



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL CASE NO. 14 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

PAKISEN LENGOMBIRO MOILE.....ACCUSED

JUDGMENT

1. **Pakisen Lengombiro Moile** (*the accused*) is charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code. He is charged with the murder of his wife **Sarapian Moile** (*the deceased*).

2. According to the accused he was married to the deceased for many years, he could not say exactly how many, but they had five children together.

3. According to the evidence of the deceased's brother **Meita Lemorijoi** (PW6) and his wives **Ramato Mumeita Morijoi** (PW1) and **Mpalapam Limorijoi** (PW3), the accused before the death of the deceased had marital disagreements in their marriage. The deceased informed PW6 that the accused had assaulted her. PW1 in evidence stated that the accused and the deceased first separated for one week, when the deceased went to live with her brother PW6. After that one week, they were reconciled at the reconciliation meeting with the elders. That however, on that same night, the deceased returned to the home of PW6.

4. The prosecution's evidence supported by PW1, PW3, PW6 and **Nkobonu Leitiko** (PW5) was that when the deceased again returned to her brother's home PW6, the following morning the accused went to PW6's home for another reconciliation meeting. The accused attended that meeting in the company of another man.

5. The decision of the elders at that meeting was that the deceased needed to be taken to hospital before being reconciled with the accused because the deceased had a swollen hand due to the assault by the accused. When the accused was asked why he assaulted the deceased, he replied that it was because she was his, that was why he beat her. PW6 in evidence summed up the end of that reconciliation meeting as follows:

"Sarapian (the deceased) was injured. I told accused to go away so that Sarapian could go to the hospital. Pakisen (the accused) said 'twende'. He, (accused) got annoyed and began to go away. Even his friend was surprised."

6. That night, after the failed reconciliation meeting, **Ramato** (PW1) stated that the accused went to her house at 9 pm. This is what she stated:

"19.4.2016, I recall that date. Accused came to breach the peace and/caused disturbance. It was 9pm. I was in my house sleeping. I was in the company of the deceased and my three children. Yes, we were five of us. We were sleeping. As we slept we heard someone knock the door with a gun saying 'mama-mama'. Yes, that person entered the home, the way he entered the house by force, I got up and I took my children and held/grabbed onto them...I recognized the accused's voice and there was light from firewood fire in the house. Yes I saw him. I saw that it was Pakisen (accused)."

7. **Ramato** proceeded to narrate what happened. That it was the accused who forcefully opened the door. As they passed each other, **Ramato** said the accused hit her on her left shoulder. **Ramato** saw the accused had a gun which she described as a long one. She estimated it to be one meter long. When **Ramato** was shown the rifle by the prosecution, that is, prosecution exhibit no. 1, she identified it as the one she saw with the accused. **Ramato** further stated that the accused after he passed her as she and her children exited the house, he shot the deceased. This is what **Ramato** said:

"accused shot the deceased as I was going out of the house. I had gone out of the door. I heard the accused shoot once....after killing the deceased he (accused) came out saying 'I have finished her and I go without fault'."

8. That night **Ramato** and her children slept in the house of **Ndiira Leira Leitiko**.

9. The accused's brother **Kosike Ole Moile** (PW7) stated that on learning of the killing of the deceased, he went to the accused's house but he did not find him there. On another day, PW7 in the company of other elders found the accused in the middle of a forest. Accused showed them where he had kept the gun, prosecution exhibit no. 1. PW7 in evidence stated:

*"It was **Pakisen** who showed us where the gun was. **Sorrisha** took the gun where **Pakisen** showed us. The gun was in the forest. If **Pakisen** had not shown us where the gun was, we would not have found it. It was **Pakisen** who volunteered to us where the gun was."*

10. PW7 stated that the elders who were with him tied up the hands of the accused with a rope but that the accused ran away into the forest. Consequently, the elders and PW7 took the recovered gun to Doldol Police Station.

11. **Topet Leitiko** (PW8) is a herdsman. On **24th April 2016**, he was herding his animals at a place called **Siiku**. At 4 pm as he was heading to a place where morans were celebrating, he saw the accused hiding under a tree. When he reached the boma where the celebrations were taking place, he informed someone called **Kimbai**. **Kimbai** told him that the accused had killed his wife and they therefore agreed to go and look for him.

12. They did not find him where PW8 had seen him but they followed his step and traced him. Accused on being challenged to stop by the two began to run but he was out-ran by PW8. Accused was arrested by them and taken to Doldol police station.

13. Accused in his defence confirmed that the deceased was his wife. He said that someone by the name of **Leringato** went to his boma one night and shown a torch on him. That person then left. When the accused questioned his wife (the deceased) who that person was she told him that it was **Leringato**. The next day the deceased went to the deceased's family home. Accused said that the following day he went to her home but on reaching there, he was told by the deceased's family to return to his home and go back in three days. It was thereafter on returning to his home that some elders went to his home and took him to the police station. As they took him to the police station, they alleged that he had killed his wife. He denied killing her and stated that it was **Leringato** who had killed her. The accused stated that on the night the deceased was killed he saw **Leringato** at 8pm near the family home of the deceased. He further said that he first saw the gun before court at the police station.

ANALYSIS AND FINDING

14. The fact that the deceased died was confirmed by **Sergeant Timothy Njibu** who recovered the body of the deceased and took it to the mortuary. Death was also confirmed by the doctor who performed the post mortem on the deceased's body.

15. The cause of death of the deceased was stated to be a single gunshot wound to the deceased's head.

16. Who then was responsible for the unlawful killing of the deceased? There is cogent evidence adduced by the prosecution pointing to the accused as the person who killed the deceased. **Ramato** stated that she recognized the accused by his voice when he was calling out '**mama**'.

