



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 37 of 2007

REPUBLIC.....PROSECUTOR

-VERSUS-

JACKSON MAINGI NZIOKA.....ACCUSED

JUDGMENT

The accused person, JACKSON MAINGI NZIOKA is charged with Murder contrary to section 203 of the Penal Code. It is alleged that the accused person murdered the deceased on the 25th day of August, 2006.

The prosecution case can be summarised as follows:

PW1 was S W M the mother of the deceased and the wife of PW2 (P M) the landlord of the accused. Her evidence is that on 2nd August, 2006 the accused, who she knew as *Wamuzee* and who was their tenant, went to her home at 7.30 p.m. and asked her for drinking water. The water was given to him in a jug which he kicked. P.W.1., S, told the court that even though the accused was their tenant occasionally PM gave him casual work. The accused who had entered the house flashed a panga and demanded Kshs.1,500/= from S saying he had repaired their fence. S testified that she pleaded with the accused to wait to get paid by P M with whom he had agreed on payment but that he refused and threatened to kill her and the children if he was not paid. S testified that she pleaded to be allowed to go to her bedroom with the children but that the accused refused. That instead the accused locked S's children E K (PW7) and N W in their room. S was carrying her youngest child, F W, on her back. S testified that she managed to escape with F but that the accused got up with her and tripped her so that she fell down. S stated that the accused assaulted her on shoulders, fingers and the face with the panga he was holding. S testified that she stood up and managed to escape leaving her son F on the ground. S testified that she ran to her neighbour's place, one Murungu (PW4), while raising an alarm. S said that she found Murungu who immediately went to her home to see what he could do to help. Half an hour later Murungu returned to report that the accused could not be found and that S's son F was dead.

P M was the father of the deceased and husband of S. His evidence was that he left home on the 2nd August, 2006 at 6.00 a.m. for work. He testified that he was called at 8.00 p.m. same day and asked to go back home urgently. He stated that he went home immediately only to find his youngest son was dead.

P M testified that on 5th May, 2007 almost one year after the incident he saw the accused in Loitokitok Town and arrested him with the help of Peter Njau, (PW5). P M agrees that the accused was his tenant and that he gave him work to repair his fence at the cost of Kshs.1,500/=. P M stated that the accused did not complete the work.

PW3, S.M was 17 years old and was living in the plot overlooking PM and S's home. S M testified that on 2nd August, 2006 at 7.30 p.m., he had lit a fire to prepare supper when he heard two neighbours quarrelling about four metres from him. S stated that the quarrel was over Kshs.1, 500/=. Which *Wamuzee* was demanding from Mama K. Mama K was S. S M testified that he walked to his fence and saw the Mama K on the ground carrying a baby and the accused assaulting her with a panga. S M stated that Mama K got a chance to escape and that she left the child on the ground. S M said that the accused threatened him forcing him to ran for safety to Mzee Murungu's home. S

M testified that he only went back to scene with members of public and Murungu to find that the deceased had been severely assaulted on the head.

PW4 was MICHAEL MURUNGU GITHUTU who was living near S's home with his wife and 7 children. He testified that on 2nd August, 2006 at around 6pm to 7pm he was going home when he heard some noise. He stated that he went towards the noise only to meet with S naked from head to waist and also having injuries on her hand and back. Murungu testified that he was told that one *Wamuzee*, the accused in this case, had assaulted her. Murungu stated that he was asked to go back to S's home because the accused had been left there. He stated that he went to the home only to find the deceased lying on the ground with a cut injury on head. Murungu said that the child was dead

PW5 PETER KIRUI NJAU helped P M arrest the accused on 5th May, 2007.

