



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL CASE NO. 4 OF 2019

REPUBLICPROSECUTOR

VERSUS

EZEKIEL LOKATUKONACCUSED

JUDGMENT

1. The accused person **EZEKIEL LOKATUKON** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars of which were that on 26th day of March, 2019 at Lorugum location in Loima Sub-County within Turkana County murdered **ZIPPORRAH ALETIA**.

2. He pleaded not guilty to the said charges and to prove its case against him, the prosecution called and examined a total of seven (7) witnesses. When put on his defence, the accused gave sworn statement in defence without calling any witness.

PROSECUTION CASE

3. The prosecution case was that the accused and the deceased were married and both used to enjoy drinking of alcohol either jointly or severally. The deceased was a known village drunkard.

4. On the 26th March, 2019, **PW1 EWAAR JAIRUS**, who was a neighbour to the deceased who was known as auntie “Bellah” heard her groaning sound from the home of Regina Nakeny and thought that she was drunk as usual, only for her to inform him that she had been stabbed by the accused. He went closer to her and found her bleeding from the back. He decided to go to the home of one Bosco, where he had seen her brother, Victor Ekal, to call him but found when he had left for Nangoriong and he followed him and caught up with him and gave him the information.

5. It was his evidence that they went back to the scene together with Victor where they found the deceased who was at that time not able to speak but holding her wound with her hand. He then left Victor (PW2) with her.

6. **PW2 VICTOR NAKADINI** corroborated PW1’s evidence and stated that at the scene, he found the deceased lying down and bleeding from her back. Beside her, there was a T-shirt, bra and blood stained traditional knife. He took the said items to Lorugum police station where he reported and with the police from the station went back to the scene and found the deceased lying on the ground next to the accused, who was also bleeding from his left shoulder with a knife stab. Both the accused and the deceased were then taken to the hospital (Lorugum sub-county) before the deceased was later on transferred to Lodwar District from where she died.

7. In cross examination he stated that he did not know whether there was a dispute between the deceased and the accused but confirmed that they used to have marital problems.

8. **PW3 JOHN EKADEL** and **PW6 EMMANUEL LOKALU** identified the body of the deceased for purposes of post mortem examination which was done by **DR. DANIEL MWENDA** but produced by consent by, **PW4 DR. WAYAA JONATHAN**, who confirmed that the cause of death was massive haemorrhage secondary to stab wound to the lungs and the heart. He stated that from the report there was no indication whether the blood and the stomach contents were taken for analysis.

9. **PW5 CI FRANCIS NJOMO** confirmed having received PW2 at the station with the blood-stained T-shirt and bra belonging to the deceased and a blood stained dagger and rushed with him to the scene where they found both the deceased and the accused and to save their lives, they rushed them to the hospital. They were able to notice that the accused had a shaft on his belt which he thought had carried the dagger used to stab the deceased, which they took from him.

10. In cross examination he stated that both the accused and the deceased had injuries and were hospitalized and that at the scene the accused was unconscious while the deceased was semi-conscious.

11. **PW7 PC OBADIA KIPLETING** corroborated PW5's evidence and produced the exhibits which were taken to the station by PW2 and the shaft that was recovered from the accused belt. He further produced the photographs which were taken from the scene. He stated that on 4/4/2019 the accused was discharged from the hospital and was arrested. In cross examination he stated that both the accused and the deceased had injuries, with the accused having injury on his neck and fingers. He stated that a P.3 form was filed in respect of the injuries sustained by the accused.

12. He testified further, that from the investigations, he established that there was a fight between the deceased and the accused and from the deceased dying declaration, the accused had started the fight and that the dispute was over some roasted meat which the accused had bought for himself and not for the family.

DEFENCE CASE

13. **DW1 EZEKIEL LOKATUKON**, the accused, stated that on 26th March, 2019, he went with the deceased for a church function in the morning, where they were up to 3.30 p.m., when they returned back to where they were living but did not get the deceased at home. He then decided to follow her to Bonde la Ufa village, where she used to drink and told her to go home earlier to purchase food stuff, having given her money.

14. It was his evidence that the deceased later on followed him to where he was with elders and she ordered a drink which she started to drink at the club. She later on left the club while the deceased remained with the elders. It was his evidence that when he went home, he did not find the deceased but she later on came with one litre of Changaa and meat. She then asked him for the knife when he said he did not know where it was, she went out of the house and started to eat the meat while drinking.

