



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 87 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JAMES KARIUKI LESILAMBA.....ACCUSED

JUDGMENT

1. On 11/08/2014, early in the morning Philip Kalian Lenailapu found his brother, Saidimu Lenailepu (Deceased) lying in a ditch near Poro Centre in Samburu County. The Deceased had obvious injuries on his head and other parts of his body. He had lost his ability to speak. He was in bad shape.

2. Philip quickly arranged for a boda boda to take him to Poro Health Centre. Unfortunately, the Health Centre was closed. It was only at around 8:00am when it was opened. Alice Mwaura, a nurse at the Health Centre, and Margaret Lenaruke, a cousin to the Deceased, were the first Health Centre workers to arrive. Alice opened the Health Centre and attended to the Deceased. She put him on a drip. Margaret was around all the while. Philip, apparently, was not in the room.

3. After Alice, the nurse, put the Deceased on a drip, he temporarily regained consciousness. At that point, Margaret asked the Deceased for information on his assailants. The Deceased raised three fingers. Then he named three people: the Accused Person herein; one Longushuru; and one Ambrose.

4. Poro Centre is a small town. Margaret knew all three. They were soon arrested. The area Assistant Chief, Robert Lengile, played a major role in their arrest. So did APC Wycliffe Mudaili of Poro Administration Police Post. The latter had received information from a Mr. Lumbesi that his (Lumbesi's) kiosk had been attacked by the Deceased and much of his property had been damaged. APC Mudaili went to the kiosk. He found the Deceased lying next to the kiosk. Foam was coming out of his mouth. He was badly injured. Inside the kiosk, APC Mudaili found a chaotic scene: tea poured on the floor; and *mandazi* and utensils thrown all over the place.

5. The Accused Person was inside the Kiosk. APC Mudaili testified that the Accused Person had told him that there was a fight in the kiosk. He promptly arrested him. The Accused Person mentioned that Leshurto and Lekum were also involved in the fight. So, APC Mudaili arrested them as well. All three were taken to Maralal Police Station and were charged with assault causing grievous bodily harm. That case, however, was withdrawn because the Deceased passed on the following day.

6. After due investigations, APC Mudaili confirmed that only the Accused Person was involved in the fight. He released the other two and recommended that the Accused Person be charged with murder.

7. What was the APC Mudaili's theory of the case? That the Deceased apparently went to the kiosk where the Accused Person was working at around 10:00pm on 11/08/2014. The Deceased, then, began to cause commotion by pouring out the tea and throwing out utensils. The Accused Person responded by fighting with the Deceased resulting in the bodily injuries the Deceased had.

8. The investigating officer, Inspector Boniface Mulee had remarkably the same theory of what had happened. Here he is in his own words:

From my investigations, I gathered that there was a fight between the Accused and the Deceased. The Accused used to sell coffee and tea. The Deceased went and poured out the tea from the kettle. A fight ensued and Accused injured the Deceased....I never recovered any sharp weapon [at the scene]. A post-mortem [examination] was done on the body. I witnessed the same.

9. Later on, in cross-examination, Insp. Mulee stated: "It was the Deceased who prompted the fight by pouring out the tea which the Accused was selling."

10. Lesas Lekureto was, apparently, in the Kiosk when the incident happened categorically said: "I know nothing about this case. I do not know how the Deceased met his death."

11. The other two witnesses from Poro who testified singularly said they did not witness the incident: Pumeso Lesilamba, a brother to the Accused Person, testified that he found the Deceased lying near the kiosk. He then helped take him to the clinic. The Area Chief Robert Lengile received a report of the incident and rushed to the gate of the Health Centre where he found the Deceased lying there unconscious.

12. Dr. Philip Leturugu, a Medical Officer who conducted the autopsy on the body of the Deceased confirmed that the cause of death was perforated wound on the head with tissue coming out.

13. Finally, Mr. Henry Kiptoo Sang, a Government Analyst testified. He had received a blood stained purple shirt and a sack for analysis. These items were taken by Insp. Mulei from the scene of crime and were produced in evidence by him. Mr. Sang confirmed to the Court that the shirt and the sack contained human blood matching the blood sample of the Deceased. The two items had been recovered from the Accused Person.

14. It is on the basis of this evidence that the Prosecution hopes that the Court will return a verdict of guilty on a murder charge: that Accused Person, James Kariuki Lesilamba, killed, with malice aforethought, Saidimu Lenailepu (Deceased), on the night of 10-11/08/2014 at Poro Trading Centre in Samburu Central Sub-County within Samburu County contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code.

15. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

16. Flowing from this definition, the Prosecution is required to prove beyond reasonable doubt the following three crucial ingredients in order to return a guilty verdict:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

17. In his defence, the Accused Person delivered a straight denial: he said he knew nothing about the death. He told the Court that on the material day he went to work at around 5:00pm when a friend told him that the area chief was looking for him. That put in motion a process that led to his arrest for an offence he knew nothing about.

18. I found that defence as delivered to be so implausible as to have no inherent possibility that it is true. I found the evidence given by APC Muidali; Insp. Mulei and the area Chief much more credible about the arrest of the Accused Person. I accept their versions.

19. However, even after accepting the versions of the Prosecution witnesses, does that establish the charged offence?

20. There is no question that there was *actus reus*. The Deceased is dead. An autopsy report was submitted in evidence to this regard. And the doctor who performed the autopsy testified as well.

21. Was the Accused Person involved in the homicide? From the circumstantial evidence given in the case, I have answered it in the affirmative. I have relied on the evidence of APC Muidali; Insp. Mulei and the area Chief.

22. However, from the evidence adduced, no evidence of malice aforethought was sought to be established; and none was, in fact, established. Instead, the evidence on record unmistakably shows that the Deceased went into the kiosk of the Accused Person and started destroying property and pouring down prepared tea. The words come from the Prosecution witnesses themselves that it was the Deceased who provoked the attack. And APC Muidali, when he visited the scene, found it to be in utter disarray. How can one, then, in the face of this conclude that there was malice aforethought as defined in section 206 of the Penal Code. That section says that malice aforethought is only established when there is evidence of:

- a. *Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not; or*
- 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; or*
- c. *Intent to commit a felony; or*
- d. *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.*

23. The Prosecution did not prove any of these elements. Indeed, the theory of its witnesses is that it was the Deceased who provoked the attack. And he did not do it in a single, fleeting action but in a series of actions that infuriated the Accused Person to act. The circumstances clearly show that the Deceased and the Accused Person then engaged in a fight provoked by the former. It was during that fight that the Accused Person fatally beat up the Deceased. Simply put, the circumstances here do not inconclusively point to an intention by the Accused Person to either kill or cause grievous harm to the Deceased.

24. In the *Joseph Kimani Njau v R [2014] eKLR; Nzuki v R (1993) KLR 171*, the Court of Appeal remarked as follows:

There was a complete absence of motive and there was absolutely nothing on the record from which it can implied that the Appellant had any of the intentions outlined with the fatal consequences. Other than observing that the Appellant viciously stabbed the Deceased and in so doing intended to kill or cause him grievous harm, the Trial Court did not direct itself that the onus of proof of that necessary intent was throughout on the Prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the Appellant beyond reasonable doubt. In the absence of proof of malice aforethought to the required standard, the Appellant's conviction for the offence of murder is unsustainable. His killing of the Deceased amounted only to manslaughter.

25. The remarks by the Court of Appeal in the *Nzuki Case* apply, in my view, to the present case. Clear and uncontroverted evidence in this case shows that it was the Deceased who first attacked the Accused Person.

26. To sustain a murder charge, the Prosecution would have had to prove beyond reasonable doubt that at the point at which the Accused Person hit the Deceased, the Accused Person had the requisite malice aforethought. In my view, this was not proved in this case.

27. Hence, evidence tended to show that the Accused Person acted committed in the act of self-defence since the Accused Person was under attack by the Deceased. However, it is clear that the Accused Person responded with excessive force. There is no evidence at all that the Accused Person faced imminent death or risk of serious injury and there has been no suggestion or evidence that the Accused Person held an honest even if mistaken belief that it was only by repelling the Deceased using the knife that he would have preserved his life.

28. Consequently, even though the Deceased was the unlawful aggressor, it was unjustifiable for the Accused Person to respond with deadly force. The Defence of self-defence, though suggested by the circumstances, is "imperfect" in this case since the Accused did not hold a reasonable belief that it was necessary for him to repel the attack with deadly force to avert an imminent infliction of death or serious bodily harm to himself.

29. Consequently, my conclusion is that the Prosecution has not proved the third necessary element to establish the offence of murder against the Accused Person: malice aforethought. Murder cannot be established in the absence of the third element of premeditation. Instead, the Prosecution has established all the elements for the lesser but cognate offence of manslaughter: the unlawful killing of a human being. Consequently, this Court finds the Accused Person guilty of the lesser but cognate offence of manslaughter contrary to section 202 as read together section 205 of the Penal Code and is so convicted.

30. Orders accordingly.

Dated and delivered at Nakuru this 15th day of January, 2019

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JOEL NGUGI

JUDGE