



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL CASE NO. 7 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SUSAN ASINYEN.....1<sup>ST</sup> ACCUSED**

**PETER NATIENG.....2<sup>ND</sup> ACCUSED**

**JOHN JUMA LOKWANG.....3<sup>RD</sup> ACCUSED**

**JUDGEMENT**

1. The accused persons were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which were that between 3<sup>rd</sup> and 4<sup>th</sup> August 2017 at Lopangae Village in Turkana Central sub-county within Turkana County jointly with others not before court murdered **PHILIP EKIRU**.

2. They both pleaded not guilty and on 19/12/2017 their trial commenced before Riech J. who heard the evidence of six (6) prosecution witnesses before proceeding on transfer. On 2/10/2018 the matter being part-heard was placed before me for directions under **Section 200** as read with **Section 203 (2)** of the **Criminal Procedure Code** and whereas the accused persons sought that the hearing starts afresh, having looked at the circumstances of the case, I gave directions that the matter proceeds from where it had reached.

3. For record purposes it must be noted that I did not have the advantage of seeing and hearing six (6) prosecution witnesses but took time to read and understand the recorded proceedings for the purposes of the Judgement as the law requires.

**PROSECUTION CASE**

4. The prosecution case was that **PW1 DME** a minor aged thirteen (13) years at the time of trial had gone to the home of the 1<sup>st</sup> accused **Asinyen** where he met the deceased who was his friend where they took twenty (20) litres of jerrican and the 1<sup>st</sup> accused's bicycle for the purposes of drawing water. When they came back, they met two daughters of the 1<sup>st</sup> accused who told them that the 1<sup>st</sup> accused was calling them. The 1<sup>st</sup> accused ordered the deceased to remove his shoes and put his feet into the sand. The foot then swelled causing the 1<sup>st</sup> accused to state that they were the ones who had stolen her missing money, which the deceased denied.

5. It was his evidence that the 1<sup>st</sup> accused told them to go into one of the houses in her compound where she was with her husband and started to beat them up from 7.00p.m. to 3.00 a.m. The deceased then confessed that it is **PW1** who had the money. They were then tied with ropes and car tyres placed upon them on which petrol was poured with the intention of burning them. They were later on taken to the forest to go look for the money but no money was recovered. On their way back to the house the deceased fell down and was pulled to the home of the 1<sup>st</sup> accused where they continued beating them. The 1<sup>st</sup> accused then called KPR and a *bodaboda* rider to carry the deceased but he declined. They were taken to the police station together with the 1<sup>st</sup> accused. That was the last time he saw the deceased alive.

6. It was his further evidence that he knew the 1<sup>st</sup> accused as his aunt and the 2<sup>nd</sup> accused as her husband. He further stated that the 3<sup>rd</sup> accused was part of those who beat them up. **PW2 JOSEPH NANGORE EKITELA** testified that he was at the 1<sup>st</sup> accused's bar at 9.00 p.m. when he found several children lying down having been beaten. He advised the 1<sup>st</sup> accused to take the children to their parents. He asked the deceased whether he had stolen the 1<sup>st</sup> accused's money and he answered in the negative. At the scene there was the 1<sup>st</sup> and the 2<sup>nd</sup> accused. In cross-examination he stated that he did not see the accused persons beat the boy, neither did he see the 3<sup>rd</sup> accused at the place.

7. **PW3 SAMWEL AKUREE LOBETO** heard two children who were passing by his home say that two children including his nephew **David Mangaa** had been killed. He reported the issue to the police station and went to AIC Hospital where he confirmed the death of the deceased who had injuries on his fingers. He confirmed in cross-examination having not witnessed the beating. **PW4 JOSEPHAT**

**EMURIA** a KPR officer was called by the 1<sup>st</sup> accused who reported that some boys had stolen her Kshs.10,000/=. He advised her to take them to the police station. He proceeded to the police post and made a report on the same. He then went to the scene where he found the deceased lying down and **PW1** standing. They denied having stolen the 1<sup>st</sup> accused's money. He then took the deceased and the 1<sup>st</sup> accused to the nearest hospital and proceeded with **PW1** to the police station. In cross-examination he confirmed having not witnessed the beating.

**8. PW5 DANIEL ETABO NGIPOI** a bodaboda rider confirmed having carried the KPR officer to the home of the 1<sup>st</sup> accused whom he knew, where they found **PW1** and the deceased. The 1<sup>st</sup> accused when asked what had happened stated that they had stolen her money. He then carried them to the hospital where the deceased was pronounced dead. He had observed that the deceased had an injury on the head.

