



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CRIMINAL CASE NO. 28 OF 2006.**

**REPUBLIC.....PROSECUTOR.**

**VERSUS**

**LOSIKE LOPELE.....ACCUSED.**

**J U D G M E N T.**

**1. Losike Lopele** (hereinafter referred to as the accused person) was 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 22<sup>nd</sup> day of February, 2006 at Mapenzi Street in Lokichoggio in Turkana District within Rift Valley province, the accused person murdered **Lospang Echarait**. (Hereinafter referred to as the deceased) The prosecution adduced evidence from five witnesses in a bid to prove the offence of murder against the accused person.

**2.** The brief summary of the evidence by the prosecution's witnesses especially by **Ebel Lokwar (PW3)** was that on 22<sup>nd</sup> February 2006, at about 5.00 p.m. PW3 was drinking some local brew at a Manyatta along Mapenze street. He was in the company of the accused person and the deceased who were both were known to him and other people whom he said he did not know. The accused person demanded to know from the deceased why the deceased had trespassed on their area. The deceased person came from Lodwar while the accused person came from Lokichoggio. The accused person responded that he was free to live and work anywhere as the land belongs to God. Accordingly to PW3, the accused person hit the deceased with a walking stick on the head twice. The deceased fell down, and PW3 decided to look for help so he ran away but when he returned he found the deceased had been taken to the hospital. The stick that the accused person allegedly used to attack the deceased was produced in court as an exhibit.

**3.** The postmortem examination on the body of the deceased was carried out by **Dr. Kikwan** however, he could not attend court without unreasonable delay, and pursuant to the leave given to the prosecution by the trial court under the provisions of section 33 (b) of the Evidence Act, the report was produced by **Dr. Joseph Karimi Kinyua (PW2)** who told the court that he was familiar with the hand writing of **Dr. Kikwan**. According to the post mortem report, the body of the deceased was identified by **Samuel Lochomin (PW4)**, the brother of the deceased. The body of the deceased was at Lopinding sub-district Hospital on 24<sup>th</sup> February 2006, when the post mortem examination was carried out.

**4.** The post mortem report revealed that the deceased had a cut wound on the right, upper arm, about 4

cm long. He also had stitched wound on the side of the head which was about 15 cm long. There was a depressed skull fracture about 4 cm long with cerebral contusion i.e. part of the brain was bruised. There was also bleeding within the skull and in the opinion of the Doctor, the cause of death of the deceased was due to severe brain damage and bleeding in the skull due to head injury, as a result of trauma.

5. There was no other direct evidence as other witnesses especially by **Meshack Kamau Nyaga (PW1)** the arresting officer testified that he received a report from **Samuel Lochomi** that there was a fight along Mapenzi Street on 22<sup>nd</sup> February 2006 between a group of people and two other people and in the course of fighting the deceased and the accused person were injured. PW1 did not carry out investigations to establish whether there were other people at the scene. The other evidence by **Samuel Lochomin (PW4)** was formal, how he took the deceased to hospital on 22<sup>nd</sup> February 2006, and later identified the body for purposes of post mortem.

6. Put on his defence, the accused person gave unsworn statement. He testified that on the material date he was at a house where people were drinking local brew. While in that house, a person called **Loreng** disagreed with the deceased and a fight ensued. The accused person testified that he remained in the house but he was attacked by the crowd. He also sustained serious injuries from which he was hospitalized at Lopinding hospital. He was unconscious and remained in hospital under arrest. The accused person also relied on the evidence of **Joseph Ewite Lokwang (DW2)** who testified that on the material day at about 7.p.m. he received a message from one Christine that the accused person had been beaten to death. DW2 found the accused person lying by the roadside. He was badly injured and he was unconscious. He had injuries on the head and from which he was bleeding profusely. It is DW2 who took the accused person to hospital where he was admitted.

7. Counsel for the accused person submitted that the prosecution failed to prove their case to the required standard. **Mr. Bungei**, learned counsel for the accused person recited several contradictions which he identified from the prosecution's witnesses. For example, PW3 who was the only eye witness testified that it was only the accused who was armed with a stick and the accused person hit the deceased twice and he fell down when PW3 ran to look for help. Yet even the accused person was also seriously injured. PW3 also stated that there were other people who were drinking the local brew when the fight erupted and yet he claims to have ran away to look for help. The evidence of PW1 was also faulted because he did not carry out investigations, regarding the ownership of land that was said to have been the cause of the fight. Counsel urged the court to resolve those contradictions in favor of the accused person and acquit him of the charge of murder.

8. On the part of the state, **Mr. Onderi**, learned counsel for the state urged the court to find that the evidence of PW1, PW2, PW3 and PW4 established to the required standard that it was the accused person and no other caused the death of the deceased. He submitted that both the accused person and the deceased were admitted in hospital after they fought and sustained severe injuries. It is also common ground that the accused person comes from Lokichoggio and the deceased came from Lodwar. The offence took place in Lokichoggio the hometown of the accused person who had accused the deceased of trespassing in his territory. PW3 was an eye witness, thus the court should disregard the contradictions which are immaterial, and did not affect the weight of the evidence.

9. The evidence in this case was recorded by **Ochieng – J**, who was transferred from this station. I took over this matter at the submissions stage. I have evaluated the evidence as I have recapped, above albeit in summary. The issue for determination is singular that is whether the prosecution proved the case against the accused person to the required standard. The only direct evidence (eyewitness) is that by PW3. He stated that he, the accused person, the deceased and some other people whom he did not know were drinking at a local joint when the accused person demanded to know why the deceased had relocated to their land in Lokichoggio.

10. According to PW3 it is the accused person who hit the deceased with a walking stick twice on the head. The deceased fell down. PW3 then ran to look for help but when returned he did not find the deceased or the accused person at the scene. According to PW1, he received a report from PW4 on 24<sup>th</sup> February 2006 that there was a fight around Mapenzi Street, Manyatta between a group of people who

fought the accused and two others and during the fight both accused person and deceased were injured. PW1 did not carry out investigations to find out the people who were at the scene.

**11.** The evidence of PW3 is not cogent as he stated that there were other people at the scene where they were drinking but he did not know their names. It is also trite law that when dealing with evidence of a sole identifying witness, the court has to warn itself of the dangers of mistaken identity. This offence took place at a place where a group of people were drinking alcohol. PW3's evidence is not clear on what happened to the other people or how the accused person was injured if the fight was between the deceased and the accused person.

**12.** If proper investigations were carried out, the evidence of other people who were at the scene would have helped the court to unravel the mystery of whether the deceased was hit by the accused or by other people. What compounds the problem even further is the fact that the accused person was also injured. He was unconscious and was hospitalized. If one has to go with by the story of **PW3** it does not add up at all, as to how the accused person sustained such severe injuries if he hit the deceased twice with a stick on the head and the deceased fell down. Who assaulted the accused and who were the people who were fighting? There are several gaps in the prosecution's evidence which should be resolved in favor of the accused person.

**13.** Taking the totality of the evidence before this court, there is doubt in my mind that the prosecution has established beyond reasonable doubt that it is the accused person and none other caused the death of the deceased. Accordingly the accused person is hereby acquitted of the charge of murder.

**Judgment read and signed on 3<sup>rd</sup> December, 2010.**

**MARTHA KOOME.**

**JUDGE.**