



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CRIMINAL CASE NO 23 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMUEL NJENGA MUCHAL.....ACCUSED**

**JUDGEMENT**

**Introduction**

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya, in respect of the deceased, James Karinkai Koikai

2. He pleaded not guilty. He did not call any witnesses in his defence.

**The case for the prosecution**

3. The prosecution called twelve witnesses in support of the charge. The first witness called by the prosecution was David Nkuyayu (Pw 1). Pw 1 testified that he is the brother to the deceased. He further testified that the accused operated a bar. He also testified that the deceased blocked the accused in the hallway; when the accused was going to his room. It was also his further evidence that he sat with the deceased and then left.

4. Furthermore, the prosecution called David Omari Narikae (Pw 2). Pw 2 was the employee of the accused in that Tours bar. He testified that the deceased was a former school mate. It was his evidence that the accused was drunk and created a disturbance. Additionally, he also testified that the accused was also the one selling (beer) at the counter. Finally it was also his further evidence that the accused threatened to kill himself, his wife and children.

5. In addition to the foregoing witnesses the prosecution called Sang'o Ole Kayie (Pw 3), who was the brother in law to the deceased. Pw 3 testified that on 16<sup>th</sup> May 2018, he identified the body of the deceased to the doctor who performed the postmortem examination on the body of the deceased.

6. Miriam Wangare (PW 4) was an employee of the accused at the said Tours bar. It was her evidence that on 11<sup>th</sup> My 2014 at 8.00 pm there were many customers at the bar. At that time the deceased came with another man, whom she did not know. They ordered for a guinness. The deceased asked for cane extra, which they did not have. As a result, the deceased with this other man retreated to a private room and asked to be given two empty glasses. In that private room, there were three people including the deceased, all of whom were drinking and chewing miraa. By 11.00 pm two police men had left the bar, leaving behind only one of them. The police were the last to leave. Pw 4 left the bar and went to sleep.

7. The next morning at 6.00 am Pw 4 heard a person knocking at her door. She opened and she was then questioned about the death of the deceased, whose body was lying down three steps from the bar. Pw 4 was alleged to be the cause of the fight leading to the death of the deceased. It was her evidence that she was detained for one week.

8. The prosecution then called Mesenga Togom (Pw 5). Pw 5 met the deceased in a hotel at Melilo. In that hotel they were watching news. Thereafter they got miraa and went to the club of the accused. In that club they sat in a private room and ordered for soda. Thereafter they left each other at 8.00pm. The next day he learned of the death of the deceased, whose body was close to the club of the accused. The body had injuries on the chest and there was no blood at the scene.

9. The prosecution also called Dr Allan Soita (8), who produced the postmortem report prepared by Dr. Ngulungu as exhibit 1. According to that report the deceased body aged 31 years. The body had a stab wound in the chest. The cause of death was due to injuries to the cardia muscles, lung tissue with blood loss from one stab injury by a sharp object to the left chest.

10. Furthermore, the prosecution called No 45688 P C James Mutisya (Pw 6) of Olkurto police station. Pw 6 testified that he met APC Cpl Langat and then they proceeded to Kwa Njenga bar. While there Apc Cpl Langat spoke with the accused for 15 minutes. Pw 6 then decided to go home at 9.00 pm. The next day he went to the scene of murder. There he saw the body of the deceased behind the bar with a deep chest wound. There were spots of blood in the corridor. He finally testified that the deceased was chewing miraa and that the accused was selling at the counter.

11. The evidence of Pw 6 is supported by that of No 899024889 AP Sgt David Mole Kaino (Pw 7). He has only added the following. The next morning, he went to the scene of murder. There he saw the body of the deceased outside the bar. He then went to room 7, where he saw blood stains which had been washed unsuccessfully. He then arrested the bar owner (the accused) for further investigations. It was his further evidence that the deceased appeared to have been thrown out of room 7. There were attempts to clean room 7.

12. Furthermore, the prosecution called No 502426 PC Ernest Okubasu (PW 10), who was attached to Olkurto police station. Like the other police officers, Pw 10 visited the scene of crime. There he saw a trail of blood to room 7. In that room there was blood on the wall and the floor had been washed. He arrested the accused as a suspect. When questioned about the killing of the deceased, the accused was unable to explain. He was told by witnesses that the accused was drunk during the previous night. And that while drunk, he threatened to kill somebody. He also testified that the accused rented out room 7 to the deceased. It was also the evidence of Pw 10 that the accused operated the bar and managed the rooms.

13. The prosecution also called No 61187 Cpl Henry Kiboma (Pw 11). Pw 11 testified that on his first visit to the scene of crime, he was unable to take photographs; since the crowds were hostile to him. They did not allow access to that scene. It is on the second occasion after two weeks that he was able to take photographs, which he produced as exhibit 3 (a-g). Finally, it was his evidence that the door to room 7 was blood stained.

