



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

CRIMINAL CASE NO. 4 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

SAMSON EIPA alias CHIEF NAOROS.....ACCUSED

JUDGMENT

1. The accused **SAMSON EIPA Alias CHIEF NAOROS** 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 27th day of February, 2018 at Eiye village in Turkana Central Sub-county within Turkana County murdered **ERASTUS EKATO**.

2. He pleaded not guilty to the charges and to prove its case against him, the prosecution called and examined a total of four witnesses. When put on his defence, the accused gave unsworn statement of defence and called no witnesses.

3. At the close of the defence case, the prosecution indicated that they shall not make any final submissions, while the defence indicated that he shall put in written submissions and the matter was therefore set down for judgment.

4. As at the time of writing this judgment, the accused through his Advocate had not filed written submissions and therefore this court proceeded on the basis of the evidence on record.

PROSECUTION CASE

5. The prosecution case was that on 27th July, 2018 **PW1 SABELA ADOME** saw the accused person hit the deceased with a walking stick on his head, having held and lifted him up with the head. The deceased then fell down.

6. It was her evidence that she proceeded to where the deceased was and he told her that the accused had killed him because of Kenya shillings twenty (Kshs.20). She raised an alarm, attracting people to the scene and they took the deceased to Eliye hospital where he was admitted. She then proceeded to the police station where she made a report and when she went back to check on the deceased she was told that his condition had deteriorated. He was later referred to Lodwar Referral, and at 7.00 p.m. he died.

7. In cross examination, she stated that she witnessed the fight between the deceased, who was her younger brother and the accused, who was his friend. She testified that the accused hit the deceased once with the walking stick. It was her further evidence that the deceased was transferred from Eliye to Lodwar Referral Hospital at about 5.30 p.m.

8. **PW4 SGT. PETERSON ESIENY** stated that he was at Lodwar police station on the material day at 8.00 p.m. when he received a report from PW1 on what had happened between the accused and the deceased and recorded her statement. He then proceeded with the police officers to arrest the accused before going to the scene. They did not find the accused who was arrested after six months when he was seen by one Ekort in Lodwar Town.

9. In cross examination he stated that he interrogated the accused, who confirmed having fought with the deceased but the statement was not recorded by a police officer in the rank of Inspector of police and above. He stated that the accused and the deceased fought over money which had been given to them by a good Samaritan to share but the deceased took the money and refused to share it with the accused, who tried to snatch it from him and when the deceased refused, he twisted his neck.

10. **PW2 PETER EKATOR** identified the body of the deceased. He had earlier been called by a Doctor at Eliye Dispensary who informed him that his brother (the deceased) was at the dispensary in bad condition and that they were transferring him to Lodwar Referral, where he was pronounced dead on arrival. It was his evidence that the deceased had injuries on his head. He was later on informed that the accused

whom he knew had assaulted the deceased.

11. In cross examination, he stated that his sister PW1 gave the doctor his number, who called him and told him that the deceased had been assaulted by a person known to him.

12. **PW3 DR. YAA JONATHAN** conducted post mortem examination on the body of the deceased, who had blood clot under the covering of the brain (left subdural haematoma) and as a result of the examination formed an opinion that the cause of death was massive left subdural haematoma and that the injury was caused by a blunt head trauma.

DEFENCE CASE

13. The accused stated that he did not kill the deceased who was his friend, who he used to give work. He stated that on 25/2/2018 he was with the deceased at Eliye Boys Secondary School together with five (5) others loading motor vehicles, since he had young children, he left the deceased with others at the school and proceeded home. He was later on told that there was a fight between the deceased known as Raster and Phillip. He then proceeded to the hospital where he found many people.

14. It was his further evidence that he asked the deceased what had happened and he said that he did not know. He then proceeded to the AP Camp where he made a report, but was referred to the Chief but he did not go to the chief. He stated further that the deceased was treated at Lodwar hospital until the 10th when he died.

15. It as his further evidence that there was a grudge between him and the brother of the deceased, arising out of 2017 election when he found the same distributing money and reported him to the police who arrested him. He stated that after several years, while at a workshop buying a table, he met a relative of the deceased who asked him why he had killed the deceased and they started to beat him up. He then ran to the police station, where they followed him and reported that he had killed the deceased, he was thereafter arrested and charged.

