



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 79 OF 2014**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**SIMEON LEPOON LELEGWE.....1<sup>ST</sup> ACCUSED**

**LEMUYA LETIWA.....2<sup>ND</sup> ACCUSED**

**RULING**

The two accused persons namely **SIMEON LEPOON LELEGWE** (hereinafter referred to as the 1<sup>st</sup> accused) and **LEMUYA LETIWA** (hereinafter referred to as the 2<sup>nd</sup> accused) are jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

***“On the 20<sup>th</sup> day of June 2014 at unknown time at Lolmoloa sub location in Samburu Central sub-county within Samburu County murdered MPAPA LEKULUAI”***

Both accused entered a plea of ‘**Not Guilty**’ to the charge and their trial commenced before me on 23/7/2015. The prosecution called a total of twelve (12) witnesses in support of their case.

The brief facts of the prosecution case were that on 20/6/2014 villagers had converged at the home of the 2<sup>nd</sup> accused where illicit brew was being sold. The deceased was one of the persons who were partaking of the brew on that date. The following morning the body of the deceased was found lying dead on a foot path near the home of the 2<sup>nd</sup> accused. The body had cuts and bruises. Police were called in. They came and removed the body to the mortuary. Upon conclusion of police investigations the two accused persons were arrested and charged with this offence of murder.

At the close of the prosecution case, this court must now analyze the evidence on record to determine whether a prima facie case has been proved.

In the case of **RAMANLAL T. BHATT Vs REPUBLIC [1957]** it was held thus

***“It is not 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 the evidence could convict if no explanation is offered by the defence”.***

In this case the fact of the deceased’s death is not in any doubt. Nearly all the prosecution witnesses who were fellow villagers testified that they saw the body of the deceased lying dead on the path.

**PW8 CORPORAL PAUL LEKULUAI** told the court that the deceased was his younger brother. **PW8** stated that he went to the Maralal District Hospital Mortuary where he identified the body of the deceased to the doctor who performed the post-mortem examination. All these witnesses who knew the deceased very well identify him as ‘**Mpapa Lekuluai**’.

**PW11 DR. RUKU NJOROGE** told the court that his colleague ‘**Dr. Moses Githinji**’ did conduct an autopsy on the body of the deceased. The body was found to have multiple bruises to the thorax and fractures of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> left rib. The cause of death was found to be ‘**cardio-pulmonary arrest secondary to massive haemo-thorax due to blunt trauma injury to the chest**’. The duly completed and signed

post mortem report was produced as an exhibit **P. Exb1**.

Having satisfactorily proved the fact and cause of death of the deceased. The prosecution must tender evidence to prove beyond reasonable doubt that it was the two accuseds (or one of them) who fatally assaulted the deceased.

Out of the array of twelve (12) witnesses called by the prosecution in this case not a single one was able to point at either of the accused persons as the ones who assaulted the deceased on the night in question. None of the witnesses paraded before the court saw how the deceased sustained those fatal injuries.

**PW1 LEDURA LEBOKIAN** told the court that he had gone to the home of 2<sup>nd</sup> accused that evening to drink and he found the deceased lying outside. **PW1** heard the next day that deceased was dead. He has no idea how the deceased met his death.

**PW2 GEOFFREY LOKUKU** was a brother to the deceased. He told the court that one 'Lesoipa' called him on 21/6/2014 and informed him that his brother had been killed. **PW3** rushed to the scene where he found the dead body of his brother lying by the road. **PW2** states that this 'Lesoipa' told him that the deceased had been killed by the 2<sup>nd</sup> accused. In the same breath **PW2** states

***“Lesoipa did not witness the murder. Lesoipa told me that he was also told that it was accused 2 who had killed the deceased”.***

This thread of rumours and hearsay evidence is what dominates the evidence of all the prosecution witnesses.

**PW3 SOFINA LOLIWA** told the court that he too was called and informed of the death of the deceased. He did not himself witness anything. In his evidence **PW3** says

***“We asked who had killed the deceased. We were told it was Lepoon (accused 1) who killed him. It is neighbours who told us this. I cannot name any person who named Lepoon as the killer.....”***

Under cross-examination **PW3** confirms

***“I do not know how the deceased met his death”***

**PW4 YUSUF LEORIA** also told the court that one 'Lesoipa' informed him about the murder. In his evidence **PW4** says

***“I heard elders say that accused and deceased had fought. I cannot recall the names of any of the elders”.***

Quite apart from the fact that it is not clear exactly which of the accused had fought with the deceased. **PW4** did not himself witness any fight. He is also unable to name of the elders who gave him this information.

This mysterious and elusive 'Lesopia' who seems to have had firsthand knowledge of how the deceased met his death was never called to testify. Whatever he may have told any witness remains hearsay evidence which is not admissible as proof of the guilt of any of the accused persons.

**PW5 PAYO LOONGONYO** in his evidence stated that the brother of the deceased called 'SOFINA' told him that Lepoon (1<sup>st</sup> accused) had killed the deceased. The said 'Sofina' testified as **PW3** and he clearly told the court that he had no idea who killed his brother.

