



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 4 OF 2017**

**REPUBLIC ..... PROSECUTION**

**VERSUS**

**SAMSON LODOMO ..... 1<sup>ST</sup> ACCUSED**

**YEKO LONGURANGOLE alias COMANDU ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. SAMSON LODOMO and YEKO LONGURANGOLE have been charged with the offence of **murder contrary to Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya**. The particulars of the offence are that on 21<sup>st</sup> December 2016 at about 2030 hours at Murwangor Village in Kopulio location within Kacheliba division of North Pokot Sub County in West Pokot County jointly with another not before court unlawfully murdered SIWYAPAT LOWYAPETA. The prosecution called eight witnesses to establish their case, after the accused pleaded not guilty to the charge.

**Prosecution Case**

2. PW1 Julius Siywat recalled that on 21<sup>st</sup> December 2016 at 8.30pm he was at his home preparing to go to bed when he heard people coming through the gate. He went out to meet them. He opened the door and the lamp light beam fell on them. It was the 1<sup>st</sup> and 2<sup>nd</sup> accused together with Mukereng Konilar. He recognized their voices first as they said *'today we go and kill someone'*. They were drunk and armed with pangas. They went to the deceased's house which had a tin lamp whose light was shining to the outside through the open door. They fought with him. PW1 (Julius) went to call for help. He could not separate them as they were many and he was alone. He did not find his brother or neighbor. He called Josephat Lopele by phone for help who told him that the assailants had torched the house. Then the neighbours Tito Lodomu, Akoles, Joshua and Korkpet came. They saw that the house had been entirely torched. That that was Julius' father's house and he had been burnt inside. Police officers came picked up the body and took photographs of the scene. The assailants escaped to Uganda. Julius identified the 1<sup>st</sup> and 2<sup>nd</sup> Accused in court but the 3<sup>rd</sup> attacker, one called Mukereng was not there. The 1<sup>st</sup> accused is his cousin while the 2<sup>nd</sup> accused is his nephew. He had not quarreled with them before but the two quarreled with the deceased at a beer drinking den. They were also alleging that his father was a witch.

3. PW2 Chepochemosi Siywat, wife to the deceased, told the court that on the material day she was in the house with her husband and her two children. As she made her bed she heard the door being hit. She peeped through the door and saw the two accused. Her husband tried to fight them at the door but they got into the house. Using the lamp that Samson 1<sup>st</sup> accused removed from the house of Julius, they burned the house. She identified it as PMFI – 1. She and her children escaped and hid in the forest. Neighbours came after the house had already been torched. She knew the assailants before then as her children as the 2<sup>nd</sup> accused was her grandchild. There were three people who attacked them: Samson, Commandu and another who was not in court and whose name she could not remember. She had not heard of any disagreement between them and the deceased. Her son Julius was at home but left to call a neighbor and relative for help and did not witness the incident.

4. PW3 Stephen Siywat also known as Simonat is a preacher at Lutheran Church. He testified that on 22<sup>nd</sup> December 2016 at around 6.00AM he was called by his brother, Julius who informed him of the incident. He himself did not witness it.

5. PW4 Margaret Julius testified that on the material day she was in the house preparing to sleep when she heard noises and one voice saying *'today someone will die'*. She peeped outside and saw them coming. From among the people, she recognized Samson Lodomu and Yeko Lungarangle as there was moonlight and the lamp in her house was on. The assailants came and told her to open the door and they entered. When she was deliberating with them outside Samson held her neck and pushed her on the ground. He kicked her in the stomach while she

was down on her stomach. The 2<sup>nd</sup> accused asked 1<sup>st</sup> accused why he was killing a woman for nothing. When she got a chance to rise she ran away with her young child in the hand. As she ran, she met Josephat Lopele, a neighbor, and told him to go and rescue her children from her father-in-law's house. After a while she saw the house of the deceased on fire.

6. Margaret testified that before she escaped the 2<sup>nd</sup> accused had asked her whether she had a matchbox, but she told him she did not have one. When her father-in-law saw the assailants approaching he got into the house where he was with his wife and Margaret's two children. When she left her house the 2<sup>nd</sup> accused also took her lamp, **PMFI – 4**, which he threw on top of the house. The rest of the people in the house had escaped and only the deceased remained. The 1<sup>st</sup> accused locked the house from outside.