17. **Ramato** in evidence said that although the accused's home was far from theirs and although she had not visited the accused home, the accused who was her brother in law would sometimes visit their home. On being cross examined, this is what **Ramato** stated:

*"I am sure it was the voice of **Pakisen**. It was **Pakisen**."*

18. On being re-examined, **Ramato** stated:

*"I recognized accused **Pakisen** by means of his voice."*

19. Voice recognition has for a long time being relied upon by the courts as a means of recognition. The fact that **Ramato** knew the accused well and must have been familiar with his voice was confirmed by the accused when he gave his defence when he said:

*"**Ramato** knows me well. She is a relative."*

20. In the case of **Boniface Gitonga VS Republic [2015] eKLR** the Court of Appeal in discussing evidence of voice recognition stated:

*"In **KARANI VS R [1985] KLR 290**, this Court held at page 293:*

"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."

21. Although the accused in his defence alleged that it was **Leringato** who shot the deceased, the voice identification by **Ramato** sufficiently placed him at the scene and identified him as the one who shot the deceased. The defence of the accused, that it was **Leringato** who shot the deceased, was contradictory and is therefore rejected by this court. At one time the accused said that he was not anywhere near the deceased's

family home. Later he stated that it was Leringato who shot the deceased. On being questioned about the contradiction of those two statements the accused stated:

“I went at 8pm (to the deceased’s family home). I saw Leringato. He (Leringato) wanted to shoot me but he shot the deceased.”

22. On being cross examined again, the accused denied that he was at the deceased’s family home on the subject night.

23. It does not escape the attention of this court that the identification of the accused by Ramato was under difficult circumstances. In the case Titus Wambua v Republic [2016] eKLR the Court had this to say on identification under difficult circumstances:

“The law as regards identification under difficult conditions is now well settled. In the case of Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu, this Court states as follows:-

*“We now turn to the more troublesome part of this appeal, namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them.....what we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of **R vs Turnbull** [1976]3 All ER 549 at page 552 where he said:-*

‘Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’

24. But this was not a case of identification but rather of recognition. **Ramato** recognised the accused because there was fire from the firewood in her house. She stated:

*“I recognised the accusedthere was light from the firewood....yes I saw him. I saw it was **Pakisen**....the moonlight entered the house because the house is not fully roofed. Inside the house, the firewood was bright and there was also moonlight lighting the house.”*

25. The fact that the house of **Ramato** was not fully roofed was confirmed by **Sergeant Timothy Njibu** who went to the scene to recover the deceased’s body. This is how the said officer described the house in which the deceased was shot:

“this room was poorly thatched. It seemed in the night it had rained and the rain water dilluted the blood of the deceased.”

26. That evidence corroborated Ramato’s evidence that she recognized the accused from the burning firewood and the moonlight because of the poorly thatched roof. It is also important to state that **Ramato** had added firewood before the accused went to her house. Therefore there was more light from the fire.

27. The gun prosecution exhibit No. 1 which was used to shoot the deceased was recovered by the accused’s brother after the accused told him and other elders where it was. It was surrendered to the police. That gun and the available ammunition were confirmed by the fire arms examiner as capable of being fired. Further, the spent cartilage recovered from the scene by **Sergeant Njibu** was confirmed to have been fired by the gun marked as Prosecution exhibit no. 1.

28. Having considered the prosecution’s evidence and the defence, I am of the view that the accused did not tell the truth in his defence. His defence was contradictory in the most vital parts. He at one time said that he was at his home on the night in question but later blamed the shooting on a person he named as **Leringato**. According to the accused, the said **Leringato** was aiming to shoot him but missed him and instead shot the deceased. On being questioned on that allegation, the accused yet again denied being at the scene of the shooting. In view of those inconsistencies and because I had the opportunity to observe the accused and the other witnesses as they testified, I do reject the defence offered by the accused.

29. On the other hand, the prosecution adduced very consistent, credible and congenit evidence which clearly shows that the accused shot the deceased.

30. **Ramato’s** evidence of voice and physical recognition was well corroborated by the evidence of **Sergeant Njibu** who saw the roof was poorly thatched; it was also corroborated by the accused’s brother who met the accused and the accused showed him and other elders where the gun that he used to shot the deceased was to be found; there was also corroboration by the herdsmen who arrested the accused. The herdsmen’s evidence was that the accused although he was requested to stop ran away. Why would the accused ran away unless he was avoiding being arrested and had a guilty mind. Running away can sometimes be construed as proof of guilt. **Ramato’s** evidence was finally corroborated by the fire arm examiner who linked the gun surrendered by the accused with the spent cartilage recovered by **Sergeant Njibu** at the scene.

31. It is clear as I review the whole evidence adduced in this case that there is overwhelming evidence proving the accused to have been

responsible for the deceased's death. The defence offered does not raise any doubt that the accused committed the offence.

32. It is also the finding of this court that the accused had malice aforethought. Pw5 stated that at the reconciliation meeting, when the accused realised the deceased would not be going home with him, he got annoyed and rushed away. This is what PW5 said:

“when accused realised we were not releasing his wife (deceased) to him he refused to talk any more. He became silent. We noticed his countenance had changed....he looked annoyed.”

33. No doubt the accused was disappointed that things did not go his way at the meeting. It is likely that that annoyance led to the killing of the deceased.

34. In conclusion, it is therefore my finding that the accused was proven beyond reasonable doubt to be guilty as charged. I convict ***Pakisen Lengombiro Moile*** of the murder of ***Sarapian Moile***.

DATED AND DELIVERED THIS 2ND DAY OF NOVEMBER, 2018.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant :Mariastella

Accused: Pakisen Lengombiro Moile

For Accused.....

For State:.....

COURT: Judgment delivered in open court.

MARY KASANGO

JUDGE