



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CRIMINAL CASE NO. 18 OF 2007**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES TODOYANY alias LOCHEDE.....1<sup>ST</sup> ACCUSED**

**SAMMY LOTORE.....2<sup>ND</sup> ACCUSED**

**J U D G M E N T**

**JAMES TODOYANY** alias **LOCHEDE** and **SAMMY LOTORE** face a charge of murder contrary to the provisions of section 203 as read with those of section 204 of the Penal Code as per the information dated 30<sup>th</sup> May, 2007. The particulars of the offence are that on the 11<sup>th</sup> day of April 2007 at Kaptibor shopping centre in Baringo District within the Rift Valley Province, jointly with others not before court murdered **ELIJAH KIMOI CHEPSENGON**.

The prosecution called seven (7) witnesses. **PW1- BEATRICE TIROK** gave evidence that she was on her way home from Kabarnet District Hospital where her sister was admitted. The time was about 9.00 p.m. She was with Elijah and another person. These two walked a head of her at a distance. She followed them hurriedly from behind. On catching up with Elijah she found him being held and pushed by some two men the witness used to see at the stage. She said the two men holding and pushing Elijah were the two accused persons now in court. Elijah told the two men that he did not drink and they could confirm that from the witness. One of the accused persons was holding Elijah's mouth. The 1<sup>st</sup> accused then hit Elijah on his mouth and at the back of the head and the witness started screaming and running away into the nearby compound of Public Works offices. There were lights from these offices illuminating the whole place. She left there, went home and slept until the next day when she heard people say that someone had been killed the previous night. The witness thereupon went and told the area chief what she had seen and together they went to Kabarnet police station where she reported the incident. The witness had known the 1<sup>st</sup> accused previously as he used to mend shoes at the centre. On the material night 1<sup>st</sup> accused had worn a black hat and a light black trouser and a green jacket which the witness identified in court. She said that the 2<sup>nd</sup> accused wore a red jacket which she also identified in court. The accused persons were later arrested by the area chief. The witness later attended an identification parade where she identified the 2<sup>nd</sup> accused person. On cross examination she said that the incident occurred at about 9.30 p.m. near the Public Works offices and the place was well lit by electric lights from those offices. That there was a blackout but lights came back as the accused persons continued beating the

deceased there at Kaptibor trading centre. The lights were about 60 meters away lighting the dark corner where the incident occurred. She did not know the names of the 2<sup>nd</sup> accused whom she only knew by appearance but she knew that he was arrested on 11/04/2007 at 3.30 p.m.

**PW2 – FRANCIS CHEMAKIN** identified the body of the deceased for postmortem on 23/04/2007 and noticed that there were injuries on the head.

**PW3 – No. 87973 P.C. VINCENT OMWERI** He was based at Kabarnet station at the material time. On 11/04/2007 at 8.00 a.m. he was instructed by the OCS to proceed with PC John Koech to go to the scene of death. On arrival they found a crowd of people on a Verandah of one of the buildings and on the floor lay the body of a male person whom they were told was called Elijah. They removed the body to the mortuary and commenced investigations which led to the arrest of the two accused persons before court. The witness participated in the arrest of the 1<sup>st</sup> accused. He said that he had also arrested another man called Boniface but who was later released. The second accused was arrested one hour after the 1<sup>st</sup> accused was arrested. He said that the ministry of works offices are situated about 50 meters away from Kaptibor trading centre.

**PW4 – No. 71126 P.C. JOHN KOECH** He was attached to Kabarnet Police Station. On 11/04/2007 his senior Chief Inspector Joshua Aseto instructed the witness with other police officers to proceed to a scene of death at Kaptibor trading centre about two kilometers from the Kabarnet police station. They proceeded as instructed and found a dead body which had an injury on the forehead. They removed the body to Kabarnet Mortuary. At about 4.00 p.m. they received information that the persons who had killed the deceased were seen at the Kaptibor trading centre. This information was given by Beatrice Tirok (**PW1**) and she led the witness and his colleagues to where the suspects were mending shoes at the centre. The accused persons were arrested and taken to Kabarnet Police Station. The witness then left the matter at that stage and the investigating officer took over. In cross examination he stated that he was with **PW3** when they arrested the first accused but the identification parade was conducted by the OCS. He saw the body of the deceased. It was swollen on the forehead. He had been told by Beatrice (**PW1**) that she witnessed the deceased being killed. She told him that both the accused persons were beating the deceased.