PW6 was APC JOSEPH SANG who at the material time was attached to Entarara Chief's Camp. He testified that on 2nd August, 2006 he heard screams from the neighbourhood and that when he went to check he found that they were coming from PW2's home. APC Sang testified that at the home he found a 7 month old baby boy outside the house with deep panga cut on the head. APC Sang stated that he was informed by S, PW1 that she had had a quarrel with the accused just before the attack. APC Sang testified that efforts to trace the accused that night were fruitless

PW7 was E K G, a son of PW1 and 2. His testimony was that he was at home when the accused came. E stated that the accused locked him and his sister W in their bedroom. That he then heard his mother and the accused quarrelling over money which the accused was demanding from his mother. E said he had heard the accused demand Kshs.1,500/= from his mother and heard him threaten that if she did not give him the money, he would kill her and the children. E testified that he shook the door and managed to open it as it had not been locked with a padlock. E said that he went outside their house in time to see the accused assaulting his mother on the shoulders. E says he saw his brother, the baby his mother was carrying on the back fall. E says that the mother ran away to the neighbours. E said he saw the accused assaulting his baby brother with the panga on the head. E said that on witnessing the assault on his brother, he and his sister W ran after their mother to the neighbours.

PW8 TIMOTHY MURUTHI was a psychiatric nurse. He testified that he examined the accused on 28th May, 2007 and formed the opinion that the accused was mentally fit. He produced his report as P EXH.2. Mr. Muruthi also produced a P3 form filled by Dr. Rotich of the Loitokitok District Hospital. Both had worked for the hospital for 2 years. In the P3 form, Dr. Rotich had examined PW1 S W on 21st August, 2006. His findings were that the subject had blood stained clothes, and had laceration on the face, cuts on the posteria back and cuts on the left 2nd and 3rd fingers. Dr. Rotich formed the opinion that the cuts and laceration were caused by a panga and that the degree of injury was harm.

PW9 PC WAMARIO was called to the scene of attack by Administration Police officers at 10pm on 2nd August, 2007. He stated that he proceeded to the scene and found the deceased child outside the house lying on the ground with a deep cut wound on the head. Wamario testified that the mother of the child was also present at the scene. PC Wamario stated that he noted that Serah had cut wounds on her fingers and face. The police officer stated that the mother of the deceased informed him how she had quarrelled with one *Wamuzee* over payment for mending her fence, and how he had cut her with a panga. PC Wamario testified that the woman informed him that she left her child down and ran to call neighbours and that upon returning to the scene she found her child dead.

PW10 was PC Mwellla who re-arrested the accused from P M (PW2) and another on 5th May, 2007. PC Mwellla testified that the accused was wanted for vhe ofnence of murder.

PW11 was CPL. Biwott who was the investigating officer of the case CPL. Biwott testified that he sent PC Wamario (PW9), and

other officers to the scene of incident on the same day it happened. He testified that he visited over the same incident, who was admitted at Loitokitok District Hospital with cuts on the face, shoulders and fingers of the left hand. CPL Biwot testified that he also saw the body of the deceased at the hospital mortuary. CPL. Biwott testified that he started looking for the accused and even informed Tanzania police to assist in tracing him. CPL. Biwott stated that the accused was arrested almost one year after the incident by the father of the deceased, PW2 and handed over to them. CPL. Biwott stated that he had the accused assessed as to his mental fitness before charging him with the offence.

PW12 was Dr. Gatura who carried out the post mortem examination on the body of the deceased on 5th August, 2006. Dr. Gatura testified that the body had a cut on the right scalp extending to the bone with fracture and brain tissue oozing through the wound. He formed the opinion that the cause of death was a severe head injury, secondary to penetrating head trauma due to a sharp object. He discussed the possibility of the injury having resulted from an accident or from a fall on a sharp object as farfetched. Dr. Gatura testified that the injury was caused by a direct hit on the head with a panga.

