



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO.58 OF 2000

REPUBLIC PROSECUTOR

VERSUS

MESHACK WAITHAKA NGUGI ACCUSED

J U D G M E N T

MESHACK WAITHAKA NGUGI is the accused charged with murder contrary to section 203 read with section 204 of the Penal Code. Particulars of the offence are that on the 10th January, 2000 at Entarara Masai Reserve in Kajiado District of the Rift Valley Province, murdered **KABOS SIRONKA LEMARA**. He pleaded not guilty.

KABOS SIRONKA LEMARA (the deceased) was a young boy age 14 years, and the brother of **LESHAN SILONKA** (P.W.3). On the 10th January, 2000 in the morning P.W.3 instructed the deceased to go and graze his cattle in the field. The deceased complied and took the cattle out. Peter Njoroge (P.W.2) the neighbour of both the deceased and P.W.3, went to a place known as Rombo, on that same 10th Jan, 2000 at 10.00 a.m. He returned from Rombo at 1.30 p.m. and met the accused driving seven cattle towards Ental. P.W.2 asked the deceased whose cattle they were and the deceased told him that some maasai man gave them to him to drive them to Ental. The accused is a Kikuyu by tribe. P.W.2 then went home.

At 5 p.m. of the same day Anne Muthoni Nganga (P.W.1) went to her shamba to work. While in the shamba she found her beans and other crops had been stepped on and the area was generally disturbed. She also saw footprints of some people and she decided to check around. While doing so she saw a dead body of a person who she didn't know. She rushed back home and found Peter Njoroge (P.W.2) to whom she reported this matter. Both P.W.1 and P.W.2 then rushed back to the shamba and P.W.2 confirmed as true his mother's report. He examined the body and he noticed stab wounds on the stomach, chest and neck. These stab wounds appeared fresh. P.W.2 immediately rushed to make a report at the Administration Police Camp, Ntarara.

AP CPL JONES MUSYOKI (P.W.4) received this report soon after 6 p.m. on the same 10th January, 2000, that a young man had been killed and his body was left in their shamba. P.W.2 led AP CPL **MUSYOKI** (P.W.4) and other security officers to the scene and indeed the deceased's body was found at the shamba. P.W.4 then made a report of this matter to **LOITOKITOK** Police Station. Investigations were carried and the accused was arrested on the 11th January, 2000 while being in possession of the animals belonging to P.W.3 which he had given the deceased to go and graze in the field. Those cattle were eventually returned to P.W.3.

On the 16th January, 2000 IP Peter Kimani P.W.5, then the OCS Loitokitok, recorded a statement under inquiry from accused, which was admitted into evidence without objection by the accused. This

statement was presented into court as exhibit I. The accused had said the following is this statement:-

“I am the above named person. The eight born of JOHN NGUGI KARUNGE. I am unemployed and live with my parents. On 8/1/2000 I returned to my father’s home from Emali. I worked in the farm till Monday around 10 a.m.. I went back home, took a knife and went onto the road. I was intending to kill anyone. I found in order I take his cows. I walked a few metres heading for Rombo direction and found the deceased KABOS SIRONKA. I asked him where he was going to graze his cow. He answered it was around the church area. We continued to look after the cows together, moving up to the scene where I killed him. I was standing on the road and him in a maize shamba. He called me to the shamba so that I could see how well the beans were doing. I moved closer and told him: “ Now you will die and I will go with the cows and sell them”. He never answered but screamed loudly saying “come and save me, I am being killed” I continued stabbing him and strangling him to death. I then carried his body a little to the interior and hid him. I drove the cows towards Rombo direction. I took the masaaini route and on reaching Maili Tatu, I met one NJOROGE who asked me where I was taing the cows. I answered ” INTILAL” while it was approaching dark, I met morans and they started bargaining for the cows. I lowered the price and they realised I had stolen the cows. They tricked me that they would buy them when we reach their home. They then arrested me and tied me up. On further interrogation I confessed to have stolen them. Next morning they sent for the police who came to pick me. That is all”

DAUDI KAYAN OLE NONGOSHETI (P.W.6) testified that on the 10/1/2000 at a round 6.00 p.m. he was driving his own cattle home from the river. He then saw a person driving cattle towards **ENTILAL**. He stopped that person and asked him whose cattle those were and he was told that they belonged to his father. P.W.6 said he called his neighbour and arrested that person and detained his cattle. They questioned him further. That person confessed that he had stolen those cattle. He was detained till the following day when they handed him over to the police. He identified that person who was in possession of the stolen cattle as the accused. This evidence therefore sufficiently corroborated the accused’s statement under inquiry.

