



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL CASE NO.4 OF 2016

REPUBLIC

VERSUS

LARIO LEKARANTULA LTARASIAN

JUDGEMENT

The accused person is charged with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that the accused person on the 3.7.2016 at South Horr trading centre in Loyangalani Sub-County within Marsabit County murdered **Kelvin Lekalantula Ltarasin**. The state called seven witnesses in support of its case.

PW1 SARERE LEKENIT works in a bar called "Re-loaded". He knew both the deceased and the accused. On 3.7.2016 at about 8.00p.m he was selling at the bar and had about 50 customers. He went to the counter to collect alcohol and when he went back to his customers he found that they were going out. He saw somebody holding a knife. He ran away and returned to the bar after sometime. He did not see anything and closed the bar then went to sleep. He had seen the deceased at the bar at about 4.00pm but did not buy anything. He had not seen the accused at the bar. The following morning Police went to the bar and informed him that someone had been killed at the bar. He did not witness the killing. There is solar light in the bar including security light.

PW2 LAMPEI LEKALANTURA is the accused mother as well as the mother of the deceased. It is her evidence that the accused is older than the deceased. On 3.7.2016 at about 8.00p.m she was asleep when the accused went to inform her that he had fought with the deceased and that the deceased had landed on a knife which had stabbed him. The accused told her that he had left the deceased at the bar. The accused was in shock and did not have any weapon with him. He went to his other son's house (PW3) to inform him. PW3 told him that the deceased had passed on. It is her evidence that there was no animosity between the accused and the deceased. The two liked each other. She can't tell if the two used to drink.

PW3 MICHAEL LEKARANTULA is a teacher by profession. He teaches at Nyiro Boys' Secondary school. He is a brother to both the deceased and the accused. On 3.7.2016 a neighbor called his wife and informed her that he could not reach him because his phone was off. The neighbour told him that the accused had stabbed the deceased. He went to the scene which was outside a bar. The deceased had a stab wound on the left side of the chest and blood was still oozing. He took the body in a vehicle to the local hospital. The doctor told them that the deceased had already passed on. When he received the phone call he saw the accused at a distance but did not talk to him. Police went to the Catholic dispensary and took the body to Malaral Hospital mortuary. It is his evidence that the accused and the deceased had no issues and were very close but also used to fight a number of times. The two used to drink. He did not see any murder weapon at the scene. The accused lives in the same house with PW3. The Police searched the house and recovered a knife that was outside the house. The knife had blood stains.

PW4 PC VINCENT was stationed at the South Horr Police Post. On 3.7.2016 at about 8.00pm a report of the incident was made by PW3. Together with other Police officers they went to the scene at Reloaded bar. They saw a pool of blood at the back of the bar. They then went to Catholic Mission hospital where the body was and saw the body on a stretcher. The Doctor told them that the deceased had already passed on. They went to the house where the accused was staying and recovered a blood stained knife. They were not able to trace the accused that night. The following day they took the body to Maralal county hospital. The postmortem was done the same day. The deceased had a deep cut on the left side of the chest. While on their way taking the body to the mortuary they received a report that the accused had surrendered himself at the station. When he went back to the station he found the accused in the cells. He knew the accused before the incident.

PW5 PC FRANCIS KAHURA MWANGI was stationed at South Horr Police post on 3.7.2016 he was on night duties. PW3 went to the post and reported that his two brothers had quarreled at Reloaded bar and the deceased had been stabbed with a knife. Together with other officers they went to the scene. They saw a pool of blood but the body was not at the scene. He drew a rough sketch plan of the scene. They then went to the Catholic dispensary and saw the body in a stretcher. The body had a stab wound on the left side of the chest. The accused was living with his elder brother (PW3). They went to the house and conducted a search. They recovered a knife. The following

day the accused surrendered himself at the police post. He was arrested and placed in the cells. They did not find anyone at the bar. PW1 told them that he had seen someone holding a knife.

PW6 INSPECTOR FRANCIS MUTHAMIA was the in charge of South Horr Police Post. On 3.7.2016 he was at the Police post at about 8.00p.m when he was notified of the incident. They went to the scene where they saw a pool of blood. There was nobody at the bar. There were also blood stains near the entrance of the bar. They went to South Horr Mission hospital and were informed that the victim had passed on immediately he had been taken to the hospital. He asked the hospital to keep the body until the following morning. They went to the house where the accused was living and recovered a knife. The following morning they went back to the scene and talked to PW1. The deceased body was taken to Maralal mortuary for Post mortem. He talked to the accused who informed him that the deceased was his younger brother. The accused was crying so much and looked confused. The accused told him that the deceased was his younger brother but he used to beat the accused so much. The accused showed him stab marks on his body. It is his evidence that his investigations found that it is the deceased who went to the accused at the bar. The postmortem was done by Dr. Atandi.

PW7 DR. STEVE MAKORI SERETI is stationed at the Marsabit District hospital. He produced the postmortem that was conducted by Dr. Atandi on 4.7.2016 at Maralal hospital. He knows Dr. Atandi and have worked together for over 15 years. The deceased had a deep wound on the anterior chest measuring 4x8cm. There was deep penetration to the left lung. The Doctor opined that the cause of death was a sharp object penetrating a deep wound on the left lung and touching the heart leading to bleeding in the chest.