The accused person was placed on his defence after the close of the prosecution case. He opted to give a sworn statement. In his sworn statement, the accused testified that he was a businessman and farmer. The accused testified that he had rented a room from Mama K in 2005. That they had a good relationship and at times Mama K left him at home cooking and washing for the children as she did business in Arusha and Nairobi even for up to 14 days. The accused testified that on the material day, he went for business at Loitokitok and returned at 5.30 p.m. He said he passed by a club where he took 3 glasses of alcohol. That he reached home where he had rented a house from Mama K (PW1) at 6.30 pm. The accused said that he entered her sitting room and lay on the sofa set since she was not at home. The accused testified that after sometime he was woken up by K and informed that Mama K had returned. The accused stated that he went out to find his goats outside. He locked them and returned to the house and knocked, and that Mama K opened the door and the two started chatting. The accused testified that he asked Mama K to lend him Kshs.20000/= since he had gotten a piece of land. The accused claimed that when Mama K heard that, she went into her bedroom and returned with a panga in one hand and a baby on the other. The accused claimed that as Mama K lifted the panga to cut him, he picked a hoe handle (jembe) which was in the sitting room and blocked the panga from cutting him. He claimed that he was cut on the left hand and that PW1 started screaming. He says that a fight ensued after which he ran out. The accused stated that he does not know what happened, because he was drunk and that it was dark.

After the accused closed his case, both counsel, Mr. Ondieki for the accused and Ms. Macharia for the State, gave submissions. I have carefully considered the entire evidence adduced by the prosecution and the defence and submissions by both counsel.

The burden in this case like in all criminal cases lies with the prosecution to prove its case against the accused beyond any reasonable doubt. The charge is that of murder contrary to Section 203 of the Penal Code. That section stipulates as follows:

“203. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

The prosecution must show that the accused person formed the necessary *mens rea* to commit the offence. The prosecution must also prove that having formed the necessary *mens rea*, the accused person hit and caused the deceased severe injury from which he died. The prosecution must also establish malice aforethought and that the act or omission constituting the offence was unlawful.

I have set out the evidence adduced by both sides hereinabove. Mr. Ondieki has suggested eight issues which deserve a determination by this Court. I will consider each of these issues as they arise.

Mr. Ondieki submitted that the particulars of the charge against the accused was at variance with the evidence adduced by the

prosecution in that the name by which the accused was described, that is 'Wamuzee', was not included in the particulars of the charge. Counsel submitted that the defect was fatal and relied on the case of YONGO v. REP. [1983] KLR 319.

Ms. Macharia for the State urged that since PW9 PC David Wamario confirmed that the accused was known as *Wamuzee* and also Jackson, there was no defect in the charge.

In YONGO –V- REP. (supra), POTTER, HANCOX JJA and CHESONI Ag. JA defined what a defective charge is on the following terms –

- “1. A charge is defective under section 214(1) of the Criminal Procedure Code (Cap.75) where:
- (a) *It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses;*
or
 - (b) *It does not, for such reasons, accord with the evidence given at the trial; or*
 - (c) *it gives a misdescription of the alleged offence in the particulars.”*

I am well guided by this decision. Mr. Ondieki's submission was that the evidence adduced by the prosecution was at variance with the particulars of the charge for reason the name *Wamuzee*, by which the accused was known by the key witnesses was not in the particulars of the charge whether substantially or as an 'alias'. Under YONGO –V- REP. supra, a charge is defective where the evidence adduced at the trial does not accord with the charge for reason of inaccuracies or deficiencies in the charge. These deficiencies or inaccuracies may occur either for reason the offence for which the accused is charged is not disclosed in the evidence or where the offence disclosed in the evidence is not the one charged.

I have considered the learned counsel's contention that the person described in the charge is not the one charged. Ms. Macharia's submission was that the evidence of PC Wamario was that the accused was known by the names 'Wamuzee' and also 'Jackson'. The name 'Jackson' is in the charge. The accused did not raise any issue with the names in the charge as having any error or misdescriptions, nor does he deny that the names are his.

With due respect to the learned counsel for the accused, the YONGO case does not support his submission since no deficiency or inaccuracy to the offence charged is disclosed. The misdescription of the accused person is not one of the inaccuracies or deficiencies envisaged by the Court of Appeal in the holding relied upon. I find the issue merely academic and of no material significance to the charge or the case.

