



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CRIMINAL CASE NO. 14 OF 2012

BETWEEN

REPUBLIC.....PROSECUTION

AND

LIVINGSTONE LIPAPU NDAKALA.....ACCUSED

JUDGMENT

1. On 24th February 2012, this court was informed that the accused, **LIVINGSTONE LIPAPU NDAKALA** had murdered **ANDREW WERE alias DADDY** (“the deceased”) on 20th February 2012 at Silula Village, Sauri Sub-location, Gem District within Siaya County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. After the accused pleaded not guilty, Chemitei J., heard the matter in part and I finally completed the hearing after complying with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The prosecution called 6 witnesses while the accused elected to give sworn testimony. The prosecution case was as follows.

2. On the night of 20th February 2012, Francis Okok Okumu (PW 1), told the court that he was called by his friend that the deceased had been injured. At the time the deceased was employed by his son. When PW 1 went to see the deceased at his son’s home, he found his crying and vomiting. The deceased told him that the accused had beaten him. He took the deceased to Yala Sub-District Hospital for treatment where he was admitted for treatment. He later learnt that the deceased died at New Nyanza Provincial General Hospital (“Russia Hospital”) where he had been taken for further treatment. In cross-examination, PW 1 stated that the deceased told him that the accused had found him with his girlfriend and that they fought.

3. The deceased’s brother, Paul Omusiwa Amunga (PW 2), recalled that that on 21st February 2012, the deceased called him and asked to be taken to hospital following an assault. PW 1 also called him and told him to go Yala Hospital where he had taken the deceased. When he went to hospital, he found the deceased had been injured in the stomach. The deceased told him that he had fought with someone over a girl and the that he had been beaten. PW 1 confirmed that the deceased was later admitted to Russia Hospital where he died. PW 1 identified the deceased’s body before the post-mortem was conducted.

4. The Assistant Chief, Sauri Sub-location, Austin Ouma Owino (PW 3), testified that on 21st February 2012, he met with PW 1 who was from Yala Hospital. PW 1 told him that the accused and the deceased had been involved in a fight. He was later informed that the deceased had been transferred to Russia Hospital where he passed away. He informed the area Chief of the incident and assisted police officers to

locate the accused and the girlfriend who was the subject of the dispute.

5. On the night of 20th February 2012, Pamela Adhiambo Odera (PW 4), told the court that she had just fallen asleep at about 9.00pm when she heard some commotion outside her house. She woke up and went to her co-wife's house where she found Margaret Auma Ombonya (PW 6) who told her that it was the accused beating the deceased. She went back to sleep.

6. PW 6 recalled that on the material night, she had gone to sleep when she decided to go out for a short call. She found the deceased outside her house. He asked her to accompany him to his house but she refused. When she went back to sleep, she heard the accused calling her from the road. She came out of the house and saw the accused with armed with a panga and rungu. He told her not to go with the deceased, who was standing by her door. The accused stated chasing the deceased. They chased each other into the night while she went back to sleep. On the next day, she was informed by the accused that the deceased had been taken to hospital.

7. The investigating officer, Chief Inspector Michael Were (PW 5), confirmed that PW 3 made a report at Yala Police Station that on 20th February 2012 at about 9.00pm, the accused and deceased had fought and that the deceased had been assaulted. His investigations revealed that the accused met the deceased, in the company of PW 6, they exchanged words and a fight ensued. After the receiving news of the deceased's death on 23rd February 2012, he decided to charge the accused with murder.

8. In his sworn testimony, the accused denied killing the deceased. He testified that he did not know the deceased or PW 6. He told the court that prior to arrest, he was a businessman at Dudi selling omena, mandazi and charcoal while living at Silula Village and that between 20th and 22nd February 2012, he carried on his business as usual. He was arrested on 22nd February 2012 at 10.00pm by police officers who come to collect him from his house.

9. To prove murder the prosecution must establish three key ingredients beyond reasonable doubt: first, the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and third, that the accused committed the unlawful act with *malice aforethought*.

