REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 13 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS TERERE PARSOKOYO.....ACCUSED

JUDGEMENT

The accused person Julius Terere Parsokoyo stands charged with the offence of murder contrary to section 203 of the Penal Code.

The brief facts of the offence states that on the night of 16th July 2016 at around 19.30 hours at Kabuagi Bore Hole in Ololopin Village in Kisamis Location within Kajiado North accused murdered Melee Kimer Lepish.

During the plea he denied the offence and particulars as alleged in the charge sheet. The accused was represented by Mr. Ochieng while the state was represented by the Senior Prosecution Counsel Mr. Alex Akula.

In order to prove the case beyond reasonable doubt nine witnesses were line up to testify against the accused person.

Case for the Prosecution

In the testimony of PW3 John Saruni on the fateful day 16th July 2016 he was driving his motor vehicle Reg. KBU 498Y towards Kabuagi bore hole to fetch water. According to PW3 on board his motor vehicle were three other passengers namely Isaac Risa PW4, the accused person and Ndagusa Kirekere.

In the testimony of PW3 on arrival at the bore hole they met with the deceased, Philip Njuke and himself, since his purpose was to fetch water. PW3 stated that he picked the jerricans to fill up the water from the bore hole. However, while at the actual bore hole he heard a loud bang which forced him to go back to confirm the source. PW3 further claimed that he noticed the accused holding a club in his right hand and on the ground near to the car was the deceased at the time of the incident. PW3 further testified that they got hold of the accused and also made arrangement to escort the deceased to the hospital for treatment for the injuries sustained. On arrival at Enkitok Health Centre the deceased was examined by PW2 Bernard Ochieng. According to PW2 the deceased had been brought in a white motor vehicle which in this case was identified as KBU 498Y with a history of having been assaulted on the head. The brief observation by PW2 confirmed that the deceased had already passed on.

The next witness PW4 Isaac Risa testified that on 16th July 2016 he was at the Kabuagi bore hole in company of the accused the deceased and PW3. As they were fetching the water PW4 told this court that he decided to remain in the car where he sat at the passenger's seat.

In a short while he was joined by the deceased who they had a conversation as he stood leaning towards the motor vehicle. Before long PW4 stated that he heard a loud bang which he did not know the source. He went further and explained that when he came out of the car he saw the deceased had sustained injuries to the rear side of the head and was also unconscious. They apprehended the accused leaving him in custody of Philip as they rushed the deceased the hospital. It is at the medical centre the deceased was confirmed dead, this therefore turned out to be a police case.

PW5 James Ntekeet Ole Parteroi testified that he was informed of the incidence of the person who committed the offence. Since he was well known to them PW5 joined hands to search and arrest the accused person before long PW5 saw accused walking along Olerope Forest where he called for more people to assist in infecting arrest. As they were on the way to the police station they met with a police land rover which they handed over the accused for further investigations.

PW6 Edwin Letuya testified as one who was also at the Kabuagi Bore Hole the location of the alleged murder incident. in his evidence PW6 narrated on how he heard the accused call the deceased who was standing outside the motor vehicle KBU 489Y. PW6 further stated in court that the accused who was armed with a club fixed at the head with a metal nut hit the deceased on the head and sides of the ear. As this is was going on PW6 told the court that there was no prior confrontation or fight between the deceased and the accused. According to PW6 they however managed to disarm the accused from causing further injuries on the deceased. PW6 further testified that when they escorted the deceased but later took flight. They had therefore to content in escorting the deceased to the hospital to receive medical treatment. It was at the examination stage when the medical officer PW2 confirmed the deceased had already succumbed to death. What followed was the search of the accused person at various locations with a view to apprehend and escort him to the police station to answer for the offence of killing the deceased. During the search, they were joined by PW7 – Wilfred Marago. The witnesses finally confirmed that the accused had been arrested and escorted to the police station for further investigations.

