



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 50 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

DAVID SILALE EKENO.....1ST ACCUSED

FRANCIS OYIE LOMONING.....2ND ACCUSED

JUDGMENT

1. David Silale Ekeno (*the 1st accused*), and Francis Oyie Lomoning (*the 2nd Accused*), (*together the accused*) are charged with the murder of Robert Ouko Oliech contrary to Section 203 as read with Section 204 of the Penal Code (*Cap. 63, Laws of Kenya*).
2. The prosecution alleged that the accused on the 23rd day of March 2008 at Katorongot village in Koibatek District within Rift Valley Province, jointly murdered Robert Ouko Oliech (*the deceased*). The accused however pleaded not guilty and the matter proceeded to hearing in the course of which the State called a total of eight witnesses including the doctor (PW6), who carried out the post-mortem on the deceased body.
3. It was the evidence of PW6 that he found stab wounds on the lower right rib exiting through the 5th – 6th ribs intercostal space about 2.5 c.m. in length and 1 cm diameter. He formed the opinion that the cause of death was due to massive haemorrhage due to the stab wound. He also subjected both accused to mental assessment and found both accused mentally fit to stand trial.
4. PW7, merely identified the body for purposes of the post-mortem.
5. PW8 one of the officers who went to the scene testified on the circumstances under which the deceased was killed. The deceased had fought and had overcome one Dickson Ekal (PW2) (*Dickson*). Dickson then decided to call for help. The accused took up his cause and armed themselves with a sword and a panga. The second accused carried the sword while the first accused carried a panga. The sword was snatched from second accused by Jumapili Lorino (PW4) but the panga was never recovered.
6. This witness testified that though the accused and the deceased were not involved in the fight, it was a common practice among the accused's community to avenge an injury or assault against their own kin.
7. The details of the fighting that led to revenge attack are given by PW1. The day was 23.03.2008. The time was about 9.00 a.m. He was among others with the deceased, and PW3, and were on their way to Athenai village from Katorongot. The deceased however started a quarrel with Dickson, (PW2) and the first accused and second accused using fists and blows and the fight came to a standstill and the

antagonists then their separate ways. However long after the morning fight and about 1.00 while PW1 and the deceased were coming from the deceased's employer, the accused sprang out of the bush and confronted the deceased. The first accused "slashed the deceased with a panga on the left side of his head while the first accused emerged holding a knife and *"pushed the same into Roberts stomach digging it into him from the right to the left side of the stomach."* They took the injured to a nearby hospital but he was already dead, and the doctor advised them to report to the Police.

8. Upon cross-examination, PW1 testified that the deceased fought three times that day. The first fight was with PW2 and twice with the accused. He denied a suggestion by counsel for the accused that the deceased was in the habit of fighting, and that this was about 8.00p.m., in the night, when the accused emerged from the bush, and that the two accused *"fought the deceased for fighting with Dickson Nyakial"*, and that he did not know what the accused were fighting the deceased for.

9. It was the testimony of PW2, that he and the deceased had fought that day and the deceased stabbed him with a common kitchen knife for which he was treated and went home.

10. However before he retired into bed, the accused had come to his home, the first accused holding a panga while the second accused *"had a sword which was inside a pipe"*, and they told him that they would kill somebody that day but did not say whom they intended to kill, and they left to a destination unknown to him.

11. PW1 further testified that on their return, the first accused was carrying the sword, and he was bloody, and the second accused (Francis) said "that he had finished somebody", and then went away. The first accused remained with PW1, and went to bed. They were arrested by the Police that night. Four of them he, Wanga, Silale and Oyie, but he and Wanga were released after recording their statements.

12. Upon cross-examination this witness reiterated his evidence, that at 7.00 a.m. they heard people screaming but at about 7.30 p.m. they came back and said, they had finished somebody. The blood on the knife was cleaned/wiped off the grass. He stood by the door, the grass was only two steps from his door.

13. Perhaps the evidence of PW3 was the clearest of them all. He and the deceased had gone to visit his grandmother at a place called Athenai. On their way back home, they passed by the home of the parents-in-law of the second accused. The deceased was complaining to him of pain in his leg when they met the first accused who started fighting with the deceased. He with some in-laws of the second accused tried to separate them, while the second accused who was lying on the ground with a knife in his hand greeted him and said "Oyie na kisu" (*"Oyie and a knife"*) and struck him with the knife on the elbow and then "pierced" the deceased with same knife and ordered them to run. He and the deceased run, but the deceased collapsed, as he had been injured.

