



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 7 OF 2012**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**SAMUEL SAITAPAU LEMPURUK.....ACCUSED**

**RULING**

The accused **SAMUEL SAITAPAU LEMPURUK** 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 29<sup>th</sup> day of January 2012 at Waso Rongai in Samburu North District within Samburu County, murdered BERNARD LOMIRAA LESANA”.***

The accused entered a plea of ‘Not Guilty’ to the charge. His trial commenced on 17/2/2014 before **Hon. Lady Justice Abigail Mshila**, who heard the evidence of the first eight (8) witnesses. Following the transfer of the Honourable Judge to the Nyeri High Court I took over the case and heard the last two (2) witnesses. A total of ten (10) witnesses testified in the case.

**PW1 JAMES LESAMO** was the father of the deceased. He told the court that on 23/1/2012 at about 9.30pm he was resting inside his house. Suddenly he heard the sound of two gunshots. Immediately thereafter **PW1** heard people crying. He went outside and found his son lying mortally wounded and bleeding on the ground. Efforts were made to rush the deceased to hospital but he died upon arrival there.

**PW6 KELVIN LENANGU DUDU** told the court that on the night of 26/1/2012 at about 9.30 pm he was with other friends outside a shop. The accused then came and joined them. The accused had a G3 rifle slung on his shoulder.

Shortly thereafter the deceased also came and joined the group. **PW6** stated that the accused and deceased began to wrestle playfully with each other. Suddenly **PW6** heard gunshots. He and his companions fearing that it was an attack by Turkana Morans, all scampered for safety. **PW6** saw a man fall to the ground as he ran away. Later when he came out to check he found it was deceased who had been shot. The deceased later died while efforts were being made to take him to hospital.

**PW2 SAITERA LENKAK** was the local chief. He told the court that on the material night at about 9.30pm he was inside his house when he heard the sound of gunshots and people crying, **PW2** did not come out to check what the problem was because as he told the court insecurity was rampant in that area.

The following day at 7.00am **PW2** went to the scene. He was told a man had been shot and killed. Residents named the accused as the suspect. **PW2** reported the incident to Baragoi Police Station. The accused was found hiding in his house and was arrested by police. The father of the accused also handed over to authorities a G3 rifle.

Police commenced investigations into the matter and the accused was eventually charged with the offence of murder. The prosecution having closed its case this court must now analyze the evidence on record and determine whether a prima facie case, has been established to warrant calling upon the accused person to defend himself.

In the celebrated case of **RAMANLAL T. BHATT Vs REPUBLIC 1957 E.A.L.R.** the court held that

***“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 mind to the law and the evidence could convict if no explanation is offered by the defence”.***

In any criminal trial the onus lies on the prosecution to prove each element of the charge beyond reasonable doubt. In a murder trial the ingredients requiring such proof include

- The identity of the deceased
- The cause of death
- The unlawful act or omission on the part of the accused which caused the death
- Malice aforethought

In this case the identity of the deceased is not in any doubt **PW2** the father of the deceased and **PW3 PENAE LESARRA** the deceased's mother both confirmed that their son '**Bernard Lomuraa Lesana**' was killed on the night in question. Several of the other prosecution witnesses who were fellow villagers and who knew the deceased well also identify him as '**Bernard Lemuraa**'.

Having proved the identity of the deceased as well as the fact of death, the prosecution is required to go further and tender evidence sufficient to prove the cause of death. It must be proved that the victim met his demise as the result of a culpable act of homicide and not due to any other natural cause.

In this case it is the prosecution case that the deceased died as the result of a gunshot wound. A mere declaration that the cause of death was a gunshot wound will not suffice. The prosecution must tender evidence to **prove** that this was in fact the case. Ordinarily it is requirement that evidence from a pathologist who conducted an autopsy on the body be called in order to establish the cause of death. In **NDUNGU Vs REPUBLIC [1985] KLR**, the court held as follows

***“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution”.***

In this case no doctor was called to testify as to what led to the death of the deceased and no post-mortem report was exhibited to the court. **PW9 PC JAMES MWATHE** who was the investigating officer attempted to explain this omission, by stating that irate morans forcibly and hurriedly buried the body of the deceased before an autopsy could be conducted.

However the fact of burial does not totally preclude an autopsy being conducted on the body. **PW9** admitted under cross-examination that he made no attempt to seek an order from the court to have the body exhumed for purposes of the autopsy. The prosecution simply wants the court to take its word that the deceased died due to a gunshot wound.

In **CHENGO KALAMA Vs REPUBLIC**, the Court of Appeal sitting in Malindi held as follows

***“The position then appears to be that save in very exceptional cases.... it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post-mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt”.***

In this case I find that the prosecution failed and/or neglected to take all necessary steps to have a doctor examine the body of the deceased and conduct an autopsy to prove the cause of death beyond reasonable doubt. This omission is in my view fatal to the prosecution case.

Aside from the failure to prove the cause of death beyond reasonable doubt the prosecution have failed to prove that it was the accused who fired the shots that night. Out of the eight prosecution witnesses who were at the scene, there was none who stated that they saw the accused aim at the deceased and fire shots at him. Most of the witnesses only heard the sound of the shots and ran to hide thinking that they were under attack from Turkana morans. It is only later that the body of the deceased was found lying dead on the ground.

The closest to an eyewitness was **PW6** who told the court that he was in the company of several youths including the deceased and the deceased on the night in question. **PW6** says that he saw the accused with a G3 rifle hanging on his shoulder. The accused and deceased were playfully wrestling each other when the gun went off. **PW6** said the two did not quarrel or fight. He did not see the accused take aim at the deceased. All the witness heard was a gunshot which caused him to scamper for safety into a house. He emerged later to find the deceased lying bleeding on the ground. The circumstances under which the deceased got shot are not clear at all. Did the rifle accidentally misfire and hit the deceased. These are questions which remain unanswered. I find no evidence of a deliberate or negligent act on the part of the accused which led to the death of the deceased.

In the circumstances 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. Accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered in Nakuru this 22<sup>nd</sup> day of September, 2017.**

Mr. Nyambati holding brief for Mr. Tombe

**MAUREEN A. ODERO**

**JUDGE**