



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 66 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JOHN NAKUMOI LONGORI.....1ST ACCUSED PERSON

EKWAM LOKICHAR.....2ND ACCUSED PERSON

JOSPHAT EKIRU.....3RD ACCUSED PERSON

PHILIP LOWASA.....4TH ACCUSED PERSON

FRANCIS LOKAI ALIAS BULAI.....5TH ACCUSED PERSON

JUDGMENT

1. The Accused persons herein have been charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on 26th August 2014 at Game Area, Isiolo County within Eastern region the accused persons jointly murdered **Aloo Abdilahi**.

2. **Pw1 Halima Aloo Abdulla** testified that on the material date together with **Nimo Yusuf** they escorted her father to cross a seasonal river. That at the time his father was herding 150 goats and sheep. That in the evening only five goats came back. That she informed Nimo Yusuf of the disappearance of his father. They reported the matter to the sub Chief of the Area who together with the Kenya Police Reservists and the area locals conducted a search for her father. That her father's body was brought home at around 9:30 p.m. In the next day she was informed that five (5) suspects had been arrested. She stated in cross-examination that she only became aware of the suspects when she saw them at the police station.

3. **Pw2, Ali Ismail, Pw3 Nimo Yusuf, Pw4 Etabo Afunu, Pw5 Daniel Ngachiro, Pw6 Isaack Hassan Yusuf, Pw7 Adan Mohammed Ali, Pw8 Joseph Israeli, Pw9 Adan Ndainye, Pw10 Abdi Hussein Abdi** all narrated the course of the search. It was their common testimony that on the material day accompanied by women children, elders and two police reservist they formed two groups one went to the right and the other went to the left. That those who went to the right found a goat that had been strangled. They went forward and found the body of the deceased which was crushed in the head by a stone. Those who went to the left managed to track and recover 35 goats and three sheep. It was also their testimonies that the deceased was not herding his own goats and sheep only but was herding for other people. They also told the court that the goats and sheep were recovered in Kakilu Primary School in the custody of the accused persons.

4. **Pw3, Nimo Yusuf** testified that two of his goats were recovered from the herd. **Pw4** testified that he was familiar to the 5th Accused person who they arrested in custody of the sheep. He also stated that he is familiar to a 6th person known as Lowoi who is at large. **Pw5**, a village elder near Kakilu Primary School stated he was informed of the report of the missing goats and on the same day proceeded to Kakilu Primary School where they found the 5th accused person, Lowai and a 3rd person who escaped from the scene. They however were able to apprehend the 5th Accused person from his hide out in a forest near the G.S.U. Camp. They later escorted him to Kakili Primary school where the police arrested him.

5. **Pw7** stated that the scene of the murder to where the goats were recovered is a distance of 5km. **Pw8** who is based at Laparawa conservancy stated told the court that at Kakili Primary school they found tyre marks of a motor vehicle leading the presumption that some goats may have been ferried away. That they arrested 1st and 3rd accused persons at the scene, 2nd and 4th accused persons was brought by Kenya Police reservists while the 5th Accused persons was brought by the elders. That the 1st and 3rd accused persons alleged they were herding cattle but there was no cattle at the scene.

6. **Pw9 Adan Ndainye** also based at Laparawa conservancy stated that the 1st, 2nd and 5th accused persons were found at the scene while the

2nd and 4th were brought by Kenya police reservist. The 2nd and 4th accused persons were found where the sheep which had delivered was kept. **Pw10** stated that the 3rd, 4th and 5th accused persons were found at the scene whereas the 1st and 2nd accused persons were found a short distance away.

7. **Pw11 Dr. Mohammed Abdi Kadir** presented the post-mortem report. He testified that the deceased died as a result of severe head injuries and internal organ injury due to crash trauma on head and chest leading to cardio pulmonary arrest. The post mortem report was produced as **PEXh 1**.

8. **Pw12** the investigating officer testified that he supervised the printing of 12 photographs showing several goats and sheep. He produced the **memo as Exh 2a Certificate bundle as Exh 2b and the 12 photographs as Exh 2c**.

