

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA.

CRIMINAL CASE NO. 3 OF 2023

STATE. PROSECUTOR

- V E R S U S -

DANIEL MNANGAT NGOLESIA ..

.....ACCUSED

J U D G M E N T

Daniel Mnangat Ngolesia is charged with the offence of Murder contrary to section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 20/5/2023, at Chewoyet area in West Pokot Sub-County, murdered **Isaac Likitari Loitasiwa**

The Accused denied committing the offence and the case proceeded to trial with the Prosecutor calling a total of five (5) witnesses in support of their case. The accused was called upon to defend himself and he gave a sworn statement. He did not call any other witness.

Prosecution case: -

PW1 James Rotino was a brother to the deceased. PW1 recalled that between 13/3/2023 to 20/3/2023, he received a message from the accused that a small snake can swallow a big rat; that the accused called him on 20/3/2023 at about 1.00p.m. asking whether he was at home but he said was going to Makutano; that the Accused called him again at 5.00p.m. asking where he was and PW1 said he was at Makutano and the deceased disconnected; that he called five minutes later asking where PW1 was and had told him he was at Teachers Plaza, Makutano, where he was sheltering from rain. After it stopped raining, PW1 went home to Kitalakapel on a motor cycle. He found his bother Isaac there. They left Kitalakapel with the brother on a motor cycle about 8.00p.m. and arrived at Makutano about 9.30p.m. He left his brother at Cool Pool as he went to the Pharmacy to get medicine. He went for his brother and they left for Chewoyet on a motor cycle. They stopped somewhere to buy bread and a motor cycle which had no lights passed by them. He did not see the rider. The motor cycle passed them again with full lights going toward them. They left

for Chewoyet and at the junction of Bendera and Chewoyet, they took the rough road and noticed a motor cycle behind them coming in high speed. At that time, two people were walking towards them and they by passed each other. The motor cycle that came from the rear hit them from the rear and both motor cycles overturned; that the rider of the other motor cycle jumped over his brother; kicked him and the brother got up asking what was happening and that person held each other with the brother. On getting up, he saw the sheath of a knife on the ground and found no knife in it. PW1 got hold of the person from behind, lifted him and both fell as it had rained and it was wet; that the person lay on him and wanted to stab him and PW1 got hold of him and pulled the knife and he was cut on the palm of his hand. PW1 showed the court the scar on his palm; that he held onto the knife till he got up, hit the person on the knee and he released the knife; that the person stood about two (2) metres away and using security lights, he was able to recognize him as Dan (the accused). It is then he realized that he had been stabbed on the right side of the stomach (scar seen). He called out his brother who said he had been stabbed and was dying; that the person on hearing that

jumped over the fence and ran. He observed his brother Isaac (the deceased) and noticed that he was stabbed on the chest. PW1 called the two boys that they had just met (PW2 & 3). One took his motor cycle and took him to hospital, while the other boy rode the motorcycle of the person who hit them. They left his brother at the scene because he could not talk or move. He carried the knife with him and was taken to Intensive Care Unit (ICU) at Kapenguria Hospital where he remained for three (3) days after which he recorded his statement. He denied having a grudge with the Accused but that they were friends, used to play pool and sometimes used each other's motorcycle.

PW2 Humprey Chumba a student, recalled that on 20/5/2023, he left school at about 9.00p.m. to go and watch a match at Makutano while in company of Ian, PW3. When at Murpus Secondary School, they witnessed a motor cycle hit another motor cycle from the rear. They saw three (3) people fighting. They heard a person call for help as one ran off. He rode PW1's motor cycle (John) while Ian rode the other red motor cycle and they took John (PW1) to Kapenguria Hospital; that John was carrying a knife. After leaving John at the Hospital, they took the motor cycle to police station where they

reported. They left the person who was on the ground at the scene. PW2 confirmed that there were security lights where the incident occurred and he was about fifteen (15) metres away.

PW2 further stated that he saw three people fighting and that the person who ran off was the one who stabbed both the deceased and John.

PW3 Ian Ndinyo was with Humphrey (PW2) on 20/5/2023 at about 9.30 p.m. going to watch a football match at Makutano; that while at Murpus suddenly, two motor vehicle came in speed and the one at the rear hit the one at the front; that the first motor cycle had two people and the second had one. They collided, fell and the person at the rear got up faster than those on the front and the people started to fight. That the one on the rear motor cycle attacked those on the first motor cycle. After a short while, PW1 called for help and asked them to take him to hospital but the person who was on the ground could not talk. They took PW1 to Hospital as he carried the knife that had been used to stab him. They went to Referral Kapenguria and the Police station where they left the motor cycles. They went back to the scene with police and found the person left at the

scene had died. PW3 stated that he saw Accused first stab the deceased then PW1 on the stomach. PW3 said that although he had never seen accused before that day, he is the accused in court.