14. The prosecution finally called No 65450 PC Samuel Liu (Pw 12), who is the investigating officer (I.O.). As the I.O. he testified that the accused lived in the bar where the body was found. It was also his evidence that the witnesses told him that the deceased and the accused had quarreled. He further testified that the deceased was killed in room 7; before his body was thrown to a local path near the bar lodgings. The accused and four other suspects were arrested. He further testified that the blood specimen, the jacket and sweater of Cpl Langat were submitted to the Government chemist for analysis. The suspects in the killing of the deceased were Cpl Langat and the accused. He also had information that the deceased and the accused had quarreled and were not in good relationship. Additionally, Pw 12 took possession of the dark blue jacket, white sweater and a blood stained knife of the Cpl Langat and the blood of the deceased and submitted them for analysis. The knife taken from Cpl Langat was blood stained and was in his pocket. He also testified that only Cpl Langat and the accused were the suspects.

15. The court recalled Pw 12 in connection with the Government analyst report. In his recalled evidence PW 12 testified that when he testified he did not have the Government analyst report; which he received towards the end of 2017. He testified that he took blood specimen from Cpl Langat because his jacket was blood stained on the right arm, chest and at the back. Cpl Langat did explain the presence of blood stains on his jacket. The report was put in evidence as exhibit 6.

16. Furthermore, No. 2001009455 Ap Cpl Wesley Langat (Pw 9) was recalled for further cross examination upon the application of Mr. Kilele for the accused. He testified that he was now attached to Longisa police station. He further testified that he was arrested and detained as a suspect for one week in Narok police station. And that while in cells a suspect gave him a jacket. He also testified that the police took his jacket for analysis. Finally, he testified that he was not found in possession of a blood stained knife.

### **The case for the defence**

17. The accused gave sworn evidence and did not call witnesses in his defence. It was his evidence that the deceased was his friend and a former school mate at Olkurto primary school. He also testified that the deceased entered his bar at 9.00 pm and stayed until 10.30 pm. The deceased was with Kuyoni. Kuyoni was chewing miraa and was drinking cane extra beer. The deceased was not having any beer. He learned of the death of the deceased the next morning. It was also his evidence that PC Okubasu interrogated and slapped him. While being examined in chief by Mr. Kilele the accused admitted that there were blood stains at the stairs. He also admitted that *"It is true that Ap Cpl Langat told me not to tell anyone about the incident, and that if I did he was going to kill me and my entire family."* The accused continued to testify that he did not know what made Ap Cpl Langat to tell him not to divulge to anyone or else he would kill him and his entire family. In re-examination by Mr. Kilele for the accused testified that he did not witness Ap Cpl Langat do anything other than pulling the deceased outside the gate. Finally, the accused testified that in re-examination that *"It is true that the police had this information when they charged me in court."*

18. It is important to point out that twelve witnesses testified before Lady Justice Meoli and only two recalled prosecution witnesses (Pw 9 and (PW 12) testified before me in addition to the accused who gave sworn evidence before me. As a result, upon the accused being explained of his rights under section 201 (2) of the Criminal Procedure Code (Cap 75), Laws of Kenya the accused elected to have the case proceed from where it had reached. His counsel, Mr. Kilele confirmed the position.

### **ISSUES FOR DETERMINATION.**

19. After considering the totality of the prosecution and defence evidence, I find the following to be the issues for determination.

1. Whether or not the accused caused the death of the deceased.
2. Whether or not the evidence discloses murder or manslaughter.
3. The scope of using accomplice witnesses.

4. What are the appropriate orders to be made?

#### ISSUE 1

20. There is no direct evidence against the accused that he is the one who killed the deceased. It therefore follows that the evidence against the accused is circumstantial in nature. For the court to convict on such evidence, the circumstances must form a complete chain pointing exclusively to the accused alone as the perpetrator of the offence charged. If there is any break in that chain of evidence, the offence has not been proved with the result that the accused is entitled to an acquittal. *See Republic v. Phyllis Grace Karimi, Criminal Case No 29 of 2015, High Court (Embu)*. The circumstances in the instant case are as follows. The accused was the owner and manager of Tours bar business. There is credible evidence from David Nkuyayu (Pw 1) that the deceased blocked the accused in the corridors leading to his room. There is no evidence to explain this unusual conduct of the deceased. There is further evidence from David Omari Narikae (Pw 2) that the accused was drunk and that he created a disturbance on that material day. Additionally, the accused also threatened to kill himself, his wife and children according to Pw 2. In this regard, it is important to point out that the prosecution did not produce evidence in respect of the mental status of the accused.

