



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 46 of 2002

REPUBLIC.....PROSECUTOR

VERSUS

REUBEN EBENYO LEBEYOK.....ACCUSED

JUDGMENT

The accused, Reuben Ebenyo Lobeyok was charged with **Murder** contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that during the night of the 14th & 15th of July 2001 at African Location, Rumuruti, Laikipia District, the accused murdered Jared Wambugu (*hereinafter referred to as the deceased*). The accused pleaded not guilty to the charge. The prosecution called a total of eight witnesses in its bid to prove its case against the accused. When the accused was put on his defence, he offered sworn evidence. After the close of the prosecution's and the defence case, Mr Orege, learned counsel for the accused and Mr Koech, learned State counsel made rival submissions urging this court to find either in favour of the accused or in favour of the prosecution. This court shall revert to the submissions made after setting out the facts of this case.

On the 14th of July, 2001, PW2 Margaret Chepkoech Koskei held a birthday party at her parent's house at Rumuruti. She invited her neighbours who included the deceased. During the party, traditional liquor (Busaa) was served to the visit night. Among those in attendance at the party were the deceased, PW3 Antony Kariuki and PW4 Moses Mwangi Ndege. According to PW4, the deceased and the accused were drinking busaa outside the house of PW2. At about 10.30 p.m., a quarrel ensued between the accused and the deceased.

According to PW4, the accused and the deceased quarreled because the accused had demanded that the deceased buys him busaa. The deceased was reluctant to buy the accused busaa and told him (the accused) to stop begging. The accused did not take kindly to the remark which was made by the deceased. PW4 testified that the accused and the deceased started pushing each other while quarreling. They pushed each other outside the compound of the house of the parents of PW2. PW4 did not intervene in the quarrel between the accused and the deceased but instead continued taking his drink.

After a short while, PW4 heard PW2 screaming that the deceased had been stabbed. According to PW2, as she was inside her house attending to the visitors who had attended the party, she heard someone calling her name in an insistent voice. She went to investigate and discovered that it was the deceased who was calling her. The deceased was a few metres outside the gate to her parent's compound. The deceased told PW2 that he had been stabbed by the accused. He referred the accused by his name Reuben. PW2 did not have any doubt that the deceased was referring to the accused because she knew the accused well prior to the said incident. She testified that she knew the accused because she had schooled with a younger sister of the accused. The accused confirmed in his defence that PW2 knew him well because of the school connection with his sister. PW2 testified that she did not however see

the accused at the scene where she found the deceased. Upon realizing that the deceased had been stabbed, PW2 screamed attracting the attention of the people who were at the party. PW3 and PW4 responded to the screams and went to where the deceased was lying on the ground. PW3 and PW4 made a decision to look for the accused but they were unable to trace him. They later went to their respective homes.

Meanwhile as PW1 Stephen Maina was going to sleep in house within the neighbourhood of the house of the parents of PW2, he heard screams emanating from the direction of the home of PW2. PW1 thought that it was his sister who had gone to the nearby church who was in trouble. However, after a few moments his sister arrived home. He went to sleep. He was woken up at night by a friend of the deceased called Paul who told him that the deceased had been stabbed. He woke up his father PW6 Peter Gitonga Maina. Together they went to the nearby dispensary but they were not able to trace the deceased. They decided to go to the police station. They found the deceased being carried towards the direction of police station.

They saw that the deceased was badly injured. They made a decision to take the deceased to the Nyahururu District Hospital.

The deceased was admitted at the said Nyahururu District Hospital for a day after which they were advised to transfer the deceased to the Provincial General Hospital Nakuru where the deceased was admitted for a period of 1½ months. PW1 and PW6 recalled that when they took the deceased to hospital, he was conscious. He told them that he had been stabbed by the accused. PW1 and PW6 were aware of whom the deceased was referring to because he told them he had been stabbed by Reuben. PW6 testified that the deceased was discharged from hospital on the 20th of August 2001 and advised to attend the nearby Rumuruti Health Centre for follow-up. However the condition of the deceased deteriorated and took a turn for the worse and on the 2nd of September 2001, he succumbed to his injuries and died. After his death, the deceased's body was taken to Nyahururu District Hospital where a post-mortem was performed by PW7 Dr. David Gicheru Kariuki who formed the opinion that the cause of death of the deceased was severe intestinal obstruction secondary to a penetrating abdominal injury (Postmortem report produced as Prosecution's exhibit No.1). PW7 however conceded that the deceased could have died due to the infection in his abdomen which could have been caused when surgery was performed on him to stitch up the stab wound.

