



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
CRIMINAL CASE NUMBER 6 OF 2015
(Formerly Kitale High Court Criminal Case number 21 of 2014)

REPUBLIC ::::::::::::::::::::::::::::::::::::::::::::::::::::::: PROSECUTION

VERSUS

SAMSON LOTUU LOMERILE ::::::::::::::::::::::::::::::::::::::::::::::: ACCUSED

JUDGMENT

SAMSON LOTUU LOMERILE, is charged with the offence of **Murder, Contrary to Section 203 as read with Section 204 of the Penal Code.**

The Particulars of this offence are that on the night of 18th March, 2014 at Lotepes village, Lokichar Location within West Pokot County, the accused together with another not before court, murdered Francis Namorinyang.

The prosecution called 8 witnesses in this case. Their case is that on 18.3.2014 PW-3 in this case was in company of Esther Chelimo. They boarded a matatu in which the deceased was a passenger. The deceased alighted at Loyori as the rest moved on.

In the evening PW-3 used a motorbike and went to Loyori. At the place she found the deceased, the accused person, Lowerile and Lobur, drinking beer. They were drinking chang'aa in the forest. The accused and Lobur Alukai asked her for Kshs.200 and she gave them. PW3 and her friend (Esther Chelimo) were there for about 10 minutes. They left leaving the rest behind.

On the said very day, that is 18th March, 2014 at 8.00pm PW-1 was guarding Lotepes Primary School. He heard a cry emanating near the school's gate. He rushed there to find out who was crying. He was armed with a two batteries powered torch. When he got there he found three men. One was the accused person, Samson Lotuu. The others were Ngalukai and Franco (the deceased). The accused was grappling with the deceased, while Ngalukai was standing aside. The accused person alleged that the deceased had used his (accused's) 5,000/-. He alleged the 5.000/- was earned from sale of charcoal. They were drunk as they fought. PW-1 knew the three before then. He left them and went to continue with his work.

On 20.3.2014 at about 9.00am PW-2 woke up and went to Ololua Centre. He was approached by a woman who told him that her son told her there was a dead body in the forest that resembled his brother (deceased). PW-2 boarded a motorbike and rushed to the said forest. He found a crowd of people. He was led to where the body was. He looked at the body and confirmed it was indeed of his brother. It had head and back injuries, inflicted by stones. He called the OCS Kacheliba Police Station, one Stanley

Mwaura (PW-8). PW-8 got to the scene within two hours, on a motorbike. He found the decomposing body. Around the body there were several stones stained with blood. There was also a stick and a jacket of the deceased. The body was lying upside down and had blood oozing from the mouth and nostrils. He commenced investigations.

He noted the deceased was killed on 18.3.2014 at 20:30hours. He trailed the path of struggle guided by blood drops and found the last drop was near Lotepes Primary School. PW-1, the school watchman told him of the incident he had witnessed and disclosed the two suspects as Lotuu and Lobur Alukai. PW-8 looked for the two but in vain. He informed PW-4, a Kenya Police Reservist (KPR) to look for them and arrest them. PW-4 commenced hunting for the two. He was informed that they were seen heading towards the river. He went there and found Samson Lotuu Lowerile removing clothes to take a bath. He arrested him. The accused was asked whether he knew cause of the arrest and said yes. He said he had done something bad at Lotepes. He said he was with Lobur Alukai and Francis Namorinyang. He alleged Lobur Alukai quarreled with Francis Namorinyang and the two fought. He explained that he intervened and helped his friend against the deceased. He fought the deceased properly. He was asked to the point of killing him and he answered, yes. He alleged they did not kill a person but a Turkana. He was told to dress up. He was taken to Cherangani Centre and later to Kacheliba Police station. Lobur Alukai went underground and was not traced.

PW-8 later returned to the scene. He collected a stone which had blood stains, a stick and a jacket for the deceased. He as well picked the deceased's body and took it to Kacheliba District Hospital for postmortem.

