



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

Criminal Case 122 of 2003

REPUBLIC.....PROSECUTOR

VERSUS

LCHOKITAN LESWAKERI.....ACCUSED

JUDGMENT

The accused, Lchokitan Leswakeri was charged with murder contrary to **Section 203 as read with Section 204 of the Penal code**. The particulars of the charge were that on the 23rd of April 2002 at Mbaringon village in Samburu District, the accused murdered Machoinne Lengapaati (*hereinafter referred to as the deceased*). When the accused was arraigned before this court, he pleaded not guilty to the charge. The prosecution called a total of seven witnesses in its bid to prove its case on 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 testimony in his defence. Mr. Gekongá learned counsel for the accused made closing submissions urging this court to acquit the accused as the prosecution had not proved its case against the accused to the required standard of proof beyond reasonable doubt. On his part, Mr. Gumo the Assistant Deputy Public Prosecutor submitted that the prosecution had proved its case on the charge of murder.

The facts of this case as gleaned from the evidence of the prosecution's witnesses are as follows; on the 22nd of April 2002 PW2 Asha Maria Lengapaati, the widow of the deceased, had just arrived to her home after fetching water from a nearby homestead. It was about 7.00 p.m. When she reached her house, she testified that the deceased started beating her for no apparent reason. She recalled that she did not scream but instead chose to run away and seek refuge in the house of a neighbour. She testified that she did not see the accused during the time the deceased was beating her. While at the house of the neighbour, she heard the deceased screaming that he had been killed by the accused. She testified that the deceased mentioned the name 'Lchokitan' three times. She testified that the deceased was the uncle of the accused.

After she heard the screams, she was assisted by some elders to go back to her house where she found the deceased had already died. She saw that the deceased had sustained a stab wound on his chest. She recalled that the deceased and the accused were friends and had not quarrelled prior to the day of the incident. She testified that on that day it was the first time for the deceased to beat her. She reiterated that she had not seen the accused at the scene on the material day although she heard the deceased say that 'Lchokitan' had killed him about three times before he died. She further reiterated that there was no other person known by the name 'Lchokitan' in the manyatta where she used to live. She testified that after the incident the police arrived at the scene and took away the body of the deceased. She did not

identify the body of the deceased when the post-mortem was conducted.

PW3 Murkesi Leoshoa recalled that on the material evening at about 7.00 p.m. he was in the house of a neighbour called Lekushore chatting with some of his friends when he heard screams emanating from the house of the deceased. He testified that he heard the deceased screaming that 'Lchokitan' had killed him about four times. He went to the house of the deceased and found the deceased was alive but was unconscious. There were other people at the compound of the deceased. He did not see the accused at the scene.

He testified that he was certain the deceased was referring to the accused because there was no other person by the name 'Lchokitan' in their manyatta. He recalled that the deceased died soon after he had arrived at the scene. He saw that the deceased had sustained a deep wound on his chest. He recalled that the deceased did not speak to anyone at the scene as he had lost consciousness. He testified that he did not see any weapon that was used to kill the deceased. After the incident, he made the report to the chief who later made a report to the police. He recalled that the accused used to visit the deceased at his homestead. After the incident, the accused disappeared from the manyatta.

PW1 George Lembushona, the chief of Kisima location Samburu District testified that on the 22nd of April 2002 at about 9.00 p.m. while he was at his home, he received information from the Mbaringon manyatta that the deceased had been killed. He went to the scene and saw the deceased lying dead outside his house. The deceased had a stab wound on the chest. He also saw a wound on his back. He did not see the weapon that was used to stab the deceased. He was informed that the accused had intervened when the deceased was beating his wife and in the course of the intervention, the accused killed the deceased. PW1 knew that the deceased was an uncle of the accused. After the incident, the accused ran away from the scene. PW1 did not find him at the scene. He reported the incident to the police who went to the scene and collected the body of the deceased. He testified that the person who gave him the information of the death of the deceased was PW3. He testified that prior to the incident, he had not heard that the deceased had had a disagreement with the accused. He did not know where the accused was arrested but he recalled seeing him after a week at the police post when he was already arrested.

PW5 PC Martin Namnana and PW7 PC Bernard Mutai testified that on the 28th of April 2002, they received information that the accused was hiding in a nearby manyatta. The manyatta in question was about two kilometres from the police post. They recalled that they went to the said Manyatta at about 9.00 p.m., and with the assistance of the elders managed to arrest the accused. They took the accused to the Kisima police post and later to Maralal police station where the accused was charged with the current offence. They denied that they had arrested a person who was not connected with the death of the deceased. They testified that the information they had received connected the accused with the death of the deceased.