PW8 PC Josephat Muriuki testified as a gazetted scenes of crime officer. His evidence focused on the photographs taken of the scene and on the deceased body at the mortuary. The various photographs processed and developed under his supervision were admitted in evidence as exhibit 2(a) and the certificate in support as exhibit 2(b).

PW9 Elphas Obiero the Investigating Officer testified that on 16th July 2016 a report was made by members of the public namely **John Saruni PW4, Isaac Risa and Pw6 Edwin Letuya.** The report was on the killing of the deceased at the Kabuagi Bore Hole.

PW9 further testified that he recorded statements from witnesses, made arrangements for the post mortem to be conducted at the city mortuary. PW9 further told the court that after accused's arrest he recommended that he be charged with the offence of murder. The murder weapon recovered on the scene identified as a club fitted with a metal at the edge was produced in evidence as exhibit. According to PW9 the body of the deceased was identified at the mortuary by **PW1 Sammy Malit Lepish**. In conclusion PW9 recommended that the investigation information had revealed that the accused was the perpetrator of the crime which resulted in the death of the deceased.

The Defence Case

At the close of the prosecution case the accused was placed on his defence. He elected to give a sworn statement where he denied the offence of murder contrary to section 203 of the Penal Code. According to the accused on the material day he was at Kabuagi Bore Hole with the deceased, **PW4 Isaac Risa, PW3 John Saruni and one Ndagusa**. The accused further stated that while at the Bore Hole he saw someone armed with a sword aiming it at him. It was then he feared for his life and took the club and retaliated in self-defence. However, as the victim of this assault fell down he realised it was his cousin who had been

felled by the assault. The explanation given by the accused is that the attack on the deceased was done in self-defence.

Mr. Ochieng Learned Counsel for the accused made his final submissions. He gave a summary of the evidence by the prosecution witnesses and what elements of the offence are to be proven by the state. In the submissions Mr. Ochieng argued and contributed that the case against the accused had not been proved beyond reasonable doubt.

Analysis and Determination

I have considered the evidence in totality, submissions by both counsels and the defence testimony by the accused.

The main issue in this trial is who committed the offence of assaulting the deceased which led to his death. Under the offence of murder contrary to section 203 of the Penal Code the following elements must be proven beyond reasonable doubt.

a. **The death of the deceased**
b. **The unlawfulness of the death**
c. **That in causing death there was malice aforethought on the part of the accused.**
d. **There is either direct or circumstantial evidence to place the accused at the scene.**

I will endeavour to analyse the evidence vis a vis the elements of the offence.

The death of the deceased is not disputed by both the prosecution and the defence that the deceased Melee Kimer Lepish is dead. According to the post mortem report adduced in evidence as exhibit 4 confirms this element.

The second element is the unlawfulness of the death: the testimony by PW3, PW4, PW5 and PW6 indicates that on 16th July 2016 at 19.30 hours the deceased was alive, he was at Kabuagi Bore Hole, there is evidence from PW3 and PW6 on how the deceased was injured at the scene. The accused himself said that he hit someone but it was in self-defence.

The nature of the injuries involving the head and the nervous system occasioned the deceased to succumb to death. The post mortem exhibit 4 by Dr. Oduor corroborates the evidence of PW3, PW4 and PW6 on the nature of the injuries sustained.

The cause of death from the autopsy report were the injuries inflicted upon the deceased in the night of 16th July 2016. It is confirmed from the prosecution evidence that the injuries sustained while the accused hit the deceased as he stood outside the car which ferried them at the scene.

At this juncture it is appropriate to state whether this attack happened in circumstances where self-defence would be availed to the accused. In common law self-defence operates in three spheres.

a. **Defend oneself from attack**
b. **Prevent an attack on another person**
c. **Defence of one's property.**

The general principle given in these circumstances is that the law allows reasonable force to be used. What is reasonable is judged from the circumstances of each case.

