



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Criminal Case 133 of 2003**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**AUGOSTINO EMAKWALA LOMUTUNGA.....ACCUSED**

**JUDGMENT**

1. Augustino Emakwala Lomutunga is before this court charged with the offence of murder contrary to s.203 as read with s.204 of the Penal Code. At the conclusion of the trial, the Honourable Assessors returned an opinion that he was not guilty of the charge and I retired to consider the evidence and render this Judgment.

2. The case for the Republic was that on 14.1.2003, P.W.3 Hassan Abdi, a lorry driver was driving his lorry, Registration No. KAP 547 W from Nairobi to Moyale and on reaching Isiolo, an officer in Administration Police Uniform and later identified by other witnesses as APC Simon Nzioka Kaleli boarded the motor vehicle and later that night reached Marsabit. At Marsabit, the accused boarded the Motor-Vehicle and later that night reached Marsabit. At Marsabit the accused boarded the motor vehicle which proceeded to Turbi Trading Centre along the Marsabit – Moyale Road. P.W.3 did not clearly see the deceased nor the accused but both were in Administration Police Uniforms and carried rifles and in fact P.W.3 could not identify the accused, even in court. In any event, P.W.3 who was at all times with his lorry turn-boy, one Lula on reaching Turbi decided to take a break and proceeded on to Moyale at 4 a.m. the same night. He did not enquire whether both police officers were on board but at Walda Police Barrier, he saw one of the officers dropping off a bag and re-boarding the vehicle which then proceeded to Moyale. It was only at Moyale, P.W.3 stated that Lula aforesaid told him that one of the two officers had **“became drunk”** and that **“he had been left at Turbi.”** P.W.3 took no note of the matter until later when an unnamed source informed him that the officer had been murdered.

3. P.W. 4 Ali Jillo discovered the deceased’s body within his compound at Turbi and when he screamed and a crowd of people came and the body was taken away, he was himself arrested as a suspect in the presumed murder and kept in custody for 7 days before he was released. He said in evidence that the body was lying side-ways with a gun held to the chest by a shrub and that there were no visible blood-stains or signs of struggle at the scene which was near the path leading to the Administration Police Lines at Turbi.

4. P.W.5 Chief Habudho Godana Dabasso recalled that on 16.1.2003 while at Turbi, two of his subjects, Mamo and Guyo asked him if he had heard gunshots the previous night and because he had not, he went to enquire of the matter and two Administration Police Officers based at Turbi, APC Bruno and APC Guyo informed him that **“two officers escorting a truck to Moyale the previous night had got drunk and released a bullet from their gun”**. Further that the **“officers had left for Moyale”**. On the

next day P.W.5 received information that the body of the deceased had been found and on proceeding to the scene saw the body which was in a place with no apparent sign of any disturbance. APC Bruno who was P.W.8 confirmed that on the night of 16.1.2003 while at AP camp Turbi Cpl. Raymond Kanja woke him up and told him that he had heard a gunshot but when P.W.8 went out he heard nothing akin to a gunshot. This piece of evidence is not consistent with that of P.W.5, the chief who was emphatic that APC Bruno was actually there. To compound this contradiction more, APC Bruno said that the next day, he was informed by unknown and unnamed persons that one of the two officers escorting a truck to Moyale was the one who released a bullet because he was drunk. Later on 17.1.2003, P.W.8 said that he got news of the discovery of the deceased's body within P.W.4's compound and on proceeding there found that the deceased's body had a bullet wound on the chest and that a gun was held to the chest.

5. At this point and because their names were mentioned, I should state that neither Lula, the turn-boy who from the evidence of P.W.3 had close contact with both the accused and deceased, nor Cpl. Karisa were called to testify and the significance of that fact will become apparent from subsequent evidence tendered.

6. P.W.1 P.C. John Mwanthi merely confirmed that on 15.1.2003 while at the Marsabit-Moyale Road Barrier, he inspected M/V Reg. No. KAP 547 W and noted that amongst its passengers were two Administration Police Officers who told him that they were escorting the lorry to Moyale.

