



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 143 Of 2003

REPUBLIC.....PROSECUTOR

VERSUS

LESHAN OLE SAPOR.....ACCUSED

JUDGMENT

The accused, Leshan ole Sapor 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 1st of December 2002 at Sekenani Gate Masai Mara Game Reserve, Narok District the appellant murdered Alice Wausi Mutungi (*hereinafter referred to as the deceased*). The accused pleaded not guilty to the charge. At the hearing of the case, the prosecution called eleven witnesses to prove its case against the accused. When the accused was put on his defence he opted to give a sworn statement.

The facts of this case as can be gleaned from the evidence of the prosecution witnesses is as follows: On the 1st of December 2002 PW1 Mutungi Kioko accompanied by his wife, the deceased attended a meeting called by their hosts the Maasai at a place called *maendeleo manyatta*. There were about thirty people at the meeting. The meeting had been called to discuss development issues. The deceased who was a herbalist had been invited to attend the meeting by some of her customers. At about 5.30 p.m., PW1 heard murmurs emanating from the people at the meeting and after a while he saw the people dispersing. They were running helter skelter. PW1 and the deceased were left at the scene. PW1 testified that he then saw the accused armed with a bow and arrows. After a while he heard the deceased say that she had been hit with an arrow on her back side. The deceased fell down, convulsed and died. PW1 testified that he shouted seeking help from the people. A report was made to the police and the body of the deceased taken to Narok District Hospital Mortuary where post-mortem was conducted by Dr Abakalwa Gerishom (PW10). When he was cross-examined, PW1 conceded that he did not see the accused actually shoot the deceased with an arrow but saw the accused (*whom he knew*) running away from the scene after the incident. No other person saw the person who shot the arrow that fatally injured the deceased.

PW8 Kaitalel ole Kilisho and PW9 Sonkoi ole Keser were at the meeting where the deceased was shot with an arrow. Both of them testified that when they heard the murmurs emanating from the people at the meeting they run in different directions not knowing what was going on. PW9 thought that the people had dispersed from the meeting because someone had seen a snake. Both PW8 and PW9 narrated how after the commotion had calmed down, they went to the place where the meeting was being held and saw that the deceased had been shot with an arrow. PW8 reported the incident to the police who later came and took the body of the deceased from the scene. PW9 testified that he saw the person who shot the

arrow at the deceased but could not identify him because he had covered his head and run towards the bush after fatally shooting the deceased.

PW2 Olosurua ole Pesi and PW3 Kerepei ole Sapor, relatives of the accused, narrated how they received information that the deceased who had been treating the accused for some years had been killed by someone who shot her with an arrow. PW3 told the court that the accused sometimes used to suffer mental breakdown and would neglect to take care of his animals and children. PW2 and PW3 did not know who killed the deceased. PW6 AP Sergeant Joseph Mutai testified that after the incident the accused disappeared from the area never to be seen for nearly a year. On the 19th of October 2003, PW6 received information that the accused had returned to his homestead. PW6 was informed by PW4 Peter Olongai ole Narok who told him that the accused had gone to his house at 4.00 a.m. in the morning and told him that he was going to kill him because he alleged that PW4 had an affair with one of his wives. PW4 testified that the accused had threatened him and told him he was going to kill him the way he killed another woman. PW4 further testified that at the time he was being threatened by the accused, the accused was armed with a bow and arrows. When PW6 received the information, he went to the homestead of the accused accompanied by PW5 APC Richard Cheruiyot. They were able to arrest the accused. PW5 and PW6 then took the accused to the police patrol base at Masai Mara Reserve where they handed him over to PW7 Inspector Reuben Chumo. PW7 testified that he took the accused to Narok Police Station where investigations were conducted and later the accused was charged with murder.

PW10 Dr Abakalwa Gerishom testified that on the 4th of December 2002, he conducted a post-mortem on the body of the deceased. He established that there was a penetrating stab wound on the left gluteal region measuring 5x1cm. PW10 recovered an arrow 15cm long with spikes which had been lodged in the left hip joint. The spike was produced in evidence as an exhibit. He observed that the surrounding tissue was necrotic. There was generalized haemorrhage on tissues and organs. The liver was haemorrhagic. The doctor formed an opinion that the cause of death of the deceased was toxic shock secondary to compartment bleeding due to a poisoned arrow injury.

PW11 PC Martin Matiti investigated the case and reached the conclusion that the accused should be charged with murder. He testified that from his investigations he established that the accused had killed the deceased because he thought that the deceased had bewitched him.

When the appellant was put on his defence, he denied that he killed the deceased. He denied that he had met with the deceased in his life time. He testified that he had been arrested by the police on the 19th of October 2003 when he had gone to the house of PW4 to claim back his children. He testified that PW4 had taken away one of his wives and had framed him in his case to remove him from the local scene. He reiterated that he had not killed the deceased.