PW4 Kangogo Nelson a nephew of Isaac Liktari testified that on 25/5/2023, he attended hospital to witness the post mortem on the body of Isaac Liktari.

PW5 Cpl. Jackson Kiprotich of DCI Kapenguria recalled that on 20/5/2023, he was asked to proceed to a scene of Murder on Chewoyet Road. At the scene, he found the OCS and other police officers. The body of a male adult was on the road, and it had a stab wound on the upper side of the abdomen. He produced various items that were found at the scene, most of which were identified by PW1 as what they had in their possession. He forwarded some items to the Government Analyst through an exhibit memo form P.Exh.3 blood samples and saliva extracted from the suspect; Blood sample extracted from PW1 James; blood stained knife; blood sample from the scene, helmet; black jacket, Safari boots, thick wooden peg(stick) blood sample of the deceased; that the Government Chemist found that the DNA generated from blade of knife

matched profile of John and Isaac; that the sticks, the handkerchief and shoes matched deceased's DNA, DNA profile from jacket, the coat matched DNA of James; DNA generated from handle of the knife matched that of the accused Daniel Ngolesia; All were produced as exhibits.

Defence Case.

When called upon to defend himself, the accused testified on oath as DW1. He stated that PW1 who he called John is his good friend since 2022, as they used to play pool in town; that on 20/5/2023, PW1 called him about 3.00p.m. enquiring on his whereabouts because he wanted them to play pool. He was away selling his chicken and returned to town at 6.00p.m. He went home to attend to his children who were alone since his wife had gone back to her parents due to a disagreement. When he reached home, his wife called him and asked him to take to her milk for the baby she had gone with. He took to her the milk and the wife's father enquired about the dispute he had with the wife which was that she had an affair with his friend John; that the wife's father promised to deal with the issue and he left about 8.00p.m. on his motor cycle. He used the short cut through Chewoyet. He found a grader had dug

the road and the road was slippery because it had rained. When near Murpus School, the motor cycle skidded and he saw another motor cycle ahead but when he braked it skidded and hit the motor cycle that was ahead; that the passengers on the motor cycle fell off just as he did; that he tried to lift his motor cycle when John who was on the other motor cycle also got up and kicked him and he told him that the message he had sent him was true; **“that a small snake can swallow a big rat”**; that PW1 continued to kick and hit him with fists; that the brother joined in beating him and he screamed till school children came; that a knife fell from one of the two and they all scrambled for it with John; that he held John’s hands, pulled him by force and that by bad luck, the knife stabbed the deceased; He then pushed John, they fell together and the school children told him to leave or he would die too and he ran home. Next day, when he wanted to go and report, he heard screams that his houses should be burnt he and looked and saw that indeed his house was on fire and he decided to report at Kitale because John is a police officer and he may have been killed. He said that John was his friend and had no grudge with him and the death of deceased was an accident. In cross

examination, accused admitted having held the knife and in the process, deceased was stabbed. Though he denied to have beaten and injured on the hands with the knife, he did not seek treatment.

Determination : -

I have duly considered the evidence on record. This being a murder charge the Prosecution has to prove beyond reasonable doubt. Proof beyond reasonable doubt was defined in **Woolmington -V- Republic 1935 UKHL1**. Where the court stated thus; **“Throughout the web of the English Law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner’s guilt..... if, at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained”**

The ingredients to be proved in a murder charge are;

- 1. The death of the deceased;**
- 2. That the accused committed the unlawful act or omission;**
- 3. That the Accused had malice aforethought.**

Death;

PW1, 2,3 witnessed the manner in which the deceased was injured and died. PW4 a nephew to the deceased identified the deceased's body to the Doctor before post mortem was done. The post mortem form was produced in court by consent by the Investigating Officer. The Doctor found that the deceased sustained a deep cut wound 6cm by 5cm on the left chest wall which perforated the left lung and diaphragm and was inflicted by a sharp object with high force; that two ribs 6th and 7th were cut. The Doctor formed the opinion that the cause of death was haemothorax compounded by exsanguination (bleeding from the stab wound) secondary to a stab wound. The deceased's death is not in dispute.

