



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 24 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WYCLIFF ANIRUKA RENJI ALIAS SWELELI.....ACCUSED**

**JUDGMENT**

1. **WYCLIFFE ANIRUKA RENJI** alias **SWELELI** (*the accused*) is charged with murder Contrary to **Section 203** as read with **204** of the **Penal Code** that on 12<sup>th</sup> April 2011 at **KAPKANGANI** village in **NANDI** county, he murdered **SHADRACK MUSIKALI KELOSIO** (deceased)

He denied the charge.

2. **HELLEN ITSUZA** (PW7) the deceased's wife was at home with her late husband at about 5.00pm, the deceased said accused had a panga belonging to him and demanded for it, but accused said he did not have it. The deceased got annoyed and removed the door to their house.

3. A quarrel ensued and the accused begun beating up the deceased using kicks and blows. The accused then dragged the deceased outside, even as the deceased and PW7 screamed for help – but no one came. The accused then left.

4. PW7 took her husband into the house and covered him with a blanket –they slept in the sitting room. At about 4.00am/5.00am she called one **JOEL** for help but he did not come. She then called a boda boda operator named **SHABIL** to help ferry the injured husband to **KAPKANGANI** hospital. On arrival at the hospital, the deceased was pronounced dead. It was her evidence that the deceased had injuries on the head, legs, and chest. The panga which triggered the altercation was identified in court by the witnesses. She stated that the accused had been their neighbour for 3 years and there had never been disagreements between him and the deceased.

5. On cross examination she confirmed that the accused and the deceased were friends, and on that day, both of them were drunk. The accused had come to the house with the panga which he placed on the table, but PW7 took it and placed it behind the seat.

6. Incidentally when the incident begun, **SHABIR** and **MARAGOLI** were present, but **SHABIR** fled when **MARAGOLI** tried to separate them without success – that is when the accused dragged the deceased outside and continued beating him.

7. **ALFRED SHABIR** (PW6) told the court that on 12.4.2011, PW7 called him with a request to help dress up her husband.

When he got to her house, he noticed that there was blood on the floor, and the deceased had cuts on the head, legs, stomach and hands – he was on a seat and said he had been cut by **SWELELI** and another man called **MARAGOLI**.

He helped call for boda boda to take the injured man to hospital, but the latter died before reaching hospital.

According to PW6, the deceased said **SWELELI** had cut him because of Ksh.200/- when he got to the house that morning the deceased was not drunk.

8. **JAMES TIANI** (PW2) a boda boda rider confirmed that on 12.04.2011 at about 8.30am, the deceased's wife called requesting him to take him to hospital and he obliged. However, he did not speak to the deceased.

9. The area Assistant Chief, **SAMUEL KIPTOO ARUSEI** (PW1) received a report from the **MOGOYWA VILLAGE** elder **DANIEL MARITIM** at about 8.00am that **SHADRACK KELOSIO** had been killed in the night by **PHILIP OSONJA**, and **WYCLIFFE SWELELI**. He visited the scene and noticed that there was blood on the wall. The deceased's wife told him that the accused and the deceased had fought over a panga which the accused had and the fight erupted when the deceased asked for the panga.

10. **SHIELA TANUI** (PW8) a Clinical Officer at **MOGOTIO** Sub-County hospital told this court that while on duty at **KAPKANGANI HEALTH CENTRE** on 12.04.2011, at about 8.30am, someone who was already dead was brought on a stretcher, she observed that he had deep cut wounds on the head, lower and upper limbs but his clothes were not blood stained – meaning he had changed his clothing.

She called **KAIMOSI** Police who collected the body.

11. Upon receiving reports about the incident, from the area Assistant Chief (PW1), **APC SALIM OPIYO MASINDE** (PW5) proceeded to the deceased's home, where he was informed that the deceased had been taken to hospital by his wife, while at the scene the deceased wife came and said the deceased was attacked by **SWELELI** and **PHILIP OCHCHO** whom she knew very well. She identified **PHILIP** when PW5 arrested that day and handed him over to **KAIMOSI** Police Station.

12. Meanwhile **IP ABDIKADIR HASSAN** (PW9) got a call from PW8 of **KAPKANGANI HEALTH** Centre and proceeded there. He found the deceased who had cut wounds on the head, abdomen and leg. He and other officers transferred the body to the mortuary. He then visited the deceased's home, but the house had been mopped and cleaned by the deceased's wife.