15. He then took the changaa which he poured out and the deceased followed him carrying the knife and abusing him, before stabbing him three times with the said knife. It was his evidence that a fight then ensued over the knife and he took the knife and in the process stabbed her with it, before he lost consciousness, only to find himself at the clinic, where he was admitted for seven days, from where he was arrested. It was his evidence that they had lived together for nine (9) years without any dispute.

16. In cross examination, he stated that it was the deceased who had the knife and that they were struggling over the said knife and in the process the knife hit the deceased. He stated that the dispute was because he had given her money to buy supper but she decided to buy alcohol and ready-made food.

17. When recalled, the accused stated that the deceased died as a result of a fight between them during which he also sustained injuries on the right hand, right chest and left shoulder for which he was admitted in hospital for eight (8) days where he was operated upon and that due to the said injuries he was not able to report to the police. He produced P3 form filed in respect of the injuries as Exhb. No. 1.

SUBMISSIONS

18. At the close of the defence case, the prosecution opted not to make submissions while the accused filed written submissions, in which it was submitted that lawful homicides under Article 26(1) of the constitution is committed in execution of court order, in reasonable defence to property, defence of person or as a result of natural fate or accident. It was submitted that the prosecution did not place before the court any direct evidence as to how the deceased was stabbed and that the accused person acted in self-defence.

19. It was submitted that under Section 17 of the Penal Code, the use of force in the defence of person or property shall be determined according to the principles of English Common Law and was applied in the case of **REPUBLIC v JOSEPH CHEGE NJORA [2007] eKLR** and **KUIITEE JACKSON v REPUBLIC [2014] eKLR**.

20. It was submitted, that it was the deceased who assaulted the accused and in the course of the struggle to disarm her, the accused got stabbed when pushed against the wall and that in the process of the struggle, the accused also got injured as per the P3 form produced, it was therefore submitted that the defence of self-defence was available to the accused.

21. It was further submitted, that there was no proof of malice aforethought as defined in Section 206 of the Penal Code and as stated in the case of **TUBERE s/O OCHEN v REPUBLIC [1945] E12 EACA 63** and **NYAMWERU s/o KUNYABOYA v REPUBLIC [1953] 20 EACA 192**. It was submitted that the deceased was the aggressor and that the accused was produced by the deceased and that the evidence on record did not support premeditation on the part of the accused.

DETERMINATION

22. To sustain a conviction on a charge of murder the prosecution is under legal and evidential duty to prove:-

- a) *The fact and cause of death.*
- b) *That the said death was caused by unlawful act of omission or commission on the part of the accused person.*
- c) *That it was caused with malice aforethought as defined under Section 206 of the Penal Code.*

23. The fact and cause of death of the deceased was not disputed throughout the course of this trial. All the prosecution witnesses confirmed that the deceased died as a result of injuries sustained on 26th March, 2019. The cause of death was confirmed to be massive haemorrhage secondary to stabbed wound. It is therefore my finding and I hold that the fact and cause of death was proved beyond any

reasonable doubt.

24. On whether the said death was caused by unlawful act on the part of the accused person, as submitted by the defence, there was no eye witness who saw the accused stab the deceased. The prosecution case was therefore solely based on circumstantial evidence, which was that both the deceased and the accused were found at the scene and that the deceased told **PW1 JAIRUS EWAAR** that it was the accused who had stabbed her with a knife. The deceased before the death also gave this information to **PW7 PC OBADIA KIPLETING** who recorded her statement.

25. In the case of **REPUBLIC v RICHARD ITWEKA WAHITI [2020] eKLR** the court quoted with approval the Court of Appeal decision in the case of **AHAMAD ABOLIFATHI MOHAMMED & ANOTHER v REPUBLIC [2018] eKLR** and stated as follows:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; 9iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.

(see also Sawe v Republic (2003) e KLR and GMI v R Cr. App. No. 38 of 2011).

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.

(see Teper v R [1952] ALLER 480 and Musoke V R [1958] E.A 715). In Dhalay Singh v Republic, Cr. App. No. 10 of 1997, this court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”

25. *In this case, four key strands of evidence tend to connect the Accused with the death of the deceased. These are the Accused’s alleged jealousy or animus elicited by the fact that the deceased had entered into an amorous relationship with a male friend, one K.; the location of the deceased’s body on its discovery as well as the Accused’s presence in that compound in the material period; material evidence collected from the Accused’s person and his alleged dwelling by police; and the conduct of the Accused on the day or days proximate to the disappearance of the deceased.*

26. *In Neema Mwandoro Nduzya v R [2008] e KLR the Court of Appeal reiterating the probative value of circumstantial evidence and the attendant duty of the trial court, stated that:*

“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R v Taylor Weaver and Donovan (19280 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.