I noted that the date the alleged offence was committed as per the charge was 25th August, 2006. The evidence adduced by all the witnesses PW1, 2, 3, 4, 6, 7, 9 and 11 clearly gives the date of incident as 2nd August, 2006. The defence has not raised this as an issue. That notwithstanding, I have considered it as an important point to rule on. The accused does not deny that the incident took place. He does not deny going to the home of S and having a confrontation. I find that the error in the date has not occasioned a failure of justice in all the circumstances of the case. This is more so on account of the fact Mr. Ondieki for the accused and also the accused person did not raise any issue or objection in that regard.

The other issue raised by Mr. Ondieki is that of recognition. Mr. Ondieki submitted that even though the evidence of identification was that of recognition, it was not safe to rely on it since it was possible for identification by recognition to be mistaken. For this proposition the defence counsel relied on the case of KIARIE –V- REP [1984] KLR 739.

Ms. Macharia, learned counsel for the State argued that identification was not an issue. Counsel urged that both PW1 S and PW7 E, identified the accused as the one who lived in their home and also as the one who attacked them on the material day. Ms. Macharia urged the

Court to consider the fact that prior to the attack S had had a conversation with the accused in the presence of E and that therefore there was no doubt regarding his identity.

In KIARIE'S CASE, (supra), KNELLER JA, CHESONI and NYARANGI Ag. JJA held:

“1.

“2. *It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken.*”

“3. *where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.*”

I am well guided by this decision.

Having evaluated the evidence adduced I find that the accused person does not deny having gone to S (PW1's) home on the material night. Neither does he deny having been embroiled in a scuffle with S. Considering that the accused does not deny having been to S's home or having had a scuffle with her, I find that identification is not an issue.

Even if the accused had made no comment on identification and or even if he denied having been at the scene, the evidence of the prosecution is very clear. S's evidence was that the accused came to her home where he had rented a room and where he was staying. She testified that he knocked at her door and upon entering the house and upon making demands and issuing threats, pulled out a panga with which he attacked her. S was very clear in her mind as to the identity of the person who attacked her. I took into account that the accused had demanded payment of some money which S acknowledged. I also considered that the attack followed immediately after the demand for the money had been made and that therefore the prosecution is able to establish a nexus between the attack and the money. The identification of the accused by S is corroborated by PW3 S M, S's immediate neighbour. S M's evidence was that it was 7.30 p.m. after sun set. He said there was moonlight which enabled him to see. I am satisfied from this evidence that the evidence of identity was reliable, and watertight.

This leads to the next issue raised by Mr. Ondieki. Counsel submitted that PW3 was a child of tender years and that his evidence ought to be disregarded. PW3, S M was 17 years old. He was not a child of tender years by any standard. On the other hand, PW7, E K was 10 years old. Justice Apondi, who was the trial Judge of this case at the time E testified, carried out a *voire dire* examination before taking that evidence. In his short ruling, my learned brother Judge ruled that E was intelligent and understood the nature of an oath. In regard to S, I see no legal basis upon which I should disregard his evidence.

That leads me to Mr. Ondieki's other argument that the evidence adduced did not establish that the accused had formed the necessary *mens rea* to commit the offence for reason there was no malice aforethought on accused part. Ms. Macharia, learned counsel for the State in response to that submission relied on Section 206 of the Penal Code and urged that malice aforethought was established in that the accused inflicted grievous harm on the deceased.

Section 206 stipulates as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person 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) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

Section 206 speaks for itself. In DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR), Bosire, O’Kubasu and Onyango

Otieno JJA ,while considering what constitutes malice aforethought observed as follows:

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

I am guided by the decision of the Court of Appeal in the above case. In the instant case the prosecution alleges that the accused person cut the deceased on the head. If it is found that it is the accused person who injured the deceased on the head therefore causing fatal injuries, then the prosecution would have discharged his duty to establish malice aforethought. This is because once it is established that it is the accused person who hit the deceased on the head with a sharp object, then it can be safely be inferred that the accused must have known that the act of cutting the deceased on the head with a sharp instrument would cause death or grievous harm to the deceased.

