



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 4 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS MASETI MULEMBANI

JOAB POWON LOITALIMA.....ACCUSED

J U D G M E N T

The accused persons were charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that on the **13th day of January 2013 at Kamatira Forest within West Pokot County jointly Murdered Daniel Maseti Mulembani**.

The accused persons denied the offence and the prosecution called 5 witnesses whose evidence can be summarised as follows;

PW1 Everlyne Chepowon Lopeitodo testified that on the material day she was going with one Veronica to collect vegetables from her fathers home. On their way near a river they heard people

conversing in Kibukusu. They saw the 1st accused and the deceased. The deceased had been injured and was down raising his hands and begging for forgiveness. The accused was telling him that he would not forgive him as he had prevented him from acquiring land. Their attempt to plead with him to forgive fell on deaf ears. The 1st accused ordered them to leave the scene. The deceased was bleeding from the stomach. They reported the matter to the police reservist.

During cross-examination she confirmed that she knew the 1st accused and maintained that the deceased was raising his hands asking for forgiveness.

PW2 Martin Site Longolengiro testified that on the material day he was informed by his son that there was someone lying down near his house. He went and saw him bleeding profusely and could talk. He told him that his brother Franco had injured him. He called the area chief and he was taken to hospital.

PW3 Jacob Limo Lorita who is a police reservist said that he was informed by PW1 and Veronica about the incident. He went to the river but did not find them. He was later ordered to arrest the accused.

PW4 PC Walter Kiprono Menjo was the Investigating Officer in this matter. He testified that initially the 1st accused was charged with the offence of assault but later changed to Murder after the deceased died. He said that he visited the deceased at Moi Teaching and Referral Hospital where he had been

taken for treatment.

The deceased told him that its the 1st accused person who had assaulted and injured him. He also recorded statement from him. Less than 24 hours thereafter he died.

PW5 CPL Gedeon Ochieng carried out the investigation after PW4 was transferred. He produced the postmortem report as well as the psychiatric forms on behalf of the accused persons.

When put on their defences the accused person gave unsworn evidence. **DW1** said that his brother the deceased had visited him from Kakamega . He went on a drinking frolic on 14/1/2013. Later he was told that he had been assaulted and injured as he was found drinking with someone's wife. He showed him where he had been stabbed. He then went looking for a vehicle to carry him but when he arrived he did not get him for he had been taken to Kapenguria hospital. He went to Kapenguria but was told he had been transferred to Eldoret. He then told his relatives and advised them to go to Eldoret. Later he was arrested by the police reservist and taken to the police station and later charges preferred. He denied ever differing with the deceased.

DW2 said that on 13/1/13 he went to church till 1 pm. Thereafter he went praying for a sickman and went home. On 20th he was arrested by police reservist and taken to the chief's office and later to the Police station. Thereafter he was charged with the current offence.

Analysis and Determination

I have perused carefully the entire proceedings as well as the written submissions by the counsels on record. The offence of Murder ought to be anchored on the question of malice aforethought. Was there any malice on the part of the accused person? Did any of the witnesses accurately found the accused person on the act? What circumstances were prevailing at that particular time?

I shall propose to deal with the second accused herein. Having gone through the entire prosecution evidence I respectfully do not find any eye witness connecting him with the offence. Even circumstantially no evidence was tendered to suggest that he was at the scene. Pw1 together with her friend Veronica only saw accused one with the deceased. She did not suggest that the 1st accused was with any other person. Neither did the deceased tell PW2 or Pw4 that the second accused participated in the assault. More importantly the deceased dying declaration talks of a tall slender person and not the 2nd accused. On that score alone I find that there was no case proved against the 2nd accused and I shall set him free under the provision of Section 215 of the Criminal Procedure Code.

As regards the 1st accused I find that there are sufficient evidence to convict him for the offence.

In the first instance PW1 clearly knew the accused and the event took place during the day. She even had time to plead with him to forgive the deceased.

She found the deceased bleeding profusely. If the 1st accused was attempting to assist the deceased why chase away PW1 and her friend.

Although no murder weapon was found the postmortem report by Dr. Ndirangu was consistent with the injuries as seen by PW1 and her colleague.

I have also perused the evidence of Pw2 and Pw4 together with the deceased dying declaration as written by PW4. Section 33(a) of the Evidence Act Cap 80 provides that:

“Statement, written or oral, of admissible facts made by a person who is dead ----- are themselves admissible in the following cases:

(a) When the statement is made by a person as to the cause of his death, or as to any

circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not at the time when they were made, under expectation of death, and whether may be the nature of the proceedings in which the cause of his death comes into question."

In *Pius Jasunga s/o Akumu Vs R. (1954) 1 EACA 333* the court stated as follows:

"The question of the caution to be exercised in the reception of dying declarations and the necessity for their contribution has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval ----- It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration

(R V Eligu S/o Odel & Another (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused ----- . But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration." (Underlining mine)

In the instant case the deceased did make a written dying declaration which he thumb printed 24 hours before his death. I find that the same was clearly corroborated by the evidence of Pw2 as well as PW4 who spoke with the deceased.

In the premises I am satisfied that the charges have been proved beyond any reasonable doubt against the 1st accused person Francis Maseti Mulembani and I proceed to convict him under the provision of Section 203 of the Penal Code.

The 2nd accused as earlier indicated is hereby acquitted under the provision of Section 215 of the Criminal Procedure Code and the sureties discharged unless lawfully held.

Delivered on this 5th Day of October 2016.

H.K. CHEMITEI

JUDGE

In the presence of

Kakoi for prosecutor

Nyamu for Abari for accused

Kirong – Court Assistant