Under cross-examination **PW5** goes on to state that

***“Everyone said it is Lepoon (1<sup>st</sup> accused) who killed the deceased. I cannot recall the name of any person who told me this”.***

The court cannot rely on what villagers say out there. The court can only base its decision on tangible evidence presented before it by witness.

Similarly **PW6 NKURUAI YUSUF LEORIA**, told the court that

***“People said it was Lepoon (1<sup>st</sup> accused) who killed the deceased”.***

If as it seems all the villagers were in agreement that it was the 1<sup>st</sup> accused who committed the murder. Why then was it so difficult for the prosecution to get even one single witness to come and give first hand evidence of this fact in court. Instead the court is being treated to a menu of rumours, immuendo and suppositions with no direct and/or tangible evidence presented at all.

Even the witnesses who claimed to have been at the scene were of no assistance to the court. **PW7 LEKIRAO NTAPARA** told the court that on 20/6/2014 he was at the drinking den and he saw the 1<sup>st</sup> accused quarrelling with the deceased and Yusuf. However **PW7** clarifies that

***“Nothing occurred in my presence.....”***

Under cross-examination PW7 appears to back track and states

***“When I left there was no fight. I heard two people quarrelling. It was Lepoon (1<sup>st</sup> accused) and another man. It was not deceased. I did not hear 1<sup>st</sup> accused quarrel with the deceased”*** (my emphasis)

Thus in cross-examination PW7 contradicts his own evidence in chief. He now says that the man the 1<sup>st</sup> accused was quarrelling with was not the deceased. In any event the mere fact that the 1<sup>st</sup> accused may have quarreled with the deceased in a drinking den is not proof that the 1<sup>st</sup> accused killed the deceased.

It is clear to this court that the police did not bother to conduct any independent investigations into this murder. They simply relied on the rumours fed to them by the villagers.

PW12 PC JOB MOITA was the investigating officer who made several astounding and almost laughable statements in court. PW12 admitted that he was given the names of the suspects by members of public. PW12 went on to state that

***“The witnesses informed me that 1<sup>st</sup> accused was being accused of having an affair with the wife of the 2<sup>nd</sup> accused. I do not know if this was true”.***

This has nothing to do with the murder of the deceased – at most this fact would have led to enmity between the 2 accuseds themselves.

PW12 went on to state that he linked the 1<sup>st</sup> accused to the murder because when he tried to contact the 1<sup>st</sup> accused on his mobile number his phone had been switched off. In his own words PW12 says

***“I suspected the 1<sup>st</sup> accused because he had switched off his mobile phone and I could not trace him”.***

This is laughable. Does that mean that any person who had switched off his mobile phone after the murder would automatically be elevated to the status of a suspect? PW12 admits that the 1<sup>st</sup> accused was eventually arrested by Administration Police and taken to the police station.

PW12 went on to tell the court that when he interrogated the 1<sup>st</sup> accused, he admitted to having hit the deceased with a hammer. Such an admission if indeed made would amount to a confession. Confessions are only admissible as against an accused if made before an officer of the rank of Inspector or above and if recorded in compliance with Section 25A of the Evidence Act.

PW12 was a Constable not an Inspector. There is no evidence that a caution was administered to the 1<sup>st</sup> accused in line with Section 25A. Thus this alleged confession by the 1<sup>st</sup> accused is not admissible as evidence against him.

Finally PW12 told the court that although he had initially released the 2<sup>nd</sup> accused, he later re-arrested the 2<sup>nd</sup> accused when the 1<sup>st</sup> accused implicated him. Again PW12 did not appear to have conducted any independent investigation to establish the guilt or otherwise of the 2<sup>nd</sup> accused. Having initially exonerated and released the 2<sup>nd</sup> accused, PW12 decided to implicate the 2<sup>nd</sup> accused based on the say so of the 1<sup>st</sup> accused. The evidence of a co-accused cannot be used to implicate an accused person in any offence.

The body of the deceased was lying on a path near the home of the 2<sup>nd</sup> accused. It seems that this is the only reason why the 2<sup>nd</sup> accused was implicated in this offence. The body lay on a public road. Any person had access to that area and any person could have attacked and killed the deceased as he left the drinking den. The evidence does not point exclusively at the 2 accuseds.

In law the burden of proof lies exclusively on the prosecution. To place accused on their defence based on the evidence on record would be tantamount to shifting the burden of proof to require the accused to prove that they were not involved in the murder of the deceased. There are several gaps in the prosecution case and the court cannot require that the 2 accuseds fill those gaps.

Based on the foregoing I find that no prima facie case had been shown against either of the two accused persons. I therefore enter a verdict of ‘**Not Guilty**’ and I acquit each accused of this charge of murder. Each accused person is to be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered in Nakuru this 3<sup>rd</sup> day of August 2017.**

Ms Kerubo holding brief for Mr. Keboga

Mr. Chigiti for DPP

**Maureen A. Odero**

**Judge**