



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL CASE NO. 32 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WILSON LOLIKET ALIAS LOTURO.....ACCUSED**

**JUDGMENT**

**1. WILSON LOLIKEY alias LOTURO** (the accused herein) faces a charge of murder Contrary to Section 203 as read with – 204 at **KIPKOLONY** village, **BARWESSA** division, **BARINGO NORTH** Sub-county within **BARINGO** County, he murdered **ZIPPORA CHETALAM**. The accused denied the offence.

2. On 24.03.2015 **MUSA KIMELI** (PW1) was seated under a tree within the home of **ZIPPORA** (the deceased) where there were many people when the accused went to him and hit him on the head, hand and legs using a stick produced as Exhibit 1. Accused then hit the deceased on top of the head, and she fell down bleeding. The accused then took off towards the forest. They were unable to get means to ferry the deceased to hospital until the next morning when they took her to **BARWESA HEALTH CENTRE** where she was given first aid then referred to Kabarnet District Hospital where she died while undergoing treatment.

On cross examination PW1 stated he had been drinking the whole day, but was certain the man he saw hitting the deceased on the middle of the head was the accused. He (PW1) was also injured, and he could not tell how many people had been in his company.

3. PW2 **MILLICENT KOSGEY** was burning charcoal when she heard screams from her home in **KIPKOLON**, and rushed to find out what was happening. She found PW1, **WILSON** and **ZIPPORAH** (deceased) – according to her :-

**“Three people were bleeding. Zipporah was seated. She was bleeding. Musa was bleeding on the head. Loturo also was bleeding.”**

She ran away to inform her neighbour and upon her return, the people had left. It was her further evidence that none of the injured persons was speaking. She saw the accused with a rungu.

She had not known the accused before that day, but was certain he was the person she found at the scene, holding a rungu. Upon re-examination PW2 stated:

**“The people who had sticks were Musa and Wilson. Deceased did not have a stick.”**

4. **TALAA CHETALAAM** (PW3) an elderly mother-in-law of the deceased told the court that she just heard screams from another compound but never went to the scene. She went to see the deceased at **BARWESA** hospital and noted that she had an injury on the head, and she was not talking. She was informed that the accused had attacked the deceased.

5. **JOSHUA KIPTUI** (PW3) who is a Kenya Police Reserve got a call at his home at about 5.00am from one **KIPTURO**, who told him that **MUSA** and **ZIPPORAH** were on the road with injuries. He proceeded to the scene and found the injured pair, noting that both had bleeding injuries on their heads, and **ZIPPORAH** appeared to be in a critical condition and was lying down. Musa told her that **LOTURO** had beaten them but **ZIPPORAH** was not talking. He got a motorcycle to take them to hospital, then teamed up with another person to search for **LOTURO**. They traced the accused at one **CHELIMO**'s farm and apprehended him – they recovered a stick, a panga and a knife from him. PW5 observed that the accused also had injuries on the head.

PW5 Stated:

**“I know Loturo for a long time. He was a herdsman. Zipporah was a neighbour. Musa is my uncle. The three had no friends.”**

On cross examination PW5 said the stick he recovered had blood.

**6. BENEDINE CHELAGAT** (PW7) a Clinical Officer at **BARWESA** Health Centre testified that on 25.03.2015, a woman who was in coma was escorted by a man to the health facility. She was vomiting and her heart rate was weak. He gave her an injection to clear her chest and managed her heart to improve her condition, however by 10:30am she had died.

On cross examination he confirmed that the deceased had a wound on the head. She succumbed to her injuries shortly.

**7.** The deceased's father **JOSHUA K. RUTO** (PW4) identified her body to Doctor **SARGO KENNEDY** (PW6) who produced the postmortem report performed by Doctor **ODIRA**. Observation on the body were, bruises on the right and left shoulder front, lacerations on the left thigh, left lumbar region, deep cut wound on left parietal area.

On the head there was massive bleeding under the scalp approximately 100 ml and also inside the skull approximately 300 ml. The cause of death was massive epidermal haemorrhage due to blunt head trauma. The post mortem report was produced as exhibit 2.

