



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Case 28 of 2001

REPUBLIC.....PROSECUTOR

VERSUS

SIMANKA OLE LEPET alias NALUBO.....1ST ACCUSED

RONTE OLE LEPET.....2ND ACCUSED

JUDGMENT

The accused have been jointly charged for the offence of Murder, contrary to Section 203 as read with Section 204 of the Penal Code. The facts of the prosecution case as stated in the information are as follows:

“On the 22nd August, 1997 at Ole Tukat area in Narok District of the Rift Valley Province, jointly murdered Longisa Ole Mwanik.”

According to the PW1 – Patita Ole Mwanik, on 22nd August, 1997 at about 9.00 p.m. while he was at home with Lasiti Ole Esho, Molonket Ole Yenke and Lenkai Ole Dikir, the Accused 2 went to where they were and asked to be allowed to borrow a rungu. In response, the PW1 replied that he had only one rungu. Subsequently, the Accused 2 flashed a torch and headed towards the house of the grandma of the PW1. However, after about 20 minutes, the Accused 2 went back while accompanied by the deceased. On going back, the Accused 2 asked for a rungu from Molonket Ole Yenke who also declined explaining that he had only one rungu. Thereafter, the Accused 2 pursued the deceased and after a few minutes, the PW1 heard the deceased groaning. On rushing to the scene, the PW1 heard the Accused 2 telling the Accused 1 to cut the throat of the deceased so that they could go. In response, the Accused 1 replied that he had already finished. Prior to the incident, the PW1 had known the Accused 1 since his childhood. In his evidence, the PW1 stated clearly that he could see the Accused 1 since the Accused 2 was flashing a torch at him. The PW1 also added that the Accused 1 was using Maasai language and that he was familiar with his voice. Consequently, the PW1 and his friends raised an alarm and the two Accused ran into a bush. Though many people later rushed to the scene, the deceased could not talk. The PW1 revealed that the deceased was his elder brother and that he found him bleeding from the left ear on the material night. The PW1 denied that his family had any grudge with that of the Accused persons.

On his part, the PW2 – Kimosoi Olololgero deposed that on 22nd August, 1997 between 7.00 to 9.00 p.m. he was in his grandmother’s house with John Kibelekenya, the deceased and Noonkera. By then, they were eating food while using a lamp. Thereafter, the Accused 2 went to where they were and greeted them before he called the deceased to talk to him outside. Later, the Accused 2 told Kibelekenya to go and call Mute Rian who was in the same manyatta.

According to the PW2, he heard the Accused 2 telling the deceased that he had something, confidential matters to discuss with him. At that particular time, the Accused 2 was carrying a rungu and a torch that was on. In addition, the PW2 stated that while he went back to the house, the Accused 2 and the deceased walked away. However, after about 10 minutes, the PW2 heard screams and on rushing to the scene he found the deceased lying down. The PW2 conceded that he never found any of the Accused persons at the scene. On observing the deceased who is his cousin, he saw a wound next to his ears. In his evidence, the PW3 – Timoi Ole Montoi deposed that on 27th August, 1997 he identified the body of the deceased before a post-mortem was carried out. As far as the father of the deceased viz, PW4 – Kirinkai Ole Mwanik was concerned, he heard the screams from the manyatta while he was eating supper with his family. On rushing to the scene, the PW4 found his son lying down and also saw a crowd of people which included the PW1, Marima Ole Kipaken, the PW2 and his brother Olodaru. In his medical evidence, Dr. Carey Francis Otulo deposed that on 27th August, 1997 he carried out a post-mortem on the body of the deceased and observed the following injuries:

- deep cut on the left side of the neck.
- deep cut on the left arm.
- a cut wound at the back.
- the cervical spine was amputated.

Dr. Otulo formed the opinion that the cause of death was due to cardio-pulmonary arrest due to amputated spinal column and haemorrhage.

In his evidence, the PW6 – Marima Kiparken deposed that he had seen the Accused 2 at around 8.00 p.m. when he came to their home. Consequently, the PW6 accompanied the Accused 2 and on the way they met Ole Merdik, the deceased and Kimursoi. Later, they went to the cattle boma. While there, the deceased sent Ole Merdik to call Muterian. When Merdik went, the deceased left to respond to the call of nature, and the PW6 heard screams. By then, the PW6 was with the Accused 2, Ole Merdik and Kimursoi at the middle of the boma.

After they heard the screams they rushed to the scene where they found the body of the deceased lying down. According to the PW7 – Lasiti Ole Esho, on the material night, he was with Molonket Lenkai, Patita and Lasiit. Thereafter, the PW7 saw the Accused 2 approaching them and he called aside Lenkai and asked for a rungu. In response, Lenkai replied that he did not have a rungu. Subsequently, the Accused 2 came back while accompanied by the deceased and they passed the PW7 while talking to each other. However, after a few minutes, they heard some screams and on rushing to the scene, the PW7 observed that the deceased was lying down and was unable to talk. Apart from the above, he also observed that the deceased had a cut by the side of the neck. The evidence of the PW7 was confirmed and corroborated by that of the PW8 – Molonket Ole Enko. On the other hand, the PW9 – John Kiberekenya deposed that on the material night he was with his grandmother, the deceased and Kimosoi while eating food. While there, the Accused 2 approached them and asked where the deceased was because he wanted to talk to him. Subsequently, the PW9 came out with the deceased and the Accused 2. While outside, the Accused 2 sent the PW9 to go and call one Muterian. On the way, the PW9 heard screams and on rushing to the scene, he heard the Accused 2 saying: “kill him...and we go...”

