



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Murder Case 64 of 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**LEPEREEN LENENGWESI.....ACCUSED**

**JUDGMENT**

In the information dated 24/6/2010, **Lepereen Lenengwesi** was arraigned before this court for the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of which are that on 24/5/2010 at about 10.00 p.m., in Ngare Narok Location, Samburu East District, he murdered Sekule Lekupano.

The prosecution called a total of 7 witnesses in support of their case. The accused person denied committing the offence and testified on oath in his defence.

Ltimiyan Loboitong (PW4) was the first to arrive at the scene where the deceased was injured. He was in his house at Ndonyo Nasiba in Maralal Samburu, at about 10.00 p.m. on 24/5/2010, when he heard a cry of a person in pain. He followed the direction of the cry, and from a distance he asked who was crying and the person answered that it was an uncle (Mjomba). PW4 did not have a torch but he recognized the voice to be that of Sekule Lekupano who was his neighbour. PW4 asked who had injured him and he replied that Lepereen Lenengwesi. PW4 then approached the deceased and found him injured on the stomach, the intestines were exposed. The deceased asked for water, PW4 got water for him, tried to wash the intestines and return them into the body. PW4 said he stayed with the deceased the whole night. He said he was the first at the scene and others arrived later. He however, did not see when accused was arrested. He had known both the deceased and accused although accused came from a different location and he did not know of any disagreement between them.

PW1, Lopeleu Lekupano, a Kenya Police Reserve from Ndonyo Nasiba in Ngare Narok Location of Samburu East, said he was asleep in his house about 12.30 a.m. when he was woken up by some morans who informed him that somebody had been killed. He went with them where the deceased was lying, he flashed his torch and saw that the deceased was injured on the stomach and his intestines were exposed. The deceased was still talking. PW1 did not hear the deceased say who injured him. They went to try to get help. They watched over the deceased till about 9.00 a.m. when he died. PW1 said they informed their Chief, Joseph Lekamario (PW3) who also went to the scene at about 11.00 a.m. long after

the deceased had died. PW1 also said that after the deceased had died, they received information that the accused was seen lying somewhere near a nursery school, they went there, and he was disarmed of a knife (sword) by PW2, Atano. PW1 and PW3 escorted accused to Wambaa Police Station while others looked after the deceased's body so that animals could not eat the body. PW1 said that when he went back to the scene with the police they found the body had been eaten up and only deceased's ½ coat, kikoi cloth, pieces of bones and intestines. PW1 also identified a club (rungu) which he said belonged to the deceased but they found it with the accused at the time of arrest. He had seen the club with the deceased for a long time. All those items were taken by the police.

Lesrayon Atano (PW2), a Kenya Police Reserve also from Ngare Narok recalled that he was woken up about 4.00 a.m. and informed that somebody had been killed. He found the person still alive and the person informed him that it is Lepereen Lenengwesi who had injured him. He stayed with the deceased till next day. He said the deceased talked for some time but became unconscious and died about 9.00 a.m. They received information of accused's whereabouts nearby, they went there, he took away the accused's knife. He identified it in court as PEx.1. He also identified the club they found with accused as that belonging to the deceased. They took the accused person to the scene where the deceased had died.

Joseph Lekamario (PW3) is the chief of Ngare Narok. He received information about the murder on 25/5/2010 about 9.00 a.m., he went to the scene, saw the deceased's body, found accused already arrested, took him to Wambaa Police Station. They did not get a vehicle till 27/5/2010 and when they went back to the scene, they found the body had been eaten by wild animals.

PC Polycap Odhiambo (PW5) of Wambaa Police Station together with Senior Sergeant Julius Kathurima (PW6) recalled that after the OCS received the report on the murder, they went to the scene on 27/5/2010 where they only found a jacket, kikoi, some intestines, bones, a shoe and a sword. They suspected that the body was eaten by wild animals because there were many foot prints.

PW6 prepared the exhibit memo form (PEx.4) and the items recovered from the scene, which he forwarded to Government Chemist for analysis. He also forwarded the blood samples of the deceased's wife and son to the Government Chemist for analysis. He later produced the items that had been taken to Government Analyst as exhibits.

John Kimani Mungai (PW7), a Government Analyst performed an analysis on the specimens that were taken to him from Wambaa Police Station. He formed the opinion that the DNA profile generated from the blood on the jacket (Ex.B), intestines (Ex.C) with DNA profiles generated from the blood specimen D(I) and D(II) are 99.99% more chances that the owner of DNA profile from Ex. B and C, of the deceased is the biological father of Lekupano Leseeko (PEx.5).

In his sworn defence, the accused said that he did not know the deceased and that on 24/5/2010, he was at the market and went back home about noon. He said that his home is far from the market a distance that takes him from morning till noon. He was arrested at Ol Donyo Nasiba when following his flock which he had bought the day before.

This case turns on circumstantial evidence because nobody witnessed how the deceased was injured. All the witnesses arrived at the scene and found the deceased already injured.

After hearing from the prosecution witnesses and specifically PW1, PW2, PW3 and PW4, they knew both the accused and the deceased. Their description of where both hailed from is supported by the accused's defence.

