



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.27 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH LEKINI LEKUPUNY.....ACCUSED**

**JUDGMENT**

1. **Joseph Lekini Lekupuny (Joseph)** pleaded not guilty to the charge of murder of **Resipo Lesipia (deceased)**

2. The death of the deceased was confirmed by the deceased's two brothers **Jacob Lekaldero (PW1)** and **Julius Lekaldero (PW7)** and by the doctor who performed the post mortem. It was doctor **Miringu** who conducted the post mortem of the deceased and he found that the cause of death was severe head injury with intra cranial haemorrhage and haematoma after an assault.

3. Prosecution relied on evidence of the deceased's two brothers who were eye witnesses. According to PW1, on the material date, he went to the deceased home by means of a motor cycle. On arrival he found PW7, the deceased, the accused and the daughter of the deceased. He found them at the boma of the deceased. This is what he stated:

***“When I arrived, I found they (accused and deceased) were quarreling and fighting. It was Joseph Lekini (accused) and Resipo (deceased) [who] were fighting. As they fought they were talking about cows, dowry.”***

4. The witness said that the accused wanted his cows that he had used to pay dowry to be returned to him while the deceased wanted the accused to wait for the matter to be discussed in the family. PW1 said that the accused wanted to take his cows immediately.

5. PW7 stated that he on the material date visited the boma of a person called **Loloju** where he found the accused, the deceased and PW1. That boma of **Loloju**, was as stated by PW7, one and same boma as that of the deceased. PW7 said that on his arrival he found the accused and the deceased fighting with a club. This is what PW7 stated that he found on his arrival:

***“they (accused and deceased) were fighting with rungu (club). Joseph (accused) was hitting the deceased Resipo Lesipia. He was using rungu. The rungu was made of wood.”***

6. On being cross examined PW7 stated that the deceased also had a walking stick when he was fighting with the accused. PW7 on further been questioned said that the deceased did not ordinarily use the walking stick to aid him with his walking.

7. The above was the only evidence which the prosecution presented to prove that the accused committed murder by killing the deceased.

8. The accused gave a sworn defence. He stated that on the day in question, he was at the boma of **Luchui** where he was taking alcohol. PW1, PW7 and the deceased arrived at that place drunk looking for alcohol. PW7 purchased alcohol for Ksh 200. They drunk including the accused. He further stated that the lady selling them the alcohol refused to give the deceased alcohol on credit. Accused therefore bought alcohol for Ksh 1000 which they all drunk and became ineberrated. A problem arose when the accused purchased alcohol for his own consumption and the deceased and PW7 wanted to have some of it. When the accused refused, the deceased began to abuse him invoking the accused mother's name. Accused said he responded with similar abuse. That was when the deceased hit him on his forehead and on his back with a rungu. Accused said that he realised that the deceased could harm him so he stood up. He reiterated by hitting the accused on his back. accused said that he hit the deceased in self defence. He further said that PW7 held on to him and told PW1 and the deceased to beat him up. As a consequence of that beating, he fell down together with the accused and PW7. Whilst they were down struggling accused was able to free himself and jump over the fence. Accused went to his house where his wife helped him wash his injuries. They slept and police arrived the following morning and arrested him without informing him why he was been arrested. He later learnt at the police station that he was facing a charge of murder.

9. Prosecution's eye witnesses PW1 and PW7 were brothers of the deceased. In their testimony those witnesses were less than candid on

how the fight started and more importantly who started the fight. It is only the accused in his defence who alluded to this and stated that the deceased began to hit him while being assisted by PW7 and he, the accused, only fought in self defence. That line of defence was consistently set out in the cross examination of the prosecution witnesses by the accused's learned counsel. Indeed it was not until PW7 was cross examined that he admitted that the deceased had a walking stick while they were fighting with the accused. The sum of the evidence before me is that it was the deceased who would have been the enraged party and which could have led to the fight between him and the accused. This is because the accused was insisting on taking back his cows, from amongst the deceased's cows. This was because he wanted a divorce from the deceased's daughter. It is clear, even from the deceased's brother's evidence, that the deceased was intent on not allowing the accused to take the cows. The fight between the accused and the deceased could have been triggered by the fact that the deceased did not want his cows to be taken. Those brothers did not at any one time say that it was the accused who was beating the deceased. They however stated that during the fight the deceased was hit by the accused. When the fight ended, the accused did not run away. He said that he went home and had his wounds washed by his wife. The fact that he did not run away shows that he was not the provocateur of the fight.

10. In my view, the provisions of Section 17 of the Penal Code need to be referred to in this case. That section provides:

***“17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”***

11. The evidence in this case as I see it is that the accused was defending himself when he engaged in a fight with the deceased. After all he was facing three brothers who as the accused stated began to engage him in a fight.

12. The defence of self defence was masterly considered by the Court of Appeal in the case of **Ahmed Mohammed Omar & 5 Others v Republic [2014]eKLR** where the court stated:

*“What are the common law principles relating to self defence? The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in PALMER v R [1971] A.C. 814. The decision was approved and followed by the Court of Appeal in R v McINNES, 55 Cr. App. R. 551. Lord Morris, delivering the judgment of the Board, said:*

***“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances....some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. ...The defence of self defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”***

*According to ARCHBOLD – Criminal Pleading, Evidence and Practice 2002, paragraph 19-42, the test of whether force used in self defence was reasonable is not purely objective.*

***“There is no rule of law that a man must wait until he is struck before striking in self defence.” R v DEANA, 2 Cr. APP. R. 75, CCA.***

*The above Common Law principles have been applied locally in several decisions.”*

13. Another case cited in *Ahmed Mohammed* case (*supra*) was ***R vs William*[1987] 3 ALL ER 411**, where ***Lord Lane, C.J.*** held:

***“In a case of self-defence, where self-defence of the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury comes to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”***

14. The learned judge also cited the local case of **Robert Mungai v Republic (1982-88) 1 KAR 611**, the court, having reviewed several English and local authorities, delivered itself thus:

***“...we think, in view of the earlier East African cases we have considered, and the more recent English decision in R v SHANNON Crim. LR 438 1980, that, the true interpretation of the judgment of the privy council in PALMER v R is that while there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and one the facts of the case being considered.”***

15. What Section 17 of Cap 63 and the authorities cited above show is that where a person acts in self defence, they can rely on self defence as their defence.

16. My appreciation of the evidence before me is that the accused acted in self defence and is therefore not guilty as charged. The prosecution failed in this case to prove the charge on the required standard of beyond reasonable doubt. Since I entertain doubt, whether the accused in fighting the deceased committed an unlawful act, I will give the accused the benefit of doubt.

17. Accordingly, I hereby acquit **Joseph Lekini Lekupuny** of the charge of murder. I order that he be set free from custody unless he is otherwise lawfully held.

**DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2018.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant :Mariastella

Accused: Joseph Lekini Lekupuny

For Accused.....

For State:.....

**COURT:** Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**