



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL CASE NO. 5 OF 2019

BETWEEN

REPUBLIC PROSECUTOR

AND

HILLARY LANGAT.....ACCUSED

JUDGMENT

1. **HILLARY LANGAT** (“the accused”) is charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on 28th February 2018 at Milimani area within Kilgoris town in Transmara West Sub-county within Narok County, he murdered **BRIAN KIBET** (“the deceased”).

2. The offence of murder is defined by **section 203** of the *Penal Code* as follows, “*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*” The prosecution must prove beyond reasonable doubt the following three ingredients; the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

3. The deceased was the first born son of Roselyn Langat (“Roselyn”) and was aged about 14 years at the time of his death. The fact and cause of his death was not disputed. According to the post mortem report prepared by Dr Mutisya of Transmara Sub-County Hospital on 2nd March 2018 concluded that the deceased, who was aged about 14 years, died from a single penetrating injury to the abdomen leading to massive bleeding. The prosecution called four witnesses to prove that the accused murdered the deceased.

4. Brian Kimutai (PW 1) testified that he knew the deceased as they were neighbours. On the morning of 28th February 2018, he was home seated outside their house. At about 10.00am a man came and inquired whether Roselyn’s house was open. PW 1 showed him to the kitchen door and he proceeded to enter the house. After about 5 minutes, he heard the deceased screaming. The man left the house and started running away. PW 1 gave chase but he was outpaced. When he returned, he found people gathered outside the house. He was informed that the deceased had been stabbed. PW 1 testified that he did not know the accused prior to the incident.

5. Valentine Chepkemoi Bwogo (PW 2) told the court that she lived in the same compound with Roselyn. On the morning of 28th February 2018, she was arranging clothes in her bedroom when, at about 10.00am, she saw the accused, whom she knew, approach the back door of Roselyn’s house. She knew him as he worked with Roselyn at Kenya Power and Lighting Company Limited (“KPLC”) and had visited her home from time to time. She could also see PW 1 seated outside chatting on phone while the accused conversed briefly with him and entered Roselyn’s house. In a few minutes, she heard a very loud prolonged scream like someone was in pain coming from Roselyn’s house. She saw the accused running out of the house and PW 1 chasing him. She also raised alarm. When her house help, Sharon Chepkurui (PW 3) heard the scream, she also ran out and went into Roselyn’s house. She came out and told her that the deceased had been injured. She quickly flagged a vehicle which carried the deceased to the hospital.

6. PW 3 recalled that on the material morning while taking a bath, she heard PW 2 say, “*What has he done.*” She quickly left the bathroom and went to Roselyn’s house where she found the deceased on his knees. She asked him what happened and he told her he had been stabbed. She saw him holding a knife with a green handle. She ran out to call for help and when she went back into the house, she found the deceased had removed the knife and had collapsed. A vehicle arrived and they took the deceased to hospital where he later died.

7. The Investigating officer, PC Gregory Malakwen (PW 4) confirmed that he was instructed to investigate the incident where a young man had been stabbed. He proceeded to Kilgoris Sub-County Hospital where the deceased had been admitted to the ICU. He also went to Roselyn’s home and recovered a knife. He started looking for the accused after he was informed that he lived in Kilgoris town. When he went to his residence, he was informed that he had left. He went to look for the accused in his rural home in Chebole, Bomet but he was not there. After broadcasting the accused’s name and picture to the police departments all over the country, the accused was located at Kuresoi.

He was arrested and brought to court. PW 4 testified that his investigation revealed that the accused was sacked from his job as a KPLC driver on 28th February 2018 by Roselyn on suspicion that he was making illegal power connections.

8. In his unsworn statement, the accused (DW 1) denied the offence. He told the court that although he came from Bomet County, he had settled in Kuresoi where he had bought a shamba. He stated that he was also running a hotel in Kuresoi. He told the court that on 28th February 2019, he was arrested by police officers while at his hotel. The police took his personal items and brought him to Kilgoris where he was interrogated, beaten and threatened. He told the court that he did not know the deceased and that he first went to Kilgoris on 28th February 2018. He also denied that he was employed by KPLC or that he knew Roselyn Langat.

9. Haron Kiprono Kirui (DW 2) testified that he worked for the accused in his hotel. He told the court that he had worked there since 2015. In February 2018, he left to go home but when he returned, he did not find that accused. He told the court that the accused did not inform him that he worked in Kilgoris. He knew that the accused came from Bomet but he did not know where. He told the court that he could not recall when he left employment.

10. The main issue for determination is whether the accused is the one who stabbed the deceased. Counsel for the accused attacked the prosecution's case on the ground that it did not prove that the accused is the person who assaulted the deceased. Counsel pointed out that PW 1 did not know the accused and no identification parade was conducted to confirm that the accused was the person he had seen on the material day. He submitted that the prosecution failed to call essential witness like Roselyn Langat and attendant proof that he was working at KPLC. In his view, the prosecution case was not full proof.