7. Josephat Lopele brought her the other children. She then went to the neighboring home. When she went back to the scene later, she found many people including police officers. The house had been fully consumed in the fire and it was only the head of the deceased which could be seen as the rest of the body had completely burnt to ashes. The OCS took the lamp and the dress she was wearing which she identified as **PMFI – 5**. It was blood stained since blood from the hand of 1<sup>st</sup> accused which had been pierced or stabbed by the deceased with a spear. She saw both accused very well. The 1<sup>st</sup> accused was wearing short trouser which was camouflaged which she identified as **PMFI 6a**. He was also dressed in a black sweater. The 2<sup>nd</sup> accused was in a white short trouser and a white vest which she identified as **PMFI 6b**. The clothes were recovered from the respective houses of the accused. Margaret further testified that her husband was not at the scene when the incident occurred, and that she was the one who gave him the information when he returned home.

8. PW5 Joseph Lopele [Joseph] testified that on 21<sup>st</sup> December 2016 at about 8.30PM he was at Murwong Centre before he went home. Julius Siwyat called him and asked him to go save his children. When he was between Julius's house and his he heard noises of people going towards his home; it was Julius's wife. She requested him to rush for her children so that they could not get burnt in deceased's house. He saw a house on fire and she told him that it was the upper house. He went there and met three people; the 1<sup>st</sup> and 2<sup>nd</sup> accused and one Kiptoo Kaniki, who were his neighbours. There was a lot of light from the house that was burning. The moon was also there. The house was burning about 6 meters from where they were. The 2<sup>nd</sup> accused had arrows, Kiptoo had stones and 1<sup>st</sup> accused had stones and a club. He went and removed the two children from the bed and rushed to where the mother was and handed them over to her. He left the assailants there and later when he returned there were many people. His house had been completely consumed by the fire. The 2<sup>nd</sup> accused was wearing a red jumper top and below he was in a long trouser. 1<sup>st</sup> accused was wearing a camouflaged short and a long sleeved whitish top and he had an injury on the left hand. Joseph could see blood.

9. PW6 Peter Atondongorok [Peter] is chairman of '*nyumba kumi*' in the area. He confirmed to the court that the house of the deceased was torched with the deceased inside on 21<sup>st</sup> December 2016. He could not tell whether the accused persons are related to the deceased or if there were any quarrels between the deceased and the accused persons.

10. PW7 NO. 211729 IP Anthony Omusugu of Kanyerus Police Post testified that on 21<sup>st</sup> December 2016 at 9.00PM he received a call to the effect that some people had attacked an elderly person and also lynched him. He organized his men and went to the scene together with the chairman of *nyumba kumi* who led the way. They found one of the houses was entirely consumed as well a body of which they could only see part of the skull outside as the rest of the body continued to smoke. They could not rescue the victim. He called the OCS Kacheliba and reported the incident.

11. They got two people in the home, daughter in law and a neighbor. The daughter in law took them around the home and they noted the wall had panga cuts and there were also stains of blood on the ground. She narrated to them what had happened which corroborated with what she told the court. They waited till dawn and followed the trail of blood stains since the deceased had stabbed one of the assailants with a sharp object but they lost the trail in the bush. When they went to the house of the 1<sup>st</sup> accused, they found his wife who informed them that the 1<sup>st</sup> accused did not spend the night at home. In the 2<sup>nd</sup> accused's house there was nobody. In Yeko's or Commando's home they found his wife who told them that she was not aware where her husband was as she never spent the nights there for the reason that whenever the husband got home drunk he would beat her. She usually went away for the night and returned in the mornings. They requested to carry out a search and found a camouflaged short trouser and white sweater with fresh blood stains which they were informed he was wearing when he came home in the morning. Those items were taken as exhibits (**MFI 6a** and **MFI 6b** respectively). On the way back they were told the 3 suspects were in Uganda. They sought assistance from UPDF Barracks known as Kokochea. They returned to the scene later and handed over the matter to the OCS.

12. PW8 NO. 233642 CI Linus Kimoboi, the OCS Kacheliba Police Station testified in line with what was stated by PW7. When the matter was handed over to him he visited the scene where he found a burnt down home. He also saw a whitish object which he learnt were the remains of the deceased. He took photographs of the scene and produced them as **PMFI – 3a** to **3g** and a report explaining the photos marked exhibit 4. He then commenced his investigations. He interviewed 3 sons of the deceased present: Siwyapat Lowyapeta, Stephen Lomanan and Julius Siwata and also took a statement from Margaret. Apart from asking the four people to go to the police station, he also requested them not to carry the deceased's remains as the same were in ash form, but told them that the only way they could do so is by going to court or swearing an affidavit to that effect. The sworn affidavit was produced and marked **PMFI – 2**. The death certificate was marked **PMFI – 1**. He made an effort to have the suspects arrested but they had escaped on the 27<sup>th</sup> December 2016. PW8 later got an intelligence report that the suspects were seen near the border between Kenya and Uganda. He networked with officers in Uganda and was informed that 1<sup>st</sup> accused was hiding in Kanyarkwat from where he was arrested in March 2017 with the help of KPR at Kongoloi. After Yeko was arrested, the two accused were charged with murder before the High Court and arson in the lower court. The prosecution closed its case without producing the postmortem report.