PW4 PC Samson Lenkopito, a police officer attached to Maralal police station testified that on the 23rd of April 2002, he visited the scene of the murder and collected the body of the deceased. At the scene of the murder, he saw body of the deceased. He saw that the deceased sustained a piercing chest wound. He recorded statements from PW2 and a woman called Mary Lenashaiya. He commenced investigation and established that witnesses had heard the deceased screaming that he had been stabbed by the accused. He established that the deceased was the uncle of the accused. After the incident, he learnt that the deceased had disappeared from the scene. PW4 removed the body of the deceased from the scene and took it to Maralal District Hospital Mortuary where a post-mortem was performed on the 29th of April 2002 by Dr. Samuel Amwayi. PW4 recalled that on the 28th of April 2002 the accused was arrested by the police officers based at Kisima Police post and taken to Maralal Police station. On the 2nd of May 2002, he took the accused to Maralal District hospital where he was examined by Dr. Amwayi to establish his mental status. He recalled that when he visited the scene the witnesses told him that the accused had ran away from the scene with the murder weapon. He confirmed that no witness actually saw the accused stab the deceased.

PW6 Dr. Amwayi Samuel Anyangu recalled that he performed a post-mortem on the body of the deceased on the 29th of April 2002 at Maralal district hospital mortuary. He observed that there was a wound on the left side of the chest of the deceased which measured 12cm x 4cm. At the lateral aspect of the chest there was a smaller wound measuring 8cm x 3cm. On internal examination, he observed that the left lung of the deceased had extensively been lacerated. The heart had a wound on the lower side. He formed the opinion that the cause of death of the deceased was a penetrating cardiothoracic injury secondary to a knife stab. He produced post-mortem report as *prosecution's exhibit No. 1*.

After the close of the prosecution case, this court found that the prosecution had established a prima facie case to put the accused on his defence. The accused in his sworn testimony denied that he had stabbed the deceased. He recalled that he had been arrested at a manyatta neighbouring his home when he was relaxing with his friends. He testified that he had a good relationship with the deceased and his wife. He denied that he could have intervened when the deceased was beating his wife because according to Samburu culture only the age mates of the deceased could have intervened if he was beating his wife. He testified that he knew that the deceased used to beat his wife. He testified that he did not hear the deceased scream that he had been assaulted by someone of his name. He testified that the deceased could have been referring to another person of a similar name who resided within the locality. He urged the court to acquit him of the charge of murder.

In all criminal cases it is the duty of the prosecution to prove its case to the required standard of proof beyond reasonable doubt. In the present case the prosecution relied on circumstantial evidence and the evidence a dying declaration by the deceased in its bid to establish the guilt of the accused. There was no direct evidence. No one saw the accused fatally stab the deceased. The circumstantial evidence adduced was that of PW2, the wife of the deceased, who testified that on the material evening the deceased beat her for no apparent reason. She left her young child at home and sought refuge at the house of a neighbour. Soon thereafter PW2 and PW3 heard the deceased scream that he had been killed by the accused. Both witnesses testified that they heard the deceased scream more than three times that it was a person called 'Lchokitan' who had killed him. PW1 testified that when he was informed that the deceased had been killed, he immediately visited the scene and was told that the accused had intervened when the deceased was beating his wife and in the course of the intervention, the accused fatally stabbed the deceased. PW1 and PW3 testified that after the incident, the accused disappeared from the manyatta and was only arrested about six days later in a different manyatta by PW5 and PW7. PW2 and PW3 did not however recall seeing the accused at the scene on the material evening. The only evidence that was adduced by the prosecution alluding to the fact that the accused was present at the scene is the dying declaration of the deceased who stated that it was 'Lchokitan' who had killed him.

Does this evidence establish that it was the accused who had fatally stabbed the deceased? The law as regard dying declarations is now well settled. As was held by the Court of Appeal in **Okethi Okale & others –vs- Republic [1965]EA 555** at page 558 para E;

*“In this respect we would quote the following passage from the judgment of the court in **Jasunga Akumu –vs- R. ((1954)21EACA** at page 334): ‘the question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from **FIELD ON EVIDENCE (7thEdn.)** has repeatedly been cited with approval:*

*‘the caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting; and ... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed...the deceased may have stated his inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them.’ (**Ramzani bin Mirandu (3); R. –vs- Okulu Eloku (4); R. –vs- Munyovya bin Musuma (5)**). Particular caution must be exercised when at attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (**Ramzani bin Mirandu (3); Munyovya bin Musuma (5)**). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is no guarantee of accuracy (*ibid*). It is not a rule of law that, in order*

to support a conviction, there must be corroboration of a dying declaration (R. –vs- Eligu odel (6); Re Guruswami (7), and their may be circumstances which go to show that the deceased could have been mistaken in his identification of the accused. (See, for instance the case of the second accused in R. –vs- Eligu Odel (6) and R. –vs- Epongu Ewunyu (8)). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross examination, unless there is satisfactory corroboration.”