11. The prosecution's case is founded on the testimony of two witnesses who saw a man enter Roselyn's house and immediately thereafter the deceased was found stabbed. PW 1 admitted that he did not know the accused and had not seen him before hence his identification of the accused was a dock identification. The police ought to have conducted an identification parade to test the identity of the accused. What is clear though, is that the man who came to the Roselyn's home on that day seemed to know where he was going when he asked whether Roselyn's door was open. Thus the evidence of PW 1 established that the man who came to the home on that day was familiar with the home.

12. The testimony of PW 2 was clear and direct. She testified that she knew the accused as Roselyn's driver. She had seen him coming to her home from time to time to have his work ticket signed so that when she saw him on that morning, she was not suspicious about his presence at the house. The incident took place at day time and I am satisfied that PW 2 saw the accused enter the house.

13. Counsel for the accused attacked this evidence on the grounds that the prosecution did not call Roselyn to confirm that the accused was indeed employed at KPLC and that nothing was produced to support the prosecution's case that he was working with that company. In **Bukenya & Others v Uganda [1972] E.A. 549**, the former Court of Appeal for East Africa held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case and that failure to call such a witness would entitle the court to make an adverse inference that the evidence would be favourable to the defence.

14. However, **section 143** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. Taking the general principle established by precedent and the provision of the **Evidence Act**, I hold the position that the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

15. In this case, PW 2 was present when the accused came to the Roselyn's home. She knew him and had seen him before the incident. Roselyn testimony would only confirm that she knew him and supply the motive for the attack, a matter I shall deal with later in the judgment. Roselyn was not at home when the attack took place and would neither add nor subtract from the testimony of PW 2 which I found credible.

16. The accused's defence was in the nature of an alibi. This court has to consider whether the alibi raised reasonable doubt in the prosecution's case. In the case of **Kiarie v Republic [1984] KLR 73**, the Court of Appeal held that:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

17. In **Sekitoleko v Uganda [1967] EA 531** the Court stated, in relation to *alibi* evidence, that as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else and that the burden of proving an alibi does not lie on the accused. In **Uganda v Sebyala & Others [1969] EA 204**, the court observed that:

The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.

18. The unsworn statement made by the appellant lacks any weight in light of the clear testimony of PW 2 putting him at the scene of the incident on the material morning. Likewise, DW 2 was not sure when he last saw that the accused as he had left employment in February 2018. He could not vouch for the accused presence in Kuresoi on 28th February 2018. I also take the position that it was not inconsistent for the accused to do farming, run a hotel and work for KPLC in Migori. What emerged from the testimony of DW 2 was that the accused never told him much about his personal life.

19. PW 4 told the court that the accused's action was motivated by the fact that he had been sacked by the deceased's mother. The

prosecution did not call Roselyn or anyone from KPLC to support its case. Under **section 9(3)** of the **Penal Code**, motive is irrelevant in proving the commission of murder however where the prosecution case is founded on circumstantial evidence, the evidence of motive may support the chain of circumstantial evidence. In **Libambula v Republic [2003] KLR 683** the Court of Appeal observed as follows;

We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain of presumptive proof especially where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.

20. The totality of the evidence is that the accused went into Roselyn's home where he was seen PW 1 and PW 2. Whereas, PW 1 did not know him, PW 2 knew him and identified him. His defence, as I have shown, is lightweight. The fact that the accused disappeared from Kilgoris for a whole year only to be found in Kuresoi is inconsistent with his innocence. I do not think Roselyn's testimony would have added any value nor was it suggested that the evidence would be exculpatory. I would also add at this stage that I found the testimony of PW 2 clear and consistent. There was no suggestion that she would randomly implicate the accused, if he was a stranger in the murder of her neighbour's son. I therefore find and hold that the accused is the person who stabbed the deceased.

21. Evidence of malice aforethought may be direct or indirect depending on the peculiarity and facts of each case at the trial. In **Republic v Tubere s/o Ochen [1945] 12 EACA 63**, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. In this case, the accused went to the Roselyn's home and viciously stabbed the deceased in the stomach. The deceased was a young boy who had done nothing to suffer such a painful fate. What is clear is that the accused went to that house with a clear intention of killing the deceased. The accused acted with an intention to cause grievous harm or death which constitutes malice aforethought under **section 206(a)** of the **Penal Code**

22. I find that the prosecution has proved its case against the accused beyond any reasonable doubt. I therefore find **HILLARY LANGAT** guilty of the murder of **BRIAN KIBET** and I convict him accordingly.

DATED and DELIVERED at KISII this 22nd day of MAY 2019.

D.S. MAJANJA

JUDGE

Mr Kaburi, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.