In our jurisdiction, section 17 and 241 of the Penal Code provides for the defence of self as follows:

> ***Section 17 of the Penal Code "Subject to any express provisions in the code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the Principles of English Criminal Law".***

Section 241 of the Penal Code "Any person authorized by law or by the consent of the person injured by him to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess".

What are the common law principles relating to self-defence?

In the classic landmark case of **Palmer Versus Republic (1971) AC 814** the decision was approved and followed by the court of appeal in the **Republic Versus MCINNES 55 CR. Appeal R551**. The court held interalia that;

"it is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that it may do but may only do what is reasonably necessary. But everything well applied upon the particulars facts and circumstances".

The above common law principles have been applied locally in several decisions.

In **Jane Koitel Jackson Versus Republic 2014 Criminal appeal 146 of 2009** where the court of appeal upheld the decision of the trial court to sentence the accused to ten years imprisonment for occasioning grievous harm on the complainant. The accused in her defence told the court that she had grabbed a panga from the complainant and cut her as she tried to defend herself. The court did not agree and stated that:

"if the accused's aim was to defend herself she would not have cut the complainant viciously as she did, one cut to immobilise the complainant would have sufficed"

In the case of Robert Kinuthia Mungai Versus Republic 1982 to 1988 *KAR* 611 the court held that:

"It is a doctrine recognised in East Africa that excessive use of force in the defence of a person or property, whether or not there is an external provocation, pressure, may be sufficient for the court to regard the offence not as murder but manslaughter."

From the neighbouring court in **Uganda, Versus Mbubuli 1975 HCB 225** the court observed as follows on the elements applicable to self-defence.

"First, there must be an attack on the accused. Secondly, that the accused must, as a result of the attack believe on reasonable ground that there was eminent danger of death or serious bodily harm. Thirdly, accused must have believed it necessary to use force to repel the attack meant upon him.

Fourth, that the force used by the accused must be such force as accused believed on reasonable grounds to have been necessary to prevent or resist the attack. Fifth, the nature of the force used by the accused to repel the attack must be proportionate to the attack."

The wisdom in both the Palmer case and the authorities cited by the law of self defence is that for the defence to be availed the evidence must show that the accused believes on reasonable grounds that it was necessary to do what he did in self-defence.

The test is to be evaluated from the perspective and belief of the accused based on the circumstances of the case that it was reasonable to use force to defend himself.

It would appear to me that the reading of section 17 and section 241 of the Penal code and jurisprudence surrounding the self-defence by itself did not contemplate the use of force that involves the use of excessive force that is disproportionate to the attack by the enemy.

The law expects depending on the circumstance given a greater measure of self-control in such actions

where human life is concerned not to cause death or grievous injury to the victim. The defence of self from this provision of the law is only applicable in the very exceptional circumstances in which the conduct of the deceased is excusable.

In light of the above legal background it should not be lost that the burden of proof in regard to the reasonableness of the force used in self defence lies with the prosecution. The accused person will plead self defence and it is up to the prosecution to rebut the plea. In doing so, the prosecution must show the court that the acts of the accused were done and thus there was no justification for the act. The court to me however ought to ensure a balance between the constitutional right to life and the unlawful use of force under the guise of self-defence.

In this case therefore, I have considered the evidence and also the submissions of both the prosecution and the defence. I have in mind the evidence tendered by the prosecution and plea of self defence by the accused to determine whether the acts causing death were justifiable in the protection of his life.

According to the accused he did not want to fight the deceased but his actions arose from the deceased who was armed with a Maasai sword ready to attack him.

On the part of the prosecution evidence was adduced from PW3, PW4 and PW6 who gave graphic explanation on what transpired at the scene. The witnesses were categorical that their mission at Kabuagi Bore Hole was to fetch water. That activity commenced in earnest as the motor vehicle was parked in order to load the jerricans of water being collected from the bore hole.

This incident of the deceased being attacked caught the PW3, PW4 and PW6 by surprise. Their evidence is indicative of the absence or confrontation, quarrel or fight between the accused and the deceased.

