



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE 34 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

SEMPERE DIKIR.....ACCUSED

JUDGMENT

Sempere Dikir faces a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The allegation against the accused is that on 7/4/2009 at Kisiriri Village in Narok, he murdered James Nyang'au Ouko. The accused person denied the offence. The case proceeded to full hearing with the prosecution calling a total of 9 witnesses in support of their case. When called upon to defend himself the accused made an unsworn statement and did not call any other witness.

PW1, Yohana Manani Ouko is the brother of the deceased James Nyangau Ouko. He recalled that he was with his brother at Kisiriri Trading Centre on the evening of 7/4/2009. With them was also Nkasaine Kidis (PW6). They left for home about 9.00 p.m. and on reaching a junction, the deceased told him that he was going to Mama Salaite's home (PW2). He was accompanied by Nkasaine Kidis (PW6). The next day about 7.00 a.m, Nkasaine asked him to go and try to rescue the brother. He ran to deceased's home, found people gathered and deceased was lying in bed. He saw that he was injured on the neck. They got means, took him to hospital but he was pronounced dead on arrival. PW1 said that when he arrived at the deceased's bed the deceased told him to look for Dikir and said no more. PW1 said Dikir had been at the bar with them and that he knew Dikir well as he was a friend to the deceased too.

Mary Sakut (PW2) told the court that on 7/4/2009, Dikir went to her home about 9.00 p.m. and slept. What happened thereafter, she seems not to have known because she said she fell asleep and her children PW5, Peter Sakut and PW8 Samuel Sakut told her what happened on that night.

PW3, Kennedy Kidis recalled that on 8/4/2009, at about 7.00 a.m. he saw people carrying James Nyangau who was his neighbour. He noticed that Nyangau had an injury on the neck. He helped take the deceased to hospital but was pronounced dead on arrival. He is the one who asked police to look for Dikir (accused) because the deceased's brother said it is Dikir who stabbed the deceased.

PW4, Johnson Tagar, the Assistant Chief of the area received information of the death of James from PW3. He found the accused at the shopping centre, and informed the accused of what he had allegedly done but he denied.

PW5, Peter Sironik Sakut and PW8, Samuel Tobola Sakut knew the deceased and the accused well. The deceased had been their mother's (PW2) lover and Dikir had taken over as the mother's lover. They told the court that on 7/6/2011, they were in their house with their mother, PW2 and two smaller children when about 11.00 p.m. the accused arrived and went to sleep in the mother's bed. Soon thereafter, they

heard a knock on the door and when they did not open, the person locked the door from outside. PW5 asked who it was, shook the door and managed to open and they followed the person. They found it was the deceased and Nkasaine, PW6. As PW5 and PW8 enquired what the two wanted, the accused came from behind them with a Maasai sword and cut the deceased on the neck. The deceased fell and the accused told him to get up and go. PW5 said he told the accused not to use the sword on the deceased but he persisted. Meanwhile, PW6 had gone ahead as the deceased was assaulted. PW5 said that the deceased was bleeding and was struggling to walk. They heard of his death on the next day.

PW6, Nkasaine Kidis recalled that he was with the deceased at Kisiriri on the evening of 7/4/2009 upto about 9.00 p.m. The deceased asked him to escort him to Sailate Sakut's house. On arrival at the said home the deceased knocked on the door thrice but nobody opened. They decided to leave but 15 to 20 steps from the house, he heard the voice of Dikir behind him and he was asking what they wanted. PW6 said he was walking ahead of the deceased. PW6 said he has known the deceased for the last 10 years and knew him voice well. Dikir followed them and started assaulting the deceased with a Maasai sword. When he looked back, the deceased had fallen down and he cut him on the neck. He went to intervene but was also cut and the accused threatened to finish him too. Both escaped through the maize. PW6 said the deceased told his brother and mother that Dikir assaulted him. PW6 was one of the people who took the deceased to hospital.

The post mortem on the deceased's body was conducted by Doctor Gerishom Abakalwa (PW7) on 13/4/2009 at Narok District Hospital. He found a clear cut 10cm x 3cm across the left posterior table of the neck and a 2cm x 1cm cut above it. Internally, there was a severed neurovascular bundle of the left side of the neck including the carotid and jugular vessels. He formed an opinion that the cause of death was cardiac arrest due to severe haemorrhage due to the cut across the neck.

The Investigation Officer in this case was PW9, Cpl Mwinyi Haji Mkali of Narok Police Station. On 8/4/2009 he found the deceased's body at Narok Hospital which was still on a trolley, arranged for it to be taken to the mortuary and was photographed about 11.00 a.m. The area Chief brought the accused to the police station with a Maasai sword but the sword was clean. PW9 recorded witness statements. He visited the scene but because of rain the blood had been washed away.

The undisputed facts in this case are that all the witnesses herein PW1, deceased's brother, PW2, PW3, PW4, PW5, PW6 and PW8 all knew both the accused and the deceased very well. It is also a fact that the cause of this conflict was PW2 Mary Sakut. PW1, deceased's brother, PW5 and PW8, PW2's own sons told the court that the deceased used to be PW2's lover therebefore and the current lover at the time was the accused. PW2 admitted that fact in court.

