



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL CASE NO. 25 OF 2008**

Lesiit, J.

REPUBLIC.....PROSECUTOR

VERSUS

LOCHURUVA ESMIRADAN.....ACCUSED

**JUDGEMENT**

The accused person faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 28<sup>th</sup> of February 2008 at Liyai Sub location in Marsabit jointly with another not before the court murdered Boru Guyo.

The prosecution called ten witnesses of these ten PW1 is Mohamed Boru and PW3 Diramu Sasure son and wife of the deceased respectively were eye witnesses of the incident. PW1 said that they were seated at the table with his father and siblings at about 8pm on the material night. He said that he was facing the door and as they took tea two people whom he knew before walked into the house. He identified one as one Karan and Ismiradan the accused person in this case. Mohammed stated that the accused person aimed his gun at his father and shot him on the head without uttering a word. Mohammed said that after the accused shot his father on the head and the chest he fired another shot at their Manyatta before walking away. Mohamed said that immediately the gun was fired the lamp that was in the house went off. Mohammed testified that he ran out of the house behind the accused only to find Karan outside holding a spear. Mohammed stated Karan and the accused ran away and that he and his siblings and his mother also ran away and spent the night at the neighbours. The evidence of Mohammed is corroborated by that of his mother PW3.

Both PW 1 and PW3 testified that they were able to see the accused and his accomplice through the moonlight. PW 5 PC Kyalo and PW 7 inspector Kinoti went to the scene of the shooting at 8.30 pm same evening. PC Kyalo's testimony was that on entering the house of the deceased they found his body on a mud-bed with injuries on the head and the chest. PC Kyalo discovered empty cartridges from the floor of the house. Inspector Kinoti who was the OCS of Marsabit Police station at the moment removed the body from the scene and took it to the mortuary. Both PC Kyalo and inspector Kinoti contradicted the testimony of Mohammed PW1 and Diramu PW3 regarding the lighting condition at the scene on the night in question. Both of them testified that, that night was very dark but there was no moon light. PC Kyalo was based at Liyai Patrol Base. He testified that while at the Patrol Base they heard shooting at 8.30 pm. he said that the shooting was coming from the Manyatta. PC Kyalo testified that before leaving the patrol he saw and spoke with the accused person who was living in a house very near the patrol base. PC Kyalo said that the accused was a Kenya Police Reservist. He says that after talking to the accused he proceeded to the scene of the incident. PC Kyalo testified that on their way to the scene they met a group of about 6 people who were running away from the shooting scene and going towards the patrol base to seek security. PC Kyalo testified that the 6 people informed him and his colleagues that a person had been shot dead.

PW 4 Stephen Lerap was the chief of Songa Location where both the deceased and the accused were living. His evidence was that on the 24<sup>th</sup> February 2008 he received information from residents of his area that there were people who had visited the home of the deceased with an intention to steal his cattle. He says that he visited the scene and confirmed that there had been shooting by people who wanted to steal from the deceased. Mr. Lerap stated that the deceased did not know who had invaded him. Mr. Lerap however said that the accused person and the deceased had a disagreement and that he tried to reconcile

them. Mr. Lerap stated that he called a reconciliation meeting for the 27<sup>th</sup> of February and that because very few people turned up for the meeting he postponed it to the 1<sup>st</sup> of March 2008. He says that the deceased was killed before the second meeting. Mr. Lerap testified that he heard the shooting in which the deceased was killed. He said that he could not visit the scene until the following morning. Mr. Lerap contradicted the evidence of PW1 and PW3 on three important aspects the first contradiction was in regard to the lighting condition on the material night it was Mr. Lerap's testimony that on the night in question there was no moonlight and that night was very dark. The second contradiction was in regard to the first report given to him by PW3 the wife of the deceased. Mr. Lerap told the court that when he interviewed PW3 a day after the shooting she told him that she saw a young moran during the shooting. The third contradiction was in regard to PW1 Mr. Lerap told the court that PW1 was a primary school student and that on 28<sup>th</sup> of February being within the school term he would have expected him to have been in school at the time of the shooting. Mr. Lerap explained that the school in which PW1 was, was a boarding school.