At the police station, PW-8 observed the clothes of the suspect and noted the blue jeans trouser had blood stains. He took the jeans trouser and marked the area which was stained. He prepared an exhibit memo form and forwarded the blue jeans trouser marked A1, a maroon jacket marked A2 and a stone marked A3. These items were received at Government chemist, Nairobi on 13.6.2014. PW-8 also got the blood sample from PW-6, the mother to the deceased. It was marked B1. It was also forwarded to Nairobi Government Chemist and was received on 16.6.2014. The request to Government Chemist was to examine the items and determine presence and origin of blood stains. PW-5 carried out the examination by doing a DNA analysis. Her finding is that they were 99.99(plus)% more chances that the donor of blood sample marked B1 is the biological mother to the DNA profile generated from blood stains on the trouser item marked A1(of the accused), jacket marked A2 (of the deceased) and the stone item marked A3. She compiled a report to the said effect and signed it on 31.8.2016.

The postmortem on the deceased's body was done on 20.3.2014 at Kacheliba temporary mortuary at 15.30hours. The body was identified to PW-7 by PW-6 who's the deceased's mother. At the time the body was swollen and producing bad smell. Over 72 hours had passed since death and the body was in a decomposing state. However the clinical officer observed stains of dry blood on the head, eyes and ears. There was a bruise and a depression on the forehead measuring 3x1cm. Both eyes had been gouged out. There was oozing fluid from the mouth and noses. There were also blisters on the chest and abdomen. The upper limb was deformed with a fracture of radial ulna. He did not open up the body given its state. He was of the opinion that the cause of death was head injury leading to cardiopulmonary arrest. He thus filled the postmortem report of which he produced as an exhibit.

After the investigations were completed the accused was charged with the offence of Murder.

The accused gave unsworn testimony in his defense and called no witness. His defense is that on 18.3.2014 he was called by PW-3 to go and collect his pay. He had cut for her trees and fenced her land and was to be paid 3,000/- for the job. He went to Kalas Primary School and was told that she was at her shop. He proceeded to her shop and found her mother who was selling Busaa in a club nearby. He waited for PW-3 who was not there as she had gone to look for change. When she appeared she told him that she had no money. She requested him to take 200/- for food and return the following day for his money at Kodich. He agreed. She locked the shop and left. The accused went to her mother's club and took Busaa. The mother suggested they shift nearby for chang'aa. They went and took chang'aa. Lopur was at the place with the deceased. Lopur demanded the accused pay him 500/-. The accused said he was

not paid and could pay him at Kodich the following day.

Lopur said there was no problem as the deceased will treat him. The two left. The accused was there even at 8.00pm. The mother of PW-3 had also left and the accused was left with some other friends. By the time the accused rose to go home he was drunk. At the road he met Lopur and the deceased near a school gate. They were quarrelling. They were quarrelling over 5,000/- of which Lopur was owed by the deceased. The school watchman directed his torch on them and ordered them to leave. The deceased headed towards his house. Lopur followed him. The accused went on up to his home and slept. The following day he woke up and went to Kodich where he found PW-3. PW-3 told the accused that Lopur was looking for him. The accused was paid 2,500/- by PW-3. Lopur returned and the accused paid him 500/-. He then left. The accused shopped and went home. On 21.3.2014 he went to graze animals. At 2.00pm he took them to drink water in the river. He also bathed. It's while bathing that KPR men appeared. They said Lopur was missing. The accused said he did not know where he was. Accused was arrested on allegation that he was with him at Kodich. He was taken to Kacheliba Police Station. The police beat him asking him where Lopur was. He was then shown some clothes and asked whose it was. The short trouser was for Lopur. He was then taken to Kitale Court and charged with murder.

The offence of **Murder under section 203 of the Penal Code**, is committed when any person who of *malice aforethought* causes the death of another by an unlawful act or omission.