PW5 Joseph Lore Longori, the area Assistant chief of Rumuruti location testified that he was informed that the accused had stabbed the deceased on the night of the 14th of July 2001. He looked for the accused but was unable to trace him. On the 3rd of September 2001, he was informed that the accused had been seen at his homestead. With the assistance of a vigilante group, he was able to apprehend the accused. The accused was taken to Rumuruti Police Station where he was charged with the offence of murder after he had been examined by a doctor who certified that he was mentally fit to stand trial (P.3 form produced as prosecution's exhibit No.3). PW8 PC Richard Ndhiwa Kemei was assigned to investigate the case. He investigated the case by visiting the scene of crime and also by recording the statements of the witnesses. He testified that upon the conclusion of the investigations he reached the decision that the accused should be charged with the offence of murder. He however testified that he was not able to recover the knife that was used to stab the deceased.

When the accused was put on his defence, he offered an alibi defence. He testified that he did not go to the homestead of PW2 on the night of the 14th of July, 2001. He testified that on that particular night he was asleep in his house at African village with his family. He testified that he had not taken any alcohol on the 14th of July, 2001. On the following day, the 15th of July, 2001, he traveled to Suguta Marmar to purchase goats for sale. He later transported the goats to Nyeri. He was therefore surprised on the 3rd of September, 2001 when he returned

home, he was arrested and charged with an offence which he had no knowledge of. He recalled that when the area chief was apprehending him, he was told that he had stolen a bicycle of one Samwel Charagu. He denied that he had stabbed the deceased causing him to sustain fatal injuries. After the close of the defence case, Mr Orege, learned counsel for the accused made submissions urging this court to acquit the accused because the prosecution had not established its case on the charge of murder to the required standard of proof beyond reasonable doubt. Mr Koech on the other hand submitted that the prosecution had adduced sufficient evidence to establish its case against the accused on the charge of murder.

In all criminal cases, it is the duty of the prosecution to adduce evidence to establish the guilt of an accused person in accordance with the charge which has been brought against such an accused person. The burden of proving the guilt of an accused person rests with the prosecution. The accused cannot be called upon to prove his innocence. That burden of proof has to be discharged to the required standard of proof beyond reasonable doubt. In the present case, no one saw the accused stab the deceased. The incident took place at night. However, the prosecution adduced circumstantial evidence in its bid to establish that it was the accused and no one else who could have committed the offence.

In law, for the prosecution to rely on circumstantial evidence to secure the conviction of an accused person, it must establish that the facts incriminating the accused is such that a court of law considering all the circumstances of the case would reach no other conclusion other than the fact that it was the accused who committed the offence. The said incriminating evidence against the accused must be incompatible with the innocence of the accused. As was held by the Court of Appeal in the case of *Sawe vs Republic* [2003]KLR 364 at page 372;

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution, It is a burden, which never shifts to the party accused.”

In the present case, PW4 testified that he saw the accused and the deceased quarrel after which they pushed each other outside the compound of the house of the parents of PW2. Some moments later, PW4 heard PW2 scream that the deceased had been stabbed. PW3 and PW4 went to the scene where the deceased was lying on the ground and saw that the deceased had indeed been stabbed. They asked the deceased to tell them who had stabbed him. The deceased answered that it was Reuben. PW4 was convinced that it was the accused because he was the one who was quarreling with the deceased prior to the said stabbing. PW2 and PW3 were certain that the deceased was referring to the accused. Although the accused attempted to dent the testimony of the prosecution witnesses as regard whom the deceased referred to as Reuben, all the prosecution witnesses including PW1 and PW6 were emphatic that it was the accused who was referred to by the deceased.

The deceased told PW1 and PW6 that it was the accused who had stabbed him. It should be recalled that the deceased died nearly two (2) months after he was stabbed. He was admitted at the hospital for a period of 1 ½ months before he was discharged to go home. PW8, the police officer who investigated the case saw the deceased. The deceased told him that he had been stabbed by the accused. PW8 knew the accused prior to the said stabbing incident. When post-mortem was conducted on the body of the deceased, PW7 was of the opinion that the deceased had died due to intestinal obstruction which had been caused by the penetrating stab wound. He did not however rule out the possibility that the deceased could have died from an infection that could have occurred when the deceased was operated on when he was

admitted at the hospital after the said stabbing incident. When the accused was put on his defence he denied that he had stabbed the deceased. He testified that he was elsewhere when the stabbing incident took place.