14. Both he and the deceased run, but as the deceased had been injured and as he collapsed, he asked him to call his parents. The mother responded but the deceased could not speak, and was pronounced dead upon arrival at Mogotio Health Centre. He then reported the incident to the Police. He was unaware of any reason or grudge why the second accused pierced the deceased with the sword. He assisted the Police in arresting both accused by pointing them out at their respective homes. He had known both from youth.

15. Upon cross-examination, the PW3 was categorical that the fight was not started by the deceased. The fight between the first accused and the deceased earlier in the day had ended. He refused to say that the deceased was a rowdy person. He reiterated his evidence-in-chief that the second accused was lying on his stomach in the bush, about 10-12 metres away when he sprang and stabbed the deceased. He was found lying and hiding under the seat, and holding a panga. He was categorical that it was first accused, that he was not the one, who struck the deceased with the sword ***"As regards David I can say categorically that he was not the one who struck the deceased with the sword."***

16. When PW4 heard screams that Robert (*the deceased*) had been stabbed with a sword by Oyie (*the 2nd accused*) he rushed to the scene and found the deceased being held in a house as he bled profusely. He

left as the deceased was being taken to hospital. He found the two accused on a path to his house. He knew them both, that there was light, he also recognised them by their voices. At that point the second accused got up and tried to flee. He was however restrained by his companion who held him by his hands to the back, and asked for his help. He managed to snatch the sword from him, but the second accused managed to riggle out of the hold by his companion, and bolted away. He kept the sword and handed it over to Mogotio Police the next day.

17. In cross-examination, PW4 admitted that it was dark, but that his and eyes of others in the village are used to the darkness and can see and recognize each other at night. He accompanied the Police during the arrest of both accused and he was therefore present during their arrests.

18. It was the testimony of PW5, the mother of the deceased, that it was PW3 who informed her that her son Robert had been stabbed by the second accused. She rushed to the scene, and found the deceased bleeding from the rib-side, and moved him first to his sister's house, and she then informed the sister of the second accused of what her brother had done, and then took the deceased to Mogotio Health Centre where he was pronounced dead on arrival. Thereafter they reported to the Mogotio Police Station.

19. PW8, corroborated the evidence of PW4, on recovery of the weapon, the sword, which he produced as P.Ex.1 and also corroborated the evidence of PW6, that it was PW2 who assisted them most (*though he was first arrested as a suspect*). He had snatched the sword from second accused, but did not recover the panga which was being used by the first accused.

THE DEFENCE EVIDENCE

20. When put to their defence, the first accused gave sworn testimony. The second accused opted to given an unsworn statement.

21. His evidence as DW1 was clear. He had woken up and on the material day. He went to Athenai Trading Centre, and about 3pm he went to a house of one James Ekipande, and had some local brew, popular known as “busaa” till about 4.00 p.m. when the deceased joined him and others.

22. The deceased then proceeded to tell him that he had a fight with Dickson Ekale (PW1), and that even he (DW1), could do nothing to him. The drinking pals advised DW1 to leave the deceased alone, as he was armed with a knife. However no sooner than he was thus advised, the deceased picked a quarrel and a fight with another person, called Wanga. The pals separated the two, (*Robert and Wanga*). At that point he left James Ekipande's drinking place, and passed by the home of his brother-in-law, where he found others taking similar brew, “busaa”.

23. His co-accused joined him at Eric's place, where he stayed for about 30 minutes before being joined by the deceased, and another young man called “Matthew” (PW3) but that the deceased and the young man did not take any drink. The deceased however confronted and told him that he had escaped from Athenai and took out a knife. However, the second accused told him not to fight with knives, but fists. The deceased did not listen, he held on to his knife, and jumped upon the second accused and a struggle ensued, and in the struggle every one left and he too went home, and does not know what happened exactly, and that later he, his co-accused, Dickson, and Wanga were arrested by the Police, and that he did not know why they were arrested, that the deceased had attacked and fought the four of them that day.

24. When cross-examined, this defendant stated that he was not present when the deceased fought with Dickson (PW2), and he did not understand what the deceased meant when the deceased told him that he had finished with “Dickson”, and that he had no disagreement with the said Dickson. He denied being found carrying a panga. He however admitted being at Eric's place where the deceased and the second accused struggled over a sword (*a knife being held by the deceased*) but denied meeting PW6, at James' place (*first Busaa joint*).

25. DW1, admitted knowing the deceased from their childhood, but had never been friends, though they routinely exchanged greetings. Though the deceased had four fights on that date, two at Kotorongot

Athenai, (*the first fight*), and two fights at Athenai, he never decided to kill the deceased.

DW1 reiterated his evidence-in-chief that it is the deceased who started all the fights, that no sword was snatched from him, that he never started any fight, and he did not kill the accused.