### **The Defence Case**

13. When put on their defence, the accused persons gave sworn evidence. DW1 Samson Pkemoi Lodomomo stated that the deceased was his father's brother. He told the court that on 21<sup>st</sup> December 2016 at about 8.00PM he was together with the 2<sup>nd</sup> accused and Kiptoo Kaniki still at large when they went to drink changaa together at the home of Julius Siwyat since Julius was a changaa brewer. When they got to the

home of Julius, there they found the wife of Julius, Margaret, who told them to wait for Julius since he had gone out armed with a bow and arrow. That Julius had quarreled with his father the deceased and that according to Margaret, in fact she thought they had answered to her screams.

14. While the 1<sup>st</sup> accused and his companions were still talking to Margaret, they heard Julius asking what it was they were discussing. The voice came from behind the house and he recognized the same as that of Julius then hit him with an arrow on his left hand just above the wrist and ran off. People came to where he was as he was bleeding. Margaret rushed into the house and came back with some salt for his wound. At this point PW2, Chepochemosi Siyvat came out of her house together with the two children of Julius. She looked at his hand and left with the two grandchildren. They were all drunk. At that time Margaret removed her headscarf and gave it to Yeko who tore it into pieces and made a sling to support his (1<sup>st</sup> accused's) hand.

15. In that moment too, he heard the voice of Julius coming while calling out '**Rimun Tunot**' meaning his "**he-goat**" which means he was targeting something or someone. On hearing what Julius was saying they all left. They walked for about a kilometer before meeting Joseph and Newton Lomorok who were also going to Julius's house. They informed them what had happened as Margaret also explained how Julius and his father had quarreled on suspicion that the deceased had bewitched Julius's bull. Then they saw a big light coming from the house of Julius. At that point, Margaret asked 2<sup>nd</sup> accused, Joseph Kaniki and Newton to run back and try and establish what the fire was all about while he and Margaret remained behind. Yeko, Joseph, Kaniki and Newton returned half an hour later with Margaret's two children and told them that Julius's kitchen was burning.

16. Thereafter Joseph, Newton together with Margaret and her children went to Joseph's home while he, Yeko and Nkereng walked to his home. He informed his wife about what had happened. He then removed his blood stained clothes and went to Chepkain Hospital where he arrived at 2.00AM seeking treatment from a doctor who normally works from home. After treatment they went and spent the night at his sister's home. Early in the morning Yeko and Mkereng went back to their homes as he went back to the doctor for more treatment. Thereafter he went to Julius's home. He found many people there including Yeko and Nkereng. He learnt that the deceased had been burnt in the house the previous night.

17. The first accused testified further that thereafter, he went home and informed his father as well as his own brother about what had happened. His wife then told him that Julius had come to the house in the morning and had taken his clothes with him for traditional cleansing. Two weeks later Julius told him that he had given his clothes to the OCS Kacheliba. On 24<sup>th</sup> February 2017 he went to Lolwang Trading Centre where he found dancers and then went to Chepwonon School. One KPR by the name Napareng pulled him aside and informed him that he was required at Kanyarkwat Police Post. On arrival at the police post, he was handcuffed and later charged with arson and murder.

18. DW2 Yeko Longurangole alias Commandu, 2<sup>nd</sup> accused person, confirmed and reiterated what was stated by DW1. He further stated that on the next morning he went to the home of Julius where he found many people and was informed that the deceased had died. He was asked to explain what had happened the previous night. When Julius was asked if he had shot Samson he denied doing so. The elders then asked for the arrow for purposes of traditional cleansing to confirm the person who had shot Samson and also burnt the house. Julius told the elders that the arrow was at Samson's house. The police later collected the same but the elders did not allow them to take away the body of the deceased. On Monday 27<sup>th</sup> February 2017 was the day the elders set aside for the cleansing ceremony. On 3<sup>rd</sup> March 2017 while at his home two people came and asked him to accompany them to Mtembur AP camp. He was then handcuffed and taken to Kapenguria Police Station and subsequently charged with murder.

