



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

**Criminal Case 104 of 2005**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WILSON LEARPORA.....ACCUSED**

**JUDGMENT**

The accused, Wilson Learpora was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 15<sup>th</sup> November 2005 at Archer's Post, Lorupai area in Samburu District, the accused murdered Paul Lemojong (*hereinafter referred to as the deceased*). When the accused was arraigned before this court, he pleaded not guilty to the charge. The prosecution called nine witnesses in its bid to prove the charge of murder against the accused. After the close of the prosecution's case, the accused was put on his defence. He gave sworn statement in his defence. He denied having fatally injured the deceased. The accused called two witnesses in his defence. The two witnesses, his mother and his wife, testified that the accused was with them the entire period that it was alleged that the accused had assaulted the deceased. In effect, the two witnesses were offering an alibi defence on behalf of the accused. After the close of the case, Mr. Ndubi, learned counsel for the accused made submissions urging this court to acquit the accused. On the other hand, Mr. Mugambi for the State submitted that the prosecution had proved its case to the required standard of the law.

I will address the issues raised in this case after setting out the facts of the case as narrated by the prosecution witnesses. The deceased was employed by Samburu County Council as a ranger. He resided near the gate of the Samburu Game Reserve at Archer's Post. The deceased worked with PW1 Cleopas Lolosoli, PW2 Francis Olkadepe, PW4 Daniel Lekmai and PW7 Samuel Lenayara. On the 14<sup>th</sup> November 2005 at about 8.00 p.m., the deceased left his house and went to Lorupai village which was near Archer's Post. There was conflicting evidence of what the deceased had gone to do at the said village. PW1 suggested that there was a ceremony which was taking place at the house one Josephat while PW2 testified that there was a disco at Archer's Post. PW2 attended the disco.

At about 10.00 p.m., while PW1 was walking from Lorupai manyatta, he saw a group of adults and children congregating at a spot ahead of him. PW1 went to investigate and saw the deceased lying on the ground. He testified that there was moonlight. PW1 had a torch and pointed the torch at the deceased. He saw that the deceased had been injured on the head and on the stomach with a blunt object. The deceased was unconscious. He was not talking. PW1 realised the deceased was his fellow ranger with the Samburu County Council. He testified that he heard the children at the scene say that the deceased had been assaulted by one "Wilson." PW1 testified that he knew the Wilson that the children were referring to because there was only one Wilson who was at Lorupai village at the time. The said Wilson

is the accused in this case.

PW1 made a decision to have the deceased taken to hospital. While he was at the scene, PW2 arrived. He instructed PW2 to fetch a motor vehicle to ferry the deceased to hospital. PW2 went to the house of Josephat Learpora and sought his assistance. The said Josephat Learpora instructed PW5 Mike Leadismo, his driver, to take the deceased to hospital. PW5 took the deceased to Archer's Post Mission Hospital where the deceased was admitted. PW5 was in the company of PW1 and PW2 when they took the deceased to hospital. PW1 was told by the doctor at the Mission hospital that the injuries sustained by the deceased were serious and required medical intervention from either the Isiolo District Hospital or the Wamba Hospital.

PW1 informed PW4 to get the Samburu County Council motor vehicle so that they could ferry the deceased to a better hospital. PW4 secured the motor vehicle and went to the hospital with PW7. When they reached the Mission hospital, as arrangements were being made to transfer the deceased to a better hospital, the deceased succumbed to his injuries and died. A decision was made by the rangers to report the incident to the police. A report was made to the police based at Archer's Post Police Post. The officer in charge of the police post was PW9, IP Fred Makori. He testified that he received information that the deceased had been injured about 11.30 p.m. on the 14<sup>th</sup> November 2005. He was told that the deceased had been taken to Archer's Mission Hospital. PW9 accompanied by PW6 PC Kipngeno Rop and PW8 PC John Matung' visited the deceased at the said hospital but found that the deceased had already succumbed to his injuries and died.

