

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 35 OF 2009

REPUBLIC PROSECUTOR

V E R S U S

FANUEL LUMBASI ACCUSED

J U D G M E N T

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 on the 25.6.2009 at Ifwetere village in Shamberere sub-location, South Kabras location within Kakamega North District in Western Province, the accused murdered CHARLES AMBANI.*

The prosecution called six witnesses. **PW1 ELLY CHIKATA** and **PW5 AYUB AMBANI SHIRU** went to Kakamega Provincial Hospital on the 26.6.2009 and identified the deceased's body to the doctor for post mortem purposes. The deceased was a brother to PW1 while he is a father to PW5. **PW2 DR. JEREMIAH KINUTHIA** conducted the post mortem on that date at the Kakamega Provincial General Hospital. The deceased had several cut wounds on the body and on the head. There was fracture of the skull, fracture of the 3rd, 4th, 5th, 6th and 8th ribs and fracture of the hand below the elbow. The right lung was bruised. The doctor opined that the cause of death was cardiopulmonary arrest due to acute haemo-neumothorax caused by blunt object.

PW3 MILKA AMBANI is the wife of the deceased and the accused's mother. Her evidence is that on the 26.5.2009 the accused passed his parents' home while pushing handcart and went to his house. The accused usually used to pass through the parents' house with his handcart. It had rained that day. The accused had before that day assaulted the deceased and broke his hand. PW3 had put on fire and the deceased was warming himself near the fire. It was about 5.00 p.m. Shortly the accused went with a panga and attacked the deceased asking him who had demolished his house. She tried to stop him but could not. Joseph Ambani who is the deceased's son from the first wife heard her screams and went there. Several people went to the scene. The accused ran to his house. He was arrested and taken to the police. The deceased was taken to hospital but he died. The accused was beaten seriously by members of the public. It is her evidence that the accused never used to quarrel with the deceased. The accused is her last born son.

PW4 JOSEPH MUTONYI was at home on the 25.6.2009 at 5.00 p.m. He is the deceased's son from the first wife. He heard screams and went out. He noted that the screams were from the house of PW3. He saw the accused coming out of the house carrying a panga that had blood. He entered in the house and saw the deceased burning on the jiko. He took the deceased to Kakamega Provincial Hospital but he died at midnight. He had never heard quarrels between the deceased and the accused. **PW6 PC ALI MASOOD** was based at the Kabras police station. The report was made at the station on the 26.5.2009 at about 10.00.a.m. It was reported that the accused had assaulted his father with a panga. The victim was taken to Kakamega hospital but passed on. He went to the scene and recovered a small panga. The accused tried to escape but was arrested by members of the public and was assaulted. The accused sustained two broken lower limbs and one broken hand. He re-arrested the accused and took him to the police station. He later charged the accused with the offence.

The accused was put on his defence and gave sworn evidence. He testified that he does manual jobs of carrying luggage at the local market. The deceased was his father and they used to attend the same church. According to him the deceased took contaminated water and was taken to hospital on 24.5.2009.

His mother is Milka. The deceased had a long dispute with his other wife by the name Lucia and they fought. On the 25.5.2009 it was a Thursday and he was at the market. He got KShs.280/= from his work and people invaded him at his house and took the money plus his documents. He had also harvested maize and had chicken and they took them. Some of the attackers were one **MALIK, SAULO, ATILA, JOSEPH MUTONYI, DAMARIS** and **ALIVITSA**. He suffered broken limbs and was taken to Kakamega Provincial General Hospital. The attackers took his property. He lost consciousness. He denied that he assaulted his father.

The main issue is whether the accused killed the deceased. According to PW3 who is the accused's mother it is the accused who went to their house and assaulted the deceased. PW3 is the mother of the accused and it was about 5.00 p.m. PW4 is a step brother to the accused and heard the screams from PW3. He went there and saw the accused coming out of the deceased's house carrying a blood stained panga. He found the deceased injured in the house. The defence evidence is that he did not assault the deceased. Counsel for the accused relied on his submissions that the accused had no case to answer and stated that the cause of death has no relation to the evidence on record. He relied on the case of **GIDEON MWANIKI KITHOMU V REPUBLIC. Nairobi Criminal Appeal 119 of 2007.**

From the evidence on record it is clear that PW3 and PW4 knew the accused. They were living in the same compound. It was at 5.00 p.m. and PW3 saw the accused who is her son assaulting the deceased claiming that the deceased had demolished his house. I am satisfied that it is the accused who assaulted the deceased. The defence evidence does not raise any doubt on the prosecution evidence. I do therefore find that the accused assaulted the deceased.

The next issue is whether the accused was provoked. According to PW3 and PW4 they had not seen the accused quarreling with the deceased. However it the evidence of the two witnesses that the accused had broken the deceased's hand earlier that time. It is the evidence of PW3 that the accused passed their house as usual and went to his house. He shortly came back with a panga alleging that his house had been demolished. It is the evidence of PW3 it was possible that the accused's house could have been demolished by the rain. It is therefore established that the accused's house had been demolished. The accused concluded that it was his father who had demolished his house. **Section 208** of the **Penal Code** defines provocation and includes any wrongful act or insult that may deprive any ordinary person the power of self-control. I do find that when the accused found that his house had been demolished he lost his self-control and thought that it was his father who had done so. The accused was therefore provoked although not by the deceased.

In the end I do find that the accused is not guilty of the offence of murder as charged. I however, find the accused 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.

Delivered, dated and signed at Kakamega this 18th day of September 2014

SAID J. CHITEMBWE

J U D G E