REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 20 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

WELDON LANGAT TOWET.....ACCUSED

JUDGMENT

The accused **WELDON LANGAT TOWET** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

> ***"On the 22nd day of February 2011 at Mawe Mbili Elburgon in Molo District within Rift Valley Province murdered WILLIS CHEMUNAI TOWET"***

The accused pleaded **'Not Guilty'** to the charge. His trial commenced on 29/2/2012 before **Hon Lady Justice Hellen Omondi** who recorded the evidence of all the three (3) prosecution witnesses and placed the accused onto his defence. Following the transfer of the Hon. Judge to Bungoma High Court, I took over the matter and heard the defence. Below are the brief facts of the case.

PW2 NICHOLAS CHERUIYOT TOWEET told the court that the deceased was the father of both himself and the accused. On 22/2/2011 the deceased came to the home of **PW2** and requested **PW2** to accompany him to the home of the accused. The two walked together and got to the accused's homestead at about 9.00pm. **PW2** says he heard his father call out to accused saying **'Weldon' Weldon'**. Thereafter **PW2** heard the deceased cry out saying **'Weldon you have killed me'**. **PW2** took to his heels and ran away.

PW3 ANDERSON CHEMANAI told the court that he too was a son to the deceased and a brother to the accused. On 22/2/2011 **PW3** was asleep in his house when **PW2** came and called him telling him that accused had killed their father. They went together to the home of accused and found the deceased lying dead on the ground with an arrow next to the body. The brothers went to the police station to report the incident and found that the accused had already gone and surrendered himself to the police station. Upon conclusion of police investigations the accused was taken before court and 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 stated that he was shooting at persons he believed were cattle thieves only to discover later that it was his father.

This court is now required to analyze the evidence on record to determine whether the charge of murder has been proved as required in law.

Section 203 of the Penal Code, Cap 63, Laws of Kenya defines the offence of murder thus

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

In this case neither the fact nor the cause of death of the deceased are in any doubt. **PW2** and **PW3** who were both sons of the deceased told the court that they found the body of their father lying dead on the ground. **PW3** stated that he noted an injury to the chest of the deceased. Both witnesses who obviously knew the deceased well identify him as **'Willis Chemunai Towett'.**

Evidence regarding the cause of death was tendered by **PW1 DR. ALMA AKUTE** a medical officer attached to Molo District Hospital. **PW1** told the court that she conducted the autopsy on the body of the deceased. She noted a 30mm wound with jagged edges to the chest area and the heart. The doctor opined that the cause of death was **'pericardial tamponade with massive haemorage secondary to sharp object trauma'**. She filled and signed the post mortem report which was produced in court as an exhibit **P. exb 1**.

The next question requiring proof is whether it was the accused who inflicted the fatal wound on the deceased. The only eyewitness to the incident was **PW2**. He did not mention having seen the accused assault and/or injure the deceased in any way. **PW3** said that he only heard his father call out **'Weldon you have killed me'** before he fell to the ground. The time of the incident was 9.00pm. It was dark and visibility was not good. **PW3** spoke of there being moonlight but he failed to describe the intensity of that moonlight.

It seems that as soon as the deceased fell to the ground **PW2** ran away. He did not see what caused the deceased to fall to the ground. **PW3** only came to the scene after the fact. He did not see how his father sustained the fatal injuries. Therefore as it is no prosecution witness has been able to state with certainty that it was the accused who shot and killed the deceased.

In his defence the accused told the court that on the material night he noticed a man leading away his cow. He thought there were thieves in his homestead and he shot an arrow. It was only later that the accused came to realize that the person he had shot was his father. The accused in his defence therefore admits to having shot the arrow which killed the deceased. I therefore find that the *actus reus* for the offence of murder has been proved.

The final ingredient of a murder charge which requires proof is **'malice aforethought'** which forms the *mens rea* for the offence of murder. It must be shown that the accused acted with premeditation and with intent to kill or to grievously injure the deceased.

The accused pleaded that his shooting of the deceased was inadvertent. He explained that he thought he was shooting a cattle rustler. The law provides that any person may act with necessary force to defend his person, his home or his property.

As has been stated earlier this incident occurred at night when visibility was poor. I have no reason to doubt the defence of the accused. He may not have been able to clearly see and recognize his father during the night. There is no evidence of any disagreement that would have caused the accused to shoot his own father. Neither **PW2** nor **PW3** advanced any possible motive why the accused would have wanted to kill the deceased.

There is nothing to discount or negate the accused's defence that he believed he was defending his property (cattle) against imminent theft. **PW2** who conceded that the lighting in the area was poor at the time cannot tell whether or not there could have been other nefarious elements hovering around the area. It is a well accepted concept in law that **'a man's home is his castle'** and thus one may take all steps necessary to protect his home and property.

In acting as he did I find that the accused did not act recklessly and/or unlawfully. He shot his arrow in the belief (albeit mistakenly) that he was protecting his property.

In the case of **BECKFORD Vs REPUBLIC [1987] All E.R 425** it was held

> ***"If a plea of self defence was raised when the defendant had acted under a mistake as to the facts he was to be judged according to his mistaken belief of the facts regardless of whether viewed objectively his mistake was reasonable. Accordingly the test for self-defence was that a person could use such force in the defence of himself or another as was reasonable in the circumstances as he honestly believed then to be ……."***

I find the defence raised by the accused was reasonable and I am inclined to award him the benefit of doubt. I find that no malice aforethought has been proved and as such the charge of murder was not proved.

For the above reasons, I find that this charge of murder has not been proved and I acquit the accused. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 12th day of June, 2017.

Mr. Simiyu holding brief for Mr. Wambeyi

Mr. Chigiti for State

MAUREEN A. ODERO

JUDGE