26. DW2 was the second accused. He gave an unsworn statement. The core of his evidence was that it was the deceased who first attacked the first accused, but found when they had a struggle and that two of them fell into a pit and then the deceased cried that he had stabbed him (*the deceased*). DW2 stated the first accused was not involved in the fight at all that the sword (*somali sword*) belonged to the deceased, who he knew but had no relationship with. He did not intend to stab him, or to kill him, that it was accidental. He confirmed that he was arrested about an hour after the incident.

27. DW3 was a cousin of the deceased and they were close, and was not a bad boy, not troublesome, and may have been influenced by his peers.

ANALYSIS OF EVIDENCE AND ISSUES

28. At the close of the defence case, Ms Sakari, counsel for the accused submitted that -

(a) the accused were drunk when the offence was committed, and that even the deceased was drunk,

(b) the weapon used belonged to the deceased, and which weapon the accused had used in attacking several other people on the material day, and that the weapon was recovered at the scene according to the evidence of PW3, and counsel urged the court to find the accused not guilty of murder and acquit them.

29. On his part Mr. Nombi, prosecution counsel submitted that the State had proved its case and urged the court to find the accused guilty as charged and convict them accordingly. The issues in a murder case is whether the prosecution evidence has proved any malice aforethought (*the necessary mens rea*), that the accused committed offences for which they are charged. The second issue is whether the accused raised any plausible defence for committing the offence, such as provocation or intoxication. I will commence with the defence of intoxication which counsel for the accused raised and was also raised by the second accused.

30. Generally intoxication is not a defence to any criminal charge (*Section 13(1) of the Penal Code*). A defence of intoxication may however be established where it is shown by evidence that -

(a) the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -

(i) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(ii) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

31. And where such a defence of intoxication is established the person charged will be discharged, but where intoxication caused temporary insanity the accused may be detained in a mental health facility at the pleasure of the President.

32. Intoxication is taken into account in determining whether the accused person formed any intention or otherwise, and in the absence of which he would be guilty of the offence.

33. The evidence of DW1 was that he had a local brew busaa from about 3 – 4 p.m. on the material day, and that at about that time the deceased came and informed him how he had dealt with his cousin,

Dickson Ekale (PW2) and that his drinking pals asked him to leave the deceased alone as he was armed with a knife, that he left and went to Eric's house, where found more people taking busaa. Yet again the accused followed him, in the company of PW3, and developed another quarrel where he fought with the deceased, and that it is the deceased knife which pierced the deceased. DW2 too gave a similar story that the sword belonged to the deceased, but denied awareness of the deceased having fought or assaulted other people. DW3 too took the theme that the accused were drunk, and the deceased was very drunk.

34. In contrast to the defence evidence, PW1 testified that he and the deceased were going back home when they were way-laid by the accused at about 7.00 p.m. The fighting had ended at about 4 p.m. and attacked the deceased. That evidence tallies with the evidence of PW2. The accused passed by his home, at about 7 p.m. and told him they would kill somebody that day. The second accused was carrying a sword in a pipe. They returned later and informed him that they had finished somebody, and went away. According to the evidence of PW3, the fighting had been between the deceased and PW1. The accused who were relatives of PW1, and came to avenge the injuries inflicted by the deceased to PW1. The deceased and PW3 were on their way home from Athenai to Katorongot. It was when they were way-laid and attacked by the accused.

35. It does not appear to me that the accused were in any way intoxicated. There was a deliberate decision, to go out and kill the deceased, and after doing so, went back and confirmed so to PW2.

36. A defence of provocation as defined by Section 207 of the Penal Code is an act which causes a person to deprive him of self-control and induces him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered. Is not, for the same reasons, available to the accused.

37. The first accused did not strike the fatal blow upon the deceased. He was however with the second accused formed a common intention to prosecute an unlawful purpose with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. (*Section 21 of the Penal Code*).

38. In this case, the fight which all the witnesses acknowledge took place ended at about 4.00 p.m. The accused were not even involved in those early fights, and if they were, as soon as they parted ways, the accused went to their homes and returned armed with a panga, and a sword, and way-laid the deceased after declaring their intention to PW2 and PW3 and later confirming to them and in particular PW2, that they had accomplished their purpose.

39. It is thus clear to me that both accused had the malice aforethought and proceeded to execute it by arming themselves with a panga, and a sword, and by the second accused stabbing the deceased to death.

40. For those reasons, I find both accused guilty of the offence of murder contrary to Section 203 of the Penal Code, and convict them accordingly.

41. I invite counsel to submit in terms of Section 329 of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*) on the question of sentence.

42. It is so ordered.

Dated, signed and delivered at Nakuru this 13th day of June, 2014

M. J. ANYARA EMUKULE

JUDGE