**PW6 PC LOTULIA NICHOLAS** stated that he knew the three accused persons. He stated that on 4/08/2017 the 1<sup>st</sup> accused went to the station and reported that she had apprehended two boys on 3/08/2017 and detained them in her house for stealing her money. She disciplined them and one of them got sick and was pronounced dead on arrival at the hospital.

**9.** He proceeded to the scene where they recovered a tyre, sticks, a rope and half litre of petrol. He later re-arrested the 2<sup>nd</sup> accused at the police station when he followed his wife. In cross-examination he confirmed that that the 1<sup>st</sup> accused had a bar and a camp site but did not know whether she used a generator. **PW7 DR. WAYAA JONATHAN** produced post-mortem report on the deceased and confirmed that the cause of death was severe head injuries due to blunt force trauma.

**10. PW8 SGT. BERNARD MOROKO** was informed by his colleagues at Kalokol post that the 1<sup>st</sup> accused had made a report at the post to the effect that she had confined two suspects who had allegedly stolen her money who had been subjected to beatings and the deceased was confirmed dead while **PW1** survived. The 1<sup>st</sup> accused was detained at the post and the body of the deceased taken to the mortuary.

**11.** It was his evidence that two other suspects were arrested on 6<sup>th</sup> and 7<sup>th</sup> of August 2017. On 11<sup>th</sup> August 2017 he visited the scene with **PW1** where he collected exhibits. In cross-examination he confirmed having not seen a generator at the scene.

## DEFENCE CASE

**12.** When put on their defence all the three accused persons gave unsworn statement of defences. The 1<sup>st</sup> accused **SUSAN ASINYEN** stated that she had two homes – one in the rural area and one in Lodwar. She stated that on 3<sup>rd</sup> August she was in town selling fish but went back to her rural home at night where she met the deceased who had allegedly stolen her property including Kenya shillings ten thousand (Kshs.10,000) in cash. She detained them until the next morning when the deceased declined to show them where the money was. She boarded a motor bike with the deceased and **PW1** and the deceased decided to jump off the motor bike injuring himself. She called an NPR officer who instructed her to report to the police station which she did and made a report thereat. She then took the deceased to the hospital where he was pronounced dead. She stated that she was not with the 2<sup>nd</sup> and 3<sup>rd</sup> accused on the material day and further that the petrol found in her home was for running a generator. She denied committing the offence.

**13.** The 2<sup>nd</sup> accused **PETER NATIENG** stated that on 3<sup>rd</sup> August 2017, he was at the lake and only returned to Lodwar on 8<sup>th</sup> August 2017 to vote. On 14<sup>th</sup> August 2017 some people went to his home and forced him to board a motor bike to unknown place but ended with him at Kalokol police station where he was locked up before being produced in court on 18/08/2017 together with the two accused persons. He denied committing the offence and denied knowing the 1<sup>st</sup> and 3<sup>rd</sup> accused neither did he know the deceased.

**14.** The 3<sup>rd</sup> accused **JOHN JUMA LOKWANG** stated that he was a water vendor. On 3<sup>rd</sup> August 2017 he was at his place until 4.00 O'clock when he went for football practice and thereafter returned home. On 5<sup>th</sup>, he left home in the morning on a bike to collect water and met one KPR from Kalokol on a motor bike who requested for water to be taken to the police station which he did upto 1.00 p.m. When he asked for money he was told to come back at 3.00 p.m. when the boss was present. He returned to the police station at 4.00 p.m., when he met the boss and the officer who was at the report office but was told that there was a report which had been made at the station on a certain Juma and was advised to wait for the complainant after he was paid Kshs.3,000/= for his services. The complainant did not come back to the station and he was therefore locked up in the cell until 14/08/2017 when he was produced in court for an offence he denied committing. It was his evidence that he did not know the deceased.

**15.** At the close of the prosecution case the parties agreed to file written submissions but at the time of writing this Judgement none had been filed and therefore relied upon the proceedings herein to reach the determination.

## ANALYSIS AND DETERMINATION

**16.** To sustain a conviction on a charge of murder, the prosecution is required to prove beyond reasonable doubt the following elements of the offence:-

*a) The fact and cause of death.*

*b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.*

*c) That it was caused with malice aforethought as defined under Section 206 of the Penal Code.*

**17.** The fact and cause of death of the deceased is not in dispute. **PW1** who was with him when they were assaulted confirmed his death. This was corroborated by **PW3 SAMWEL AKUREE LOBETO** who confirmed his death at AIC Hospital Kalokol who was thereafter taken by the police to Lodwar. **PW4 JOSEPHAT EMURIA** a KPR officer who was called by the 1<sup>st</sup> accused found the deceased lying at the compound of the 1<sup>st</sup> accused and was informed by her that he had died. **PW5 DANIEL ETABO** a bodaboda rider who took a police

officer nicknamed “Onyi” to the home of the 1<sup>st</sup> accused also confirmed the death of the deceased. **PW6 PC LOTULIA NICHOLAS** also confirmed that the deceased was pronounced dead on arrival at the hospital. The cause of death was confirmed by **PW7 DR. WAYAA JONATHAN** to be severe head injuries due to blunt force trauma.