On the other hand, the PW9 heard the Accused 1 uttering the following words: “Let that one who wants to prevent us from doing that...come...”

Besides the above, the PW9 deposed that the Accused 2 later advised the Accused 1 that they should escape and hence they ran into a bush. The PW9 explained that he was able to see both the Accused through the moonlight and that he had known both of them since childhood.

In his medical evidence, PW1 – Dr. Edwin Wafula deposed that on 23rd January, 2001 he examined Ronte Ole Lepet – the Accused 2 and found him to be mentally fit. He later filled and signed the P3 form

which he produced as Exhibit 2. Apart from the above, the PW10 also produced a P3 form that had been filled and signed by Mr. Wanga – a Clinical Officer. That P3 form indicated that the Accused 1 had a shallow cut at the bridge of the nose and that the probable type of weapon used must have been sharp. The PW11 – Sgt. Silvester Sikilai (Retired) recalled that on 22nd March, 1999 when they wanted to arrest the Accused 1, he jumped out of a stationary Peugeot 404 Pick-up and started running away. While the Accused 1 tried to escape, they arrested him. According to the PW12 – Kantim Mwanik, a cousin to the deceased, on 27th August, 1997 he went to a harambee function where he was the cashier. On the other hand, the Accused 2 was the Master of Ceremonies. After the function, the Accused 2 took the money and they were accompanied by Parlekeno Ole Kipaken and Ronte. On their way home, the PW12 saw a taxi and when the same stopped, he saw the Accused 1 and the driver. The PW12 was categorical that he knew the Accused 1 very well because they hail from the same area. Consequently, the taxi stopped right at the manyatta of the Accused 1 and then the Accused 2 alighted and told them to accompany him to his house. Later, after the PW12 had finished bathing he heard people yelling and on rushing to the scene, he saw the deceased bleeding from the neck and ear. However, the PW12 conceded that he never saw any of the Accused at the scene. By the time that the taxi came to the scene, the deceased was already dead. According to the PW12, on the following day, he saw the following at the scene:

- a lot of dry blood.
- A sharpened metal rod.
- 2 rungas and a torch.

The PW12 reckoned that he had seen the twisted rod which had been tied on the carrier of the bicycle of the Accused 1. On 27th August, 1997, the PW12 identified the body of the deceased before a post-mortem was carried out. On the other hand, the PW13 – PC Jairus Wafula deposed that on the night of 22nd and 23rd August, 1997 he received a Murder report while he was attached to Narok Police Station. The said report implicated both Accused persons as suspects. On the following day, the PW13 went to the scene and saw the deceased lying with a deep cut on the left side near the neck. Apart from the above, the PW13 saw blood-stains at the gate, two rungas and iron-bar which were all blood stained. Though the PW13 and other police officers later went to the homes of the suspects – they never traced them. Whereas the Accused 1 was arrested on 22nd March, 1999 within Narok Township (two years after the incident) the Accused 2 was arrested on 21st January, 2001 at Suswa Trading Centre.

In their defence, both the Accused have denied committing the offence for which they have been charged for. The Accused 1 explained that in 1994 he moved to Olokirikirai where he bought a shamba. Besides the above, he explained that he has two wives and eight children. Though the Accused 1 explained that he has known the deceased since 1990 he was categorical that he did not know how the latter had met his death. In addition to the above, the Accused 1 explained how he had brought 27 heads of cattle to Nakuru on 16th August, 1997 before he started slaughtering them for sale upto 28th August, 1997. According to the Accused 1, by then, he was staying in a lodging opposite Carnation Hotel, Nakuru and that his business associates were Rinta Ole Nkainoi, Meeli Ole Sina, Nteri Ole Kolua and Kitipa Ole Narkarish.

Apart from the above, the Accused 1 also explained that after the order for supply of meat to the military was stopped he started trading in timber from Mau Forest to Narok Town. The Accused 1 recalled that on 22nd March, 1999 he took a lorry registration number KAD 807L for refueling when a C.I.D. officer viz, Sikilai enquired on what he was carrying. Though the Accused 1 gave Sikilai the Permit, the latter retorted that the same could not allow him to travel at night. Besides the above, when Sikilai demanded Kshs.10,000 from the Accused 1, the latter replied that he never had the same.