PW9 was informed by PW1 that the deceased had been injured by the accused. He made the decision at that time to go to the house of the accused and arrest him. At about 1.20 a.m., he arrested the accused while he was asleep in his house. PW9 made arrangements to have the body of the deceased taken to Maralal District hospital where post-mortem was performed on the 17<sup>th</sup> November 2005 by PW3 Dr. Eric W. Hungu. He testified that the deceased had sustained an injury on his head that caused him to have internal haematoma. He was of the opinion that the cause of death of the deceased was due to intracranial haemorrhage. He produced the post-mortem report as *prosecution's exhibit No.1*. He also examined the accused's mental status to establish if he was mentally fit to stand trial. He formed the opinion that the accused was mentally fit to stand trial although at the time he was under treatment for a chest infection which was diagnosed in August 2005. The P3 form was produced as *prosecution's exhibit No.2*.

The case was investigated by PW9 who reached the conclusion that the accused should be charged with murder. PW9 testified that the only evidence that linked the accused with the death of the deceased was what he was told by PW1. PW1 told PW9 that he heard children state that it was "Wilson" who had assaulted the deceased and thus caused him to sustain the fatal injuries. PW1 was emphatic that although he did not see the accused assault the deceased, the children had properly identified him as the one who had assaulted the deceased.

When the accused was put on his defence he denied that he had assaulted the deceased. He testified that on the material day, he was selling retail goods at his kiosk after which he went home and slept because he was not feeling well. His testimony was corroborated by the testimony of his mother DW2 Justine Learpora and his wife DW3 Sarah Learpora. They testified that the accused was with them at the time that he is alleged to have assaulted the deceased.

In criminal cases, it is the duty of the prosecution to establish the guilt of an accused person to the required standard of proof beyond reasonable doubt. An accused person is under no obligation to prove his innocence. His duty is only restricted to raising reasonable doubt on the prosecution's case. The onus of proving a criminal case is always on the prosecution and does not shift to an accused person. This court is required to evaluate the evidence that was adduced by the prosecution witnesses and the defence offered by the accused so as to reach its own determination whether or not the prosecution has established the guilt of the accused in this case.

In the present case, the prosecution did not adduce direct evidence. No witness testified before the court that he had seen the accused assault the deceased. PW1 testified that when he arrived at the scene where

the deceased was lying on the ground, he heard children saying that the deceased had been assaulted by one “Wilson.” PW1 testified that he had no doubt that the children were referring to the accused who at the time was the only “Wilson” who was residing at the village. He testified that although there was another “Wilson” from the area, at the material time, the said Wilson was working some distance of about 15 km from the scene. PW1 testified that when the accused was arrested by the police, and was asked if he had assaulted the deceased, the accused answered “Yes.” The police officers who accompanied PW1 during the arrest of the accused however did not corroborate the testimony of PW1. PW6, PW8 and PW9 testified that they arrested the accused and took him to Wamba Police Station. None of the three police officers testified that they had heard the accused admit that he had assaulted the deceased. There is no other evidence which was adduced by the prosecution to connect the accused with the death of the deceased.

None of the children who allegedly saw the accused assault the deceased were called by the prosecution to give evidence before court. It is unclear if PW1 actually heard the children claim that it was the accused who had assaulted the deceased. This is because the incident took place at night and further PW1 was unable to identify any of the children who claimed that it was “Wilson” who had assaulted the deceased. There was evidence also that apart from the fact that PW1 claimed that the “Wilson” referred to was the accused, the children did not specifically mention that it was the accused. The accused was arrested in his house while he was with his wife. No one, other than PW1, heard the accused say that he had assaulted the deceased. Since there were more than five people at the scene during the arrest of the accused, it was improbable that none of the other witnesses heard the deceased say that he had assaulted the deceased.