PW4 was the first to arrive at the scene where the deceased lay injured and in agony. PW4 was attracted to the scene by the deceased's groans. PW1, PW2 and PW4 all said that when they found the deceased, he was still talking. Although PW1 denied that he heard the deceased say who it is that injured him, PW4 who was first at the scene said he enquired from the deceased as to who had injured him and he said it was Lepereen Lenengwesi who injured him. PW2, too said he heard the deceased say that it is Lepereen Lenengwesi. They knew who Lepereen Lenengwesi was. The question is whether the court can rely on the said dying declaration by the deceased to found a conviction. Both PW2 and PW4 were firm that the deceased named the accused as his assailant. PW1 may not have heard what the deceased said because it seems several people came to the scene when they learnt of the incident. A dying declaration is admissible in evidence under **Section 33** of the **Evidence Act** which provides as follows:-

**“S.33 Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases –**

**(a) when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”**

In the case of **David Ngugi Gichuru v Rep [2011] eKLR (Cr. App. 134/2007)** the court in considering evidence of a dying declaration considered the case of **Pius Jasanga s/o Akumu v R (1954) 21 EACA 331**, where that court said:-

**“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 (R v. Eligu s/o/ Odel and another (1943) 10 EACA 9, Re Curuswani (1940) Mad 158, 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.”**

In **Choge v Rep [1985] KLR1**, the court said this of the evidence of a dying declaration:-

**“5. The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death.**

**6. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.**

**7. The first statement of the deceased was admissible as a dying declaration under section 33(a) of the Evidence Act (cap 80). However, the evidential weight of this declaration was lessened by the fact that the deceased’s expectation of death was not severely imminent at the time it was made, the fact that the deceased had not said to any one else other than the two police officers at the crime scene that the 1<sup>st</sup> appellant was responsible for his death and further by the fact that the dying declaration was not mentioned by a witness who had been at the scene of the crime.”**

From the above cited authorities it is clear that evidence of a dying declaration need not be corroborated but the court has to exercise caution that the deceased could not have been mistaken in his identification of the accused. I am satisfied that PW2 and PW4 heard the deceased say that he was injured by the accused. They were with the deceased for a while before he died.

Both the accused and deceased were persons known to PW1, PW2, PW3 and PW4. All these witnesses told the court that the deceased’s club which they knew very well because they had been seeing the deceased with it was found with the accused where he was arrested in the bush. Whereas it was accepted that all Samburu men walk around with a club and a knife or sword, it is questionable why the accused would be in possession of the deceased’s club soon after the deceased was injured. I found the witnesses

quite truthful and there is no good reason to doubt their evidence that the deceased's club was with the accused at the time of his arrest. PW1 and PW4 also told the court that the accused was arrested while asleep in a bush next to a school but near where the deceased was found injured. The accused was found far from his home but near the scene of crime. PW1 and PW3 said that it would take about 5 hours to walk the distance between accused's home and where accused was arrested. PW3 said it is about 10 km away. The accused did accept that Ndonyo Nasiba where he was arrested is far from his home and he would take about 6 hours walk but he claimed to have been following some flock which he had purchased the day before. As observed earlier in this judgment, I have no reason to doubt the witnesses who arrested the accused. He was very far from home, a sleep in the bush and in possession of the deceased's 'rungu' then the deceased named him as his assailant. PW2 specifically said they knew each other's rungu (clubs) and the deceased's rungu was found with the accused soon after the death of the deceased. I am satisfied on the evidence on record that the accused was arrested near where the deceased was found injured and was in possession of the deceased's club (rungu) which goes to show that the accused and deceased had come into contact before the deceased was injured. That evidence sufficiently corroborates the evidence of PW2 and PW4 that deceased named the accused as the person who injured him.

The body of the deceased was not found for purposes of post mortem because it was abandoned at the scene for two (2) days after he died and was said to have been eaten by hyenas. The question is whether the evidence on record goes to confirm the death of the deceased. In the case of **Kimweri v Rep [1968] EA 452**, where the body of the deceased was not found, the then East African Court of Appeal said at page 453:-

**“On the first point, while death may be proved by circumstantial evidence without evidence as to the production of the body of the allegedly dead person and without any evidence of a person who saw the body of the dead person and without a confession by a person accused that he caused the death, yet where a court is asked to find in a murder charge that a person is dead in the circumstances which we have stated, the evidence on which the court is asked to infer the death must be such as to compel the inference of death and must be such as to be inconsistent with any reasonable theory of the alleged deceased being alive, with the result that taken as a whole the evidence leaves no doubt whatsoever that the person in question is dead.”**

In the instant case, PW1, PW2 and PW4 saw the deceased's body when he was still alive until he died. PW3 arrived at the scene after the death and saw the body. PW1 said that their people are scared of the dead. When PW1, PW3, PW5 and PW6 came to the scene, they found the deceased's blood stained half coat, piece of bone and pieces of intestines. PW7 matched the DNA profile in the blood on the jacket and intestines to that of the deceased's son (DII) whose blood was taken for purposes of comparison with that of the deceased. PW7 found that the deceased must have been the biological father of his son Lekupano Leseek. In the end, I am satisfied that the evidence on record leaves no doubt that the deceased is dead.

As observed above, I am also satisfied that it is the accused who fatally injured the deceased. The last question is whether the necessary malice aforethought existed. PW1, PW2, PW3 and PW4 all found the deceased's stomach sliced, with intestines exposed. PW1 and PW4 said they tried to return the intestines into the stomach but failed. The injuries were so severe and it leaves no doubt in my mind that whoever injured the deceased intended to cause grievous harm or kill the deceased. The accused then left the deceased to die. The serious injuries go to show that the accused had the necessary malice aforethought. The deceased merely denied the offence. There is no reason why the witnesses could have framed him. I disbelieve his defence. I find the accused guilty of the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** as charged, and convict him accordingly.

**DATED and DELIVERED this 18<sup>th</sup> day of March, 2013.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr. Chirchirl for the State

Ms Samich holding brief for

Mr.Kurgat for the accused

Kennedy – Court Clerk