### **The Law and Issues for Determination**

19. The offence of murder is defined as follows by **section 203 of the Penal Code**:

***"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."***

From the definition, the ingredients of murder may be deduced. This was so expressed in the case of **Republic v Mohammed Dadi Kokane & 7 others [2014] eKLR** as

***"This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond any reasonable doubt in order to prove the charge. These are:***

- 1. The fact of the death of the deceased.***
- 2. The cause of such death.***
- 3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly***
- 4. Proof that the said unlawful act or omission was committed with malice aforethought."***

### **Analysis and Determination**

20. With regard to the first and second issues, that is the fact and cause of death of the deceased, from the evidence adduced there was indeed a fire in the homestead of the deceased and a house burnt down. From the prosecution witnesses specifically Julius, Chepochemosi and Margaret, the deceased was inside the house when the house was burnt down. When PW7 visited the scene with his men he could only see part of the skull as the rest of the body had been completely burnt. PW8 produced the deceased's death certificate P exhibit -1 but no post

mortem was done on the body which had been reduced to ashes. It is clear that the deceased's cause of death was burning by fire, as all the witnesses, and even both accused confirmed that accused had been burnt beyond recognition. The only issue here is whether lack of post-mortem report was fatal to prosecution's case. It had been held that mere absence of medical evidence does not make it impossible for the court to make a finding on the cause of death. This was expressed in the case of **R v. Cheya (1973) EA 500** as follows:

***“Of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of the death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the cause of the death in the circumstances relied on by the prosecution.”***

21. I am of the considered view that the fact and cause of death in the instant case has been satisfied.

22. The third issue is whether the deceased met his death as a result of an unlawful act or omission on the part of the accused persons. On the part of the prosecution it is alleged that the accused persons wanted to lynch the deceased and his son Julius because they were said to engage in witchcraft. Julius was able to run away but the deceased was lynched to death. Chepochemosoi wife to the deceased as well as Margaret her daughter in law witnessed the whole incident. The witnesses' testimonies were all consistent. It was said that the deceased stabbed one of the assailants whose clothes were found in his house. When put on their defence, the accused persons told the court that they were drunk when they went to Julius's home to look for more changaa. In the process Julius stabbed the 1<sup>st</sup> accused on the hand that is why his clothes were stained in blood. However, upon careful consideration of the defence case, I find and hold that it was all made up and does not rebut the evidence given by Julius, Chepochemosoi and Margaret.

23. The two accused also alleged that Julius was the one who quarrelled with his father and not them. In addition they refuted the allegations that they had run away to Uganda, but I am satisfied that the reason why it took months to arrest the two accused is because after committing the offence, they fled, whether to Uganda or to some other place. From the evidence by the prosecution, I am satisfied that the prosecution discharged the burden of proof beyond reasonable doubt. Hence, I am satisfied that the deceased met his death as a result of an unlawful act on the part of the accused persons, namely locking the deceased inside the house and burning down the house without caring whether the deceased died or survived.

24. On the final issue, as to whether there was any malice aforethought on the part of the accused, I refer to **Section 206 of the Penal Code** which provides that:-

***“206: Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—***

***(a) an intention to cause the death of 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, or by a wish that it may not be caused;***

***(c) .....***

***(d) .....***”

25. The deceased was locked inside his house by the accused persons and they then proceeded to throw a lit lantern on top of the house whose walls were mud and the roof covered with thatch. They stood there and watched as the house caught fire with the deceased inside. This clearly demonstrated an intent on the part of the accused persons to cause the death of or grievous harm to the deceased.

### **Conclusion**

26. In the result, I am satisfied that the prosecution has proved all the four ingredients of the offence of murder beyond any reasonable doubt. I therefore find the 1<sup>st</sup> and 2<sup>nd</sup> accused persons guilty of the murder of SIWYAPAT LOWYAPETA and convict each one of them accordingly of the offence of murder contrary **Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya**. I do so under section 322(1) of the Criminal Procedure Code.

It is so ordered.

**Judgment delivered, dated and countersigned in open court at Kapenguria on this 9th day of October, 2018.**

**RUTH N. SITATI**

**JUDGE**

**In the Presence of**

Mr. Changorok for both accused persons

Miss Kiptoo for Republic

Mr. Juma Barasa – Court Assistant