



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Case 84 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

SANGO LEANDULA.....1ST ACCUSED

DIBEK LEKAMARIO.....2ND ACCUSED

JUDGMENT

By an information dated 20/9/07, Sango Leandula Amaa and Ntipiyan Lekamario were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on 13/8/07, at Lkuroto Village, Samburu District, murdered Estherina Lenanyeki. The accused persons denied the offence and the case proceeded to hearing with the prosecution calling a total of six (6) witnesses. The accused persons gave their defence on oath.

Briefly the prosecution case is as follows:- Joseph Laikipian (PW1) of Olkurto was one of the last persons to see the deceased alive. He told the court that the deceased went to his house at about 8.00 p.m. on 3/8/07 and informed her that Leandula had hit her and she wanted PW1 to go with her to ask him why. He did not go but asked the deceased to go to sleep and they would go to enquire from Leandula on the next day. At about 8.30 p.m., PW1 heard screams from the 2nd accused's Manyatta. He went to the deceased's house on the next day at 7.30 a.m. when her children informed him that she was lying in a bush unconscious. PW1 went to the scene, found the deceased unconscious and got a vehicle to take her to the hospital and made an assault report. He did not know where the deceased went after leaving his house on the previous night.

PW2 Mutesia Lewarani of Maralal was in her Manyatta at about 8.00 p.m. on 13/8/07, when she heard children screaming and thought it was the deceased beating her children. Next day, she heard that the deceased was lying in a bush.

PW3, Samuel Lenanyeki was the husband of the deceased. On 15/8/2007, he was on duty at Sopa Lodges when he received a report of his wife's death and he found her unconscious but she died soon thereafter. He attended the post mortem after which he was given the body for burial.

PW4, Andrew Lenanyeki who was aged 13 years, was the son of the deceased. After being interviewed by the court, the court was satisfied that he did not understand the meaning of oath and he gave unsworn statement. He recalled that on 13/8/2007, he left home with his mother about 5.00 p.m. to 6.00 p.m. to go and call the father at Yale. When there, accused, without provocation, hit the deceased with a rungu on the left side of the head. The deceased went home and accused followed her there and slapped her. It is then the deceased went to report to the Village Elder and he accompanied her to 2nd accused's Manyatta where the 1st accused who was her friend was. The deceased entered the house while the elder remained outside. The mother was armed with a panga and she cut the 1st and 2nd accused on the head. The 1st accused then stabbed the deceased twice on the throat while 2nd accused hit the deceased with an iron rod

and she fell. The village elder ran away. PW4 ran away to inform his elder sister. He denied that his mother ever drunk alcohol and was not drunk on the said date.

PW5, Dr. John Karina, of Maralal District hospital produced the post mortem report, that was prepared by Doctor Kuntai who performed the post mortem on the deceased. The Doctor formed the opinion that the deceased died due to massive haemorrhage secondary to assault with resultant hypovohmic shock.

PW6, Ag. IP Mark Masinde, recalled that he was assigned the duty to investigate the case on 14/8/07. The two accused persons reported to Maralal police that they had been assaulted and they had visible injuries on the head and bruises on the hands. They visited the scene which was 2nd accused's Manyatta. Inside the house, they found blood stains on the floor, which dripped outside upto a nearby bush where there was evidence of a struggle. They recovered from the house a blood stained panga, motor vehicle spring and a blood stained club. PW6 went to Maralal Hospital where the deceased was admitted with deep cuts on the left side of the neck but was still alive and was able to talk to her though she did so with difficulty. He learnt that the quarrel emanated from adoption of a child by name Chirchir. PW6 forwarded the items he recovered from the 2nd accused's house to Government Analyst for further investigations. PW6 produced the Government Analyst report (PEX.7). He also submitted blood samples of the accused and deceased to the Government Analyst who found the blood on the club and panga to match the DNA of the 1st accused.

The 1st accused told the court that he was in Maralal on the fateful day. He met the 2nd accused who was his friend at about 10.30 a.m. and they went to the bar to drink till 2.30 p.m., then went to the 2nd accused's home where he went to sleep because he was drunk. He was woken up by screams at 8.00 p.m. Six men arrived and one hit the 2nd accused who started screaming together with the children. He was suddenly hit on the head with a metal bar 5 times and he fell unconscious and by the time he came to, the people had gone and he was bleeding. The people in the Manyatta came and they included PW2 and his brother; that it is PW2 who took him to hospital where he was admitted till the next day when he was discharged and went to report at the police station where he was issued a P3 form. He denied knowing the deceased and he never saw her and never slapped her. He claimed that he never attacked the deceased as alleged by PW4.

The 2nd accused, Ntipiyan recalled that she was cooking on 12/8/07 when people entered her house and started to cut them. Neighbours came. She also denied having known the deceased before but that the 1st accused was her friend. She was injured on the head and started bleeding and did not see her attackers. She reported to the police station, was issued with P3 form. She said she sustained a cut on the head and was beaten all over the body. The defence requested to recall PW6, the Investigating Officer, who produced the statements of Irene Lesukuta, a daughter of the deceased who was not called as a witness as she was said to have disappeared from the area and that of Andrew, PW4 (DEX.2 & 3).