That leads me to the next issue raised by Mr. Ondieki. Learned counsel for the accused urged that the circumstantial evidence adduced by PW1, 2 and 3 established that there was intense argument between S (PW1) and the accused. Mr. Ondieki submitted that from the evidence, the possibility of the deceased child having been injured as a result of an accident or a fall could not be ruled out. Mr. Ondieki urged that the fact that no weapon was recovered; and the fact that S and the accused had lived together amicably, all go to establish that death due to accident could not be ruled out.

Ms. Macharia relied on the evidence of the prosecution witnesses and submitted that the prosecution proved that the accused caused the death of the deceased.

I have considered submissions by both counsels on the issue of circumstantial evidence. The issue is what is the circumstantial evidence relied upon in this case and whether there is a possibility that the deceased was attacked by anyone else other than the accused person?

Section 111(1) of the Evidence Act provides as follows:

111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

In the instant case there is circumstantial evidence by the prosecution as is found in the evidence of PW1 who is Serah, PW3 Stephen Mwanzia and PW7 E the son of S. The evidence of S was that when the accused person demanded Kshs.1500/= from her, she tried to escape from the house and that he tripped her and she fell down with her son, who is the deceased in this case. Upon falling down, S’s testimony was that the accused person cut her on her shoulder, the face and the two fingers on the left hand. S testified that she managed to escape from the accused’s blow but unfortunately she left the deceased child behind. She ran to her neighbours, PW4. In the meantime S M, who was the immediate neighbour of S, heard the quarrels and the commotion and went to the fence from where he stated that he

witnessed the accused person assaulting S with a panga. It was S M's testimony that S was on the ground with the child at the time of the attack. SM stated that when S escaped leaving her child behind, the accused moved towards him and that he threatened him with a panga causing him to run away.

E, S'sson stated that he was able to open the door to their bedroom; he claimed that he saw the accused person hit his brother the deceased on the head with a panga before he escaped with his younger sister, W. I took the evidence of E with caution. I was not convinced that he was able to let himself out of a door which the accused is said to have locked.

Murungu is the person towards whose home S and SM ran. Murungu testified that he heard noises and that he decided to find out what was happening by walking towards the direction the noises were coming from. He says he met Shalf naked from the head to the waist, and with injuries on the head and the back. He says S persuaded him to go to her home and that upon going to S's home he found the deceased lying outside the house with a cut injury on the head. He says that the deceased was not dead by the time he arrived at home.

From the evidence of these three witnesses it is clear that the accused person was violent towards S and that he attacked S with a panga just before she escaped to Murungu's home leaving her son behind. The deceased was alive at the time Sand SM left the scene. From the evidence given by the witnesses, Murungu was able to return back to the scene almost immediately after S had escaped from the accused's attack. The fact that Murungu went back to the scene soon after S left in my view rules out the possibility of another person other than the accused having come to the scene to attack the deceased. This is because the witnesses are clear that Murungu went back immediately and found the deceased injured but still alive, and the accused missing.

S's evidence that it is the accused person who had the panga is corroborated by at least 2 witnesses that is, SM the neighbour, and E, S's child. The prosecution evidence also established that at the time S ran from the scene to escape any further assault by the accused, her child, and the deceased in this case, was alive. S's evidence that the child was alive is also corroborated by SM and E.

I have considered that SM was an independent witness since he was not related to either S, or E or the accused person. His testimony was that of an independent witness. Having analysed this evidence, I find that the accused's defence that it was S who had the panga is untrue and I don't believe it. I dismiss it accordingly. I also dismiss the accused defence that he is the one who escaped from the scene and not S. S's evidence that it was her who was under attack and that she had been assaulted with a sharp object is corroborated by SM and Murungu, who met her running away from the attack. Neither Murungu nor SM saw S with any panga.

