



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**  
**AT KITALE.**

**CRIMINAL CASE NO. 19 OF 2006.**

**REPUBLIC ::: PROSECUTOR.**

**VERSUS**

**STEPHEN OTEMO LESERO ::: ACCUSED.**

**JUDGMENT.**

1. The accused person **Stephen Otemo Lesero** is charged with the offence of murder contrary to the provisions of section 203 as read with section 204 of the Penal Code. The particulars of the offence stated that on the 2<sup>nd</sup> day of February, 2006 at Makutano Township in West Pokot District within the Rift Valley Province, jointly with others not before the Court the accused person murdered **JOHN EKILECHE ETYANG**. The prosecution called a total of seven witnesses who gave evidence in support of the charge of murder.

2. The accused person gave a sworn statement of defence; he denied having had anything to do with the offence he is charged with. The accused person contested that on the material day he had spent a night in Eldoret town and produced a hotel receipt to that effect. He further contended that there is a striking similarity between him and his cousin who was named as **KIFO** and who some witnesses said was at the scene, thus there was a possibility that he was arrested by mistake. In other words the accused person's defence alluded to an alibi. This Case was tried with the help of assessors. The evidence was summed up to the three assessors who returned a unanimous verdict of not guilty.

3. The prosecution's case was supported by the evidence of **Dennis Wafula PW1**, who testified that on 1<sup>st</sup> February, 2006 at about 9.00 p.m. he had gone to Makutano to attend a funeral wake at the home of Mzee **Longutis Sang**. They were partaking traditional liquor and when it was about 2.00 a.m. the deceased told him that he was going to town with his girlfriend **Jane Akiru Amase, PW2**. PW1 testified that the accused person with Mike, Bonny and Peter followed the deceased as they were claiming that he had snatched and gone with their girl friend to town. Thus PW1 followed them and maintained a safe distance as they walked towards town. When they reached the stage, he saw the accused person, Steve and Mike attacking the deceased. The accused person held the deceased while Mike beat him up. The deceased fell down and when PW1 reached where he was, he saw that the deceased had been injured and the attackers ran away.

4. While the scuffle was going on, PW1 told the court that the deceased held on the hands of PW2 while the other men were pulling him on the other side. PW1 said he was able to see what was happening through the lights from the verandah of the Post Office. PW2 called the parents of the deceased and they recovered a knife. The deceased was taken to the hospital but he died on arrival. PW2 testified that she had gone to the funeral wake where she found other people including the deceased. They stayed at the funeral wake until 2.00 a.m. she said the deceased was chewing miraa. The deceased requested PW2 to take him to town so that he could buy more miraa. After they left the funeral place, they were attacked by four people whom PW2 said she was able to identify as **Peter, Mike, Stephen** and **Bonny**.

5. It was **Peter** who started by slapping PW2 and when the deceased asked Peter what was wrong, **Peter** started beating the deceased. **Peter** was trying to pull PW2 on their side. The other three joined the fight, that is when **Mike** removed a knife, and as the fighting ensued, Mike stabbed the deceased on the hand while the accused person was holding the deceased from the back. PW2 started screaming, People arrived and took the deceased to the hospital but he was pronounced dead on arrival. PW2 identified the knife that was produced in evidence and was allegedly used to stab the deceased.

6. **Antonina Nelima** also testified that on the 2<sup>nd</sup> February, 2006 at 2.00 a.m. he was woken up by his cousin who told him that the deceased was involved in a fight over a girlfriend with Steve Anyole, Mike Anyole, Boniface Anyole and their friend who are known in the area as they were neighbors. PW3 ran to the scene and looked for a motor vehicle which took the deceased to the hospital. However, the deceased died on the way. At the scene they collected the knife that was produced in evidence. During cross examination PW3 said that he knew the accused person who was known as **Kifo**.

