



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Case 38 of 2007

REPUBLIC.....PROSECUTOR
VERSUS
LOBOO LENAIGERO.....ACCUSED
JUDGMENT

LEBOO LENAIGERO, the accused, is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence allege that on 20th March 2007 at Nomutio area in Samburu District of Rift Valley Province the accused murdered Selina Lengupae.

The prosecution case is that on the material date while the deceased with her sisters PW1 and PW2 were herding their goats, the accused who was herding his employer's goats in the same area went to where they were and suddenly and without any apparent reason shot the deceased on the nose and ran away. The deceased apparently died immediately.

The accused does not deny shooting the deceased. In his defence he claimed that while dusting the gun he had, and due to his drunken state, having drunk bussa that day before going to look after his employer's goats, he accidentally pulled the trigger thus shooting the deceased. His advocate submitted that he is guilty of manslaughter and not murder.

The issue in the circumstances is whether the accused is guilty of murder or manslaughter.

Section 203 of the **Penal Code** defines murder as the causing of death of another person by an unlawful act or omission with malice aforethought. It follows therefore that for the accused in this case to be convicted of the murder of the deceased, the prosecution has to prove that he had malice aforethought.

The only evidence the prosecution is relying on to prove malice aforethought is that of PW1 and PW2 both of whom, as I have said, are sisters of the deceased. PW2 is a minor child aged 5 years old. After vire dore examination, though intelligent, I found that she did not understand the meaning of an oath. She therefore testified without being sworn.

The testimony of these two witnesses was that on 20th March 2007 at about 5.30 p.m. as they were herding their goats together with the deceased, accused who was also herding his employer's goats went to where they were and asked the deceased if she was the one who had been married to Natuko Manyatta. The deceased told him that it was her other sister who had. He then drew his gun remarking that she was unlucky as he was going to kill her and he shot her on the nose and ran away. They both said there was no problem between the accused and the deceased. While PW2 said the accused appeared drunk and terrified after shooting the deceased, PW1, however, denied that the accused was drunk. As I have said the accused admitted to shooting the deceased but attributed it to accident due to his drunken state.

From this evidence, no reason has emerges as to why the accused would have wanted to harm, let alone kill, the deceased. There is nothing to show what the accused's motive was in shooting the deceased. Motive is the reason that makes a man do a particular act in a particular way. It exists for every voluntary act, and is often proved by the conduct of a person. See **Section 8** of the **Evidence Act** Cap 80 Laws of Kenya.

Motive is of course immaterial in proving one's criminal responsibility. That is quite clear from **Section 9(3) of the Penal Code** which provides that:-

“Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility”

Obviously with this provision in mind, in case of **Joseph Wambirwa Mwanthi –Vs- Republic, Criminal Appeal No 63 of 2005 (CA Nyeri)**, the Court of Appeal stated that “Generally speaking, motive is not essential to prove a crime.”

However, as the same court said in **Lubambula Vs R [2003] KLR 683** “Motive becomes an important element in the chain of presumptive

proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.” In **David Kipkemboi Ngetich Vs Republic, Nakuru Cr. Appeal No. 276 of 2006 (CA)** the Court of Appeal said its relevance “is to contextualize the circumstances in which the offence charged was committed.”

Motive therefore becomes important in proving the accused’s malice aforethought. In this case, both PW1 and PW2 said they knew of reason whatsoever why the accused would have wanted to kill the deceased. There was no grudge between the accused and the deceased or between their families. That leaves me with no option but to consider the accused’s claim that, at the material time, he was drunk. As a matter of fact, the defence of intoxication having been raised, I am duty bound to consider it. In **Said Karisa Kimunzu Vs Republic, Cr. Appeal No. 266 of 2006** (unreported) the Court of Appeal stated this requirement in the following term:-

“But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”

Section 13(1) of the **Penal Code** states that, save as provided in that section, intoxication is not a defence to any criminal charge. Sub-section (2) provides for the circumstances under which intoxication can afford a defence. It states:-

“13. (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

The rest of the Section reads:-

- (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.**
- (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.**
- (5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”**

In this case the accused said, prior to going to the scene, he had drunk busaa. We are not told how much he had drunk or for how long. There is also no evidence that, at the time of shooting the deceased, he was so drunk that he was “insane, temporarily or otherwise.” So sub-section (2) of the above section does not apply.

Accused’s claim of drunkenness, though somehow corroborated by PW2’s testimony, is not convincing. However, in the absence of any reason whatsoever why the accused would shoot the deceased, applying **Sub-Section (4)** of the above section, I give him the benefit of doubt that he was drunk at the time of shooting the deceased. Consequently, I find that the accused did not have malice aforethought of killing the deceased. He is therefore not guilty of murder but manslaughter. Consequently, I convict him of the offence of manslaughter contrary to **Section 202** of the **Penal Code**.

DATED and DELIVERED at Nakuru this 20th day of July, 2010.
D. K. MARAGA
JUDGE.