Later he learnt that the Assistant Chief had arrested the deceased's wife and another man, so he revisited the scene and collected a blood-stained coat.

**CPL WYCLIFFE WEKESA** (PW 10) took the accused from police custody to CID officers and accused said he had kept in the house of **SILAS** in **KAPKANGANI** location. PW10 proceeded to the said house led by the accused and recovered the panga which was produced as Exhibit. It however did not have any blood stains.

13. The deceased's body was identified to the Doctor for post – mortem by his two brothers **WILSON KEROSIO** (PW3) and **JOEL KEROSIO** (PW4)

14. **DR. OTIENO** (PW11) who produced the post-mortem report as exhibit 2 on behalf of **DR LIMO** stated that the body had deep cut wounds on the scalp, near the right ear, occipital – all the wounds had similar patterns with linear edges. Indicating that they had been inflicted using a sharp object. There were tram trail marks on the chest, right side of the abdomen. The cover limbs had wounds on the anterior and the left forearm had a defensive wound. Internally there was a fracture on the occipital region of the skull and there was intracranial bleeding in the brain tissue. The cause of death was head injury with intracranial and ultracerebral haemorrhage leading to increased intra-cranial pressure.

15. In his sworn defence, the appellant denied killing **SHADRACK**, saying on the date in question at about 5.00pm, he was at the deceased's home in the company of **PHILIP, SHABIR**, the deceased, the deceased's wife, and many others. They were drinking changaa, as the deceased and his wife were changaa brewers. He had a panga which the deceased had lent him, but it had been taken away from him, and the deceased demanded that he pays back the panga.

16. On the material day, the deceased renewed his demand for the panga, and accused stated:

*“I hit him using a punch. Philip then pulled me away and I left. I did not have any other weapon.”*

17. The next day we woke up and went to his errands, only to learn at about 11.00am that the deceased had died.

He rushed to the deceased's home where he found people chanting that they did not want to see deceased's wife and son – they then pulled down the **SHABIR**'s house.

Later deceased's wife, Shabir and the deceased's son were arrested.

He denied having any disagreements with the deceased whom he described as his great friend, it was his contention that what took place between him and the deceased was the usual drunkards' brawl which was not enough to result in death.

18. On cross examination he clarified that it is the deceased who got up from where he was and punched him with his fist, and they begun fighting using kicks and fists. He maintained that he did not have any sharp object; and that he was too drunk to know whether the deceased was also drunk, and that during the fight he did not see any injuries on the deceased. He insists that if the deceased was beaten by someone else, he would not know.

19. The court had directed the defence counsel to file and serve written submissions by 05.12.2018 but none were filed.

20. It is not disputed that there was an altercation between the accused and the deceased, triggered off by the deceased's demand that the accused should return his panga. It is also common ground that when the fight begun it was basically fists and kicks.

The accused conceded on cross examination that apart from him, he was not aware of any other physical confrontation involving the deceased.

Another common ground is that the accused and the deceased were friends who had never disagreed in the past.

Prosecution witnesses confirmed that PW7's was a changaa brewer and her home was a drinking den. She stated on cross examination that the accused had come with a panga which he had placed on the table, but which she took and kept behind a seat. This was the same panga

she identified in court, and which police say they recovered from the home of one **SILAS**, having been led there by the appellant.

21. The evidence presented does not suggest a premeditated act by the accused – he acted on the spur of the moment, irked by his friend’s perpetual demand for his panga, which he had borrowed. What had begun as a fist and punch quickly degenerated into a deadly furious attack where there was now no retreating by the accused, even as the deceased and his wife screamed, one of the revelers tried to separate them. I am persuaded that in this rage, the accused inflicted the injuries on the deceased, which turned out to be fatal. His action does not fit within the conventioned key ingredient of mens rea, but his action resulted in an unlawful killing – having used excessive force repeatedly.

22. Consequently I would under Section **179(1) CPC** reduce the charge and substitute it with a charge of manslaughter, which the evidence so reveals.

The accused is thus convicted on the substituted charge of manslaughter contrary to Section 202 of Penal Code.

**DATED, SIGNED and DELIVERED at ELDORET this 7<sup>th</sup> day of March 2019.**

**H. A. OMONDI**

**JUDGE**