DETERMINATION

16. To sustain a conviction on a charge of murder, the prosecution is under both evidential and legal duty to prove the following elements of the offence: -

a) The fact and the cause of death

b) That the said death was caused by an unlawful act of omission and or commission on the part of the accused person

c) That the said unlawful act was caused with malice aforethought.

17. The fact and the cause of death of the deceased was not disputed. The same was proved through the testimony of PW1, PW2, PW4 and the accused in his defence, who stated that he was treated at Lodwar up to the 10th when he died and was buried at home. The cause of death was proved through the evidence of PW3 Dr. Yaa Jonathan through the production of post mortem report which confirmed that the cause of death was massive left subdural haematoma.

18. I therefore find and hold that the fact and the cause of death of the deceased was proved beyond reasonable doubt.

19. On whether the said death was caused by unlawful act on the part of the accused person, the same was placed at the scene through the eye witness evidence of PW1, who saw him assault the deceased with a walking stick. The deceased further made a dying declaration to her to the effect that the accused had killed him as a result of a dispute over some Kshs.20.

20. The evidence was corroborated in material particulars through the evidence of PW2, his brother, who was informed that the accused is the one who had assaulted the deceased. This evidence was further corroborated by PW4 who on the strength of the information given, went to the accused home but found him missing, until he was later on arrested after six months. It was his further evidence that when they interrogated the accused, he confirmed that he had fought with the deceased over some money, which had been given to them by a good Samaritan.

21. In his defence the accused only stated that there was a fight between the deceased but did not say with whom. Having taken into account the circumstantial evidence, to the effect that soon after the death of the deceased, the accused went under until he was arrested after months. It is clear to my mind and I find that the death of the deceased was caused by unlawful act on the part of the accused and nobody else.

22. I have further taken into account the fact that when the accused was arrested on allegation that he had killed the deceased, which warranted an instant denial, refutation or protest on his part, he did not deny or refute the allegation and in his defence before the court, he stated that he was asked what happened but is silent on what his answer was.

23. The final issue for determination is whether the accused had malice aforethought. Put differently, is whether there was any justifiable excuse to the action by the accused person. There is evidence on record that the fight against the accused and the deceased was as a result of a dispute over some money which they had been given to share by a good Samaritan and that the deceased refused to share the same with the accused, and in the process of trying to snatch the money from the deceased, he twisted his head.

24. There are therefore two issues for the court to decide, that is whether the accused had an intention to cause the death of the deceased or whether the deceased action in refusing to share the money with the accused amounted to provocation.

25. Section 207 of the Penal Code provides that: -

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

26. Section 208(1) of the Penal Code defines the term provocation as follows:-

“208. (1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

27. The Court of Appeal in **PETER KINGORI MWANGI & 2 OTHERS v REPUBLIC [2014] eKLR** stated:-

“For provocation to exist, the following two conditions must be established: -

(1) The subjective condition that the accused was actually provoked so as to lose his self-control and

(2) The objection condition that a reasonable man would have been so provoked.”

28. In this matter there is evidence that it is the deceased who ran away with the money that they had been given to share with the accused and that the accused only tried to snatch, the said money from him and in the process hit him with a walking stick once. The deceased was the aggressor in the circumstances of this case.

29. In the circumstances of the matter herein, I find and hold that in running away with and refusing to share the money with the accused, the deceased had provoked the accused who did not have the intention to kill him but acted as a result of the action of the deceased. Twenty shillings (20) might sound little but based on the hard economic times and in Lodwar in particular, the Action of the deceased was reasonably provocative to any reasonable man and woman in Turkana.

30. However, having taken into account the part of the body of the deceased which the accused hit, notwithstanding the fact that he only hit him once, it is clear to me that the force used was excessive. Having failed to establish malice aforethought which is an integral element of the offence of murder, I find and hold that the prosecution failed to establish beyond reasonable doubt the offence of murder but find and hold that a lesser offence of manslaughter was proved beyond reasonable doubt, as the action of the accused was an unlawful act, dangerous and caused the death of the deceased.

31. I therefore substitute the charge of murder with manslaughter contrary to Section 202 of the Penal Code against the accused person as read with Section 205 and find the same guilty thereof and convict him accordingly.

32. And it is so ordered.

DATED, SIGNED AND DELIVERED AT LODWAR ON THIS 6TH DAY OF JULY, 2021

.....

J. WAKIAGA

JUDGE