**DR. PHILIP MBITHI** was the **PW5** and he was at the material time based at Kabarnet District Hospital. He performed the postmortem on the body of the deceased on 23.04.2007 at about 7.00 p.m. The body was that of an African male aged about 53 years old. The clothing on the body was not blood stained but there was dried blood in the mouth and nostrils. There was a large frontal swelling on the lateral aspects of the face and a bruise on the dorsal part of the left hand and on the left knee. There was frontal scalp hematoma on the left parietal bone, intracranial haemorrhage and massive subdural haemorrhage. He formed the opinion that the cause of death was severe head injury. In cross examination the witness said that the injury could have been caused by the deceased falling head first or he could have been hit with a blunt object or that a heavy object could have fallen on him from a height.

**PW6 – No. 218405 CHIEF INSPECTOR JOSHUA ASETO** was the Kabarnet OCS at the material time. He instructed the late David Musyimi to investigate and in turn the late David Musyimi requested this witness to conduct for him the Identification Parade. There were three suspects but James Todoyany alias Lochede had been positively identified by Beatrice Tirok (**PW1**) by physical appearance, clothing and voice and hence there was no need to conduct an Identification Parade in respect of him. The remaining two suspects Sammy Lotore and Boniface Serunoi were read their rights. The one witness (**PW1**) was placed at the crime office and he told her that she would see a group of people which may or may not have the persons responsible for the murder of the deceased. The crime branch office was far away from where the suspects were and so the witness (**PW1**) had no opportunity to see the Suspects before hand. The witness needed identification by physical appearance only. Ten persons including the 1<sup>st</sup> accused were paraded. The witnesses asked the 2<sup>nd</sup> accused where he wanted to stand and he chose the position between No. 2 and No. 4. All the persons on the parade were similar in all aspects. The 2<sup>nd</sup> accused was identified by being touched. He made no comment. He accepted everything about the parade and he signed his part in the Identification Parade form which was produced in court as evidence. Then

followed the Identification Parade for Boniface but he was not identified and so he was released. Answering questions from Mr. Okara for the 2<sup>nd</sup> accused the witness said that the 2<sup>nd</sup> accused and Boniface were implicated by the 1<sup>st</sup> accused.

**PW7 – HARUN CHEPSEKON** was the younger brother of the deceased and he identified his body to the doctor on 23/04/2007 for purposes of postmortem. That marked the end of the prosecution case.

In his unsworn defence the first accused said that he was at home at 7.00 p.m. on 10/04/2007 at Kabarnet. He was arrested on that day at work doing shoe shining and told that he had killed someone and he was beaten. He denied ever having killed anyone and said he did not know why he was in court.

The 2<sup>nd</sup> accused person also gave unsworn evidence. He was a shoe repairer and shiner at Kabarnet. On 10/04/2007 he worked until 6.00 p.m. when he went to the market and shopped for his family and went home and slept. The next day on 11/04/2007 he took his children to school and he went to work from where he was arrested at about 3.30 p.m. by some two people who went to his work place and asked him to identify himself. The two who arrested him were policemen in plain clothes. He said that upon telling the OCS that he was a Pokot the OCS said he was a murderer and he was locked in.

This case relies heavily on the identification of the accused persons by Beatrice Tirok (**PW1**) She gave evidence that she knew the 1<sup>st</sup> accused prior to the commission of the offence. She knew him as the one who used to mend shoes at the trading centre. She saw the clothes he wore on the material night of the offence from which she identified him and also from his voice since the accused talked to the deceased at the scene. The time was 9.30 p.m. and there were lights from the nearby offices of Public Works. She saw that the 2<sup>nd</sup> accused wore a red jacket as they (accused persons) held and beat the deceased. She saw the 1<sup>st</sup> accused hit the deceased on his mouth and also at the back of the head and at that point she screamed and ran away into the Public Works buildings. She identified the 2<sup>nd</sup> accused from an Identification Parade that the 2<sup>nd</sup> accused was satisfied with.

Identification must be free of error and this case turns on the evidence of a single identifying witness. I will be guided in my determination by the well known principle in this kind of case as set out in the case of **ABDALLA BIN WENDO & SHEH BIN MWAMBERE V. REGINAM (1953)20 EACA 166** in the following words:-

*“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such cases what is needed is other evidence whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”*

Beatrice Tirok (**PW1**) gave evidence on what happened on 10/04/2007. She knew the deceased Elijah and she saw him on that evening as the two walked home, with Elijah and another person walking ahead of the witness. There were lights illuminating the place where the incident occurred. These lights were from the office of Public Works. The witness said that she knew both accused persons whom she also saw at the scene assaulting the deceased. She knew the first accused by his name Lochede. She knew the second accused by appearance as she used to see him at Kaptibor trading centre at the stage. She saw the two accused persons clearly at the scene and saw that both were holding and pushing the deceased, who a few minutes earlier had been walking home ahead of the witness. She saw that it was the first accused who hit the deceased on his face, more specifically the mouth. When on the following day she was told that someone had been found dead, she volunteered her knowledge to the chief and that led to the arrest of the two persons she had seen assaulting the deceased the previous night. She had seen them clearly at 9.30 p.m. that night with the lights from the Public Works offices, so clearly that she had seen what clothes they wore at the material time and which she identified in court. Her uncontroverted evidence was that she knew the first accused by name and she gave that name to the authorities and that led to his

arrest. Her evidence was clear that when she first saw the accused persons holding and pushing the deceased, there were lights. There followed a blackout but lights came back soon enough for her to see the accused persons both beating the deceased.

