



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL CASE NO. 30 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

KASAIN LANKAS.....ACCUSED

RULING

The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, (*Cap. 63, Laws of Kenya*).

Section 203 creates the offence of murder by stating that -

“any person who with malice aforethought kills another person commits the offence termed murder.”

The ingredients of malice aforethought are set out in Section 206 of the Penal Code, and these are -

- (a) an intention to cause the death of or to do grievous harm to any person whether that is the person actually killed or not,***
- (b) knowledge that the act or omission causing death will probably cause the death or grievous harm to some person whether that is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused,***
- (c) intent to commit a felony.***

The fourth element of causing a prisoner from lawful custody does not apply in this case.

Under Section 306 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*) the court must after the closure of the prosecution evidence consider whether there is evidence to put the accused to his defence, and if there is none to make a finding of not guilty and acquit the accused.

The question or issue here, is whether the prosecution evidence established a prima facie case to put the accused to his defence, or whether there was no such evidence as claimed by counsel for the accused, and therefore make a finding of not guilty and acquit the accused. To be able to make an order either way the court must analyse the evidence of the prosecution witnesses.

According to the evidence of PW1, PW2 and PW3 the star witnesses, the scene is Monica's house. Monica Njeri is PW3. She is the brewer and seller of the rural folks favourite drink, “Busaa” sometimes called “porridge” to hide its alcoholic content. In this case it was referred to as “Miti ni

Dawa". The patrons were Kasaine Lankas (*the accused*), Simon Ngilimo also known as "*Muthee*", (*the deceased*), a neighbour of PW3, they were joined by Njuguna (*PW2 – Lawrence Njuguna Kagiri – PW2*).

It was PW3's evidence that Ngilimo (*Muthee*) her neighbour came and started quarreling with Musiro and accused the deceased of not caring for his sister (*Muthee's*), after marrying her. The quarrel became heated and degenerated into a fight between Ngilimo (*the deceased*), and Musiro, and according to the evidence of PW2, he noticed that the deceased had been hit with a "*nutty*" club which was in the possession of Musiro, and the deceased was bleeding. So the other patrons decided to push them out to fight there "*as Langas and myself tried to separate them.*" And as he was quite drunk, he could not assist further and went to sleep. He told the Police that the deceased had been fighting with Musiro and that he and the accused had tried to separate them.

However according to the evidence of PW2 as they (*Musiro and Muthee*) were pushed out, it was Musiro who went out first and challenged "*Muthee to follow him – and the fight continued.* At that stage PW2 became concerned and ran away to call PW1, the wife of the deceased. She saw the accused standing with a *rungu* while her husband was "*holding on to Musiro as they fought*". She pulled her husband away by the waist and then realised he was bleeding profusely from the head. At that stage Musiro ran away – but the deceased pushed her aside and run after Musiro, and then rushed to call her father-in-law as well as Musiro's wife, and that upon her return she found her husband thrown on to a nearby fence, lying on his back with eyes rolled upward, but with his heart beating. They took him and placed him by his door, to gain some fresh air to regain consciousness – but he had died.

When cross-examined by counsel for the accused, PW1 testified that she found the accused holding a club – with the deceased hurling insults at the accused, while the deceased had pinned Musiro to the wall, and could not tell whether the accused and PW2 were trying to separate the deceased from Musiro. She does not know who hit her husband in the head as Musiro also had a *rungu* which had metal nuts hammered into it.

PW3 did not however see the deceased with any weapon.

PW4 was clear in his testimony that the deceased had fought with one Zainabu Ole Jarake in the course of which the accused became involved. He was however unable to trace the elusive Zainabu.

PW5, the Doctor attributed the cause of death to blunt injuries.

PW6, was mother of the deceased. She was wakened by PW1, the wife of her son, the deceased, of a fight at PW2's house involving her son and Zainabu, and the accused, and that she found the accused standing holding a club over the deceased's body, that the accused got shocked when he saw her dropped his club which she picked and kept. Although it was night, there was moonlight and she saw the accused well and she also knew him.

When cross-examined however PW6, testified that information she received was that the fight was between the deceased and Zainabu, but she found accused holding a club over her son's body. Zainabu had run away.

The prosecution's last witness was PW7, the investigating officer, PW7. His evidence was from information from the other witnesses. They were informed that PW6, and PW3 had seen the accused with the club which they recovered below the bed of the deceased along with a piece of soap, playing cards, and a woolen cap (*which belonged to Musiro*) who had already ran away but that they followed and arrested the accused at Enegetia Trading Centre. He acknowledged that nobody saw the accused hit the deceased with the club. He acknowledged that the woolen cap belonged to Musiro, that the soap belonged to the deceased, but that it was Musiro who had been beating the deceased.

From that evidence, it is quite clear that the fighting was between the deceased and Musiro. Musiro was husband to the deceased's sister. The deceased had challenged Musiro (*his brother-in-law*) that he was an uncaring husband to his sister who was sick and yet Musiro was just drinking among other

men as brothers are won't to be protective of their sisters.

Obviously, Musiro did not take this kindly, and as the evidence of PW1, PW2 and PW3 shows, there erupted not just a quarrel but a quarrel which degenerated into a vicious fight, not between the accused and the deceased, but between the deceased his brother-in-law, Musiro.

Unhappy with that development PW2, and others, pushed deceased and Musiro to get out of the drinking den, and take their fight out of the house. In doing so, PW2 noticed that the deceased had been hit on the head and was bleeding -

“... Mosiro was the one who had the “nutty” club. As they were fighting I noticed Ope had been hit in the head and was bleeding. We decided to push them out to fight there as Langas, and myself tried to separate them..”

What is clear from the evidence of PW2 is that the deceased had been hit on the head and was bleeding when he and Mosiro were pushed out. To PW2 the deceased was simply known as “Ope”. The accused was seen by PW6, holding a club over the deceased while Mosiro was pinning the deceased on the wall, or the fence. No witness saw the accused hit the deceased on the head. The club recovered did not have metal nuts embedded into it. The “nutty” club was the one wielded by elusive Mosiro. There is no connection between that Club and the club recovered below the deceased's bed.

In terms of Section 306 of the Penal Code, there is no prima facie evidence of intention by the accused to cause the death of or to do harm to the deceased, let alone knowledge to do, or to commit a felony. The accused like PW2, was a customer at PW3's den for traditional liquor. He deserted the den when he saw the bad condition of the deceased. If he was holding a club and drop it upon the appearance of the deceased's mother, there was no evidence that he used it to hit the deceased.

In the circumstances, I must find in terms of Section 306(1) of the Criminal Procedure Code, that there is no evidence upon which to put the accused to his defence. I therefore acquit the accused of the offence of murder of the deceased contrary to Section 203 of the Penal Code, and I direct that the accused be released forthwith unless otherwise lawfully held.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 12th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE