



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NUMBER 65 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JOHN WAWERU..... ACCUSED

R U L I N G

1. The only issue is whether the prosecution has established a prima facie case to warrant the accused to be put on his defence as per **Section 306 (2) Criminal Procedure Code**.

2. The accused John Waweru was charged with murder **Contrary to Section 203 as read with 204 of the Penal Code**. That on 8th November 2016 at Olenguruone Township Kuresoi South Sub County within Nakuru County he murdered Andrew Lang'at.

3. The prosecution called seven (7) witnesses. The case for the prosecution is that on 8th November 2016 **PW1 Kiplangat Arap Koech**, the father to the deceased **received a report from a man** who came from Olenguruone to the effect that his son had been tripped by a police officer and had fallen down and injured his head. He sent his son **Joel, PW2** to the centre to check on his brother.

4. According to Joel Lang'at, Andrew was his younger brother, he said **that one boy whose name he could not recall told him** that his brother Andrew had been pushed by Waweru and had fallen on the road.

5. He proceeded to the scene and found his brother, seated by the road side. He was drunk. He noticed that he had minor bruises. He suggested that he take him to hospital but Andrew said he was not badly injured and he would just go home. He asked the deceased what had happened. The deceased told him he had just found himself lying on the road side *"nilijistukia tu nikiwa chini"*. The deceased then hired a motorbike and went home.

6. The next day Joel was called by a nephew to go see the deceased. He went and found the deceased by roadside, he was panting and could not talk. They took him to Olenguruone Hospital. PW1 was informed and he went there. He found him admitted, on a drip. He was transferred to Tenwek Hospital. There a scan was done and they were referred back to Olenguruone. He died on the way and they reported at Olenguruone Police Station. According to Joel,

"Later, I heard people complaining that deceased had been drinking with Waweru."

On cross examination Joel said that the boy who reported to him said that the deceased had been fighting with another whom he did not name. That he himself did not witness the fight. That he noted small bruises on the deceased's face, did not see any blood on the road where he found the deceased. That the deceased told him he was drunk and just found himself on the road. That people at the centre named Waweru saying that he was with the deceased, that he himself did not know whether deceased was pushed or fell due to drunkenness.

7. PW1 said that when he saw the accused at the hospital he was bleeding from the nose and mouth.

8. **PW3 John Cheruiyot** was the village elder, who broke the news of death of the deceased to the parents of the deceased. His evidence on how the deceased died;

"We were told that a police officer pushed the deceased and he fell and hit his head."

9. **PW4 No. 69903 Sgt. Arandi Mosota** was a police officer at Olenguruone Police Station. On 10th November 2016 while at the police station, some ten (10) people came there and reported the death of a man who had been assaulted by a police officer. He confirmed in the

OB that such a report had been booked in the OB. He went to the house of the officer PC John Waweru, arrested him, escorted him to the police station, from where he was later transferred to Molo Police Station for his own safety.

10. These four (4) witnesses were heard by Hon Lady Justice M. Odero. The matter landed in my docket on 26th September 2019. I heard PW5, 6, 7.

11. **PW5 Dr. George Biketi** from Nakuru Provincial General Hospital Annex Hospital conducted the autopsy on 11th November 2016. He testified that deceased Andrew Lang'at was 36 years old, 6.1 ft. tall, He found a deep cut wound on occipital scalp, extending to the skull, with a blood clot, skull fracture. Bruises on both wrists, cause of death, severe head injury due to blunt trauma to the head. On cross examination he said the trauma was as a result of direct impact with a blunt object which could have been wood or metal; that from the shape of the wound, it was a blunt object, the force used caused the fracture and the clot. He could not tell time of death. That bruises on wrists could have been signs of struggle. That if the deceased had fallen, one would not have expected injuries on other parts of the body, that deceased had injury on left eye, both wrists and this ruled out a fall. He said he could not rule out a fight.

12. **PW6 No. 91820 PC Charles Kitheka** accompanied PW4 in arresting the accused.

13. **PW7 No. 218719 IP Fredrick Juma** was attached to Olunguruone Police Station at the material time. On 9th November 2016 an assault report was booked at 14.10 hours involving a police officer and a member of the public. On 10th November 2016, it was reported that the victim had succumbed to his injuries. The OCS ordered the arrest of the officer concerned, and he was arrested and escorted to Molo Police Station.

14. PW7 recorded also suspect's statement under inquiry. He later escorted him to Nakuru where he was charged with murder.

15. On cross examination he said he was the actual investigating officer and later handed over to CI Opudo the OCS. He said that in his statement under inquiry the accused confirmed that he had been on a drinking spree with the deceased and others they ate lunch together. The deceased got drunk and engaged in a fight with others, that the accused went to separate them, that deceased fell on his back and hit his head. Others ran, he went back to the bar to seek assistance but found deceased had been taken away.

16. The prosecution closed its case.

17. To establish a prima facie case, the prosecution must provide evidence;

- i. That a person died.
- ii. That the death was unlawful.
- iii. That death was caused by the accused person
- iv. That there was malice aforethought on the part of the accused

18. In this case, we have evidence of death, that was established by the family members and the doctor.

19. Is there any evidence connecting the accused person with the death to warrant a prima facie case finding?

20. The PW1, PW2 and PW3 all said what they heard. Each of them said he was told by another, unnamed person that the deceased had something to do with the deceased's fall; that the accused had tripped or pushed the deceased to the ground. None of the eye witnesses testified that indeed the accused person was in a fight with the deceased, pushed him and tripped him to the ground. Neither is there evidence that any eye witness recorded a statement.

21. The only firsthand evidence availed to court is that of the deceased brother Joel, who spoke to his brother the day of the alleged fight. He told the court that his brother told him he just found himself on the ground. He did not tell him about a fight, he did not tell him anyone had pushed him.

22. The deceased was married with a wife and children. That evening he went home, and spent the night. He had nephews around him including those who went to call Joel the next day. None of these members of his family say that he deceased at any time mentioned that he was in a fight with anyone, leave alone the accused. Or that the accused had pushed him.

23. PW 7 spoke about an assault report having been made in the OB of the police station. However the prosecution did not reveal who made the report. Neither was any evidence led as to who made the report and what allegations were made in that report. To this end the I.O was not forthcoming. What were the circumstances surrounding the alleged report? What was the involvement of the accused?

24. It is evident that the assault report was not investigated and if it was the evidence of that investigation though very crucial to this case was not presented to court. Questions abound: was the scene visited, did anyone from the police station visited the complainant, it is not clear who made the assault report, this is because the PW1, PW2 on receiving report of the injury of the deceased, PW2 went to the scene, and Andrew took a motor bike and went home. PW2 does not say he reported any case to the police station, neither does PW1. So, who made the assault report at the police station? Clearly it was not the deceased, so who did? That piece of evidence was not given to court. Who were the eye witnesses to the fight? This happened during day, because PW2 said he found his brother at 5.00 p.m. So there must have been eye witnesses. Who were they? Were they interviewed? Statements taken? Where did the alleged assault take place?

25. There are so many questions that were left hanging in this case, such that the only evidence on record is that the deceased fell, on his head and injured the back on his head.

26. The pathologist put forth a theory that it may have been metal or wood that could have caused the injury, but no evidence that any weapon was used to hit the deceased. The consistent evidence on record, is that he fell and hit his head on the ground.

27. It is also noteworthy that the PW2 did not notice any cut wound and the head at the scene, he only saw the minor bruises, which begs the question, if indeed the deceased had a deep cut wound at the back to his head when the brother saw him, would he have led him to go home? Because the description of injury given by the doctor on post mortem and the injuries noticed by PW2 at the scene where he found his brother on 8th November 2016 at 5.00 p.m. are not consistent. Could PW2 have missed the deep cut wound on the back of his brother's head?

28. Writing the foregoing left a nagging question in my mind that there was evidence which was available but which was not availed to the court. The subject of this trial is deceased and cannot ask for the same, but I feel that the justice of this case calls for this court to invoke its inherent powers under s. 150 of the CPC. It states:

150. Power to summon witnesses, or examine person present

A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.

29. I direct therefor that Summons to issue to the Investigating Officer through the ODPP Nakuru to appear in court on a date to be assigned, and respond to questions relating to (i) the report of assault against the deceased. (ii) produce the OB entry of that report.

Dated, delivered and signed at Nakuru this 3rd August 2020

Mumbua T. Matheka

Judge

In the presence of: VIA ZOOM

For state: Ms. Wambui

Mr. Ochang for accused N/A

Martin Court Assistant

Accused Present: I also want to know. This because there is no truth in this case. I never touched him.

Order: Summons to issue to the I.O to appear on the 30th of September 2020 to produce the OB of the assault and answer questions related thereto.

Judge

3rd August 2020

FURTHER RULING

Following the ruling above, on 28th October 2020, I heard the evidence of PW8 no. 237464 IP Norah Chelimo the OC Crime at Olenguruone Police Station. She testified that on 9th November 2016 there was an entry in the OB entry No. 12 at 1410HRS:

It stated:

“Assault Report: *To the station are two brothers namely Cheruiyot and Rono of Olenguruone who report that their brother was attacked by a person well known to them as Waweru, a police officer and the condition of the complaint who was taken to Olenguruone Sub County Hospital has deteriorated and now transferred to Tenwek Hospital. They now request for police intervention in the matter”*

On 10th November 2016 at 1116 HRS a report was made that the assault victim had died around 2100HRS on the way to Olenguruone

Hospital from Tenwek Hospital. The body was lying at Olenguruone Sub County Hospital Mortuary.

According to her there was no evidence that prior to the death report, the officer assigned the assault report had conducted any investigation. The conclusion therefore is that the death report overtook any intended investigations of the assault report. Hence even the evidence of that Investigating Officer would not have made any difference to the murder case

What is evident from the police records is that the deceased succumbed to injuries sustained from an altercation of sorts with the accused person. The absence of an eye witness notwithstanding, there appears prima facie, circumstantial evidence that the accused caused the injuries that led to the death of the deceased. I am of the view therefore that the accused has a case to answer under **Section 306(2) of the Criminal Procedure Code**, and will be put to his defence.

Dated this 11th January 2021

Mumbua T Matheka

Judge

Delivered virtually on 9th of February 2021.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Edna

Court Prosecutor: Ms. Murunga

Accused: Present

Mr. Ochang for Accused N/A

9th February 2021