The investigating officer of this case was inspector Kiprop who was PW10. Inspector Kiprop narrated his findings during the investigation in this case. He said that when he interviewed PW3 the wife of the deceased she told him that the accused and one Karan had threatened her husband before the incident. She also told him that it was the accused who shot her husband. Inspector Kiprop said that he started looking for the two suspects on the 18<sup>th</sup> of March he arrested the accused person. He says that the accused was a Kenya Police Reserve and had been issued with Mara 4 rifle he said that that rifle was not the one used to kill the deceased because the kind of ammunition that caused the death of the deceased was from an AK 47 rifle. Inspector Kiprop's evidence was confirmed by the ballistic expert Mr. Kipkemoi. Mr. Kipkemoi said that on 5<sup>th</sup> November 2008 he received 2 extended cartridges from inspector Kiprop of CID Marsabit. Mr. Kipkemoi said that the examination of the two cartridges revealed that the two were fired from one gun and that the gun used was either an AK 47 rifle or a Sminov.

Inspector Kiprop said that he interviewed the accused person and that the accused informed him that he was in his house at Liyai at the time of the shooting. During cross examination by Mr. Kabiru for the accused inspector Kiprop testified that the initial report received by the OCS in charge of Liyai Patrol Base was to the effect that a known man entered the house of the deceased and shot the deceased on the head before disappearing into the darkness. Inspector Kiprop went to the defence of PW3 the wife of the deceased and stated that at the time she made the report she was traumatized and was not thinking straight and that could explain why her initial report was that a lone man shot and killed the husband. Inspector Kiprop admitted that he took statement from PW1 and PW3 on the 21<sup>st</sup> March 2008 three days after arresting the accused.

After the close of the prosecution case Mr. Kabiru for the accused made submissions. In his submissions he said that there were three issues for determination the first is whether malice aforethought was proved, the second issue is whether the unlawful act or omission was perpetrated by the accused and then 3 whether the accused person was at the scene of crime. Mr. Kabiru submitted that the only eye witness of the incident was PW1. He said that PW1 was a child of tender years being only 13 years old and that his evidence needed corroboration and it was not corroborated. Mr. Kabiru also submitted that the wife of the deceased alleged that the accused and the deceased had a dispute over land. Mr. Kabiru urged that since PW2 and PW5 who were police officers attached to Liyai Police Base, the nearest Police Station to both PW3 and the accused stated clearly that no report of animosity over land had been received from anyone including the deceased and accused.

Regarding PW4 the area chief Mr. Kabiru urged that the court should consider that the witness contradicted itself for two reasons. The first is when he testified that when he met the accused and the deceased on the 26<sup>th</sup> of February he did not notice any differences yet he claimed that the disagreement between the two men was deep enough to lead to killing. Mr. Kabiru urged the court to note that from the evidence of PW4 there were shooting incidences on the 6<sup>th</sup> and on the 7<sup>th</sup> of February 2008 when Redilles were killed by Boranas Mr. Kabiru urged that the shooting of the deceased would have been a revenge mission.

Mr. Kimathi gave submissions on behalf of the State. Mr. Kimathi urged that PW1 who was 13 years old was not a child of tender years. Mr. Kimathi urged that in any event the evidence of PW1 regarding the description of the accused was corroborated by the evidence of PW3. Mr. Kimathi asked the court to find that the evidence of identification was good as it had been made under favourable conditions. He said that the source of light that enabled the two witnesses to identify the accused and his accomplice was

bright moonlight and a lamp. Mr. Kimathi submitted that the evidence of PW3 that there was a long standing land dispute between the accused and the deceased was corroborated by PW4. Mr. Kimathi urged the court to find that malice aforethought was proved as the same could be inferred from the nature of injuries that were meted out on the deceased.

Regarding the murder weapon Mr. Kimathi submitted that even though the accused had been issued with a different rifle than the one used in the murder it is possible he may have had another gun.

**Dated signed and delivered at Meru this 28th day of Oct 2010.**

**J. Lesiit**  
**Judge.**