**8. CPL MICHEA MAKOKHA** (PW5) confirmed that he collected the accused from the AP camp and also collected the body of the deceased from the health centre. He noted that the deceased had injuries on her head. He learnt from PW1 that the accused found them outside PW2's house and started assaulting them; then one **CHERUTOI** (who did not record a statement), stopped the fight, and deceased was taken to hospital the next day. He recorded statements from witnesses, took accused for mental assessment, the deceased's body for post mortem, and the accused was subsequently charged in court. The murder weapon (a stick) was handed over to him by PW5.

**9.** In his sworn defence, the accused confirmed that he was employed as a herdsman to look after cattle and confirmed that on 24.03.2015, he was in **KERIO** valley or North Baringo Sub-county, imbibing some liquor with two other people who were seated under a tree. Some two men brought Ksh.1500/- which was done to him, but was not given to him. He hit one of the people who had brought the money on the head and his colleague who had left, returned and hit the accused, and a fight ensued.

The deceased came out as they were fighting and got in between them to separate them.

It was in that process that he aimed his stick at his aggressor but the deceased's head came in between and she got struck by mistake, and she fell. However she got up and drunk some changaa, then she got rained on, and was taken to hospital but died.

It was his evidence that:

**“...the deceased who had come in between unfortunately was on the path of assault and got hit by mistake – she got the blow I had aimed at the other man...”**

Accused admitted using a stick to strike her, but insisted that it was not the one produced in court, and he just happened to have that stick as it was the one he was using to drive the cattle.

He further stated:

**“I had never disagreed with the deceased prior to the incident.”**

**On cross examination he stated:**

**“I hit the deceased by mistake, I had not intended at all as I had no differences with her...”**

The accused further explained that **MUSA KOMEN** (PW1) is the one who had his money and is the one he had begun assaulting and when the deceased went to separate them, she caught the blow which had been intended for **MUSA**.

**10. MR KOMEN** on behalf of the accused submitted that the evidence did not prove the charge as the only person who claimed to have seen the accused hitting the deceased on the other hand was PW1 who had been drinking and was in a mentally impaired state resulting from his drinking spree and could not give an accurate account of the day's events.

**11.** The issue as to whether the accused hit the deceased on the head with a stick leading to fatal injury is not disputed, as the accused has indeed confirmed that it did happen.

The issue for determination is whether he intended to strike the deceased, and had his motive been to sniff the life out of her.

**12.** PW1 claimed that the accused, just arrived and struck him on the head with a stick, before turning onto the deceased and also striking her on the head – without any provocation whatsoever. He also claimed not to have known the accused person to the incident. He even

denied that there was a fight.

**13.** However there is a hint as to what really happened, from the evidence of **MILLICENT KOSGEY** who stated that when she arrived at the scene, she found **MUSA, WILSON** and **ZIPPORAH** bleeding from injuries on their heads.

There is nothing to suggest that the injury on the accused's head, as observed by PW2 was self inflicted.

On cross examination she stated:

“When I got home, I found people with runkus and on cross examination she confirmed that the people who had sticks were **MUSA** and **WILSON**.

The evidence by this witnesses persuades me that the version of events as described by the accused is the correct one. He had no disagreement with the deceased – this much was confirmed even by the prosecution witnesses. He was not mentally deranged to have just decided like a bolt out of the blues to strike the deceased for no apparent reason. I am persuaded that the accused had no intention of even hitting the deceased, she just unfortunately got into the path of a blow which was intended for PW1.

The evidence presented does not bear the necessary mens rea which is a vital ingredient in a charge of murder. I am persuaded that this was a non intended situation and fits in with the situation contemplated under Section 202 (1) of the Penal Code – his action albeit intend was unlawful and resulted in the death.

I would under the circumstances reduce the charge as provided by Section 179 (2) of the CPC to a lesser charge of manslaughter Contrary to Section 202 (1) of the Penal Code and convict him on the reduced charge.

**DATED, SIGNED and DELIVERED** at **ELDORET** this **11<sup>th</sup>** day of **OCTOBER** 2018.

**H. A. OMONDI**

**JUDGE**