In the testimony of PW3 it was in the course of fetching water and he heard a loud bang from the direction of the parked motor vehicle. While at the scene PW3 moved towards the parked vehicle only to notice accused in possession of a club and the deceased lying on the ground.

This was also corroborated by PW4 who confirmed that the deceased was hit while they were having a conversation. PW4 alludes to no fight between the accused and the deceased. PW3, PW4 and PW6 having realised that the deceased had been injured they made arrangements using the same vehicle to take him to the hospital. These witnesses confirmed that the deceased was not armed with any weapon let alone the alleged Maasai sword referred to by the accused.

In the present case it is crystal clear given the cogent and credible evidence from PW3, PW4 and PW6 that while at the scene there was no fight or provocation to warrant an attack on the deceased. The incident points to the accused being armed with a heavy club fitted with a metal nut at the end which he aimed at the deceased on the head inflicting fatal injuries.

The circumstances as explained by the witnesses shows no eminent danger the accused faced before using his weapon against the deceased.

In my considered view, here is a man holding a dangerous club fitted with a metal nut without provocation or assault aimed at his victim and hits him on the head.

What is more important in the facts of this case is the absence of any evidence of the accused in assaulting the deceased was in self -induced intoxication or suffering from a mental disorder.

In conclusion when I weigh the prosecution case and the plea of self-defence. I am satisfied that the accused committed acts of assault on the deceased. The death resulted directly from the commission of that offence and the beating and application of excessive force was with the intention of causing death or inflicting grievous harm against the deceased. The death of the deceased was therefore unlawfully caused.

I therefore find that the prosecution has proved beyond reasonable doubt the element of unlawful death of

the deceased.

(c) Thirdly, is the element of malice aforethought.

The general principle of law is that malice aforethought is the deliberate nature to cause great grievous harm or death. In law the intention to kill or cause grievous harm or death or an attempt to act in manner that creates likelihood of death or grievous harm.

In law the intention to kill or cause grievous harm need not be expressly specified but can be inferred from the facts of each case. The several types of such circumstances as they manifest themselves are defined under section 206 of the Penal Code. From the provisions of this section the term malice aforethought can either be expressed or implied.

In order to put the provision of section 206 of the Penal Code in context the following authorities have articulated the applicable principles. This is more so where the circumstances of death can only be inferred from circumstantial evidence, hence indirect intent.

One such starting part where the court set out guiding principles on malice aforethought is in the case of **Tubere s/o Versus Ochen 1945 12 EACA 63.** In this case the court as of necessity contemplated the following elements to constitute malice aforethought.

[*The nature of the weapon and how it was used, whether lethal or not, the part of the body targeted, its vulnerability the manner in which the weapon was used, the conduct of the offender before, during and after the attack].*

A further discussion on remanifestation of malice aforethought is well illustrated in **(W*illiams Musyoka J, Text book of Criminal Law 2nd edition 2016 page 311-320*)**. An example given in the case of **Ernest Asami, Bwire Abuang Alias Onyango Versus Republic Nairobi Court of Appeal No. 32 of 1990** where the court inferred malice aforethought when considering of the brutal killing of the deceased which was well calculated and planned by the defendant. The meaning of intention in this case seemed to involve conscious acts implemented to seek or achieve a definite result of causing death or grievous harm. In **Republic Versus Gwangire s/o Sinyangwire 1935 2 EACA 133** the court said that where the accused recognizes that death or serious harm would be virtually certain to result from his attack an inference of malice can be inferred on the basis that he intended the result even if he did not resist it.

The Penal Code under section 206 does not specify any particular time or period requirement in order to manifest malice aforethought. The definition does not necessarily mean premeditation. What the law contemplates is for the prosecution to prove that prior to or at the time of the act which caused the death there existed in the mind of the accused either intention to cause death or grievous harm to the deceased. That to me would satisfy the criteria under section 206 (a) & (b) of the Penal Code.