Having come to the conclusion that the deceased was alive at the time he was left in the company of the accused, a statutory burden rests upon the accused under S.111(1) of Evidence Act. The section provides:

111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

The Court of Appeal sitting at Nairobi in the case of SAMUEL NDUNGU KAMAU & ANOTHER –V- THE REPUBLIC C.A. 223 of 2006 in reference to sections 111 and 119 of the Evidence Act had this to say:

"The appellant did not deny he met with P.W.1. as she was leaving his room. Nor did he challenge her on her account that he told her about escorting the deceased to Nairobi. In those circumstances, it is quite clear that the 2nd appellant was the last person who was with the deceased when he was last

seen alive. It was therefore his legal duty to explain where they parted company or how he met his death. A rebuttable presumption is raised under section 119 of the Evidence Act that the 2nd appellant alone or in conjunction with persons unknown killed the deceased. The 2nd appellant was duty bound to offer a reasonable explanation on the matter. Section 111 of the Evidence Act places that duty on him. The 2nd appellant did not offer any explanation on the matter. In the circumstances we are satisfied that he was properly convicted of murder contrary to section 203 as read with section 204 of the Penal Code.

The accused person had to explain what happened to the deceased or how they parted company. All the accused needed to do was to make a statement such as would create a doubt in the mind of the Court as to his guilt and which doubt would be resolved in his favour. The explanation by the accused is that he escaped from a trap by S and it was S who had anger and who was aggressive towards him. That explanation does not create any doubt in the mind of the Court as to the guilt of the accused person. The evidence of SM and Murungu all corroborate S's evidence that she was not armed with any weapon and that she had been attacked by the accused person with a panga. Those injuries are confirmed by CPL. Biwott who saw her at the hospital where she had been admitted following the attack. The injuries were also confirmed by the Doctor who examined her soon after the incident.

From the circumstances of the case, I find that all the facts point irresistibly to the accused as the one who aggressively attacked S and also the deceased causing both of them severe injuries from which the deceased succumbed. I find that the facts adduced are incapable of explanation upon any other reasonable hypothesis other than that of the guilt of the accused. I am also satisfied that there are no co-existing circumstances which could weaken or destroy the inference of guilt.

That leaves the issue Mr. Ondieki has raised of the defence of intoxication. Mr. Ondieki submitted that from the evidence of the accused person, he had pleaded that he was intoxicated at the time of the incident and was incapable of knowing what he was doing and or that it was wrong. Mr. Ondieki urged the Court to take the defence of intoxication into account as provided under Section 13 of the Penal Code.

Ms. Macharia for the State urged the Court to disregard the plea of intoxication as it was self inflicted by the accused person and therefore not acceptable as a defence.

Section 13(1) of Penal Code states:

“13(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.”

The above subsection speaks for itself that intoxication cannot constitute a defence in a criminal charge. Subsection (2) of the same section provides an exemption to this general provision and provides as follows:

“2. Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

- (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
- (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

The accused person pleaded that he was drunk at the time of the scuffle between him and the mother of the deceased but he does not acknowledge that he attacked the deceased. In his defence he testified that he had bought three glasses of alcohol on his way to S's home where he also lived, and that at the time he arrived at home he was already drunk. Going by that defence, the statutory defence provided under S.13 (2) (a) of the Penal Code is not available to the accused person since he bought the alleged intoxicating drink willingly and drunk it of his own free will.

The evidence adduced by the prosecution clearly shows that the accused person went to S's home armed with a panga and that he attacked S, cutting her on three parts of her body, and demanding to be paid KShs.1,500/= for work he had done for them. S's husband, P M, admitted that he had given the accused person some work to do for which he was to pay the sum of KShs.1500/=. PM's testimony was that that work was not completed as the accused person only performed part of it. It is therefore the prosecution case that even though the accused person could have demanded some money, he could only have demanded the money from PM and not S.