If the evidence adduced by the prosecution’s witnesses is compared to the evidence adduced by the accused and his witnesses in his defence, then it is most probable that the accused was telling the truth when he stated that he was at his house when the deceased was assaulted and consequently fatally injured. The accused testified that he was sick at the time and after taking his supper, he went to sleep. This testimony was corroborated by DW2 and DW3. Whereas the testimonies of DW2 and DW3 may be dismissed as self serving and meant to exonerate the accused from criminal liability, in light of the evidence adduced by the prosecution witnesses, the said evidence could well be true.

I have carefully evaluated the evidence adduced by the prosecution witnesses. It is clear that the accused was arrested on the basis of the information of PW1 who stated that he had heard children at the scene say where the deceased was found lying on the ground having been injured. The deceased was unconscious. PW1 testified that the children who were at the scene told him that it was “Wilson” who had assaulted the deceased. None of the children who allegedly saw Wilson was called to testify before court. The testimony of PW1 as regard what he heard the children say was therefore hearsay evidence. This is inadmissible evidence. The deceased was assaulted at night. PW1 testified that when he went to the scene where the deceased was found lying on the ground, he used a torch to identify the deceased. It is therefore probable that, even if this court were to accept that the children had identified the accused as the one who assaulted the deceased, that they could be mistaken in their identification. Being at night, it was probable that the accused was mistakenly identified as being at the scene when the deceased was fatally assaulted.

I have further evaluated the evidence by the prosecution witnesses and found that during the night that the deceased was fatally assaulted, there were many activities taking place at the said Lorupai village. For instance, PW2 testified that there was a disco at the said village. There was also a ceremony at a house of a man called Josephat who was commemorating the death of his mother. PW1 testified that he had attended the ceremony at the house of Josephat. It is therefore clear that there were many people who were walking around within the village at the material time that the deceased was fatally assaulted. The deceased could have been assaulted by any of the revellers. It cannot be ruled out that the deceased could have been assaulted by the accused. However, the prosecution did not adduce sufficient evidence to enable this court convict him on the charge of murder. The fact that the prosecution witnesses said that the accused was the only “Wilson” who was resident at the village at the material time, is not sufficient for this court to convict the accused in the absence of any other cogent evidence. The prosecution did not adduce any evidence that could have motivated the accused to assault the deceased. There is not evidence

to suggest that the accused was an acquaintance of the deceased.

When the accused was put on his defence, he offered an alibi defence. He testified that he was sick on the material day. In the evening, after taking supper, he went to sleep. He testified that he was woken up in the middle of the night when he was asleep in his house with his wife. He denied that he was anywhere near the scene where the deceased was found having been assaulted. His alibi defence was corroborated by the testimonies of DW2 and DW3. It was further partially corroborated by the testimonies of PW1, PW8 and PW9 who testified that upon being informed that the deceased had succumbed to his injuries, they went to the house of the accused and found him sleeping in his house.

The alibi defence by the accused was not displaced by the prosecution. No evidence was adduced by the prosecution which placed the accused at the scene other than what PW1 allegedly heard the children say that it was the accused who had assaulted the deceased. In **Wangombe vs Republic [1980] KLR 149**, the Court of Appeal held that when an accused person raises an alibi in answer to the charge made against him, he assumes no burden of proof and the burden of proof in his guilt remains with the prosecution. It was upon the prosecution to challenge the alibi defence raised by the accused. They failed to do so. Instead they offered insufficient evidence which cannot sustain a conviction.

The three assessors who assisted this court during the hearing of this murder trial reached similar verdicts that the accused was not guilty. I agree with their verdicts. The sum total of my analysis of the evidence on record is that the prosecution has failed to establish its case on the charge of murder against the accused. The accused is therefore acquitted of the charge of murder and is ordered set at liberty and released from prison unless otherwise lawfully held.

It is so ordered.

**DATED at NAKURU this 31<sup>st</sup> May, 2007**

**L. KIMARU**

**JUDGE**