



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL CASE (MURDER) NO. 29 OF 2015

(Formerly Nakuru HC.CR.C. 102 of 2013)

REPUBLIC.....PROSECUTOR

VERSUS

LEMUNGA TOMPOI.....ACCUSED

J U D G M E N T

1) The Accused **Lemunga Tompoi**, is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 18th day of October, 2013 at Ol donyo Narasha location in Narok South District he murdered an **UNKNOWN PERSON alias Msamburu**. The Accused denied the charge and was represented by Mr. Kamwaro.

2) The prosecution case is as follows. The deceased and the Accused met in the home of **Noonkishu Nasieku (PW1)** at Ol Manera on the night of 18th October 2013. The precise purpose of the visit to the home is not clear from **PW1's** evidence, even though **PC Kenneth Kanyoro (PW7)** asserts the prevalence of Chang'aa dens in the area. Following an altercation, the Accused was engaged in a fight with the deceased. The women, in the neighbouring houses including **PW1, Nabolu Enole Sayialel (PW2)** and **PW1's co-wife Kumomali Saiyalel (PW3)** took cover when the fighting intensified. After a while the deceased was dragged away from the homestead.

3) The Accused later returned to the home of **PW1**. He ranted as he went round the homestead uttering murderous threats. On the next day, the body of deceased which bore deep cuts and blunt injuries was found in a bush, some distance from the home of **PW1**. Police removed the body.

4) On 22/10/2013 the Accused was arrested by rangers, including **Tobiak Parmuat (PW4)** while trespassing in the Mara Conservancy. Questioned, he claimed to be headed to the next village and explained that he had been involved in a fight with a man at Ol manera. He was detained and handed over to police at Muswani Administration Police Camp.

5) **APC Emsley Mibei (PW5)** who received him escorted the Accused to the scene of murder where witnesses allegedly identified him. He was eventually handed over to Mulot Police Station where investigations were carried out by **PW7**.

6) In his sworn defence statement, the Accused testified that he is a resident of Enkare Nairoua and did not know **PW1, PW2, PW3**, or visit the home of the former on the material night as alleged. He denied that he murdered the deceased. He stated that on the date of his arrest he was herding his goats near the Mara Conservancy. He was arrested by **PW4** and others on allegations of trespass when he chased after

some straying goats. The rangers upon searching him took his money amounting to over Shs 57,000/= and identity card. He was escorted to Muswani Administration Police Camp. Later, the prosecution witnesses who were all strangers to him were brought to the police camp.

7) The defence submission dwelt at some length on the quality of the prosecution evidence, which is described as wanting. In my own view, there can be no dispute that the injured body of a man, said to be from Tanzania, and known by the nickname “*Msamburu*” was recovered in Ol Donyo Sub-location a day or two after the incident at the home of **PW1** as described by **PW1**, **PW2** and **PW3**. For my part, I believe that a fight did take place in the home of **PW1** on the material night, and involved a fight between two or more men who were most probably revellers at the home. Thus, it is quite likely that **PW1**, **PW2** and **PW3** did not know the combatants prior to the material date.

8) Therefore, I do not agree with the defence submissions that **PW1** and **PW2** told deliberate lies to the court; namely, that the witnesses did not know the combatants before. Rather, I think the witnesses were at pains to suppress the fact that the said combatants were revellers who were drinking chang’aa in the home of **PW1**, when the fight occurred. Thus in their own admission, neither **PW1**, **PW2** or **PW3** knew the Accused prior to the material date. No identification parade was held upon his arrest. Therefore the testimony by **PW1** and **PW2** purporting to identify the Accused as the one of the combatants amounts to dock identification and is worthless.

9) The women’s evidence, as I have said regarding the occurrence of the incident of the material night is not however without value. Upon his arrest on 22/10/2013 the Accused himself told **PW4** that he had fought with a man at Ol Manera, which is the same area of residence of **PW1** and **PW2**. This information to **PW4** was gratuitous as the rangers, including **PW4** only stopped the Accused as a trespasser in the conservancy. His subsequent explanation to this court that he was innocently herding his goats, and that he was “framed” after the rangers stole his money was not put to **PW4** during cross-examination.

10) It is true though that the Accused did not identify to **PW4** the man he had fought with. But in the time lapse and sequence of events described by the prosecution witnesses, in all probability, the fight was the same one described by **PW1** and **PW2** at the home of the former on the material night.

11) If we disregard the identification evidence by the said witnesses, we are left with the Accused’s statement to **PW4**, which I believe was uttered without prompting; and the event of the night of 18/10/2013. No objection was raised in respect of the alleged confession made by the Accused to **PW4**, a person clearly in authority over him and the same was admitted at the trial.

12) Even though the confession did not specifically identify the deceased as the man the Accused had fought with, the location of the fight – Ol Manera – appears to connect the confession to the fight at **PW1**’s home. The Accused in his defence however appears to repudiate the confession in his version of events concerning his arrest while not directly referring to the said confession.

13) In the case of **Parvin Singh Dhalay –Vs- Republic Criminal Application Number 10 of 1997**, the Court of Appeal stated: -

“But a confession to criminality remain a confession whether it be made to a person in authority or to a private person and once the confession is repudiated or retracted or both, the confession requires corroboration unless the court is, for cogent and solid reasons, satisfied that the confession, though not corroborated cannot but be true.”

14) The Court of Appeal in the case of **Wambunya -Vs- Republic [1993] KLR 133** exhorted the courts to treat a retracted or repudiated confession with caution, and to satisfy themselves that in all the circumstances of the case, the confession cannot but be true. (See also **Tuwamoi –Vs- Uganda [1976] EA 91** and **Thiong’o –Vs- Republic [2004] 2 KLR 38**).

15) Applying the foregoing principles to this case, I note that the Accused’s confession to **PW4** was partial – concerning a fight, and that though it refers to the location of the fight as Ol Manera, that it was

made almost four days since the particular incident at **PW1's** and the discovery of "Msamburu's" body.

16) As earlier stated none of the prosecution witnesses identified the Accused at the scene of the fight. What has exercised my mind is the question whether their circumstantial evidence regarding the occurrence of the fight on 18/10/2013, taken with the recovery of the deceased body on the next day amounts to adequate corroboration of the repudiated confession. I am not certain, particularly because the identity of the man or men involved in a fight, allegedly with the Accused was not established. Indeed, it does not seem that **PW1** and **PW2** ever saw the body of the deceased when it was discovered. And at any rate they claimed he was a stranger to them.

17) Thus, upon a careful review of the evidence before the court, I harbor reasonable doubt as to the culpability of the Accused person. I will resolve that doubt in his favour by acquitting him at this stage under Section 322 (1) of the Criminal Procedure Code.

Delivered and signed in Narok this **28th** day of **October, 2016**.

In the presence of:-

For the DPP : Mr. Koima

For the Accused : Mr. Kamwaro

Accused : Present

CC : Barasa

C. MEOLI

JUGDE