7. The body of the deceased was identified by **Matayo Etyang, PW4** for purposes of postmortem examination. The post mortem examination was carried out by **Dr. S.K. Kemei**. However, he did not attend court because he had been transferred thus the post mortem report was produced by **Dr. John Kipkogei Chirchir, PW7**. He also produced the mental assessment of the accused person which showed that the accused person was mentally fit to stand the trial of murder. The post mortem report showed that the body of the deceased had a penetrating wound on the left elbow and also on the lower part of the chest. There was a perforation of the left vertical of the heart. The cause of death was severe bleeding from the perforation of the left vertical of the heart. In the doctor's opinion, the injuries were caused by a sharp object.

8. After the close of the prosecution's case, the accused person was put on his defence. He gave a sworn statement of defence. He denied that he was at the scene of murder on the material day. He produced an employment card that he said was issued to him as an employee of Dolphin Coach Bus. The accused person also produced a receipt for hotel accommodation that showed that he occupied a room at Keringet Hotel on 2<sup>nd</sup> December, 2006. The accused person also produced a photograph taken with his cousin who is called **Kifo** which he claims shows striking similarities between him and his cousin who was mentioned by PW1 and PW2.

9. Both counsel for the defence and the state made submissions in support of their respective positions. According to counsel for the defence the evidence by PW1 and PW2 cannot be relied upon because they kept on referring to Mike, Peter, Steve and Kifo interchangeably. Moreover, the offence took place at night and according to the evidence it occurred about 1 km from Caltex Petrol Station. It was 2.00 a.m. when it was still dark and that there was no evidence to show the intensity of the light. PW5 and PW6 who investigated the matter did produce a sketch map of the scene but did not identify where the lights were emanating from. PW5 also said that it was Vivian and Betty who identified the accused person but those two witnesses were not called as witnesses.

10. On the part of the state, **Ms. Bartoo** submitted that there was sufficient evidence by PW1 and PW2 who identified the accused person. PW1 knew the accused person well as he used to work for Dolphin Coach Bus which the accused person confirmed in his defence. This was identification by recognition which was also made possible by the lighting emanating from the Post Office building. According to the State, the accused person had malice aforethought when he held the deceased person and was stabbed by an accomplice who was not before the court. The only issue for determination is whether the prosecution proved its case to the required standard that it is the accused person in the association of others who caused the death of the deceased.

11. The attack took place at 2 am when it was dark, although PW1 insisted that he was able to identify the attackers with the aid of electricity lights that illuminated the scene from the post office building, there was no evidence that was adduced regarding the distance and intensity of the lights at the scene. It is a well settled principle of law that while dealing with the evidence of identification especially when the circumstances of correct identification can be said to have been difficult the court has to test that evidence with care. See the case of ; **Maitany vs. Republic (1986)KAR** it was held that;

***“Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, what is needed is other evidence whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted from the possession of error.”***

12. Bearing the above principles in mind in this case, the only direct evidence (eye witness) was PW1 who testified that they had been drinking from 9.00 p.m. to 2.00 a.m. with the deceased and a group of young men. The deceased started walking to town with PW2 at about 2.00am. PW1 also decided to follow the deceased and the group of young men but he walked behind them while keeping a distance of about 10 meters. He noticed that the deceased had fallen down and when he checked he noticed that the deceased had been stabbed with a knife. This evidence has been taken with the defence by the accused person who contested that he was not at the scene. Moreover there was no cogent evidence adduced by the prosecution to show that the accused person was at the funeral wake on that day.

13. The evidence of both PW1 and PW2 which interchangeably mentioned somebody called **Kifo** who has striking similarities with the accused person has also to be brought to bear. I entertain doubts in my mind as to whether it is the accused person who participated in the killing of the deceased or this was a case of mistaken identity. With this evidence, on record, coupled with the fact that the prosecution did not carry out an identification parade to test the veracity of the identification of the accused person the charge against the accused person is far from being proved to the required standard.

14. Taking the totality of the evidence before this court, there is doubt in my mind that the prosecution's case is established

beyond reasonable doubt. I concur with the findings of the three assessors that the accused person is not guilty of the charge of murder. Accordingly, the accused person is hereby acquitted of the charge of murder.

**Judgment read signed and Dated at Kitale this 3<sup>rd</sup> day of June, 2011.**

**M. K. KOOME.  
JUDGE.**