10. As regards the cause of the death, the prosecution relied on the post mortem report prepared by Dr Adera Oigo which was produced by consent. The post mortem on the deceased's body was done on 27th February 2017 at Russia Hospital after it was identified by PW 2. From the report, Dr Oigo observed that the deceased had blood oozing from his nostrils and had bruised on the right forearm, left arm, left anterior leg and on the scalp and forehead. The deceased's stomach abdomen was distended. Internal examination revealed that the gall bladder was ruptured and there was haematoma in the covering of the intestines. The doctor concluded that the deceased died from sepsis due to ruptured viscera following a blunt abdominal injury.

11. To prove that it is the accused who assaulted the deceased, the prosecution relied on the deceased's dying declarations and the testimony of PW 6. The deceased informed PW 1 and PW 2 that he had been injured in a fight with the accused. These statements, having been made by the deceased after his assault and prior to his death, fall within the definition of dying declarations and are admissible under the provisions of **section 33(a)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. Such statements must however be received with the necessary caution and circumspection although it is not a requirement of law that they must be corroborated to support the conviction (see *Choge v Republic [1985] KLR 1* and *Pius Jasunga s/o Akumu v R [1954] 21 EACA 331*). I find that the statements made by the deceased to PW 1 and PW 2 credible as he made them to people he knew, his employer and his brother, respectively almost immediately after he was assaulted. Moreover, there is nothing in the evidence that suggests that the deceased was lying or was motivated by ill-will or malice against the accused.

12. On the material night, PW 6 confirmed that she saw the accused and deceased when the deceased came to see her. After exchanging a few words, they started chasing each other. The testimony of PW 6 corroborates the statements that the deceased made to PW 1 and PW 2 that there was a fight on that night

in which he was assaulted.

13. Although, the accused denied that he knew the deceased and PW 6, the prosecution evidence shows otherwise. PW 1 testified that the deceased told him that he had been assaulted by the accused who was employed by one Ochieng. Nothing was intimated to him in cross-examination that he would have been referring to someone else or that he was not employed in the village. In addition, the testimony of PW 6 puts paid to the accused lie that he did not know her or the deceased. PW 6 was the last person to see the accused and deceased together on the night the deceased was assaulted. Since what happened to the deceased on that night was a matter within his knowledge, he had a duty to provide a reasonable explanation as to how the deceased was injured. In *Mkendeshwa v Republic* [2002] 1 KLR 461, the Court of Appeal elucidated the law in **section 111** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* as follows:

In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.

When the accused fails to offer a reasonable explanation, the court is entitled to presume what could have happened. **Section 119** of the *Evidence Act* states:

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

14. The totality of the evidence is that on the night of 20th February 2012 at about 9.00pm, the accused confronted the deceased at the home of PW 6 over his intentions over PW 6. The two exchanged some words before the accused chased the deceased whereupon he struck the accused on abdomen with the rungu he had been seen carrying by PW 6. The deceased, who was now in pain, went home and called PW 1 who took him to hospital where he succumbed to the abdominal injury. In conclusion, I find and hold that the deceased died from a blunt injury inflicted on his abdomen by the accused.

15. I now turn to the issue of malice aforethought. When PW 6 saw the accused, he was carrying a panga and rungu which implies that he intended to injure or kill the deceased. However, the statements made by the deceased to PW 1 and PW 2 was that he was injured following a fight between him and the accused. This negates the element of malice aforethought as the injury may have been unintended. I therefore give the accused the benefit of doubt and hold that he did not intend to kill the deceased.

16. I therefore find the accused, **LIVINGSTONE LIPAPU NDAKALA** guilty of manslaughter for the unlawful killing of **ANDREW WERE alias DADDY** contrary to **section 202** of the *Penal Code* and I convict him accordingly.

DATED and DELIVERED at KISUMU this 10th day of April 2017.

D.S. MAJANJA

JUDGE

Mr Amule, Advocate for the accused.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.