



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE (MURDER) NO. 14 OF 2015**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**SAMANTE OLE TIKANI.....ACCUSED**

**J U D G M E N T**

1. **Samante Ole Tikani** was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 15<sup>th</sup> day of February, 2015 at Olorropil Trading Centre in Narok North Sub-County within Narok County, he murdered **James Kool Oloshurua**. He denied the charge and was represented by Mr. Kanyi.

2. The prosecution case was as follows. On the evening of 15<sup>th</sup> February, 2015 the Accused was in a bar at Olorropil Trading Centre. With him was **Kusenyio Koda PW1**. The two men were drinking alcohol. At 8.30pm **PW1** booked a room in a nearby lodging operated by **Nterai Ole Soyiante** and continued drinking. **PW1** and the Accused left for the room at 11.00pm. While **PW1** retired to bed, the Accused said he would go back to drink some more.

3. At 2.00am **PW1** was woken up by a commotion. He heard someone plead. **“Woi, unaniua bure.”** **PW1** woke up to see the Accused wielding a simi and the deceased lying on the floor near the door where there was blood. The deceased, **James Kool Oloshurua** was a watchman at Olorropil Secondary School. **PW1** and the Accused went out in search of medical attention, thus visiting the small clinic run by **Geoffrey Muboka Wamakalu PW3**. But **PW3** fearing for his safety did not venture outside instead asking that the patient be brought to the clinic.

4. **PW1** and the Accused walked back to the lodge but the Accused excused himself saying he was going in search of a doctor never to return. **PW1** stayed in the lodge. At 7.00am he knocked at the door of his relative **Charles Mbaruk (PW6)** requesting to leave his motorcycle there as he crossed over to his home. About the same time **PW1** and **PW2** reported the matter to Administration Police **CPL Raphael Kokombo** of Olorropil Police Post. He visited the scene and notified police. He also traced **PW4**'s home and retrieved the motorcycle.

5. On hearing that the Accused was at Enaibelbel, he proceeded there and found the Accused in the custody of members of the public. He arrested him, and eventually handed him over to Police from Narok. The post mortem examination revealed that death was due to massive blood loss due to femoral vessels injury through sharp force trauma.

6. In his defence the Accused gave a sworn statement and called one witness **Wilson Tikani (DW1)**. The Accused's version of events up to his return to the hired room at 2.00am is similar to **PW1**'s. He however

added that on his return to the room he found **PW1** seated on the bed, an inert body on the floor covered in a *shuka/lesso*. That **PW1** explained the person/or man on the ground was bleeding whereupon Accused suggested they get a doctor. Both of them proceeded to **PW3's** where the Accused scaled a wall with **PW1's** assistance. That believing the person was a woman the Accused stated to **PW3** as much.

7. Not successful, he returned to the room where the **PW1** had already proceeded. He decided to leave on his motorbike but the chain thereof cut him. He however managed to take the motor cycle to **PW6** which he did often when crossing the river to his home. He arrived home drunk at 4.00am and slept. He was aroused by a call from his brother **DW1** whom police had contacted to trace him. He was handed over to police.

8. The accounts of **PW1** and the Accused the evening of 15/2/2015 and night are similar. In almost all material respects, save for the incident involving the third man, the deceased. Thus it is not in dispute that **PW1** and the Accused agreed while drinking alcohol at Olorropil Centre on the material date to share a room at a lodge at the centre on the material date; and that at 2.00am there was an inert body of the deceased which had injuries in the room. That at the said time the Accused had just returned to the room having returned gone back to bar at 11.00pm while **PW1** slept.

9. The court must determine whether with malice aforethought the Accused caused the fatal injuries on the deceased. The sole eye witness to the alleged stabbing of the deceased is **PW1**. He stated that he had retired into bed leaving the door open and was roused from sleep by the cry of the victim and then saw the Accused holding a knife or simi. The prosecution also relied on evidence by **PW1** that the Accused fled scene after failing to convince **PW3** to attend to the injured person.

10. Seemingly, **PW1** did not witness the actual stabbing of the victim, from his evidence. He was questioned at some length especially because only he and the Accused were in the room during the material time. I do not accept the defence submission that his evidence was thereby discredited.