It is also a fact, that the deceased was not alone when he visited PW2's house on the fateful night. The deceased was in company of PW6 Nkasaine Kidis. PW6 and deceased had just parted with PW1 when they left the bar. PW5 and PW8 also saw PW6 with the deceased after they opened their door following the knock and PW6 did admit having gone to PW2's house in company of the deceased.

It is also undisputed that on the fateful night, the accused was at the scene. PW2, PW5 and PW8 all testified that accused was asleep in PW2's room. It is PW5 who opened for the accused. The accused too, admitted that fact.

The evidence of PW5, PW6 and PW8 is very consistent in many material particulars as to what happened at PW2's home on that fateful night. PW6 told the court that he escorted the deceased to PW2's house about 11.00 p.m.; that the deceased knocked on the door three times and when nobody opened, they decided to leave. PW6's evidence to that extent is corroborated by PW5 and PW8's evidence. PW5 and PW8 also told the court that they heard a knock on the door, they did not open and they then heard the person lock the door from outside. That act prompted PW5 and PW8 to wake up and go to find out who it was that was locking the door from outside. PW5 said he shook the door and it opened and they followed the people, asking who they were but they did not respond. That is the part that PW6 did not tell the court, that the deceased locked the door from outside. PW5 and PW8 also corroborated PW6's evidence that he was walking away, ahead of the deceased when the deceased was attacked by the

accused who had followed them from the house. What PW6 did not tell the court is the presence of PW5 and PW8, at the scene yet their testimonies corroborated his evidence.

This offence occurred in the night. The question is whether the circumstances were conducive to proper identification. According to the three witnesses. PW5, PW6 and PW8, the accused came out of the house followed the deceased and the accused attacked the deceased who fell as he was being assaulted. PW5 said he told the accused not to cut with the sword but he did not listen to him. Similarly, PW6 said that when he tried to intervene, the accused turned onto him and cut him but he was wearing a heavy jacket and was not seriously injured. PW8 said they had a torch. PW6 said there was moonlight and he was able to identify the accused and that the accused also spoke asking the deceased what he wanted there and he was able to recognize his voice. As for PW5 and PW8, they came out from the same house with the accused to find out who it is that had knocked at the door of PW2's house. In my view, identification was not in issue. PW5, PW6 and PW8's evidence was consistent; that it is the accused who assaulted the deceased. All the witnesses were in close proximity of the accused and the deceased. All of them knew accused very well. PW6 said he had known the accused for over 10 years and was therefore able to recognize his voice. All of the three witnesses saw the accused use a Maasai sword. PW5 and PW8 said the accused normally carried the sword, which is a Maasai culture for men to carry swords. Having heard the evidence of PW5, PW6 and PW8, I believe the witnesses were very truthful and this court has no doubt that it is the accused who assaulted the deceased. The reason for that assault can be deduced from the relationship of both the accused and the deceased with PW2. The deceased's presence at PW2's house at 11.00 p.m. in the night was a threat to the accused's relationship with PW2.

This court had the opportunity to hear PW2. Initially she related to the court what happened on the fateful night only to change later and claim that she was very drunk and never woke up and that what she told the court is what she was told by her sons. Her evidence was inconsistent and worthless.

PW1 said that on the morning of 8/4/2009, when he was called to go and see the deceased, he found the deceased in bed and the deceased told him to ask Dikir. PW6 also told the court that when he went to see the deceased in his house on the next morning after the assault, he heard the deceased tell PW1 and his mother that the accused injured him. This evidence in my view, amounts to a dying declaration. In **Choge v Rep (1985)KLR 1**, the court considered when a conviction can be based as a dying declaration and admissible under **Section 33(a)** of the **Evidence Act**. The court said:-

“5. The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death.

6. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

The dying declaration is sufficiently corroborated by the evidence of PW5, PW6 and PW8. The accused totally denied any involvement in the murder of the deceased. However, he admitted to being at PW2's house on the fateful night but claims to have been drunk. However, there is overwhelming evidence to the effect that the accused did attack and injure the deceased. At the time he accosted the deceased, the deceased was not armed. The deceased did not offer any resistance. Infact according to PW5, PW6 and PW8, the deceased was walking away. The accused then used his sword to cut the deceased on the neck, a most delicate part of the body. He did not cut the deceased once, but twice, which is evidence of malice aforethought. If accused had been drunk and asleep, he would not have managed to catch up with the deceased and assault the deceased as he did. The injury was deliberate, on the neck, and no doubt meant to fatally injure the deceased.

I am satisfied that the prosecution has proved its case beyond any doubt. The accused's defence is

unbelievable. I therefore find the accused person guilty of the offence of murder as charged and convict him accordingly under **Section 322** of the **Criminal Procedure Code**.

DATED and DELIVERED this 15th day of July, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Chirchir for the State

Mr. Gai for the accused

Accused present

Kennedy – Court Assistant