In the present case, as stated earlier in this judgment, PW2 and PW3 heard the deceased scream that he had been killed by ‘Lchokitan’. Evidence was adduced by the said witnesses that there was no other person referred to as ‘Lchokitan’ in the manyatta where the accused and the deceased lived. There is also evidence that the deceased used to beat his wife, PW2. Although PW2 denied that the deceased used to beat her, PW1 and the accused confirmed in their testimony that the deceased used to beat his wife. The scenario explained by PW1 in his evidence that the deceased was killed by the accused when he intervened when the deceased was beating his wife is therefore most likely to be true. No one saw the accused stab the deceased. The evidence of PW1, PW2 and PW3 corroborates the dying declaration by the deceased that it was the accused who fatally stabbed him.

It is apparent that in the manyatta where the deceased and the accused lived there were not many people. The deceased could not therefore have been confused when he stated that it was the accused who had stabbed him. The testimony of the accused that it could have been another ‘Lchokitan’ who stabbed the deceased is therefore incredible. The deceased was certain that it was the accused who had stabbed him. He was clear in his mind that the stab wound caused his death and therefore screamed to alert his fellow villagers that it was the accused who had stabbed him. The incident occurred at about 7.00 p.m. There was therefore sufficient light to enable the deceased identify the accused. It is apparent that the motive of the stabbing of the deceased by the accused was the intervention by the accused when the deceased beat up his wife.

Upon evaluating the evidence adduced, it is the holding of this court that the circumstantial evidence and the evidence of the dying declaration adduced by the prosecution established the guilt of the accused on the charge of murder. It is evident that the accused, who was aware that the deceased used to beat his wife, intervened on the material evening and stabbed the deceased on his chest thereby causing him to sustain fatal injuries. Although PW2 and PW3 were not at the scene when the accused stabbed the deceased, they heard the deceased scream that he was being killed by a person of the name ‘Lchokitan’. PW3 immediately went to the scene and found the deceased barely alive. PW3 did not manage to speak with the deceased. PW2 and PW3 testified that there was no other person by the name ‘Lchokitan’ in the manyatta where they used to reside. They were certain that when the deceased screamed that ‘Lchokitan’ was killing him, the deceased meant the accused person and no one else. Having evaluated the evidence, and putting into consideration the applicable law, it is clear that the dying declaration by the deceased was corroborated by the testimony of PW1, PW2 and PW3 of the circumstances surrounding the fatal stabbing of the deceased.

It is further evident that the accused stabbed the deceased intending to seriously injure him. His subsequent death was therefore within the realm of expectation resulting from the said stabbing. It is clear that no fight took place between the deceased and the accused. The accused therefore stabbed the deceased because he was unhappy that he had beaten his wife once again. After stabbing the deceased, the accused disappeared from the scene. In the circumstances of this case this court can infer that the act of the accused in disappearing from the scene was an indication that the accused knew that he had fatally stabbed the deceased. As was held by Etyang J. in **Republic –vs- Ernest Gathecha Kariuki Nairobi HC Criminal Case No. 64 of 1997 (unreported)** at page 19 of the judgment;

“In the case of Malowa –vs- Republic [1980]KLR 110 where the appellant had disappeared from his home for six months after committing an offence, the court of appeal held that the appellant’s conduct, his disappearance from his home and remaining absent from home for six months, was a piece of circumstantial evidence which sufficiently corroborated the deceased’s dying declaration.”

In the present case, the accused disappeared from his home at the manyatta immediately after stabbing the

deceased and went to a different manyatta some distance from his home. He was arrested at the said manyatta when the police received information that he was hiding in the said manyatta.

Taking into consideration the totality of the evidence adduced, it is clear that the prosecution proved its case on a charge of murder against the accused person. The defence offered by the accused did not dent the otherwise strong evidence adduced by the prosecution. The assessors who assisted this court during the hearing of this murder case reached a similar verdict to that of this court that the accused was guilty of murder. He is accordingly convicted on the charge of murder.

DATED at NAKURU this 30th day of June 2006.

L. KIMARU

JUDGE