Whether the accused caused the death; -

It all started with the accused's motor cycle hitting that of PW1 from the rear. According to the Accused, the motor cycle skidded because it had rained and the road had been graded. PW1 testified to the contrary, that the accused rode his motor cycle in very high speed and rammed into their motorcycle and both motorcycles overturned.

PW2 and 3 both testified that there were lights at the scene. PW2 and 3 said they were able to see what transpired because they were about fifteen (15) metres from the actual scene.

PW1, PW2 and 3 all stated that after the collision, a fight broke out. PW1 & 3 were specific, that it is the accused who was on the second motor cycle that attacked the two people on the first motor cycle. PW1 narrated in detail how he fought back as the accused tried to stab him with a knife as a result of which he held the blade and was cut on the palm of his hand which scar he showed the court. He also received a stab wound on the stomach and showed the court the scar. Unfortunately, the Prosecution did not produce PW1's medical records but there is evidence that he was injured and PW2 and 3 rushed him to Kapenguria Referral Hospital that night where he was admitted

and it is a fact that the accused is facing a charge of attempted murder of PW1 in the lower court.

According to the accused, he did not have the knife but saw it on the ground and that a scuffle over it ended up with the deceased being stabbed when he pulled it. First, I will not believe the Accused's narration of the events because it is not convincing. First PW2 and 3 corroborated PW1's testimony that it is the accused whom they saw stab the deceased first then he stabbed PW1. I do not believe the accused's version of the events because, even though he explains how the deceased ended up being stabbed, he did not explain how PW1 was stabbed in the stomach. Besides, the doctor who performed the post mortem found that the injuries were inflicted by a sharp object with **'high force and manipulated the chest wall'**. This was a very deep wound that must have been caused as a result of high force as found by the Doctor. The thrust was intentional not accidental as Accused wants this court to believe. It is no wonder that the DNA generated from the handle of the knife was that of the Accused. He must have been the one who handled the handle of the knife. On the

other hand, the DNA on the blade of the knife was that of the deceased and PW1, those who were stabbed.

After a careful consideration of the testimonies of PW1,2,3, and the Government Analyst report this court finds that the accused attacked PW1 and the deceased after their motor cycles collided and inflicted the fatal stab injury on the deceased.

Whether Accused possessed Malice Aforethought: -

Malice aforethought is defined in section 206 of the Penal Code as follows: - 206. **Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—**

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or

grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

In **Hyam -V- DPP (1974) AC** the court held inter alia **“malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another, the accused knew that it was highly probable that that act would result in death or serious bodily harm”**

Malice aforethought can also be inferred from the acts of the accused person as was stated in **Ernest Asami Bwire Abang’a alias Onyango -V- Republic CRA.32/1990**, where the court held; **“the question of intention can be informed from the true consequences of the unlawful acts or omission of the brutal killing which was well planned and calculated to kill or do grievous harm upon the deceased”**.

In R.V Tubere s/o Ochen (1945) 12 EACA 63 the court said, **“In determining the existence or nonexistence of malice, one has to look at the facts proving the weapon used, the manner in which it was used and the part of the body injured”**

In the instant case, PW1 told the court that the accused had sent to him several messages during the day trying to find out where he was. PW1 admitted that accused was his friend as they would meet and play pool. The Accused confirmed the same, though he denied that he had no grudge with PW1, the accused suspected PW1 of having an affair with his wife and that is why his wife had gone back to her home. That same evening, Accused had just told his father-in-law about the alleged affair. This court cannot believe that accused did not have ill feelings towards PW1. A person cannot have an illicit affair with your wife and you claim that he is your friend. PW1 testified that earlier on the accused had sent him messages in parables that a small snake can swallow a big rat which accused admitted that PW1 referred to while at the scene of crime. It is my view that Accused had been looking for PW1 that day and must

have trailed him, and the collision of the motor cycles was not an accident. It was meant to stop PW1. The accused was armed with a deadly weapon, a knife which he thrust in the deceased's chest killing him on the spot. PW1 fought back escaping with serious injuries too. The injuries that the deceased suffered were meant for PW1 but unfortunately, the deceased became the victim.

This court is satisfied that the prosecution has proved beyond any reasonable doubt that, accused with malice aforethought, inflicted serious injuries on the deceased and caused his death. He is found guilty as charged and convicted under section 203 of the Penal Code as read with section 204 of the Penal Code.

Delivered, Dated and Signed at Kapenguria this **12th** day of **November, 2025**

**R. WENDOH
JUDGE**

Judgment delivered in the presence of:-

Mr. Mokaya for the State/ Prosecution Counsel

Mr. Lowasikou for accused

Accused – Present (virtually)

Juma/Hellen – Court Assistants