18. On whether the said death was caused by unlawful act of omission or commission on the part of the accused persons:- all three of them were placed at the scene by **PW1** who was with the deceased at the time and who was also assaulted on allegation of having stolen the 1<sup>st</sup> accused’s money and that it is the 3<sup>rd</sup> accused who advised against taking them to the police station. He knew the 1<sup>st</sup> accused’s as his aunt and the 2<sup>nd</sup> accused as her husband and knew the 3<sup>rd</sup> accused by name. The identification of the accused persons by **Pw1** was that of recognition and was thereafter not mistaken.

19. The Court of Appeal in **WAMUNGA v REPUBLIC [1989] KLR 424** had this to say on identification:-

*“It is trite law that where the only evidence against a Defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”*

20. **PW1** was with the accused persons at the home of the 1<sup>st</sup> and 2<sup>nd</sup> accused. This evidence was corroborated by **PW2 JOSEPH NANGORE EKITELA** who found **PW1** and the deceased in the home of the 1<sup>st</sup> accused and confirmed that they had been beaten. He placed both the 1<sup>st</sup> and the 2<sup>nd</sup> accused at the scene. **PW4 JOSEPHAT EMURIA** a KPR officer was called by the 1<sup>st</sup> accused with information that the deceased and **PW1** had stolen her money and found them at the home of the 1<sup>st</sup> accused. He confirmed that they were injured and advised the 1<sup>st</sup> accused to take the deceased to hospital while he proceeded with **PW1** to the police station. **PW5** corroborated this account by stating that he is the one who took the 1<sup>st</sup> accused and the deceased to the hospital where he was pronounced dead on arrival. He then took the 1<sup>st</sup> accused to the police station where she was received by **PW6 PC LOTOLIA** where she made a report that she was disciplining the deceased and **PW1** who had stolen her money and the deceased got sick and was pronounced dead at the hospital.

21. I have looked at the defence by all the accused persons and find that the same were mere denials, and was contradicted in all material particular by the evidence of the prosecution witnesses who placed all of them at the scene and therefore find and hold that the death of the deceased was caused by unlawful act on the part of the accused persons. The 2<sup>nd</sup> accused denied having known the 1<sup>st</sup> accused while there is evidence on record that he was her husband and relatives of **PW1**. The 1<sup>st</sup> accused stated in her defence that the deceased jumped out of a motor bike but his evidence was displaced by that of **PW5** the motor bike rider.

22. On whether the same was caused with malice aforethought:- **Section 206 of Penal Code** defines malice aforethought as follows:-

*“Section 206 malice aforethought shall be deemed to be established by evidence proving one or more of the following circumstances:-*

*(a) An intention to cause death 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, by a wish that it may not be caused.*

*(c) Intention to commit a felony.”*

23. There is evidence that the accused persons had motive in inflicting injuries upon the deceased who was alleged to have stolen the 1<sup>st</sup> accused person’s money. The injuries sustained by the deceased clearly show that the accused persons had the intention to cause death and or grievous bodily injuries. The blows were aimed at the head of the deceased and the accused persons had intended to burn the deceased and **PW1** as evidenced through the presence of a tyre, ropes which they tied them with and petrol. I therefore find and hold that the State proved beyond reasonable doubt that the accused persons had malice aforethought.

24. Having dismissed the defences offered by the accused persons and based upon the evidence on record, I find and hold that the prosecution proved beyond reasonable doubt all the elements of the offence of murder and consequently find all the accused persons guilty of murder contrary to **Section 203 of the Penal Code** and convict the same. It is so ordered.

**Dated, delivered and signed at Lodwar this 2<sup>nd</sup> day of October, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

\_\_\_\_\_ for the State

\_\_\_\_\_ for the 1<sup>st</sup> Accused

\_\_\_\_\_ for the 2<sup>nd</sup> Accused

\_\_\_\_\_ for the 3<sup>rd</sup> Accused

Accused 1, 2 & 3 \_\_\_\_\_

\_\_\_\_\_ - Court assistant