In response, Sikilai went back with reinforcements and they demanded that the Accused 1 should accompany them to Narok Police Station. However, when the Accused 1 refused to comply with the instructions of the officers, Sikilai hit him with an iron-bar on the head. On the following day, the Accused 1 was charged for Murder instead of any timber related offence. That apart, the Accused 1 further stated that on the following day, the O.C.S. ordered that the Accused 1 should be taken to hospital since his head was swollen. Mr. Gumo, the Assistant Deputy Public Prosecutor confirmed to the Court

that the P3 form was actually in the police file. The Accused 1 denied the allegations that he had any grudge against the deceased due to the infidelity by his wife. In addition to the above, the Accused 1 also denied that he had hired any taxi to go to the village where the deceased lives. Besides the above, the Accused 1 explained that he had differed with the PW9 – Kiberekenya after he had refused to refund him Kshs.11,000 that he had lent him to treat his sick wife at Kijabe Hospital. However, when the Accused 1 went to demand his money, the PW9 hit him on the left hand. He concluded that the PW9 gave evidence due to the above grudge. That apart, he also revealed that the PW9 was a cousin to the deceased. In conclusion, the Accused 1 stated that he had no reason to kill the deceased. On the other hand, the Accused 2 deposed that he has two wives and 7 children – and that he was also trading in heads of cattle. Apart from the above, he also revealed that the Accused 1 was his elder brother. The Accused 2 was categorical that he never killed the deceased whom he had known since childhood. The Accused 2 gave an alibi by stating that he was in Ngong when the incident took place. The Accused 2 made it clear that he used to go home regularly and that he never had any dispute with the deceased. From the evidence on record, it is crystal-clear that the prosecution witnesses who rushed to the scene never saw any of the Accused persons committing the offence. As far as the PW8 was concerned, he stated that he had heard the Accused 2 uttering the following words:

“cut his neck and we go...”

On the other hand, the PW9 stated that he had heard the Accused 2 saying:

“kill him...and we go...”

That apart, the other evidence that was tying the Accused 1 to the offence is the twisted iron rod that the PW12 deposed he had seen on his bicycle. Unfortunately, the PW12 never showed any identification marks on the said iron rod to make the Court conclude that the same belonged to the Accused 1.

From the above, it is apparent that the prosecution relied heavily on circumstantial evidence to prove their case. In the case of ***Simon Musoke Vs Republic [1958] E. A. Page 716***. The Court of Appeal held as follows:

“In a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the Accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

Teper V. Republic, [1952] 2 All E. R. 447, followed.

The above case was quoted with approval in the case of Muchene Vs Republic [2002] 2 KLR where the Kenyan Court of Appeal stated as follows:

“It is trite law that where a conviction is exclusively based on circumstantial evidence such conviction can only be properly upheld if the Court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the Appellant but also that there exist no coexisting circumstances which would weaken or destroy such inference. It is settled law that the burden of proving facts which justify the drawing of such inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains as such.”

Besides the above, it is apparent that the Accused 1 had given an alibi in his defence, by stating that he was staying in a lodging opposite Carnation Hotel, Nakuru when the offence was being committed. Similarly, the Accused 2 also gave an alibi by stating that on 22nd August, 1997 he was in Dagorretti where he was conducting cattle trade. In fact, he stated that he has conducted that trade from October, 1996 upto the year 2001. According to the accused 2, he used to go home regularly during that period. His evidence was confirmed and corroborated with that of the DW4 – ***Kerumboti Sadera***. In the case of ***Osiwa Vs Republic [1989] KLR Page 470***, the Court of Appeal held as follows:

“The Trial Magistrate had ignored the Appellant’s defence of alibi and the High Court had erroneously shifted the burden of proving the alibi to the Appellant. An accused person who pleads an alibi assumes no burden to prove it.”

Apart from the above, in the case of Kiarie Vs Republic [1984] KLR Page 740. The Court of Appeal held as follows:

“An alibi raises a specific defence and an Accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a Court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate’s finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.”

In addition to the above, the same Court also held as follows:

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken.”

In this case, though two witnesses had stated that they heard the Accused talking at the scene, nothing was shown to demonstrate that their voices were distinct and special in any way. The possibility of them being mistaken cannot be overruled.

Turning to the witnesses, it is apparent that the majority were related to the deceased. Those included the PW1, PW2, PW4 and PW12. Though they tried strenuously to demonstrate that the Accused had a motive to kill the deceased, the same was not convincing. Their theory was based on rumours in the village.

Significantly, the prosecution witnesses stated that the Accused 2 had asked to be lent a rungu which they declined to give to him. However, the injuries sustained by the deceased seem to have been caused by a sharp weapon. None of the witnesses testified that any of the Accused persons had such a weapon before the incident.

Having considered all the above evidence carefully, the Court hereby finds that the prosecution has failed to prove the case beyond any reasonable doubt. In the same breadth, the Court finds that the defence case for both the Accused is reasonable and plausible under the circumstances. The upshot is that the Accused are “not guilty” of the offence of Murder, contrary to **Section 203** as read with **Section 204** of the Penal Code. That means that the Court concurs with the findings of the assessors that the Accused never committed the offence.

Both Accused should be released forthwith unless held lawfully. Those are the Orders of the Court.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of Mr. Gai and Mr. Gumo, Assistant Deputy Public Prosecutor.

MUGA APONDI

JUDGE

23RD NOVEMBER, 2005