9. **Pw13** the investigating officer testified that they recovered the body of the deceased about 2 km from his home. He told the court that the 1st to 4th accused persons were arrested at the scene of the crime by the Kenya Police reservist while the 5th accused person ran away but was later arrested by members of the public on 2.9.2014. He also confirmed that the distance between Kakilu Primary School and the scene was 5 km away. He stated that the accused persons were interrogated but they could not explain how they came by the stolen sheep and goats.

10. **Dw1 the first accused** person testified that he is a herder and on the material day he was herding cattle when he was arrested and taken to Isiolo Police station. He stayed at Isiolo Police station for two weeks before being brought to Meru and the charges being read out to him. He denied being arrested while in possession of the goats and sheep and told the court that the testimony of Lomoru was a fabrication because there was enmity between them because he had married his sister. He also denied the evidence of Adan.

11. **DW2 the second accused person** stated that on 26/8/2014 he assisted one Dome to till his land and on the next day some guards from the conservancy pleaded to cross the farm and asked whether there was a boundary to the same. That he escorted the guards and on arrival at the road in Maili Tano, they met with other guards in their vehicle including the investigating officer. That as he was on his way back the investigating officer stated that he was a Turkana boy and they had caused trouble during that time. He was then arrested and taken to Isiolo Police station where he stayed for two weeks before being charged with the charges before court. He also testified that he is not familiar to the deceased nor is he aware of the stolen goats.

12. **Dw3 the 3rd accused** person stated that on 26.8.2014 he had gone to his farm where he plants onions and tomatoes to irrigate the same. That he stayed at the farm until 5:00 p.m. when he returned home to his wife and father. That on 27.08.2014 he equally took ajembe and fertiliser and proceeded to the farm. That on his way he met police officers. The first group passed him while the second asked him to stop and board the vehicle. That he was later taken to Isiolo Police station. That he was not informed of the charges that were facing him until when he was taken to Isiolo Law courts after 3 days in the cells. The judge informed him that he was facing murder charges. He was later brought to Meru Law courts.

13. On cross examination he denied knowing the 2nd accused person. He stated that Kakilu Primary school is 4km away from his home and that he only rears chicken in his farm. He denied being found with any goats and only learnt that goats were stolen from the court proceedings.

14. **Dw4 the fourth accused person** testified that he is also a farmer and grows vegetables, onions and tomatoes. That he does not keep livestock. That on the 26.8.2014 he was at his farm until 6.00 p.m. that on 27.8.2014 he was at his home when a Kenya police reservist came to his home with Pw10. That they asked him where the sub area office is and he escorted them to the said office. That on their way they found the conservancy vehicle which carried the conservancy officers' one of whom was Pw9. That Pw10 informed the officers that the person for the farm was there. That he was ushered into the vehicle and taken to the police station where he stayed for five (5) days and taken to court on the 6th day. He informed the court that he was later brought to Meru LAW court and charged with the offence of murder. He denied stealing the goats or being familiar the other accused persons.

15. **Dw5 the 5th accused person** testified that he has a wife and 5 children. That on the 26th and 27th August 2014 he was weeding his farm. That on 2.9.2014 one Nachupai Apul and Achuoro Ajuot came to his home and asked him to escort them to the town which was 1.5 km away. At the time he testified, he was a police informant and would inform the police of any person who had fire-arms. He had earlier on informed the police on Daniel and Nachupai having fire-arms and they were released on a cash bail of KSHS. 500,000/=.

16. That they proceeded to the town and when they arrived at the police station the two entered while he remained behind. That when he was outside the police station he greeted one of the police officers. Nachupai and Daniel Nachuoro later came and they both greeted the police officer who he had earlier greeted. He told the court that he saw the two give the police officer money. The police officer later came and arrested him. That he was taken to court on the next day and later stayed in remand for fourteen (14) days and when he was brought to this Meru Law courts. He produced the investigation diary as **Dexh1**.

17. **DW6 Joseph Lokichar**, father to the 2nd Accused person testified that on 24/8/2014 he had given the 2nd accused person cattle to herd. He also told the court that the 2nd accused person joined his neighbour to farm and they did the same on 27/08/2014. He testified that he later learn that his son had been arrested but upon his visit to the police station he was never given an audience to speak to his son.

