



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL CASE NO. 125 OF 2018

BETWEEN

REPUBLIC.....PROSECUTOR

AND

AMAR LEMASULANI.....ACCUSED

JUDGMENT

1) **AMAR LEMASULANI (Accused)** is charged with the offence of Murder Contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the charge are that

On 11th December, 2018 at Lokoyini village in Loigama Sub Location, Samburu East Sub-County within Samburu County murdered LTATIYA LOROKUTUK

PROSECUTION CASE

2) On 11.12.2018, elders in Wamba held a meeting to discuss the modalities of moving headers from within Salala Lodge. The elders sent Accused and LTIATIYA to go and see some trees that Accused alleged had been cut. While the elders were waiting for Accused and LTIATIYA to return, they received a report that Accused had killed LTIATIYA. PW1 to PW4 did therefore not witness the murder.

3) Accused who was the last person seen with LTIATIYA was arrested by members of public and was handed over to CPL Amayani who told court that Accused who was injured informed him that he had fought with LTIATIYA as a result of which LTIATIYA died. Accused was subsequently arrested and charged.

ANALYSIS AND FINDINGS

4) I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the deceased; that Accused caused the death and that he was actuated by malice.

5) **Section 203** and **204** of the **Penal Code** under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought. The sections read as follows:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Any person who is convicted of murder shall be sentenced to death.”

(a) The death of the deceased

6) The postmortem form **PEXH.4** reveals that the deceased died of blunt force trauma to the head.

(b) Proof that accused person committed the unlawful act which caused the death of the deceased

7) None of the prosecution witnesses witnessed the commission of the offence but Accused explained that he fought with LTIATIYA LTIATIYA as a result of which he died.

c) Malice aforethought

8) Having found that the prosecution has proved *actus reus*, the issue for determination is whether malice aforethought can be inferred now that a single blow to deceased's head caused his death.

9) The offence of murder is complete when, "*malice aforethought*" is established if, pursuant to **section 206** of the **Penal Code** evidence proves any one or more of the following circumstances:

“(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) An intent to commit a felony;

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

10) When none of the aforesaid elements are proved but there is otherwise an unlawful killing of another human being, the person commits the felony of manslaughter under **section 202 Penal Code** which is punishable under **section 205 Penal Code** by a term of imprisonment extending up to life.

11) In **Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 [1997] eKLR**, the Court of Appeal cited the case of **REX VS TUBERE S/O OCHEN** (1945) 12 EACA 63 with approval where it was stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late.

12) In this case, there is no evidence of repeated blows. This factor leads me to believe that the blow was an isolated one probably without any malice aforethought on the part of the Accused. In other words, it was likely that the Accused did not intend to kill the deceased but intended simply to hit him once.

13) Having considered all the evidence in this case, I have some doubt in my mind as regards malice aforethought and the benefit of such doubt must go to the Accused.

14) As a result, Accused is found guilty of a lesser charge of manslaughter contrary to Section 202 (1) of the Penal Code as read with Section 205 of the Penal Code and is convicted accordingly.

DELIVERED AT MERU THIS 09TH DAY OF DECEMBER, 2021

T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Accused - Present

For the Accused persons - Ms.Muna Advocate

For the State - Ms. Mwaniki