This, in a nutshell is the evidence that was adduced against the accused by the prosecution. This court has also summarized his defence. It is the duty of the prosecution to prove its case against an accused person to the required standard of prove beyond reasonable doubt. In the instant case, there is no doubt that the deceased was killed when she was shot by a poisoned arrow. She died instantly at the scene where she was shot. The evidence of PW10 clearly establishes that the deceased died from toxic shock as a result of being shot by a poisoned arrow. The issue for this court to determine is whether it is the accused person who shot the deceased with an arrow and whether the accused shot the deceased with the said arrow with malice aforethought.

No one, apart from PW1 saw the person who shot the deceased with an arrow. PW1 testified that it was the accused who shot the deceased with an arrow. On being cross-examined by the counsel for the accused, PW1 testified that he had not seen the accused shoot the deceased with a poisoned arrow but only saw him running away from the scene after the incident. PW9 testified that the person who shot the deceased ran towards the bush having had his head covered or concealed. PW9 was not able to identify him. Upon evaluating the evidence, it is clear that no witness who was at the scene at the time was able to positively identify the person who shot the deceased with an arrow. PW8, the Area Assistant Chief who was also at the scene did not see the person who shot the fatal arrow.

The circumstances at the scene at the material time as explained by PW1, PW8 and PW9 was sheer mayhem and panic. The people who were at the meeting ran in different directions not knowing the cause of the panic. Some like PW9 thought that one of the people in the meeting had seen a snake thereby triggering the commotion. PW1 who did not understand the language of the people at the meeting remained at the scene with the deceased. It is at that point that the deceased was shot with poisoned arrow. PW1 admits that he did not see the person who shot the fatal arrow. He however saw the accused ran away from the scene. On re-evaluation of the evidence it is possible that the accused was seen running from the scene just like the other people who were at the meeting not knowing what caused the commotion.

Another piece of evidence that the prosecution sought to rely on in its case against the accused is the evidence adduced by PW4 who testified that the accused had threatened him about a year after the incident that he would kill him the same way he had killed an unnamed woman. At the time the accused is said to have been armed with a bow and arrow. PW6 Sergeant Joseph Mutai testified that the accused disappeared from his homestead after the death of the deceased only to re-appear nearly one year later. Although PW3, a relative of the accused testified that the accused used to suffer mental breakdown sometimes, no evidence was adduced by the prosecution to establish whether during this period of mental breakdown the accused became violent. The only evidence that points to the fact that the accused could be violent is that of PW4 who testified that the accused had threatened him with a bow and arrows having suspected him of having an affair with one of his wives.

This evidence is circumstantial evidence and as was held in the case of **James Mwangi –vs- Republic [1983] KLR** 327 by the Court of Appeal at page 331:

“In a case depended on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (Sarkar on evidence 10th Edition page 31). It is also necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – Teper –vs- The Queen [1952] AC 480 at page 489.”

In the present case, the fact that the accused boasted about one year later that he had killed an unnamed woman to PW4 does not necessarily mean that he killed the deceased. Further, the fact that he was armed with a bow and arrows at the time does not mean he was the one who shot the deceased with the deadly arrow. His disappearance from his homestead after the incident, while suspicious does not mean that he was a fugitive from justice or that he had disappeared to run away from being brought to book. The evidence that was adduced by the prosecution clearly is insufficient to convict the accused on the charge of murder. The evidence of PW1, the husband of the deceased to the effect that he saw the accused running from the scene does not in any way point to the guilt of the accused. There is evidence that everybody who was at the meeting ran away save for the deceased and PW1.

PW9 testified that the person who could be said to be the assailant had covered his face and therefore could not be identified. PW11 the Police Officer who investigated the case testified that the accused is said to have stated that the deceased had bewitched him. PW11 was of the view that this formed the motive for the accused to kill the deceased. However, no witness testified to this fact. It is the view of the court that this theory must have been a figment of the imagination of the investigating officer. The entire evidence of the prosecution is that of suspicion. As was held in the case of **Sawe –vs- Republic [2003] KLR** 364 by the Court of Appeal at page 375,

“We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made it clear in the case of Mary Wanjiku Gichira –vs- Republic (Criminal Appeal No. 17 of 1998) (unreported) suspicion however strong cannot provide a basis for the inference of guilt which must be proved by evidence.”

In this case while there is strong suspicion that the accused could have shot the fatal arrow, there is no evidence pointing to him alone as the person who could have done so. There are too many gaps in the prosecution case. The denial by the accused that he shot the deceased cannot therefore be dismissed off hand. In the circumstances of this case, I find that the prosecution has failed to prove its case on the charge of murder against the accused to the required standard of proof beyond any reasonable doubt. The assessors who assisted this court during the hearing of this murder case, all entered a verdict of not guilty. I agree with them. The accused is acquitted of the charge of murder. He is ordered discharged from remand and set at liberty unless otherwise lawfully held.

DATED at NAKURU this 3rd day of February 2006.

L. KIMARU

JUDGE