



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 19 OF 2014

REPUBLIC.....STATE

VERSUS

MOHAMED EKADELI KEBO.....ACCUSED

JUDGMENT

The accused **MOHAMED EKADELI KEBO** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.** The particulars of the charge were that

“On the 2nd day of February, 2014 at Loikas Village of Maralal Township within Samburu County, murdered MODING LOMURO”

The accused pleaded ‘**Not Guilty**’ to the offence. His trial commenced before **Hon. Lady Justice Abigael Mshilla** on 10/2/2015. The Honourable Judge heard the evidence of the first four (4) prosecution witnesses. Following her transfer to the Nyeri High Court I took over the case and recorded the evidence of the remaining three (3) prosecution witnesses. A total of seven (7) witnesses testified in the case.

PW1 VERONICA LELE told the court that on 1/2/14 she was outside her house washing clothes. The deceased who was the mother to **PW1** was seated nearby. As **PW1** washed her clothes and hung them on the line to dry, the accused came and pulled them down onto the ground. This happened twice leading to a quarrel between accused and **PW1**.

Then accused pulled off a wire mesh from a neighbour’s house and threw it towards **PW1**. The wire mesh did not hit **PW1** but instead hit the deceased in the face causing her cuts which began to bleed. The deceased was rushed to hospital and later returned home. The next day her condition deteriorated and she was returned to the hospital. She died whilst undergoing treatment.

The matter was reported to police who commenced investigations. The accused was arrested and eventually charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused gave an unsworn defence in which he admitted having thrown the wire mesh at **PW1** but hitting the deceased instead.

This court must now analyze the evidence on record with a view to determining whether the charge of murder has been proved beyond reasonable doubt.

Section 203 of the Penal code Section 63, Laws of Kenya defines the offence of murder as follows

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

The prosecution is therefore obliged to tender evidence sufficient to prove the following ingredients of the offence of murder beyond reasonable doubt.

- i. Proof of the fact as well as the cause of death of the deceased.
- ii. Proof that the deceased met her death as the direct result of an unlawful act or omission on the part of the accused
- iii. Proof that said unlawful act or omission was committed with malice aforethought

The fact of the death of the deceased is not in any doubt. **PW1** who was with the deceased at the material time told the court that the deceased was hit with a wire mesh in the face causing cuts and bruises to her face. **PW1** confirms that the deceased died the following day whilst undergoing treatment.

PW3 EKING LEMORU and **PW4 PETER ELAMIZE** the son and son-in-law respectively of the deceased both confirm that identified the body of the deceased. All these witnesses who knew the deceased well identify her as **MODING LOMURO**.

The fact that the deceased sustained injuries as a result of being hit by a wire mesh is not in any doubt. Neither does any doubt exist that it was the accused who threw the wire mesh which hit the deceased. **PW1** and **PW2 JOSPHAT NAIPONYA** were both present when the incident occurred and they both identify the accused as the person who threw the wire mesh. The incident occurred at 10.00am. It was broad daylight and visibility was good.

In his defence the accused concedes that on the material day he got into an argument with **PW1**. The accused also readily concedes that he threw the wire mesh intending to hit **PW1** but instead it hit the deceased who was seated nearby. Therefore I do find that it was the accused who threw the wire mesh which hit the deceased causing injuries to her face.

The question is whether this action by the accused was the direct and proximate cause of the deceased's death. The evidence on the cause of death is not very clear.

PW5 DR. JOHN KADENO a medical officer working at the Samburu County Referral Hospital testified and produced the post mortem on behalf of his colleague a '**Dr. Soita**'. **PW5** told the court that the cause of death was listed as "**Severe head injury**". Under intense cross-examination by defence counsel **PW5** admitted that this cause of death as indicated in the post mortem report (**P.exb2**) was both incomplete and inadequate. Simply to cite '**severe head injury**' as a cause of death does not suffice. **PW5** explained that a doctor would have to go further and state the effect of such injury on the life of the deceased e.g did this injury lead to severe bleeding or cardio-pulmonary arrest. As it is the cause of death listed is not complete. **PW5** also admitted that the injuries noted on the deceased could not possibly have led to her death.

A look at the report shows that the deceased upon autopsy examination was found to have

- Cut wound at the left eye
- Cut wound on both ears
- No fractures to limbs or skull

These are relatively minor injuries and certainly one is left wondering about the '**severe head injury**'

indicated in the report. There were no skull fractures, no bone contusion, no open or festering wound, on the head at all. **PW5** stated that the report failed to indicate the primary cause of death. **PW5** explained that subdural haematoma or in lay mans terms a bruise would not ordinarily cause death.

Finally **PW5** under cross-examination stated

“.....The injuries noted in the form do not in my medical opinion explain the cause of death. The finding of subdural haematoma would not in my opinion lead to death. The findings of the doctor do not in my view support the cause of death”

This was the expert opinion of a medical doctor and this court would have no reason to discount or disbelieve this same.

The wire mesh which hit the deceased was exhibited in court. **Pexb 1** and I was able to see it. It was a normal wire mesh one which even from a lay mans point of view would not cause fatal injuries. I find it extremely unlikely that this wire mesh led to the death of the deceased.

Given that the evidence on the cause of death is not conclusive this court cannot rule out the possibility that some other or intervening factor may have caused the death of the deceased. It has not been proved beyond reasonable doubt that the action of accused in hitting the deceased with a wire mesh was the proximate cause of her death. In the circumstances, the charge of murder has not been proved to the standard required in law. I therefore enter a verdict of **‘Not Guilty’** and I acquit the accused of this charge. Accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Nakuru this 3rd day of March 2017

Mr Mutonyi for Accused

Maureen A. Odera

Judge