21. This notwithstanding, there is a presumption of sanity in terms of section 11 of the Penal Code until the contrary is proved. Moreover, the defence of the accused is not that he was insane but that it is Ap Cpl Wesley Langat (Pw 9), who he saw struggling with the deceased during that material time. In evidentiary terms the accused is blaming the death of the deceased upon this AP police officer.

22. Furthermore, there is evidence from the police officers (PW 6, PW 7, PW 10, PW 11 and PW 12), who visited the scene of crime the following morning after the deceased was found dead a few meters from the bar. There were blood stains in room 7. They also testified that there was a trail of blood from room 7 to where the body of the deceased lay outside near the bar. According to Pw 7 when he went to room 7 he saw blood stains which appeared to have been washed unsuccessfully. He also testified that the body of the deceased was thrown out of room 7. Additionally, Pw 10 testified that it was the accused who operated and managed the rooms. I find that room 7 is where the deceased was killed and then thrown out of that room. In these circumstances I find that the accused was rightly treated as a suspect. As a manager of the rooms the accused must have known about the unsuccessful attempt of cleaning of the rooms including room 7. I also find that AP Cpl Langat threatened the accused with death to ensure that he did not testify against him in respect of this murder.

23. The foregoing circumstances raise strong suspicions against the accused. According to *Sawe v. R (2003) KLR 354*, strong suspicions alone cannot form the basis of convicting an accused for murder.

24. The upshot of the foregoing is that the chain of circumstances in the instance case, is not complete. For instance, the deceased was drinking in the private room with two other persons, whose identities remain unknown. These two people should have been called as witnesses to assist in completing the chain of circumstances. It therefore follows that the circumstantial evidence does not point exclusively to the accused as the perpetrator of this offence.

#### ISSUE 2

25. Since I found that the accused is not the perpetrator of the offence charged, it is unnecessary to make a finding in respect of this issue. In other words, the issue is moot.

#### ISSUE 3

26. The usage of accomplices as witnesses is accepted in the administration of criminal justice. This is also recognized in section 141 of the Evidence Act (Cap 80) Laws of Kenya, which provisions declare an accomplice to be a competent witness. In the instant case AP Cpl Wesley Langat is an accomplice witness. The evidence on record points to his complicity in this murder. The report of the Government analyst (exhibit 6) implicates him in that the blood sample of the deceased was found on him. Additionally, the evidence of the I.O. Samuel Liu (Pw 12) clearly shows that Ap Cpl Wesley Langat was treated as a suspect along with the accused. Pw 12 testified that he took possession of his jacket, since it was blood stained. There is the sworn evidence of Ap Cpl Wesley Langat himself that he was arrested and detained at Narok police station for one week.

27. In the circumstances, I find that the prosecution did not need the evidence of Ap Cpl Wesley Langat (PW 9), since they had ample evidence from the other police officers namely Pw 6, Pw 7, Pw 10, Pw 11 and Pw 12. Accomplice evidence is generally used where the prosecution does not have alternative credible evidence, which is not the position in this case. At the end of his evidence the prosecution did not apply to the court to immunize Ap Cpl Wesley Langat (Pw 9) against a potential future prosecution. The reason being that the prosecutor knew all along that AP Cpl Langat was to testify as an accomplice witness, whose evidence was not necessary. Hence, the inapplicability of section 128 of the Evidence Act (Cap. 80) Laws of Kenya, which empowers the court to immunize a witness who has been compelled to incriminate himself. The usage of Pw 9 as a witness is an abuse of the prosecutorial power by the prosecutor, who is required to take into account the public interest in the discharge of his prosecutorial mandate in terms of article 157 (11) of the 2010 Constitution of Kenya. It is to be remembered that it is in the public interest that those who are alleged to have committed serious crimes should be prosecuted and punished.

28. The reaction of the members of the public who did not allow Cpl Henry Kiboma (Pw 11) to access the scene of crime to take photographs as part of the investigations in this matter is troubling. I find that it is the involvement of AP Cpl Langat with this murder that made the public to deny access to the murder scene. PW 11 was perceived to be partial.

#### ISSUE 4

29. The upshot of the foregoing is that I find the accused is not guilty of murder in terms of section 306 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya. Pursuant to section 322 (1) of the Criminal Procedure Code, I hereby acquit the accused of murder. He is hereby

set free unless held on other lawful warrants.

30. The DCIO Narok North is hereby ordered to arrest and charge No.2001009455 Ap Cpl Wesley Langat with the murder of the deceased, James Karinkai Koikai. The Deputy Registrar is hereby directed to serve a copy of this judgement and order upon the D.C.I.O.

31. I would also like to register my appreciation in respect of PC Samuel Liu for investigating this case in a professional and commendable manner.

**Judgement Signed, Dated at Narok and delivered in open court this 12th day of February, 2019 in the presence of Mr. Omwega for the state and Mr. Kilele for the accused.**

**J. M. BWONWONGA**

**JUDGE**

**12/2/2019**