



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case73 of 2005

REPUBLIC PROSECUTOR

VERSUS

LAWRENCE LOKULANI LOTUKUNI ACCUSED

JUDGMENT

Lawrence Lokulani Lotukuni the Accused herein is charged with an offence of murder contrary to Section.203 as read with Section 204 of the Penal Code (Cap.63 Laws of Kenya).

The particulars of the said offence, in information dated 15th July, 2005, state that on 4th July, 2005 at Namanga Township in Kajiado District of Rift Valley Province, he murdered Timothy Ntinini Ole Ntimbao.

The Accused, who is a Police Officer and was attached to Namanga Police Station at the material time, has admitted that he had killed the deceased on the material date and the place. The body of the deceased was also identified by PW.5 Mutumbi Waweru to Dr. Titus Ndeti before he performed Post Mortem on the body of the deceased. He also opined that the cause of death was intracerebral haemorrhage due to gun shot.

It is thus not in dispute that the death of the named deceased occurred and that the death occurred due to an act committed by the Accused.

What the Accused stated, while admitting the act of killing, was that he did commit the said act while he was under the influence of alcohol and thus raised the defence of diminished responsibility. In other words he stated that he did not have malice aforethought while he killed the deceased.

In view of the aforesaid defence raised by the Accused, I have to determine whether he suffered abnormality of mind which impaired his mental capacity to have any malice before or during his act of killing the deceased. In other words, I may also consider whether the Accused could have committed the said act if he was normal in his mental faculty.

I am aware that the law requires the Accused to prove the aforesaid defence of diminished responsibility and also that the standard of proof thereof is on balance of probability. In short I should decide whether it was reasonably probable.

I have to turn to the evidence led to arrive at the aforesaid conclusion.

The prosecution called three witnesses who were with the deceased at the time of the commission of the offence. They are PW.1 Willy Roberts, PW.3 Esther Kanyu Ole Timau (who was a minor and was allowed to testify under oath after the court was satisfied), and PW.7 Abdinyo Miagi. I shall thus first consider their relevant evidence before I do the same with evidence of those witnesses who were with the Accused after the commission of the act.

PW.1 described the event which began at 5.30 p.m. The witness and the deceased were sharing the money earned and then the Accused came and asked for a share also. At that time PW.3 came and asked from him Shs.100 to buy soda. He gave her the money and asked her to give back Shs.50 if she had. The deceased told the Accused that he was giving money to those who worked with him. The Witness laughed and turned away on hearing those conversations. After two or three minutes the deceased, the Accused and PW.3 walked ahead. He followed them. PW.3 passed through a land rover parked nearby. He saw the Accused holding the deceased's collar and struggling. He intervened and asked the Accused **'what problem he had with the deceased'**, and asked him whether he was a police officer. At that the accused stated that the witness did not know who he was and he removed a gun from his jacket and shot the deceased. He further stated that PW.3 was behind the Land Rover and came out after she heard gun shot.

Thus according to this witness PW.3 was not present when the Accused shot the deceased. At the end of his evidence in chief he stated and I quote; **"The person looked drunk and one can see when one is** PW.3 in her evidence testified to the effect that she was around when the Accused and the deceased were struggling and PW.1 intervened by asking the Accused who was he to hold the deceased like that. She also talked about PW.7 asking for change as he had sold diesel of Shs.1,300 and that the deceased did not give change by saying that he did not have any. She put the incident around 5.00 p.m.

I again pause here, and note that PW.1 did not mention the presence of PW.7 around the scene. She was cross-examined on her statements to the Police wherein she has stated that the Accused greeted the deceased and he refused to do so by saying that he was greeted by many and did not want greetings from the Accused. She denied having said that to the police even though she agreed that it was her statement and that it was read back to her after it was recorded and before she signed it.

PW.7 testified that around 5.00 p.m. he was at the Petrol Station and that he sold diesel of Shs.5,320 and did not have change when the customer gave him Shs.6,000. He saw the deceased and asked him whether he had change and when the deceased was about to do so, the Accused came and got hold of the deceased and asked for Shs.200. The deceased asked for what and the Accused then told him **"Do you not know who am I?"** The deceased turned and asked him who he was? The Accused removed a gun and shot him. He mentioned PW.1 and PW.3 being around and stated that they were talking when the Accused held the deceased. He was also examined on his Police statement wherein he had stated that he was shocked and surprised and that he panicked and ran away. He also stated and I quote: **"When I came to sense I was told Timothy was shot by a police officer."**

He was stated that the Accused was not drunk. Once again I state that his presence is not mentioned by the PW.1. Furthermore this witness had stated that PW.1 and PW.3 were talking when the two i.e. the Accused and the deceased were talking, struggling and when the Accused shot the deceased.

It is on record and not denied by the Accused that after the shot he was overpowered by crowd and Police arrived. I shall thus deal with the evidence after the incident.