27. *In its earlier decision in Mwangi and Another v Republic (2004) 2 KLR 32, the Court of Appeal exhorted that:*

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge”

See also Regina v Exall and Others)1866) 176 ER 850 emphasizing the view that all pieces of circumstantial evidence ought to be viewed as individual strands of a cord which when combined together, constitute a rope.”

26. The following circumstantial evidence tendered by the prosecution connects the accused person with the death of the deceased. He was found at the scene together with the deceased, both having sustained injuries. The deceased in her statement to PW7 stated that it is the accused who stabbed her with a knife, which statement I find and hold was a dying declaration within the meaning of Section 33(a) of the Evidence Act which statement is admissible in evidence as was stated in the case of **PHILLIP NZAKA WATU v REPUBLIC [2016] eKLR**.

27. The accused person in his defence admitted having inflicted the injuries on the deceased while they were fighting over a knife, which the deceased, according to this evidence was holding and had used to attack him and that he acted in self-defence.

28. It therefore follows and I find that the death of the deceased herein was caused by an act of commission on the part of the accused person.

29. The final issue for determination is whether the accused person had malice aforethought, put different is whether the accused persons had justifiable reason for inflicting the injuries on the deceased. Since the dead tells no tales, the court is only left with the evidence of the accused and the deceased account as presented through the evidence of PW7 who took her statement. I must state for record purposes that it is unfortunate that the prosecution did not see it fit to produce the said statement at the trial. This statement to my mind was admissible in evidence as it went on to show how the death of the deceased occurred and therefore think of no basis and no real basis why it was not produced.

30. It is the accused case that he acted in self-defence and out of provocation by the deceased. It was the accused case that having given the deceased money to buy food for the family, the same decided to buy roast meat and changaa and when the accused took the said changaa and poured it out, she started to abuse him and followed him and stabbed him with the knife she was using to cut roasted meat and in the process of struggling to retrieve the said knife, he ended up stabbing the deceased.

31. The accused account was corroborated through the evidence of PW7 who took a statement from the deceased, who confirmed that there was indeed a fight between her and the accused, on account of the same having bought roasted meat for herself instead of for the family. The fact that both the accused and the deceased sustained injuries at the said fight, was confirmed through the post mortem report produced on behalf of the deceased and a P3 form produced in respect of the accused, in which the injuries he sustained were classified as grievous harm. Both the accused and the deceased were found at the scene unconscious.

32. Based upon the evidence before the court and as submitted by the defence, I find and hold that the accused person proved on a balance of probability that he acted in self-defence, within the meaning of Section 17 of the Penal Code and as was stated in the case of **REPUBLIC v JOSEPH CHEGE NJORA [2007] eKLR**, his action was justifiable and excusable. Arising from this I find the charge of murder against the deceased cannot stand.

33. Having accepted the defence of self-defence, the court is therefore called upon to determine whether the force used in the circumstance was reasonable, so as to acquit and discharge the accused or whether the force used was unreasonable so as to hold the accused liable for the lesser offence of manslaughter, as was stated in the case of **ROBERT KINUTHIA MUNGAI v REPUBLIC [1982 – 88] 1 KAR 611** where the court has this to say: -

*“We think, in view of the earlier East African cases, we will have considered and the more recent English decision in **REPUBLIC v SHONNON Crm. LR 438 1980**, that the true interpretation of the judgment of the privy council in **PALMER v REPUBLIC** is that while there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on facts of the case being considered.”*

34. From the evidence tendered by the prosecution witnesses, it is clear that the deceased was a known “village drunkard,” so that when PW1 heard her crying, his first reaction was that she must have been drunk. The accused had lived with her for nine years and must have known her nature. I have looked at the injuries sustained by the accused as per the P3 form, against the uncorroborated evidence of PW2, that the same had ran away from the scene before being brought back weighed against the injuries sustained by the deceased and the fact that there is no evidence on record that he had ran away from the scene in the first instance, I have come to the irresistible conclusion and find and hold that the force used by the accused on the deceased was excessive.

35. In the absence of proof of malice aforethought on the part of the accused person and having found that he used excessive force, I find and hold that the prosecution failed to prove a charge of murder but hereby find the same guilty of the lesser offence of manslaughter contrary to Section 202 of the Penal Code and convict the same accordingly under the provision of Section 179(2) of the Criminal Procedure Code.

36. And it is ordered accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF MAY, 2021

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J. WAKIAGA

JUDGE

IN THE PRESENCE OF:-

Mr. Tanui for the State

Mr. Pukha for the accused

Court Assistant Limo/Biwott