I have carefully evaluated the circumstantial evidence that was adduced by the prosecution against the accused. PW4 saw the accused quarrel with the deceased. At the time, the accused and the deceased were both drunk. They pushed each other out of the compound of the house where the party was being held. PW2 and PW3 had seen the deceased at the party. In fact it is PW2 who had invited the deceased to attend the party. PW2 and PW3 did not however see the accused at the party. I observed the demeanour of PW4 when he testified. I believed his testimony when he stated that he had seen the deceased. There existed no grudge between PW4 and the accused to motivate him to make a false accusation against the accused. Indeed the accused confirmed in his defence that he had no grudge against any of the prosecution witnesses. There is a reasonable explanation why PW2 and PW3 could not have seen the accused. It was at night. They were more than thirty people at the party who were drinking traditional liquor both inside and outside the house where the party was being held. PW4, the deceased and the accused were drinking busaa outside the house but within the compound.

I believed the testimony of PW4 when he stated that the accused quarreled with the deceased after the deceased had refused his request to be bought alcohol. The accused and the deceased pushed each other outside the compound of the house where the party was being held. After a short while, PW4 heard the deceased calling out the name of PW2. PW2, PW3 and PW4 rushed to where the deceased was lying on the ground. The deceased told them that he had been stabbed by the accused whom he identified by his name Reuben. Although the accused tried to put forward a case that the person who stabbed the deceased was another person called Reuben, all prosecution witnesses were certain that the deceased was referring to the accused and no one else. PW3 and PW4 immediately made a decision to look for the accused. They did not trace him. The knife which was used to stab the deceased was not found.

When the brother of the deceased (PW1) and his father (PW6) were informed, they made arrangements to take the deceased to the Nyahururu District Hospital and later to the Nakuru Provincial General Hospital where he had been referred to for further treatment. The deceased, who was conscious, told PW1 and PW6 that it was the accused who stabbed him. The deceased lived for about two months before he succumbed to the injuries which he had sustained when he was stabbed. PW8, the investigating officer saw the deceased about two weeks before his death. The deceased told him that it was the accused who had stabbed him. PW8 knew the accused. PW5, the area assistant chief, testified that after the incident, the accused disappeared from the area and only resurfaced on the 3rd of September 2001 when he was arrested by PW5 with the assistance of the members of a vigilante group. The accused was arrested at night at his residence.

Having evaluated the evidence adduced, it is clear that the incriminating evidence adduced by the prosecution witnesses points to the fact that no other person other than the accused would have stabbed the deceased. The accused had quarreled with the deceased a few moments before he was stabbed. The accused was seen by PW4 quarreling with the deceased a few moments before the deceased was stabbed. All the prosecution witnesses knew the accused. After the incident, the accused disappeared from the area and was only arrested two months later when the area assistant chief laid an ambush and arrested him. There was no reason, if the accused was innocent, why would disappear from the area after the stabbing incident. His action in disappearing from the area pointed to his guilt. It is my opinion that the prosecution has, on circumstantial evidence, proved that it was the accused who had stabbed the deceased causing him to sustain fatal injuries.

Although there was evidence that the deceased could have been mishandled by the

medical officers who attended him thereby exacerbating his condition, there is no doubt that the cause of death of the deceased is attributable directly to the stab wound which was inflicted on him by the accused. I have considered the alibi defence which was offered by the accused. In my view, the said defence was raised as an afterthought. For an accused to succeed in raising the defence of an alibi, he must raise the alibi defence at the earliest possible opportunity during the trial. He must cross-examine the prosecution witnesses with a view of setting up his alibi defence. An accused cannot just wait until the time he is put on his defence to raise the alibi defence. In any event, having evaluated the circumstances of this case, it is clear that the alibi defence put forward by the accused could not possibly be true. I thus rejected the said alibi defence.

Having found that the prosecution has established that it is the accused who killed the deceased, the issue that is left for determination is whether the accused killed the deceased with malice aforethought. There is evidence that both the accused and the deceased were drunk when the incident took place. They quarreled and fought before the deceased was fatally stabbed. In my view, the evidence on record discloses that the accused is guilty of the lesser charge of manslaughter. He unintentionally killed the deceased. The accused is therefore convicted for the lesser charge of manslaughter in accordance with Section 202 as read with Section 205 of the Penal Code.

The three assessors who assisted the court during the hearing of this case arrived at three different verdicts. One reached the verdict that the accused was guilty of murder, the other reached the verdict that the accused was guilty of manslaughter while the third assessor was of the opinion that the prosecution had not established the guilt of the accused on the charge of murder. This court however agrees with the assessor who reached the verdict that the accused is guilty of the lesser charge of manslaughter for the reasons stated in this judgment.

The accused is accordingly convicted for the lesser charge of manslaughter.

It is so ordered.

DATED at NAKURU this 26th day of October, 2006

L. KIMARU

JUDGE