In the English Case of **Republic Versus Nedrick 1986 3 ALLER, Lord Lane C.J** had this to say on this issue as illustrated in the following passage:

> ***"What then do a jury have to decide so far as the mental element in murder is concerned? They simply have to decide whether the defendant intended to kill or do serious bodily harm. In order to reach that decision, the jury must pay regard to all the relevant circumstances, including what the defendant himself said and did in the majority of cases a direction to that effect will be enough, particularly where the defendant's actions attributed to a direct attack on his victim, because in such cases, the evidence relating to the defendant's desire or relative will be clean and his interest will have been the same as his desire on motive."***

In my considered view, this legal proposition in the Nedrick Case, is relevant in the facts of this case as against the accused person. In my judgement, upon review and appraise of the entire evidence the prosecution case reveals the following. The accused and the deceased had been together for some time before the attack. The question of post recognition cannot be said to be too remote in the prevailing

circumstances of the scene. Here is an accused person in possession of a lethal club fitted with a metallic nut unleashes with force against his victim without any provocation or attack.

I take the view that picking the dangerous weapon from where he had hidden it and assaulting the deceased on the head with such unlawful force is a manifestation of intention to cause death or serious grievous harm. Malice aforethought in this case can be inferred from the use of a dangerous weapon. The wooden club fitted with a metallic nut is one of such dangerous weapon when used against another human being.

According to PW1, PW3, PW4 and PW5, evidence there was no prior scuffle between the accused and the deceased. As some of them went about fetching water from the bore hole, they wee faced with this bang and subsequently injury inflicted upon the deceased. It was also ascertained from the testimonies of PW1, PW2, PW3 and PW5 that when they came to the rescue of the deceased there was no such evidence of a sword or another weapon which was being referred to by the accused in his defence.

The prosecution case is also adequate in supporting malice aforethought from the post mortem report admitted in evidence as exhibit 4. According to Dr. Oduor's positive findings the nature of the injuries was concentrated on the head which much occasioned depressed fracture on the occiput of the skull. In his opinion the cause of death was head injury due to blunt trauma. The weight of the force as applied indeed the caused the death of the deceased soon after the assault.

What emerges from this evidence is sufficient prove that the accused acted with implied malice and intentionally committed an unlawful act of assault as a consequence it resulted in the death of the deceased. The prosecution has therefore discharged the burden of prove beyond reasonable doubt. I would therefore find the accused guilty of the offence of murder contrary of section 203 as read with section 204 of the Penal Code and do convict him accordingly.

Dated, delivered in the open court this 2nd February 2018.

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HON. R. NYAKUNDI

JUDGE

In the presence of:

Mr. Akula - for DPP

Mr. Ochieng – Counsel for the accused.

Mr. Mateli – Court Assistant

Sentencing remarks and verdict

On 2nd February 2018 after a long trial this court found you guilty of and convicted you for the offence of murder contrary to section 203 as read with section 204 of the of the Penal Code.

As it is the practice in our Judicial proceedings in Criminal Cases the case was adjourned for the preparation of a pre-sentence report, mitigation and victim impact statement.

The facts of this can be briefly restated it was on the night of 10th July 2016 at around 19.30 hours at Kabuagi bore hole located in Ololoipoi village in Kisamisi Location within Kajiado North Sub-county that you armed yourself with a club fitted with a metal nut did attack the deceased occasioning him fatal injuries.

It is clear from the evidence that the attack did not fall within any of the defences known in law on self-defence, insanity and provocation on either the part of the deceased or yourself. It was also abundantly clear that the deceased was not armed nor had he picked any fight or provoked you prior to your fatal assault. Unfortunately, the wounds inflicted on the head were confirmed by the pathologist as the ones that caused the death of the deceased due to blunt trauma.