18. From the evidence on record for the Prosecution and the Defence as well as the accused person's written submissions the issue for determination is whether the prosecution has proved beyond all reasonable doubt that the accused persons committed the offence for which they have been charged.

19. For the offence of murder to be established the following ingredients must be proved;

a. The fact of death

b. The cause of death

c. The cause of death resulted from an unlawful act or omission actuated with malice aforethought

20. From the evidence on record no one witnessed the murder of the Deceased person herein, PW1, 2 and 3 testified that they realised there was something amiss when some of the goats that the Deceased was herding came back on their own late in the evening. They raised alarm and proceeded towards the grazing field and found the Deceased had been brutally murdered as is shown in the post-mortem report produced by Dr. Mohamed Abdi Kadir of Isiolo County Referral Hospital-EXP 1. The doctor established that the Deceased died because of severe head injuries and internal organ injury due to crush trauma on the head and chest leading to cardio-pulmonary arrest. The nature of the injuries sustained by the Deceased could not have been caused by a lawful act. The person who inflicted those injuries definitely had the malicious intention of terminating his life.

21. The question that remains for this court's determination is whether the prosecution has proved that the unlawful act that caused the death of the Deceased was committed by the accused persons herein. From the evidence of the prosecution it appears that heavy reliance has been placed on circumstantial evidence and the doctrine of recent possession to establish that because the accused persons were allegedly found in possession of some of the goats that were stolen from the deceased after he was murdered then they are the ones who committed the murder.

22. The evidence of how the accused persons were arrested was tendered by PW4, PW5, PW6, PW7, PW8, PW9, PW10. PW 4 and 5's evidence corroborate each other that when they arrived near Kakili Primary School they recovered some of the stolen goats -35 and sheep-3. They said that they saw three people among the recovered goats and they were able to identify two people who were known to them. These were Francis Lokai alias Bulai A5 herein and one Lowoi who is at large. They said that the third person was not known to them. PW 4 and 5 were together with PW6 who said that five suspects were arrested at a manyatta at Kakili but he did not know their names.

23. PW 4 and 5 were also with PW7 who said that they recovered goats 50 Kilometres away from the scene of murder and five suspects found in possession of the goats were arrested. He said that one suspect was at large. PW8 was also in company of PW 4 and 5 during this search of the stolen goats and his evidence is that Accused no 2 and 4 were brought to the scene where the goats were recovered by KPR. He has not given the names of the KPR. He also says that A1 and A3 were at the scene of the recovery of the goats. This is contrary to the evidence of PW4 and 5. PW4 said he did not know A1, A2, A3 and A4. PW5 said he did not see A1 to A4 at the scene where goats were recovered. PW 4 and 5 were categorical that Accused 5 escaped and was away from home from 27th August 2014 when he escaped from where the goats were recovered until 2nd September 2014 when an ambush was laid and he was arrested when he was returning to his hideout in a forest

24. PW8 and PW9 said that A 2 and A4 were brought by KPR to where the goats were recovered but they did not give the names of the KPR and the KPR did not come to court to testify as to where they found Accused no 2 and 4 and how they are connected to the offence herein. Although PW9 said that accused no 1, 3 and 5 were found amongst the goats he could not remember the identity of the people that they arrested on the material day. He said that he only knew that three suspects were among the goats and two were brought by KPR.

25. PW8 and 10 allude to presence of tyre marks at the scene where goats were recovered and this made them suspect that some of the stolen goats had been ferried in a motor vehicle. PW 10 said that because the goats were very close to the fence of Kakili Primary School the watchman of the school was arrested and questioned as to why suspected stolen goats were being carried in a motor vehicle near the school where he was guarding but he did not raise alarm. The court was not told what happened to the watchman after he was arrested because he did not record a statement and he did not testify. The prosecution witnesses particularly PW 8, 9 and 10 have not explained why they had to arrest the watchman if indeed they found some of the accused herein amongst the goats that were recovered.

26. PW 9 and 10 claimed that a sixth person escaped from the scene where the goats were recovered but accused 3, 4 and 5 were arrested amongst the goats. Their evidence contradicts the evidence of PW4 and 5 who said they saw accused 5 amongst the goats together with one Lowoi and a third person whom they did not know and that the three escaped from the scene. PW 4 and 5 said that A5 was arrested on 2nd of September 2014 and the Investigating Officer PW 13 confirms that Accused 5 was arrested by members of the public on 2nd September 2014 and handed over to the police.

