



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL CASE NO. 13 OF 2007

REPUBLICPROSECUTOR

VERSUS

PATRICK LUSALINGAACCUSED

JUDGEMENT

The accused person is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that the accused, on the 29th January, 2007 at Lukose village, Shiru sub-location Shaviringa location, Tiriki East Division of Vihiga District within Western province murdered ABEL MWEREMA SHIVERENJE.

Five witnesses testified for the prosecution. **PW1, MARGARET MUNJERESA MWAREMA** is the deceased's wife and a step-mother to the accused. Her evidence is that on the 29th January, 2007 at about 9.00pm she was in her house with her deceased husband when the accused arrived home while drunk. The deceased was reading a bible. The accused started shouting and the deceased pushed the accused telling him to go and sleep. The accused's home is separate from PW1's home and the accused went to his house. PW1 further testified that the accused went back to his parents' house and went to the kitchen. The deceased went out to check on the accused. The accused who was standing on some poles hit the deceased with a panga on the head. The deceased fell down. PW1 rushed to where the deceased was and she saw the accused holding a panga.

It is PW1's further evidence that she sent her son Boniface (PW2) to a neighbour. The accused was arrested. The deceased was still alive but could not be taken to hospital as they could not get a vehicle. The following morning the deceased was taken to Sabatia Hospital. They were referred to Mbala hospital. The deceased died on 30th January, 2007 at 1.00pm. The accused was taken to Cheptulu Police Patrol base. It is her evidence that her other children were in the kitchen. The deceased told her that the accused had hit him twice on the head.

PW2 SHIVERENGE BONIFACE is a step-brother to the accused and the deceased's son. He testified that on 29th January, 2007 at about 9.00pm he was at home when the accused arrived and started shouting and crying while drunk. The deceased asked the accused not to make noise. The accused went to his house and took a panga and went behind some trees. The deceased went to check on the accused and the accused hit the deceased with a panga on the head.

PW2 further testified that the deceased called PW1. He was sent by PW1 to go and call a neighbour, Nathan Alusiola (PW3). He managed to call PW3 who went to their home and arrested the accused who tried to run away. The deceased could talk. He was taken to hospital the following morning but he died at the hospital. According to PW2 the accused was drunk and the deceased pushed him to go and sleep.

PW3: NATHAN ALUSIOLA is the deceased's neighbour. His evidence is that on 29th January, 2007 he was in his house when PW2 went there and informed him that his brother had assaulted the deceased. He went to the scene and found the deceased outside his home. The deceased told him that it was his child who had killed him -

“mtoto yangu ameniuwa”. The deceased then went silent. He saw the accused who tried to run away but he chased after him and managed to arrest him. The accused was drunk. PW3 sent for the village elder. The deceased was taken to hospital the following morning but he died. A panga was later recovered near the deceased's sugar cane.

PW4: JUSTUS LUKWA is the deceased's neighbour. On 29th January, 2007 at about 9.00pm he was at his home when he heard someone shouting. He later went to the scene and found the deceased had been assaulted. He later heard that the deceased had died. While at the scene he heard the deceased saying *“kijana wangu ameniuwa”* - *“my son has killed me”*.

PW5, FRANCIS WANYONYI was a police officer based at Cheptulu Police Patrol base. On 30th January 2007 the accused was taken at the patrol base by members of the public on allegations of assault. He later got information that the victim had died. He charged the accused with the offence of Murder. The village elder was amongst the members of public who took the accused to the station.

The accused was put on his defence. In his unsworn evidence, he testified that the deceased was his father. He heard that his father died. He was arrested on 31st January, 2007. He disagreed with his brother. He used to work in Kericho and he bought iron sheets. His father told him that he could not build a house since his elder brother had not built. The iron sheets were given to his elder brother Hudson who built his house. He later asked his brother to refund him his *mabati*. On 29th January, 2007 he met a friend and they went to drink. He was arrested at night and taken to police station. He is sick and uses medicine. At times he loses his memory. He denied killing the deceased. The main issue for the court's determination is whether it is the accused who killed the deceased.

According to PW1 and PW2 the accused went home at about 9.00pm and started shouting. There was a lantern lamp that enabled the deceased to read his bible. The incident occurred outside the house. It is the evidence of PW1 that the deceased called her and on reaching the scene outside the house she saw the accused holding a panga. There was no other person at the homestead that time other than PW1 and her family. It is the evidence of PW3 that he reached the scene and the deceased told him that it was his child who had killed him. Similarly, PW4 JUSTUS LUKWA heard the deceased saying that it is his child who had killed him.

In his defence, the accused testified that he was arrested on 31st January 2007 and taken to a police station. He was drunk and has been sick since 1994.

Given the evidence on record, I do find that it is the accused person who assaulted the deceased. Pw1 and PW2 were at home and the circumstances were that the deceased went out of the house to check on the accused when the accused attacked him with a panga. Both PW3 and PW4 heard the deceased saying it was his child who had attacked him. I do find that the only child referred to by the deceased was the accused. PW1 saw the accused standing near the deceased holding a panga. The deceased had gone out shortly trying to check on the accused. I do find that it is only the accused who attacked the deceased as there was no other person at the scene at the time the deceased was attacked.

It is the evidence of PW1, PW2 and PW3 that the accused was drunk. He was shouting and crying. It is also part of the prosecution evidence that the deceased pushed the accused telling him to go and sleep. It can be concluded from the evidence of PW1 that the deceased and the accused fought outside the house. I do find that the defence of intoxication under Section 13 of the Penal Code is available to the accused. Further, the accused was provoked by the deceased who pushed him out of the house and in the process the two people fought. I do find that there was no intention on the part of the accused to kill his father. The ingredient of malice aforethought is missing. I do find that the accused is not guilty of the offence of murder as charged. However, the accused is found guilty of the lesser offence of Manslaughter contrary

to Section 202 as read with Section 205 of the Penal Code and is hereby convicted of that offence.

Dated signed this **9th** day of **January, 2015**

Said J. Chitembwe

JUDGE

Dated, delivered and countersigned this **24th** day of **March, 2015**

Ruth Sitati

JUDGE