Section 206 of the Penal Code reveals that *malice aforethought* shall be deemed to be established by evidence proving any one of 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.*

The foregoing leads to the following ingredients for the offence of Murder of which the prosecution are required to establish beyond reasonable doubt are:-

- i. The fact of the death of the deceased.**
- ii. The cause of such death.**
- iii. Proof that the deceased met his death as a result of unlawful act or omission on the part of the accused person.**
- iv. Proof that the said unlawful act or omission was committed with malice aforethought.**

The death of the deceased was witnessed by various prosecution witnesses. These are PW-2 (the deceased's brother), PW-8 (the investigating officer) who visited the scene and collected the body, PW-6 (the deceased's mother) who identified the body for postmortem and PW-7, the clinical officer who carried out the post mortem examination at Kacheliba temporary mortuary. The defence does not also challenge the fact of the death of the deceased. This issue is therefore settled beyond reasonable doubt.

The cause of death of the deceased can be read from the evidence of PW-1. He witnessed the accused grappling with the deceased while another called Ngalukai was standing aside. PW-1 told the three to

leave and they obliged. Though there's no any other eye witness to what actually happened thereafter, the evidence of PW-4 as to what the accused told him during arrest offers crucial circumstantial evidence. The accused said he was with Lobur Alukai and the deceased. Lobur Alukai quarreled with the deceased and the two fought. The accused intervened and helped his friend against the deceased. He alleged that he fought the deceased properly. PW4 asked him, "to the point of killing him?" The accused answered, "yes". He alleged they did not kill a person but a Turkana. These information of which I believe came from the accused as PW-4 had no cause to fix him, shows that he had a hand together with his friend in killing the deceased. PW-1 had actually seen him grappling with the deceased and had therefore a cause to kill him. The accused and his friend Lobur Alukai (who's still at Large) were the last persons seen with the deceased alive. The following morning the deceased was discovered dead in the forest. The body had dry blood on the head, eyes and ears. There was a bruise and a depression on the forehead measuring 3x1cm. Both eyes were gouged out. There were blisters on the chest and abdomen. There was deformity of the upper limb with fracture of radial ulna. These physical injuries show that the body or the deceased had been seriously injured. The investigating officer (PW-8) followed blood drops up to a point near Lotepes Primary School, where PW-1 had witnessed the accused grappling with the deceased. The said trail of blood drops when considered together with the evidence of PW-1 shows that the accused had a hand in the said injuries, some if not all.

His jeans trouser of which was recovered by PW-8 upon his arrest had a blood stain. The blood stain was subjected to DNA as well as sample of blood extracted from the deceased's mother, stain found on a stone at the scene and on a maroon jacket belonging to the deceased, and they all agreed, confirming the stains were of the deceased's blood. If the accused did not take part in attacking and injuring the deceased, it's a mystery how the deceased's blood stain got to his jeans trouser.

The injuries occasioned by the accused and his friend to the deceased, as were clearly described by PW-7 shows that they were out to kill him. What the accused said to PW-4 upon his arrest makes the point very clear. To him he did not kill a person but a Turkana. I do find that the commission was with *malice aforethought*.

The accused defense though well thought does not exonerate him from the offence. It's a made case where he turned the blame on his friend who is at large. However PW-1 did not witness his friend grappling with the deceased and as said earlier if he took no part in commission of the offence the blood stains of the deceased found on his jeans trousers is a mystery. The alibi defense is uncorroborated and is an afterthought. It's not true. The defense case is dismissed.

I accordingly find the offence of **Murder** well established by the prosecution, against the accused, beyond reasonable doubt. The accused stands convicted of it under **section 203 as read with section 204 of the penal code**.

S. M. GITHINJI

JUDGE

22.11.2017

Judgment read and signed in the open court in presence of the accused person, his advocate Mr. Bororio and the state prosecutor, Madam Kiptoo, this 2nd day of November, 2017.

S. M. GITHINJI

JUDGE

22.11.2017

M/S KIPTOO

I have no records. Treat him as a first offender.

MR. BORORIO

The accused is a family man. He is the only breadwinner. He's remorseful. I urge the court to exercise leniency in sentencing him.

COURT

The offence carries a mandatory death sentence. It's the sentence I pronounce against the accused person. It's to be executed as per the law provided. Right of appeal 14 days.

S. M. GITHINJI

JUDGE

22.11.2017