



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 5 OF 2012

REPUBLIC.....RESPONDENT

VERSUS

LEMOIJOI MENGATI.....ACCUSED

JUDGEMENT

The accused **LEMOIJOI MENGATI** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

“On the 9th day of January 2012 at Loita Reserve in Narok South District within Narok County murdered HIRUM MUREITHI”

The accused pleaded ‘**Not Guilty**’ to the charge and his trial commenced on 10/1/2012 before **Hon Justice Anyara Emukule** who recorded the evidence of the first three (3) witnesses. Following the transfer of the Honourable Judge to the Mombasa High Court I took over the case and heard the evidence of the last prosecution witness. A total of four (4) witnesses testified on behalf of the prosecution.

PW1 ALEX GIDEON TADEO told the court that on 9/1/2012 he was drinking in a house with the accused and his brother called ‘**Sam**’. At about 6.00pm the deceased who was an Administration Police Officer came in and told them that a report had been made that men had been paid money for work which they had failed to do. The deceased then proceeded to hand-cuff **PW1** in an attempt to arrest him and take him to the police station. However **PW1** ran away with the hand-cuff and went to the home of the local chief to seek refuge. **PW1** states that as he ran off he left the accused and his brother exchanging words with the deceased. The next morning **PW1** heard people saying that a certain ‘**Afande**’ or police officer had been killed.

PW3 APC PAUL DENY BANJAR told the court that he was an administration police officer based at the Olekering AP Post. On 9/1/2012 at about 9.00pm **PW2** went to the market to purchase foodstuffs. On the way back home he passed a bar. While at the bar **PW2** claims to have witnessed an altercation between the accused and the deceased. **PW3** intervened and told the accused who was a fellow officer to calm down. The deceased responded positively and returned to his table. The witness then left the bar and went home.

The following day **PW3** received news that a police officer had been killed in the centre. He went and found the body of the deceased lying in a ditch.

PW2 AP GEORGE OUKO told the court that on 10/1/2012 he received a report that a body of a police officer was lying at the market. He went to the scene and found the partially naked body of the deceased lying on its back. The body had severe injuries and cuts.

PW3 and his fellow officers followed the trail of blood from the body which led them to nearby bar. **PW3** arrested several suspects whom he handed over to the police. The body was later removed to the mortuary.

The police commenced investigations into the matter after which the accused was arrested and charged with the offence of murder.

The prosecution having closed its case, this court must now analyse the evidence on record and determine whether the prosecution have established a *prima facie* case sufficient to warrant placing the accused onto his defence. The definition of what constitutes a prima facie case was given in the case of **RAMANLAL T. BHATT VS REPUBLIC [1957] EARL** where it was held

“.....It may not be easy to define what is meant by a ‘prima facie case’, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and evidence could convict if no explanation is offered by the defence”.

PW2 and **PW3** were police officers who knew the deceased well and both testify that they found his badly mutilated body of their colleague lying in a trench at the market. Both witnesses identify the deceased as APC **‘Hirum Mureithi’**.

PW4 DR. TITUS NGULUNGU told the court that his colleague **‘Dr Soita’** conducted an autopsy on the body of the deceased on 15/1/2012. Upon examination the doctor noted that the deceased sustained a fractured sternum and a skull fracture. The cause of death was found to be **‘severe head injury as a result of blunt force trauma’**. **PW5** produced as an exhibit the duly completed and signed post-mortem report **P. exb 1**. From the above evidence I am satisfied that both the fact as well as the cause of death of the deceased have been proved beyond reasonable doubt.

In this case there was no witness to the actual assault and murder of the deceased. **PW3** told the court that he went to a certain bar at around 9.00pm. He states that he saw the accused who was issuing threats and **PW3** further states that he saw the deceased and the accused quarrelling. However **PW3** stated that he successfully intervened and separated the two protagonists. By the time **PW3** left the bar all was well.

The fact that the accused was seen quarrelling with the deceased a few hours before the deceased was killed, certainly gives rise to a **‘suspicion’** that the accused may have had a hand in the murder of the deceased. However suspicion alone is not enough. In **SAWE VS REPUBLIC [2003] KLR** it was held that

“Suspicion however strong cannot provide the basis for inferring guilt which must be proved by evidence beyond reasonable doubt”.

PW3 did not see the accused hit, slap, beat or in any other way assault the deceased at all. The witness is very clear in his language. He states that he only saw the accused **‘challenge’** the deceased and the two began to quarrel. Under cross-examination **PW3** says

“.....I am talking the truth whatever else happened, it must have happened after.....”

It is clear that when **PW3** saw the deceased he was alive and well. **PW3** did not see the accused or any other person assault the deceased.

PW1 told the court that he was drinking in a room with accused and one **‘Sam’**. The deceased came and purported to arrest them for taking money and failing to carry out the work for which they had been paid. The deceased hand-cuffed **PW1** who ran away still in hand-cuffs to seek refuge at the home of the local chief. Although this chief was not called to testify, this part of the evidence of **PW1** is corroborated by **PW2**. **PW2** a police officer told the court that he did interview the chief who confirmed to him that **PW1** had arrived at his home at 3.00am in hand-cuffs. **PW2** further confirmed that he found the witness still in hand-cuffs and when **PW2** questioned **PW1**, the latter told him that he had been hand-cuffed by the deceased.

PW1 testified that when he ran out of the room he left the accused and his brother **‘Sam exchanging words’** with the deceased. Here again **PW1** did not mention having seen any person beat or assault the deceased.

This court finds it curious that though **PW1** has said he left the deceased in the room with two men being the accused and his brother, the police have only brought to court and charged one man. No mention is made at all of this **‘Sam’** who was also in the rooms. It is not known why he was not arrested and if he was exonerated from blame the court is not told why. The very real possibility that it was this **‘Sam’** who fatally assaulted the accused has not been excluded by the prosecution.

PW2 in his evidence stated that after finding the body of his colleague he rounded up several suspects whom he handed over to the police. **PW2** stated that he arrested one **‘Sam Mushi’**, (probably the elusive **‘Sam’**) and **‘Mara Laluya’**. None of these persons have been charged alongside the accused and none of them was called as a witness. The reasons why police exonerated them are not known. Indeed in his evidence in chief **PW2** says

“I do not know the accused. There is none of the accused persons I arrested and none is in court. The others were released and I do not know why.....”

The prosecution seeks to imply that a fight occurred between the accused and deceased. Nobody witnessed that fight. **PW1** stated that on the night in question the accused was armed with a sword and a rungu. However court takes judicial notice of the fact that in the Narok Area (where this offence occurred) it is normal for masai men to be so armed at all times. No weapon was recovered from the accused. There is no proof that the accused used the weapons he had to assault and kill the deceased.

All in all I find that several loopholes exist in the prosecution case. The investigating officer was not called as a witness to explain his decision to charge the accused. To put the accused onto his defence would be tantamount to shifting the burden of proof and requiring the accused to fill the gaps in the prosecution case. I find that the accused was charged on the basis of **‘mere suspicion’**. If the accused elected to keep silent in his defence the evidence on record could not sustain a conviction. Thus I find that no *prima facie* case has been established. I therefore enter a verdict of **‘Not Guilty’** and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 23rd day of August, 2017.

Ms Moenga holding brief for Mr. Mongeri

Mr. Chigiti for DPP

Maureen A. Odero

Judge