I have considered both the prosecution evidence and the defence and the submissions made by Mr. Kipkoech after the close of the defence case. The accused persons denied having known the deceased before. However, based on the evidence on record, I find that they were not truthful. PW1 recalled the deceased coming to his house at about 8.00 p.m. on the fateful night, to ask him to go and enquire from the 1st accused why he had assaulted her. At 8.30 p.m. PW1 said that he heard screams from the 2nd accused's house. The 1st and 2nd accused admitted that they were friends. PW4 also knew both the accused as friends and was with the deceased when she was first assaulted by the 1st accused and also at the 2nd accused's Manyatta on the same evening; PW6, the Investigation Officer found out that the genesis of the disagreement between the deceased and the 2nd accused was over adoption of a child by name Chirchir. I am satisfied on this evidence that the 1st accused and 2nd accused knew the deceased very each well. The 2nd accused and deceased lived in the same neighbourhood and the 1st accused was a friend to 2nd accused. The 1st accused, 2nd accused and the deceased were not strangers to each other.

The key witness in this case is PW4, Andrew Lenanyeki, a son to the deceased. By 2007, he was aged about 13 years. Upon the court examining him, it ruled that he did not seem to understand the meaning of

the oath and therefore he gave unsworn evidence. However, he was subjected to cross examination by the accused's counsel. In addition, the defence had PW4's statement that he made to the police produced in evidence as DEx.2. PW4 stated that the disagreement between the deceased and the 1st accused started after the deceased went to phone her husband at Yare and the 1st accused struck the deceased with a rungu (club) on the head, followed the deceased to the house and slapped her again. What is not clear is what prompted the 1st accused to hit the deceased. PW4's testimony is corroborated by that of PW1 who said that the deceased went to his house at about 8.00 p.m. to tell him to go and enquire from 1st accused why he had hit her but PW1 declined and told her to wait till next day. Even from the statement produced by the defence written to the police by one Irene Lesukuta who did not testify, it is recorded that a man had hit the deceased with a rungu. I am satisfied on the evidence on record that it is the 1st accused who was the aggressor when he assaulted the deceased first. The reasons for the attack were unknown save for the Investigation Officer's evidence that it was over adoption of a child.

PW4 went further to tell the court that after the 1st accused assaulted the deceased, the deceased went to her house, armed herself with a panga and went to the 2nd accused's house where both accused persons were. The deceased cut each one of them on the head using the panga. It is then 1st accused stabbed the deceased twice on the throat while 2nd accused hit the deceased with an iron rod. PW4's evidence is corroborated by the findings of the Government Analyst that the blood found on the panga (Ex.1) was that of 1st accused. PW4's evidence was also corroborated by PW6's evidence who saw the accused persons when they went to make an assault report that they had been assaulted and had injuries on their heads and bruises on hands. PW4's evidence was further corroborated by the Doctor's evidence who found injuries to the deceased's neck and throat. PW4's evidence though unsworn, was basically what he told the police in his statement which was produced in evidence by the accused (DEx.3). I find that PW4 was a truthful witness. When PW6 visited the scene which was the 2nd accused's manyatta, there were blood stains on the floor and drops of blood led from the house to the bush where the deceased was found.

I am satisfied that the evidence on record does disclose that the 1st accused and 2nd accused were involved in a fight with the deceased. I also find that the 1st accused being the aggressor and deceased being enraged by the 1st accused's attack on her, went to arm herself and went to retaliate only to be confronted by both accused. PW6 found the scene (2nd accused's manyatta) disturbed. It was a fight.

PW4 said that the 1st accused stabbed his mother twice on the throat and the 2nd accused also hit her. Dr. Tunkai who performed the post mortem on the deceased found that the deceased sustained the following injuries; a deep cut on the left lateral aspect of the neck, perforation of the right jugular vein, bruises on right elbow. He opined that the deceased died as a result of massive haemorrhage secondary to assault with resultant hypovolumic shock and cardio pulmonary arrest. The injuries that the deceased sustained are consistent with PW4's evidence. I find that, although this was a fight, the accused persons inflicted very serious injuries to the deceased that resulted in her death. The injury to the jugular vein was so serious that it went to cause grievous harm or death.

Having found that the deceased sustained the injuries that led to her death in a fight, no intention or malice aforethought can be imputed on the accused persons. The 1st accused inflicted very serious injuries to the neck and the jugular vein of the deceased while the 2nd accused assaulted her too. They were two against one. The two accused received very minor injuries in the fight. They used excessive force. I will find that the pair committed the offence of manslaughter. I therefore find both accused guilty of the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code** and they are convicted accordingly.

DATED and DELIVERED this 17th day of May, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Otieno holding brief for Mr. Ogola for the accused

N/A for the State

Kennedy – Court Clerk