The witness said that there was light at the scene emanating from the nearby Public Works Offices. The witness knew the first accused by name and she knew the 2<sup>nd</sup> accused by physical appearance. The 1<sup>st</sup> accused was not a stranger to the witness. Nor indeed was the 2<sup>nd</sup> accused whom she knew, though not by name but by appearance. I find in these circumstances that the prevailing conditions were favourable to accurate identification which was by recognition and thus the possibility of mistake was excluded.

Beatrice Tirok (**PW1**) was able to pick the 2<sup>nd</sup> accused from where he stood between No. 2 and No. 4 on the Identification Parade. She picked the 2<sup>nd</sup> accused by touching him on that ID parade without any hesitation whatsoever. The 2<sup>nd</sup> accused was satisfied with the whole identification process and did not question the same. I have sufficiently warned myself of the risk of mistaken identification. I have warned myself further that (**PW1**) whom I found to be an honest and conscientious witness, could be honest but mistaken. Having so warned myself and having fully analysed her evidence I find that her identification was quite safe and accurate. These accused persons are persons she previously knew and there was sufficient light at the scene for her to recognize them and the clothes they wore. She was both honest and not mistaken as to the identities of the accused persons. She was a consistent witness both in her evidence in chief and in cross examination. I have accorded this evidence on identification the greatest circumspection and I am further satisfied that the conditions were favourable to accurate identification. I find the accused persons' alibis totally displaced by **PW1's** placing them at the scene of the crime.

I am alive to the fact that it is legally possible to convict on the uncorroborated evidence of a single witness and I am fully satisfied that this case is one such case where such conviction can issue. I am of the further view that in this case the evidence of identification does not stand alone. There is the postmortem report. When **PW1** saw the accused persons assaulting the deceased, she saw them hit his face and the back of the head. The postmortem report showed that there was clotted blood in the mouth and nostrils of the deceased. Those are the parts of the deceased's body which **PW1** saw the first accused hit the deceased first. The doctor's opinion as to the cause of death was severe head injury. That agrees with **PW1's** evidence that she saw the deceased hit on his head by the 1<sup>st</sup> accused.

The witness also saw the two accused persons holding and pushing the deceased. They thereby acted in common intent - **section 21 of the Penal Code** - and it is irrelevant who administered the fatal blow. They are both equally culpable.

There must be malice aforethought before murder can be proved. Malice aforethought is defined by **section 206 of the Penal Code** as

*“Malice aforethought shall be deemed to be established by the evidence proving any one 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 the death or grievous bodily harm is caused or not or by a wish that it may not be caused;*
- (c) .....*
- (d) .....*

I find the accused persons' defence empty and evasive and of little evidentiary value. I dismiss such

defences as hollow.

The actions of the accused persons on 10/04/2007 fit squarely the provisions of section 206 of the Penal Code. For all the above reasons I find both **JAMES TODOYANY** alias **LOCHEDE** and **SAMMY LOTORE** and each of them guilty of the murder of **ELIJAH KIMOI CHEPSERGON** and accordingly convict them.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 30<sup>TH</sup> DAY OF DECEMBER 2010.**

**P.M. MWILU**

**JUDGE**

**In the presence of;**

Mr. Misoi – Counsel for 1<sup>st</sup> Accused

Mr. Misoi holding brief for Mr. Okara for 2<sup>nd</sup> Accused

Tabitha – Court Clerk

**P.M. MWILU**

**JUDGE**

### **MITIGATION**

By Mr. Misoi for both accused persons

Both accused persons have been in custody since 2007. They are advanced in age. They have families who depend on them.

**P.M. MWILU**

**JUDGE**

**Court;**

I have heard and considered the mitigation. The life of an innocent Kenyan on his way home was lost through the criminal acts of the two accused persons. The accused persons are not deserving of mercy. There is only one sentence provided for by the Law. I hereby sentence the accused persons and each of them to suffer death as provided by section 204 of the Penal Code.

Right of Appeal – 14 days.

**P.M. MWILU**

**JUDGE**