11. Firstly, **PW1** upon returning to the room after failing to persuade **PW3** to attend to the victim stayed there until the next morning when **PW2** arrived. Both then went and reported to **PW4** at 7.00am. This conduct is consistent with innocence. But he was also treated as a suspect and was indeed arrested initially. Thus the court must look for independent corroboration of **PW1's** evidence.

12. In case of **Antony Kinyanjui Kimani -Vs- Republic (2011) KLR** the court stated regarding accomplice evidence.

**“What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda [2000] 2 EA 559, the supreme court held that “in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial”, The same definition was restated by the same court in the case of Nasolo v Uganda [2003] 1 EA 181 where the court further stated:**

**“On the authorities, there appears to be no one accepted formal definition of “accomplice”. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case. In Davies of Director of Public Prosecutions (supra), the House of Lords said at 513:**

**‘On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as failing within the category: (i) on any view, persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons, committing, procuring or aiding and abetting (in case of misdemeanors).’**

13. Corroboration of **PW1's** evidence is found in the admitted conduct of the Accused. He told **PW3** on an obvious lie that a woman was bleeding in the room. The photographs taken in the room by **CPL Kiilu (PW7)** show the deceased dressed in male clothes and no *shuka/lesso* on him. The question of a *shuka/lesso* was not raised with any witness including **PW1** by the defence.

14. Secondly, the Accused left the scene of murder and returned to Enaibelbel while his residence as he told the court that he hired at Olorropil. Indeed when **DW1** was contacted by police he proceeded first to Olorropil and later to the home. The Accused despite having a deep cut on the leg, allegedly from the motor cycle, claim drove to the home of **PW6** and not seeking treatment, proceeded, supposedly on foot for another several kilometres to his family home.

15. I find in conceivable plausible way **PW1** having killed a man would wait for the Accused to return to the room in order to frame him. The normal thing to have done is escape if he killed the man while the Accused was still at the bar. He stated that he insisted to the Accused that they get treatment for the victim. The Accused clearly went an extra mile, not content when no response was received from **PW3's** quarters, he jumped over the fence and tried to persuade **PW3** to come with him when that failed, he ran away, rather than make a report to police, that **PW1** had killed a man, or, like **PW1** wait until morning in order to report to authorities.

16. Even if the Accused may have been drunk he was clearly in full control of his faculties and took actions after the fact that reflect judgment. It may well be, from the circumstances of this case, that the Accused returned to the room in the company of the deceased and was involved in a fight with him, hence the cut wound on the leg and that the body of the deceased lay at the door and not in the room. Further the victim had a small wound on the head. Unable to get medical help, and confirming the victim had died, the Accused decided to flee in the night, leaving his motor cycle with **PW6**. The Accused's plea of innocence is inconsistent with his proven actions from about 2.00am.

17. Rather, the said actions do indeed confirm the evidence by **PW1**, his drinking partner of the night therefore friend, that the Accused is the person who stabbed the deceased. The words "*unaniua bure*" must be the last words of the deceased addressing the Accused and reflect a man conscious that his life was in mortal danger. The fact that **PW1** did not actually see the stabbing does not detract from the weight of the dying declaration.

18. In the case of **Pius Jasunga S/o Akumu -Vs- Republic [1954] 21 EACA 331** the court said about a dying declaration that

**"The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7<sup>th</sup> Edition of Field on Evidence has repeatedly been cited with approval.....It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (Republic -Vs- Eligu S/o Odel & Another [1943] 10 EACA 9.....) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused.**

**.....But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross examination, unless there is satisfactory corroboration".**

19. Reviewing all the available evidence, I am satisfied that the Accused inflicted the fatal stab on the deceased. However, the circumstances of the offence suggest that the Accused had been taking alcohol all night until almost 2.00am. Likely, he was armed as is often the case for members of the Maasai Community. There is no evidence that he had any previous disagreements with the deceased.

20. The post mortem report indicates that the deceased had one stab wound measuring 50 x 30mm on the thigh. The injury involved the vessels and therefore led to massive blood loss.

21. All these circumstances tend to negate malice aforethought on the part of the Accused. In the circumstances, I will find that the prosecution has proved a charge of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code against the Accused and will convict him accordingly.

Delivered and signed in Naivasha this **16<sup>th</sup>** day of **December, 2016**.

In the presence of:-

For the DPP : Miss Kithinji holding brief for Mr. Kanyi

For the Accused : Mr. Koima

Accused : Present

CC : Barasa

**C. MEOLI**

**JUGDE**