27. I have considered the evidence against Accused 1, 2, 3 and 4 together with their statements of defence and find that there is a lot of contradiction as to where and how they were arrested and by whom they were arrested. I tend to believe the evidence of PW4 and 5 which is corroborative of each other as to the people they saw amongst the goats and the fact that it is confirmed by the IO that Accused 5 was arrested on 2nd of September 2014 by elders including PW4 and 5 when he was returning to his hideout. There was inconsistency and contradiction in the evidence of PW6, 7, 8, 9 and 10 as to how many suspects were arrested at the scene when the goats were recovered. PW 9 could not even remember the identity of the people that he allegedly arrested and that was fatal to the prosecution's case. The evidence of PW5 shows that 6 other people were rounded up within the village and together with recovered goats and sheep taken to the police station.

28. As regard evidence against Accused No.5 PW4 and 5 knew him very well and they said that after he had escaped from amongst the goats that were recovered, PW4 led the police to his home but he was not found at home and that he was later arrested in the bush. PW5 said he had known the Accused No 5 for long and identified him among the three people who escaped from where the goats were recovered. He said Accused 5 was not at home from 27th August 2014 and it was on 2nd September 2014 when they managed to arrest him after laying an ambush when the Accused person was going back to his hideout in a forest along the road to G.S.U camp. The goats that were recovered near Kakili Primary School were photographed and were produced by PW12 scenes of crime officer. PW 1, 2 and 3 identified the goats that were recovered as some of the ones that were stolen while being herded by the Deceased herein. It is therefore safe to conclude that the person who was found in possession of those goats less than a day after they were stolen is the one who committed the heinous and brutal murder of the Deceased person.

29. Accused no.5 confirms he was arrested on 2nd of September 2014 when two people known to him as Nachupai Apul and Achuro Ajit went to his home and lured him to the police station. He denied having escaped from home. He claimed the two had a grudge against him

because he had reported that they were in possession of illegal firearms .The Accused person produced O.B extract for 10th July 2014 to support his claim that he had reported the claim that he had reported PW4 and 5 for being in possession of firearms. He did not give the O.B number that was used to book the report but on perusal of O.B extract did not reveal any such report made by Accused No.5.The evidence of A5 is not supported by any other independent evidence to enable the court rely on it

30. A5 did not raise his Defence with the IO PW13 during investigations or even in cross-examination in court.PW 4 and 5 were also not cross-examined on whether they had any grudge with the accused person that could make them to fabricate him.

31. This court therefore finds that his Defence is an afterthought and it has been challenged by the overwhelming evidence of PW4, PW5 and PW 13 that less than one day after the Deceased had been murdered brutally and several goats stolen from him, some of the goats were found in his possession and the only inference that this court can make of those circumstances is that he jointly with others not before the court murdered the Deceased in order to steal the goats.

32. This court finds Accused number 5 guilty of the murder of Aloo Abdilahi and is convicted under Section 322 of the Criminal Procedure Code .As for Accused 1,2,3 and 4 this court finds that the evidence against them is contradictory and insufficient to warrant a verdict of guilty. They are therefore acquitted under Section 322 of the Criminal Procedure Code.

HON A.ONG'INJO

JUDGE

JUDGMENT DELIVERED, DATED AND SIGNED IN COURT ON 21ST NOVEMBER 2019.

In the presence of:

CA:- Kinoti

State:- Ms Mbithe

1st Accused –Present in person

2nd Accused:-Present in person

3rd Accused:-Present in person

4th Accused:-Present in person

5th Accused:-Present in person

Mr Igweta Advocate for accused person

HON A.ONG'INJO

JUDGE

Ms Mbithe

I don't have A5 past records. We can have a mention date for records mitigation and victim Impact Statement.

Order: Mention 16.1.2020 for Records, Mitigation and Victim Impact Statement. Accused Remanded in Custody. Copies of judgment to be supplied.

HON A.ONG'INJO

JUDGE