In his sworn evidence the accused testified that on 3.7.2016 it was a Sunday the deceased went to his place in the morning to take breakfast. They took breakfast together and agreed to go to town and drink. It was around 9.00a.m. They then went to a neighbour's place where wine and spirit is sold. He bought alcohol for the deceased and left him there. The accused went to a place called Sarima and returned at about 4.00p.m. At about 6.00p.m he went to Dar salam Bar. He heard people complaining. The owner of the bar told him that his brother had just left and wanted to fight with his customers. He went to check on his brother at Reloaded bar. He saw people drinking outside. The deceased was also there. The customers who were drinking outside told him to talk to his brother who was disturbing them. He tried to talk to the deceased but the deceased picked a chair and tried to hit him. He asked if he could buy the deceased a drink but the deceased refused. The accused went to sit at a different place in the bar. While talking to people the deceased appeared from behind and he heard people telling him "chungu kisu".

It is the accused's evidence that he saw the deceased holding a knife. He held the deceased's hand which had the knife and tried to disarm him. While struggling the two fell down. He then heard the deceased claiming that he had been stabbed. He checked the deceased and found that the knife had stab him. He removed the knife from the deceased's body and tried to block the bleeding. Blood was oozing profusely. He gave one of those people present the phone number to call for a vehicle. They tried to call PW 3 but could not reach him. He went home and found that PW3 had already been informed. PW3 just passed him. He followed them up to the hospital. On reaching the hospital he found PW3 coming out and it was like the deceased had passed on. When the incident occurred he was drunk and the deceased was also drunk. He had tried to calm the deceased since customers were complaining and it was the deceased who removed the knife. The deceased was living with his parents. When they took alcohol in the morning they were not drunk. However when he met the deceased in the evening he was drunk. He also had a sword. He had a cordial relationship with the deceased. The knife which stabbed the deceased belonged to the deceased. He did not tell his mother that he had killed the deceased but told her about the fracas. The knife that was produced in court belonged to the deceased. It is his evidence that the incident was accidental but not intentional.

The main issue for determination is whether it is the accused who killed the deceased. The prosecution evidence is that it is the accused who inflicted the fatal wounds upon the deceased. The evidence on record shows that nobody witnessed the incident. PW2 is the accused's mother. She told the Court that the accused went to her house on the material day at about 8.00p.m and informed her that he had fought with the deceased and the deceased had landed on a knife. The defence evidences thus confirm that the deceased was not attacked by a third party. None of the customers who were in the bar attacked the deceased. It is therefore established that the deceased died out of the scuffle he had with the accused. The accused confirms that the deceased was stabbed by a knife which caused the penetrating wound. The post mortem report shows that the deceased had only one stab wound that was 4x8cm long and 8cm deep. According to the accused, the deceased removed the knife and when they struggled they both fell down and the deceased was hit by the knife.

From the evidence on record it is evident that the deceased was drunk and to some extent was creating commotion at the bar. The defence evidence is to the effect that the accused tried to calm down the deceased. No one witnessed the incident but it is clear to me that the deceased did not stab himself. The nature and extent of injury reveals that the deceased must have been stabbed. For the knife to have penetrated the chest it must have been pushed into the deceased's body. It cannot be held that the knife fell down in an upstanding position and the deceased fell on it. Although no one witnessed the incident or testified as to what happened, I am satisfied that the deceased tried to assault the accused and in the process the accused disarmed the deceased and stabbed him. According to the investigating officer the accused showed him several stab wounds on his body which were inflicted by the deceased. I do find that it is the accused who killed the deceased.

Section 203 of the Penal Code provides for the offence of murder. The ingredients of murder are:

- (i) Malice aforethought**
- (ii) Unlawful Act or omission which causes the death of the victim.**

Section 206 of the Penal Code defines "Malice aforethought" as follows:

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.

It is clear from the evidence on record that the accused went to the bar with no intention to harm anyone. The accused did not have any intention to do grievous harm to the deceased. The accused also did not have any intention to commit a felony.

According to PW2 and PW3 the deceased and the accused had no animosity and were friends. The accused in his sworn defence seems to be giving the line of events which took place during the day. It is established that the accused and the deceased were together that morning of 3rd July, 2016. PW1 testified that he went to the counter to collect alcohol and as he was going back to his customers he saw his customers running away while screaming. He then saw someone holding a knife. It is not clear how PW1 did not see the deceased's body on the ground. It is clear that the incident was not intentional as put by the accused. However, in the process of defending himself the accused caused the death of the deceased. The stab wound was quite deep enough and penetrated into the heart. It can be said that either the accused acted in self defence or was provoked by the deceased who attempted to stab him. Section 2 of the Penal Code states that any person who by unlawful act or omission cause the death of another person is guilty of the offence of manslaughter. Although the accused acted in self defence, his action cannot be held to have been lawful. The act of stabbing the deceased was unlawful and led to the death. It could have been possible for the accused to have run away or to have disarmed the deceased and throw the knife away before escaping from the scene.

Section 17 of the Penal Code provides for the defence of the person or property which according to the section shall be determined in accordance with the principles of English common law. I am satisfied that although the accused acted in self defence he could have avoided the incident. He unintentionally caused the death of the deceased.

I do find and hold that the accused is not guilty of the offence of murder as charged. However, I do find the accused guilty of the lesser offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and is hereby convicted of that offence accordingly.

Dated, Signed and Delivered at Marsabit this 11th day of April, 2018

S. CHITEMBWE

JUDGE