PW.2 P.C. Nderitu issued the fire arm (Ex.1) to the Accused around 4.00 p.m. with six rounds of ammunition. He also stated that even though it was a Smith and Wesson Revolver the Accused recorded it as Taurus in the Arms movement Register, but he was quick to accept that the similarities between the two are many and one can make mistake in distinguishing between the two. . I mention this piece of evidence as the Learned State Counsel Mr. Ombago has submitted that due to this wrong recording, the Accused can be said to have harboured malice aforethought of committing any wrong acts. With due respect to her, I do find that it is a very far fetched and untenable submission as the Accused was in any event on patrol duties and could not have in any event shielded him from any charge due to issuance of

fire arms and ammunition. This witness was not asked whether the Accused was drunk.

He also stated that in case of any error on the record of the register, the officer would be asked to surrender the issued firearm to verify the error, on the register of the Arms Movement.

PW.5 P.C. Wambua heard a gunshot coming from the Petrol Station when he was buying a credit card (*sic*) at a nearby kiosk. He saw one person bleeding and crying and a woman near him. He saw other four to five people struggling and one of them holding a gun. Going nearer he found the Accused having been overpowered by those people. He described the revolver Keibley which is the revolver a third name for Exhibit 1 so far on the record. P.C. Nderitu (PW.2) arrived and they took the Accused to the Police Station. He stated that in his opinion the Accused was drunk as they both had to carry him to the Police Station and as he was unable to walk and was not stable. The Accused did not reply when he asked him why he shot the deceased.

PW.6 APC Jonathan Kinyu arrived at the scene after he heard the gunshot and saw PW.2 and PW.5 having arrested the Accused and added that they were holding him. He also stated that if P.C. Wambua (PW.5) had testified that they were holding the Accused because he was drunk he would not doubt him. This he said after stating that when one is arrested by police officers his movements are controlled by them.

PW.4 came to the scene after the event and except for stating that the crowd was getting angry did not add much to the issue before the court.

Last is PW.10 Chief Inspector Siplakas Lubakwah and was the O.C.S. of Namanga Police Station. He heard a gun shot around 5.40 p.m. when he had arrived home after duties. He went to the scene and took the deceased to a nearby clinic and due to his serious injuries arranged for his transport to be taken to Kajiado Hospital. On return, he saw an angry crowd and due to tension arising the Accused was handed over to DCIO Kajiado. He also stated that he found the Accused drunk while he was in cell but found him really drunk when he was being transferred to Kajiado.

The Accused in his sworn testimony stated that on the material day he was on report duties at Namanga Police Station till 4.00 p.m. and thereafter was issued a revolver with six rounds of ammunition, as he was to perform patrol duties, with PW.2 and PW.5. However, none of them has stated so in their testimonies nor were they asked. Anyway, according to him after seeing his family off at matatu stage to go home, he came back to the above two whom he found taking drinks at a Bar. He was invited and started with hard drink of Safari cane. After having one and a half bottles thereof, he got really struck and became drunk. He came out and started walking towards the Patrol Station as it was a short cut and saw some young people whom he greeted. One of them (the deceased) did not greet. They contracted each other and the deceased started pulling him. When he held him he felt the firearm was slipping off. He tried to place it back but the deceased held his hand which was holding the firearm. They struggled and all of a sudden he heard a gun shot. He saw the deceased falling down. He was shocked as he did not expect that result. He heard people running towards him who were his colleagues i.e. PW.2 and PW.5, P.C. Wambua asked for his gun and while surrendering his gun, he cautioned him not to touch the metallic part as it would interfere with the investigation, and also told him that the wounded person needed the medical assistance. They arrested him and after some distance they had to carry him. Then he found him next in a Land Rover going to Kisinya Police Station.

In my view, as per his testimony, his defence should be an accidental gun shot due to scuffle rather than the diminished responsibility due to drunken state where his mental faculty was impaired. His narration how the incident occurred, how he surrendered the gun with caution and advice for the medical treatment to the deceased, in my humble view, is not that of the person who was not aware of what was going on. I can only, however, find that, he would not have committed the offence if he was not drunk and that he was not capable of totally controlling his physical activities.

Even from the contradicted evidence from PW.1, PW.3 and PW.7, one fact does emerge which is that the Accused and the deceased had confrontation and as a result of that confrontation, his drunken state

stopped him from being in total control of himself and during the scuffle, the shot was fired which killed the deceased. It is thus difficult to find, beyond reasonable doubt, that the Accused had malice aforethought as defined in Section 206 of the Penal Code.

The Assessors also have given their opinion that the Accused is guilty of Manslaughter as he committed the act of killing under influence of alcohol.

I have for reasons given above mentioned, come to the conclusion that the Accused did not have or incapable of harbouring malice aforethought before or at the time of committing the act of killing the deceased.

In the premises, I enter a finding of not guilty for the offence of murder as leveled against the Accused and instead a finding of guilty for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

K.H. RAWAL

JUDGE

21.3.2006