



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE NO.10 OF 2012

REPUBLIC.....STATE COUNSEL

VERSUS

SALIM KHAMISI (ALIAS WEPUKHULU).....ACCUSED

J U D G M E N T

1. The accused person herein Salim Khamis (alias Leonard Webukhulu) is faced with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the night of 10th/11th March 2012 at Namibila Village, Machakha Sub-location within Bungoma County the accused murdered George Maseti Wabukulu.

2. As the accused pleaded not guilty to the charge the matter proceeded to full hearing with the prosecution calling a total of 5 witnesses.

3. The court placed the accused on his defence having found at the close of the prosecution case that the accused had a case to answer.

4. In brief the prosecution case is that on the night of 16th & 17th of March 2012 the accused and the deceased who are brothers quarreled leading to a fight where the deceased was injured and he thereafter died.

5. PW1 & PW2, the mother and an uncle of the 2 did not witness the incident. Both claimed to have found the deceased dead and with no physical injuries. PW1 denied that her two sons had quarreled.

6. PW3 PC Daniel Maratim the investigating officer testified on the information he gathered during his investigations and the observations he made while at the scene and the state of the body of the deceased as he found it. It was his evidence that the deceased had a fractured face and was bleeding on the left ear. The deceased was lying on a bed covered with a blanket. That he interrogated those presents including PW1. They saw fresh blood outside the compound and suspected there had been a fight. On interrogating police officers they learnt that the accused had been arrested by members of the public and one officer APC Joakim handed him a hammer that he learned had been found on the accused.

On cross-examination he stated that while interrogating PW1 she had said her two sons had had a quarrel. He only found two houses close together in the compound a kitchen and where people slept. He produced as part of his Evidence a statement under inquiry made by the accused where he admitted having quarreled and fought with the deceased.

7. PW5 Dr Mansur Ramzan performed the post mortem and made the following findings:

External appearance

- Blisters on the abdomen, thigh & trunk
- Bleeding from an abrasion on left ear pinna
- Laceration approximately 60mm on the left temporal area
- Swelling of the left temp-occipital area.

Internal appearance

Head: crushed left temporal fracture with epidural haematoma extending to the occipital area.

Nervous system

- Brain/contusion with massive edema and pressure He formed the opinion that the cause of death was cardio pulmonary arrest from massive intracranial pressure as a result of intracranial haemorrhage following a blunt head trauma

8. Having been put on his defence the accused gave a sworn statement where he testifies that he found his brother dead on the 17th of March, 2012 when he went to wake him up in his house as they lived separately so that they could go to work together. He denied the contents of his statement to the police.

9. This being a charge for the offence of murder 3 ingredients of the charge must be proved.

Firstly that a person died. Secondly that the deceased committed the act or omission that led to the death of the deceased. And thirdly that there was malice afterthought.

10. Both the presentation and the defence do testify to the death of the deceased satisfying the first ingredient of the offence.

11. As I consider the matter further I am minded that the onus of proving the case to the required standard, beyond all reasonable doubt falls upon the prosecution. In Okale Vs R (1966) E.A. at 555 the court stated inter alia

“.....the burden of proof in criminal proceedings is through out on the prosecution, and it is the duty of the trial court to look at the evidence on a whole”

12. Is there evidence implicating the accused person. The prosecution did not have any direct evidence save for what PW3 the investigating officer gathered. It is notable that he found fresh blood in the compound and learnt from PW1 the mother of the deceased and accused that her two sons had quarreled (although in her evidence she denied this) and that the accused was arrested by members of public and a hammer recovered from him. The witness found the deceased with a fractured head and blood oozing from his ear. His impression after investigations was that the accused and the deceased fought.

13. Although the investigating officer sought to rely on the statement under inquiry as a confession from the accused that he beat his brother, I do agree with the defence counsel that the said statement is inadmissible as it falls short of being a confession that would be admissible under Section 25A of the Evidence Act which provides that

“a confession or any admission of a fact tending to be proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of chief Inspector of police, and a third party of the person’s choice”.

PW6, was a chief inspector of police, however there was no third party of the accused choice present thus

falling short of the section. The confession is there inadmissible.

14. With the foregoing the prosecution has been left to rely on in circumstantial evidence and the test to be applied is now settled.

In **R V Taylor Weaver & Donovan (1928) 21 Cr appeal R20** the court stated

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of Evidence to say that it is circumstantial”

In **R V Kipkering Arap Koskei & Another (1949) 16 EACA 135 at 136** the Court of Appeal for East Africa had this to say

“As stated in Wills on “circumstantial evidence” 6th Edition page 311

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

15. PW3 and PW5 the doctor gave injuries sustained by the deceased PW3 saw injuries that were external and this was corroborated by PW5 upon doing post mortem examination. The injuries were serious yet PW1 and PW2 in their testimony said that the deceased had no visible injuries. Blood was coming from the left ear of the deceased they did not allude to it. There was fresh blood in the compound yet PW1 & PW2 were silent on this. PW3 on investigations established that the deceased and the accused had fought the previous night. This piece of evidence was not displaced by the defence. The witness informed the court that the information was given to him by PW1 although PW1 recanted this in court, with this information in my considered opinion the prosecution has succeeded in proving that the circumstantial evidence gathered point to no other as the killer of the deceased but the accused. The prosecution has placed the accused squarely at the scene of crime and having had an altercation (information gathered from PW1) This information and explanation was not displaced by the defence. Further a hammer was found with the accused. The injuries are evident that a blunt object was used in inflicting the fracture of the deceased head.

PW1 & PW2 attempted to conceal evidence against the accused. However the truth has come out through circumstantial evidence and the only inference to the drawer is that the killer was no one else but the accused.

To ignore this evidence will be a traversity of justice as the facts laid down are not capable of any other reasonable explanation and I therefore convict the accused of the offence of murder as charged.

Dated at Bungoma this 2nd day of March, 2017.

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ALI-ARONI

JUDGE