them to the house of the Accused who was found asleep. A blood stained spear (Exhibit 2) was leaning on the wall inside his hut. They arrested the Accused and detained him and the spear at their Post. Later **CPL Charles Chamwada (PW8)** of Ololunga Police Post took over the matter. The suspect and exhibits were handed over to him even as the victim's body was removed to the mortuary.
- 5) On 18/6/2014 **Dr. Titus Ngulungu** performed a post mortem examination on the body of the deceased. His conclusion was that death was caused by massive blood loss and asphyxia secondary to

sharp force trauma to the neck resulting in a penetrating wound to the neck. Blood samples taken from the body were taken for testing against the blood stains on the spear. The Government Analyst **Lawrence Kinyua Muthuri** (PW9) concluded that the DNA profiles of the blood on the spear matched with deceased blood sample.

6) In his sworn defence statement, the Accused stated that on the material night he was in the company of the deceased and **PW3** in a bar at Naikarra Centre. That the two left for home late and he was very drunk. He said he only learned on the next day that he had allegedly killed the deceased. He said the deceased was a relative and a friend and he had no intention or recollection that he killed him. He asked to be forgiven.

7) There is no dispute that the Accused and the deceased were close relatives, and according to **PW3**, stepbrothers. That the said brothers joined up with **PW3** on the material date. They spent most the night in a bar drinking eventually leaving for home late in the night. There is no dispute that the deceased was murdered on the same night at the home. The court must determine whether, with malice aforethought, the Accused inflicted the fatal injuries on the deceased.

8) In this regard the key prosecution witnesses were **PW1**, **PW3**, **PW6** and **PW7**. The sum total of their evidence was that the Accused and the deceased were involved in an argument on the way home, and almost fought but were restrained by **PW3**. That the Accused then separated from the deceased and the Accused by leaving them behind.

9) According to **PW1** the deceased got home only to be lured out of the house and speared to death by the Accused. Although **PW1** claimed there was sufficient moonlight to enable her witness the Accused pull out the spear from the body of the deceased, **PW3** who came to scene immediately after an alarm was raised said the night was dark night. Even so, he confirmed that ten minutes after he arrived at his home, he was drawn out by screams emanating from the deceased's homestead.

10) **PW1** when recalled said that she raised the alarm when she heard the deceased scream and found him with a spear lodged in the neck. Possibly, she saw the Accused at least close to the body of the deceased. Confirmation that indeed the Accused was the person who she saw at the scene of attack is contained in the statement which the accused made to her, namely:

“You better call for help. I have finished him.”

11) **PW1** said that at the time the Accused was about 2 – 3 metres from her and that she had known his voice as a brother-in-law residing in the same homestead for about ten years. In **Chogo –Vs- Republic [1955] IKLR** the Court of Appeal stated that:-

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused's voice, that the witness was familiar with it and recognised it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”

12) There is no evidence that before the neighbours flocked to the scene after **PW1'S** alarm, there was any other male near the deceased. Indeed **PW3** on rushing to the scene said he met the women screaming and the deceased lying down injured. This witness gave a background to the attack by narrating the exchange of words between the deceased and Accused as the two came home from the centre, only minutes before. And that after the disagreement the Accused hurried home ahead of the witness and the deceased.

13) The Accused in his defence confirmed that he did reach his home but asserts that he was too drunk to know what happened until the next day. Evidence by **PW6 – 8** that the blooded spear, identified by **PW1** and **PW3** was recovered by police on the next day from his house was not challenged. The spear was

produced as an exhibit at the trial. **PW3** said it was recovered at the time of the Accused's arrest on the day after the offence.

14) Blood samples taken from the body of the deceased and blood stains on the spear were examined by **PW9**. The DNA profiles were found to match. The presence of the deceased blood on the spear found in the Accused's hut on the next morning after the attack is independent confirmation that he used the spear to stab the deceased. As to whether a defence of intoxication can be sustained in this case, it is evident from **PW3's** evidence that the men though drunk, were able to get back home after their drinking spree. The Accused confirms that indeed he got home.

15) Section 13 of the Penal Code states:-

“(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”

16) Clearly the evidence by the Accused does not establish that he was too drunk to know what he was doing or that it was wrong. True, he was intoxicated as was the deceased. Besides, a disagreement had occurred between him and the deceased on the way home. His assertion that he had a good relationship with the deceased is confirmed in part by **PW3** and the fact that the three men had spent most of the material night in each other's company, taking alcohol.

17) While I have no doubt that the Accused speared the deceased to death, I am satisfied from the circumstances of this case that in terms of Section 13 (4) of the Penal Code, the state of intoxication of the Accused appears to negative malice aforethought. To that extent only the defence offered by the Accused appears plausible.

18) Reviewing all the evidence before me, I am persuaded that the prosecution has proved the offence of Manslaughter Contrary to Section 202 as read with Section 205 against the Accused. In the circumstances I do find him guilty and convict him for that lesser offence.

Delivered and signed in Narok this **28th** day of **October, 2016**.

In the presence of:-

For the DPP : Mr. Koima

For the Accused : Miss Mogere

Accused : Present

CC : Barasa

C. MEOLI

JUGDE