



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CRIMINAL CASE (MURDER) NO. 5 OF 2014**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**LEONARD KORIR KIMUTAI.....1<sup>ST</sup> ACCUSED**

**WESLEY KOECH CHERUIYOT.....2<sup>ND</sup> ACCUSED**

**R U L I N G**

1. The two accused persons face two counts of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars in the two counts state that on 4<sup>th</sup> December, 2014 at Nkoben area, Narok County, they jointly murdered two persons, namely **Lawrence Guto Momanyi** and **Margaret Mogotu Momanyi**. The accused persons denied the charges and were represented by Mr. P.K. Njuguna.
2. The prosecution case was that the two deceased were a married couple residing at a farm in Nkoben area owned by one Simon Pertet. They were among other lessees living and cultivating on the farm which was managed by one **Nahashon Thairu Njoroge** (PW4). In the period preceding the deaths, PW4 had fallen out with the land owner and been ordered out. He was still embroiled in a dispute with the land owner in December 2014.
3. The first and second accused were also tenants on similar arrangements with the land owner. When PW4's employment was terminated by the employer, the first accused was appointed to take over for him as the farm manager. This led to animosity between the 1<sup>st</sup> accused and PW4. Older tenants including the deceased couple were required to sign a new lease with the new farm manager. It would seem there was resistance as other tenants took sides in the dispute.
4. The deceased couple had been sucked into this conflict, receiving several threats seemingly from the opposite camp. Nevertheless on 3/12/2014 the deceased couple organized a fundraising party towards the circumcision ceremony of their sons. Among those present were **Janet Kemunto** (PW1), a relative with her husband one Ongera. PW1 went to her home as the deceased couple and their two children settled in for the night.
5. Early on the next morning one of the deceased's children Bifon (or Bevon) Momanyi, aged nine years came to her home. He reported to PW1 that both his parents had been murdered in the night. PW1 accompanied the minor back to the home where, with other neighbours she confirmed the report. The area chief **Jacob Ntaile Kiok** (PW6) and police presently visited the scene. Following a sitting presided over by PW6, three suspects among them the two accused were

arrested. They were escorted to Ololunga Police Station.

6. The prosecution case mainly rested on the evidence of PW5, the sole alleged eye witness. This witness gave unsworn evidence pursuant to the directions of the court upon conducting a *voire dire* examination under Section 19 of the Oaths and Statutory Declarations Act. He claimed in his evidence to have identified the two accused herein as the assailants who murdered his parents. The offence occurred at night at 3.00am. The witness claimed to have seen the two accused by peeping through the gaps in the wattles that consisted the wall to his parents' hut. He stated that there was moon light at the time and that one of the two men, both who spoke Kalenjin language, was well known to him as a local teacher.
7. This evidence required corroboration under Section 124 of the Evidence Act which is set in mandatory terms as follows:-

**“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**

**Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

8. Regarding the unsworn evidence of a minor the Court of Appeal stated in **Haro Guffil Jillo –Vs- Republic [2014] eKLR** that:-

**“If the court proceeds to take unsworn evidence, the accused should not be convicted in the absence of corroborating testimony. There is an exception for sexual offences.”**

9. The evidence of visual identification by a sole witness must always be carefully tested. In **Joseph Muchangi Nyaga & Anor –Vs- Republic [2013] eKLR** the Court of Appeal observed that:-

**“Evidence of visual identification should always be approached with great care and caution. (See Waithaka Chege –Vs- Republic [1979] KLR 271). Greater care should be exercised where the conditions for a favourable identification are poor (Gikonyo Karume & Another –Vs- Republic [1980] KLR 23). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be watertight (See Abdalla Bin Wendo & Another –Vs- Republic [1953] 20 EACA166, Wamunga –Vs- Republic [1989] KLR 42; and Maitanyi –Vs- Republic [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him.”**

10. PW5 claimed that the light from the moon enabled him to observe the two accused person while peeping through the wattle wall. It is not clear how close the said accused persons were at the time or how long he had them in his view. But even more disturbing is the fact that when questioned by PW6 on the next day PW5 did not give the names or identity of the assailants. It appeared from the testimony of PW6 that PW1 is the one who mentioned the 1<sup>st</sup> Accused as she wailed at the home. Both PW1 and the investigating officer PC Kevin Aduda (PW7) unsuccessfully attempted to persuade the court that the minor named the suspects to them.

11. Neither PW1 nor PW7 included this important piece of information into their original statements to police. As for the minor (PW5) he said that after the attack he and his younger brother slept until the next day. Most probably the child was in shock, but it seems to me unlikely that he would have failed to divulge the identity of the assailants upon questioning by PW6 if he knew them. Or to PW1 as soon as he reported the murder to her at the crack of dawn. On all accounts the minor had no opportunity to identify the intruders who killed his parents. And the attempt by the prosecution to introduce purported corroboration evidence of the raging farm dispute and the pair of gumboots worn by the 2<sup>nd</sup> accused fell flat on its face. Because, the deceased were not shown to have a dispute with the accused persons.

12. If anything the animus existed between PW4 and the 1<sup>st</sup> accused particularly, and the former stood to gain from the accused's association with the murder. Secondly there was no special mark on the pair of gum boots recovered almost one week after arrest, from the 2<sup>nd</sup> accused while in police custody.

13. In my considered view, the prosecution evidence does not meet the standard of a prima facie case. I find that the two accused have no case to answer. I hereby acquit them under Section 306 (1) of the Criminal Procedure Code.

**Delivered and signed at Naivasha, this 21<sup>st</sup> day of September 2015.**

In the presence of:-

State Counsel :

For the Accuseds :

C/C : Steven

Accused :

**C. MEOLI**

**JUDGE**