7. The evidence of P.W.2 Sgt. Samwel Mbaabu is significant because he was the one who received the report of the murder of the deceased on 17.1.2003 while at Marsabit Police Station and proceeded to the scene at Turbi only on 26.1.2003 where he started to interview witnesses. He later interviewed the accused who told him this;

That on 15.1.2003 at night and on arriving at Turbi, the deceased appeared disturbed and kept asking for forgiveness for ills that he had committed and which no person knew. That the accused then decided to take the deceased to the Turbi AP Camp where one Cpl. Karisa gave them water and the accused left the deceased in Cpl. Karisa's company, and returned to the lorry where he slept. When the lorry left for Moyale, he realized that the deceased was not with them and so decided to drop his bag at Walda Barrier as he was sure that the deceased would turn up there because it was his work station.

8. It is important to state here that the above narration also formed the Defence by the accused in this trial but P.W.2 did not believe him for reasons that when he sought a statement from Cpl. Karisa, the said Cpl. Karisa denied seeing the accused or the deceased on the material night and P.W.2 believed him and decided that the accused was lying and charged him with the offence of murder.

9. The evidence of P.W.7 Sp Hezbon Kadenge and P.W.9 C.I.P Mwenda Eghaiba is relevant only to the extent that they investigated the case and like P.W.2 reached the conclusion that the accused may have had something to do with the death of the deceased. P.W.6 Sgt. James Mutiso on the other hand only attended the conduct of the post mortem.

10. I have already set out above the defence tendered by the accused and I see no need to repeat it.

11. I must reach the same conclusion as the honourable assessors for the following reasons;

Firstly, the evidence against the accused although circumstantial in nature is of the weakest kind. As I understand it, circumstantial evidence can only be the basis for a conviction against an accused person if the circumstances are so inter-woven and connected by such evidence as to leave no reasonable doubt that it is the accused and he alone who could have committed the offence (see Omar Mzungu Chimera vs R. Cr. App. No. 56/98 (Msa) – unreported. In this case, there was no eye witness and no murder weapon (because none of the two guns analysed could conclusively be said to have been the one that discharged

the killer bullet). Worse of all, the only reasons the accused was charged according to P.W.2, was that his testimony conflicted with that of Cpl. Raymond Karisa. Sadly, Cpl. Raymond Karisa even if it was true that he gave a believable statement to P.W.2, was not called as a witness and his truth if at all it was so was not placed before this court.

12. Secondly, and in addition to the above, the case as presented was riddled with an unexplained contradiction; P.W.5 Chief Habudho Godan Dahasso said that when he asked P.W.8, APC Bruno about the gunshot on the night of 15<sup>th</sup> and 16<sup>th</sup> January 2003, the latter said that he was present when the drunk lorry escorts fired a bullet. In court P.W.8 denied the statement and said that he knew of the matter when he was woken up by Cpl. Karisa but he himself heard no gunshot let alone seeing it being released as stated by P.W.5. Further, without calling Cpl. Karisa it is impossible to tell which of the two witnesses was telling the truth, if at all. The contradiction is so material to the substratum of the case for the Republic that unless explained, the weak links in the case would further be strained.

13. Thirdly, and I have alluded to this point in respect of failure to call Cpl. Karisa, is the failure by the state to call two other crucial witnesses; Lula, the turn-boy and the doctor who performed the post-mortem. Lula was with the deceased and accused during the trip and was best placed to tell exactly what happened at Turbi. According to P.W.3, Lula told him that he left the deceased at Turbi because he was drunk. That matter was crucial to explain the conduct of the deceased and accused on the material night and without Lula's evidence, the point is moot.

14. As regards the doctor who performed the post-mortem, failure to call him leaves two issues unanswered; what caused the death of the deceased and where is the evidence of death? These matters are not pedestrian because for a charge of murder to be conclusively proved, it must be shown as a matter of law that the person named as the deceased actually died and as a second-generation question what may have caused his death. The twin issues with other evidence must then be connected with the accused for culpability to be firmly established. Clearly in this case, the lacunae is even greater and the connection with the accused more than remote.

15. I can only conclude by saying that a court of law properly applying its mind to these issues can only but reach the finding that the charge of murder has not been proved at all and the threshold set by law; beyond reasonable doubt has not, even in the barest been reached.

16. I will now have to state categorically that the charge of murder is dismissed, the accused person acquitted and shall order his release unless he is otherwise lawfully held.

17. Orders accordingly.

Dated, signed and delivered in open court at Meru this 8<sup>th</sup> Day of February 2007

**ISAAC LENAOLA**

JUDGE

In presence of

Mrs Ntarangwi Advocate for Accused

Mr. Muteti State Counsel for the State

**ISAAC LENAOLA**

JUDGE