The case for the prosecution was that the blunt trauma and force was from the metal wooden club fitted with a metal nut shortly after you inflicted the fatal injuries you took flight from the scene without giving any assistance to the deceased. The deceased was related you. In fact, in the defence evidence you referred to him as a cousin. The other colleagues of yours PW3, PW4 and PW5 made arrangements to escort him to the hospital where he was pronounced dead.

Mr. Ochieng, legal Counsel on your behalf submitted and mitigated that you are remorseful and do regret the offence. He also urged this court to consider the attempts made to reconcile with the victim family as a positive factor.

On the part of accused family, a victim impact statement was made on oath by the mother Koisasi Lepisu. She gave a moving testimony on the premature and violent death of her son she depended for support in absence for her late husband.

According to her what you did is unforgivable as the psychological trauma weighs on her heavily. It was also upsetting to her that no forgiveness has been forthcoming from you since the incident or any of your family members.

The pre-sentence report dealt in great detail on your personal circumstances and profile. The significant factors indicated that you are a married man blessed with 5 children. The sentiments of the victim's family and the impact the death has had on their lives.

It is also eminent in the report Mr. Akula for the state in his remarks submitted that no record of previous convictions for any offence are available. He urged this court to treat you as a first offender.

I have considered all the above remarks, pre-sentence report, the mitigation and victim impact statement. The offence which this court found you guilty and entered conviction facts within section 203 as read with section 204 of the Penal Code.

The appellant considered the seriousness of the offence as exceptionally high and did provide for a death sentence. The forensic evidence indicates that the targeted part of the body was the head. In addition, there was a deep depressed skull fracture on the occiput of the skull accompanied with acute and extensive sub-acute and sub-arachnoid haemorrhage.

I conclude that on the basis of this appalling catalogue of injuries, this was murder moreover there had been no doubt about it though your conduct in first being armed with a dangerous weapon and using it against the deceased without any threat, provocation or confrontation.

I consider that this assault against the deceased was not at the spur of the moment. It was clearly thought through by yourself including using your own weapon which you brought with you to the bore hole at Kabuagi.

When you hit the deceased on the head to me your intention to kill or cause of serious harm using that club which had a metal nut. It was unproved and intent assault in the deceased.

I do acknowledge your mitigation and that you be treated as a first offender. However, the extend of the mitigation in this case does her reduce your criminal capability and responsibility for this heinous crime. In my view it appears you asked what you were doing and had to do it even though you introduced self defence narrative as a mitigation to an unlawful act.

In the pre-sentence report you are identified as being 34 years old. The statutory point to consider is not the matter of death penalty in that regard my attention has been drawn to the helpful decision by the Supreme Court in the case of **Francis Kariuko Muruatetu & another Versus Republic Petition No. 15 of 2015** where courts can find relaxation and adopt a more purposeful approach in exercising discretion in sentencing an offender convicted of murder contrary to section 203 of the Penal Code.

The position taken by Learned Justices of the Supreme Court is that the mandatory nature of the death sentence as provided under section 204 of the Penal code isunconstitutional.

In view of the above decision and particularly its application under section 204, trial courts have been left with some level of discretion to pass a death sentence where the circumstances exceptionally demand.

Having so found I have weighed the mitigation, the victim impact statement and the gravity of the offence as defined under section 203 of the Penal Code. The measure of punishment in this case is depended on the gravity of the crime you committed, your conduct after the attack and the circumstances where the deceased was assaulted as a defenceless and unprotected victim of the murder.

Following on from this the death penalty in Kenya now is no more than an option, rather than the invevitable sentence prior to the Supreme Court decision in Muruatetu case. In all circumstances I dissuade myself from imposing the death penalty in view of the mitigation and pre-sentence report and go for custodial sentence.

Accordingly, I sentence you to 30 years imprisonment.

14 days Right of Appeal.

Dated, delivered and signed in open court on 5th March 2018.

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HON. R. NYAKUNDI

JUDGE

Representation

Mr. Ochieng for the Accused

Mr. Akula for the State

Accused – Present

Mr. Mateli: Court Assistant