IP SAMWEL ONKWARI (P.W.7) recorded a charge and cautionary statement from the accused on 16/1/2000 which he tendered into evidence without any objection from the accused. It is exhibit No.2. In this statement under charge and caution the accused said in answer to the charge of murder:-

“Ni kweli nilinyonga Silonka Lemara kwasababu nilikua nilitaka kuiba zile Ng’ombe saba alikua anachunga”.

The deceased’s body was taken to **LOITOKITOK HOSPITAL** where **DR. LISA KURARU** performed postmortem examination on the 14/1/2000, and found the body with a cut wound on the right side of the chest and massive haemothorax. The cause of the deceased’s death was cardio-pulmonary arrest due to massive haenorrhage and haemothorax (failure of both the heart and lungs to function due to massive bleeding). The issue for my determination is whether, on that evidence, it can be said that the prosecution has proved its case against the accused beyond reasonable doubt.

Murder is defined in section 203 of the Penal code. Any person who of malice forethought causes the death of another person by an unlawful act or omission is guilty of murder. The three ingredients of murder, which must be proved, are as follows:-

First the prosecution must prove the death of the deceased and its cause. From the above evidence I find that **KABOS SIRONKA LEMARA** died on the 10th January, 2000 from cardio-pulmonary arrest due to massive hemorrhage and massive haemothorax.

Secondly the prosecution must prove that the accused caused the death of the deceased through unlawful act. From the aboverecorded evidence I am satisfied that the accused attacked the deceased who was herding his brother’s cattle and killed him. He then stole the said cattle intending to sell them. The accused was however arrested by P.W.6 and neighbours. The accused therefore killed the deceased

through an unlawful act.

Thirdly, the prosecution must prove that the accused killed the deceased with malice aforethought, defined in section 206 of the penal code to include an intention to cause death or knowledge that the act causing death would probably cause death or an intent to commit a felony. The accused in his statements under inquiry (exhibit 1) and under charge and caution (exhibit 2) confessed that he killed the deceased so that he could steal his cows to go and sell. Indeed it has been established that he did kill the deceased, then he stole the cattle which he was herding and he was negotiating to sell the same when he was arrested.

In his defence, through unsworn statement, the accused said that he did not intend to kill the deceased. He said that on 10/1/2000 he started to smoke bhang at 9.00 a.m. and he got 'drunk'. His advocate Mr. Ratemo Oira has submitted that at the time the accused killed the deceased he was under the influence of bhang (cannabis sativa) which is a drug.

A prosecution witness **MR. TIMOTHY MURIITHI** (P.W.8) who is a Psychiatric Nurse who had qualified from Mathare School of Nursing in 1992 and is based at Loitokitok District Hospital, had given evidence earlier on that he had examined the accused on 13th January, 2000 for mental fitness. Though at the time of examination the accused was mentally stable and fit, the accused had told him that he had smoked bhang on the day he killed the deceased. Mr. Muriithi told the court that the effect of bhang is that it alters ones perception, that a person under the influence of bhang would not always know what he is doing. That is only a temporary effect. Indeed three days after the incident the accused had become mentally stable.

In my view the accused has sufficiently shown, on a balance of probabilities, that at the time he killed the deceased he was under the influence of drugs and has thus brought himself within the provisions of section 13(4) and (5) of the Penal Code which are:-

“ S. 13 (4) intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, intoxication includes a state produced by narcotics or drugs”

A state of intoxication negated the element of “ mens- rea” in this murder charge, so that the accused is deemed not to have intended to cause the deceased's death.

My three assessors, namely Reuben Matundura, Livingstone Mbogholi and Judy Kibera, unanimously advised me that the accused is guilty of manslaughter. I agree.

I therefore find the accused guilty of manslaughter contrary to section 202(1) read with section 205 of the penal code and do hereby convict him accordingly.

It is so ordered.

Dated and delivered at Nairobi this 31st day of May, 2001

A.G.A ETYANG

JUDGE