In cross examination S was asked whether she knew that the accused person used to drink alcohol to which she said that she did not know. S was not questioned whether the accused was drunk at the time of the attack. The accused person clearly states that he bought the beer of his free will and took it before going home. There is no evidence to show that the accused was intoxicated except his word in answer to the prosecution case. In the circumstances I am not satisfied that the accused was intoxicated at the time of the attack; in any event I am not satisfied that it has been shown that by reason of intoxication if any, the accused was insane, temporarily or otherwise, at the time of the act. From S's testimony the accused person was in control of his senses and he made clear demands from her. I find the fact the accused armed himself before proceeding to S's home, and the fact he ran away for almost a year after the attack, are proof of a person who knew what he was doing. I find that the accused conduct of attacking the deceased and then running away and hiding was consistent with conduct of a person with a guilty mind.

I therefore find that the defence is not available to the accused.

Mr. Ondieki has urged that as a result of intense argument that took place between the accused person and S as supported by all the witnesses, the likelihood that the injury on the deceased child was by a fall or otherwise could not be ruled out. For this proposition Counsel relied on the fact that the weapon that was allegedly used in this attack was never found and also on the fact that S and accused person had lived amicably prior to this incident.

The Doctor who examined the body of the deceased was Dr. Gatura (PW10). He testified that after carrying out the post mortem examination on the body of the deceased on 5th August 2006, he formed the opinion that the cause of death was a severe head injury secondary to a penetrating head trauma due to a sharp object. In his evidence, he stated that the child had been hit with a single blow on the right side of the head extending to the bone, with fracture and brain tissue oozing through the wound. When asked of the possibility of the injury having resulted from a fall on a sharp object or from an accident, Dr. Gatura dismissed both theories as not a possibility. Dr. Gatura testified that it was not possible that the child fell on a sharp object or that the injury was caused due to an accident because the injury was caused by a direct hit on the head of the child with a panga. Dr. Gatura explained further that if the injury were caused as a result of a fall or an accident, it could have affected other parts of the body for instance the neck and other tissues of the body. Dr. Gatura stated that he found no other such injuries and concluded that the injury was caused by a direct hit, and that death was as a result of the said injury. There is no evidence adduced by any other expert witness to contradict the findings of Dr. Gatura. Dr. Gatura was an expert who examined the deceased three days after the incident. He says that there was a direct hit of a single blow on the head of the deceased. And that kind of an injury could not have been caused by a fall or accident. I find no reason to dispute the findings of Dr. Gatura. In addition, the Doctor's evidence is consistent with the circumstantial evidence that the accused person was armed with a panga and that was last seen very close to the deceased child, which was alive at the time, and the evidence adduced establishes without a doubt that the injury suffered by the deceased was not caused by a fall or an accident but by a direct hit on the head with a panga.

Mr Ondieki has urged the court to disregard PW5's evidence. PW5, Peter, told the Court that he assisted P M to arrest the accused almost one year after the incident. That evidence even if it were to be disregarded does not affect the rest of the evidence. P M's evidence that he arrested the accused and took him to the Police received corroboration from the evidence of CPL. Biwott, PW11. CPL. Biwott re-

arrested the accused from Peter. The accused arrest is therefore without doubt.

Mr. Ondieki has urged the court to find that there is material contradiction and inconsistency in the evidence of the prosecution. Counsel submitted that while S and Murungu testified that the body of the deceased was found lying outside the house, P M the father of the deceased said that the body was found inside the home.

Ms. Macharia for the State has urged that if there was any contradiction of the nature alleged by Mr. Ondieki but the same did not overrule the rest of the evidence.

I have considered Mr. Ondieki’s submission. S and Murungu were the persons at the scene when this incident occurred. PM was in Loitoktok Town. I have read the evidence of PM and nowhere did he say that they found the accused lying inside the house. I find that there was no contradiction or inconsistency in the evidence of the prosecution as suggested by Counsel for the accused at all.

Having carefully considered the entire case I find that the prosecution has established its case against the accused person on the required standard, beyond any reasonable doubt.

I reject the accused defence, find him guilty as charged and convict him accordingly.

Dated this 5th day of February, 2010.

J. LESIIT
JUDGE

Read signed and delivered in the presence of:

Elisha.....Court clerk

Accused.....Present

Mrs. Tuta holding brief for Ms. Macharia for the State

Mr. Ondieki.....For the accused

J. LESIIT
JUDGE