

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS) Criminal Case 57 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON LEKUSHULA BEN & ANOTHER.....ACCUSED

JUDGMENT

The accused has been charged for the 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 offence as stated in the information are as follows:

“On 31st day of December, 2001 at Elf Service Station along Ngong Road within the Nairobi Area jointly murdered SAID MAHINE MOHAMUD.”

In his evidence Said Hassan Hamud introduced himself as the cashier at Amazon Café Mumias. Apart from the above, he also testified that in the year 2001 he was staying in Dagoretti Corner, Nairobi with his brother, namely Said Mahine Mohamud. He recalled that on 31st of December 2001, at around 10.30 p.m. he was at Posta Club with 16 other young men. They later agreed to go and usher the New Year at a well known spot called K1 club. One of their neighbours namely John Oduor agreed to borrow a pick up from his father. While they were waiting for him at Posta Club, John Oduor went to collect the vehicle. On coming back John Oduor asked them to contribute money for fuel for the vehicle. In response all of them agreed to contribute money for the fuel. However, on reaching Adams Arcade, some of their friends suggested that they should go to Kibera to buy “miraa”. After purchasing the same, they drove towards Ngong Road again. While on that road John Oduor suggested that they should buy fuel at Elf Service Station. On arrival they contributed Kshs.195. In response Oduor told the petrol attendant to give them fuel of Kshs.200 given that they were about to celebrate the new year. In response the petrol attendant declined and threw the money at Oduor. Since Oduor got offended they started quarreling before he hit the petrol attendant with a head butt. Thereafter, several attendants joined the fight and assaulted Oduor using wipers. In response PW1 and his friends grabbed Oduor whom they placed in the vehicle and urged him to drive away. One of the attendants urged the security guard to press the alarm. After about three minutes, the back up vehicle for EARS was driven to the petrol station. The said vehicle got PW1 and his friends while they were leaving. While they were on Ngong Road, two people from the back up car alighted with rifles and started shooting at them. By then their vehicle was already being driven fast by Oduor. On reaching Kobil Petrol Station Nicole Njeri started complaining that she had been shot. Seeing the above they told the driver to stop so that they could confirm the allegation. When their vehicle was stopped, PW1 saw the lights of another vehicle. Fearing it was the back up vehicle, all them alighted and started running away towards Masaba Hospital. Subsequently, PW1 heard Alexia Wambua and Ali Mohamed complain that their hands were heavy. When PW1 observed the right hand of Ali Mohamed, he observed that the same had an injury which was bleeding. Then PW1 also observed that Alexia had been shot on one of the fingers on the right hand. Before entering Masaba Hospital, Mohamed Alawi told PW1 that he had seen Said Mohamud (who is the brother to PW1) lying on the road while foam was coming out of his mouth. After taking Ali Mohamed and Alexia to hospital, PW1 and Mohamed Alawi took a taxi to go back to the scene. However, since they never got Said Mohamud, they went back to Masaba Hospital. Eventually, while they were on the way home, they met Oduor at Total Petrol Station, Adams Arcade. Oduor told them that he had taken Nicole to Mater Hospital. From there, they drove home to report what had happened. On arrival, Nasra Mohamed went to look for the brother of PW1. After some times, the Nissan vehicle that they had used was driven back and PW1 heard people crying. Nasra and Nicole’s mother told them that they had found his brother dead. Consequently, they went back to the scene where PW1 saw his brother lying dead after being shot. After sometimes, police officers went to the scene where they collected the body of the deceased and took the same to the city mortuary. It was the evidence of PW1 that his brother was shot while in the vehicle. Ultimately, they went to Kilimani Police Station where they recorded their statements. Apart from the above, PW1 also testified, that the two officers who alighted from the back up vehicle were wearing dark blue jackets which he saw with the assistance of security lights. PW1 emphasized that he clearly saw them because they were just across the road. On the other hand, PW2 Mohamed Alawi stated that he was 24 years old by the time he was giving his evidence. Besides the above, he recalled that on 31st December 2001 he went to Kibera to buy “miraa”. By then they were about 20 people who had used a pickup which was being driven by Oduor. They left Kibera at about 11.30 p.m. and drove to Elf Petrol Station Ngong road. Thereafter, PW2 confirmed and corroborated the story of PW1 in details. In addition to the above, PW2 explained that after the vehicle stopped at Mobil Petrol Station he crossed the road and he was told that one of their friends had fallen down. On going to the scene he found that it was his cousin Mahine Mohamud who was lying on the ground while frothing in the mouth and could not talk. PW2 also observed that the clothes of the deceased were blood soaked and hence he ran to his friends whom he informed about the incident. After realizing that Ali

Mohamed and Alexia had been shot on the finger, they took them to Masaba hospital. Though they later took a taxi they were unable to trace the scene due to the condition that they were in. On going back to Masaba Hospital they found that the victims had already been treated. On the way, they met Oduor with his pick up and he informed them that he had taken Nicole to Mater Hospital since she had been shot. PW2 told the court that the pick up being driven by Oduor was full of blood at the back. Consequently, PW2 went back to the scene where they found Mahine Mohamud whom they saw lying dead on the side of the road. PW2 recalled that while they were earlier at the petrol station, he clearly saw police officers who shot at them while armed with rifles. PW2 was able to describe the police officers who had shot at them. He described one of them as dark while the other had his ears pierced. Specifically PW2 identified *the accused* as one of *the police officers* who *were shooting at them*. On his part, PW3 John Oduor Otieno testified that in the year 2001, he was staying in Suna Estate Ngong road. Further to the above, he also testified that on 31st December 2001, at around 10.03 p.m. he took his mother to St. Vincent Church on Ngong road. From there he drove his pick up registration No. KAG 338 E upto his home. On the way, PW3 met Said who requested him to drop them at Langata after he had collected his friends at Posta Club. Later, Oduor drove them and found Said with his friends who were waiting for him. PW3 testified that two young girls sat in front and three girls and eight boys sat at the back. It was the testimony of PW3 that they were about 13 people on the vehicle. From there PW3 drove them to Kibera where some of the passengers bought "miraa". Subsequently, PW3 drove the vehicle to Elf Petrol Station where he gave the keys to the petrol attendant to put fuel in the pick up. Though Said collected Kshs.190 the petrol attendant had already put in fuel worth Kshs.200. Thereafter, they added Kshs.5 to make the total of Kshs.195. Due to the shortfall of Kshs.5 one of the petrol attendants threw the money at PW3. It was the testimony of PW3 that the pump attendant pushed him and he fell against his car door. At that stage the young girls told PW3 to enter the vehicle. Before entering the vehicle, one pump attendant took the windscreen washer and broke the glass on the window to the door. On the way out of the petrol station, PW3 saw a backup vehicle belonging to EARS. After passing the vehicle, PW3 heard gun shots and he joined Ngong Road. While on the way to the city centre PW3 was informed that they were being pursued by another vehicle. Reaching Kobil Petrol Station, PW3 packed the vehicle besides the road and passengers alighted and started running towards Rose Avenue. However PW3 remained with the four young girls and one young man. Since Nicole was bleeding PW3 rushed her to Mater Hospital. Later, while Nicole was being treated, PW3 left with a young man and two young girls. As PW3 was driving along Ngong Road, he met some of his passengers and drove to the home of Said where he explained what had happened. From there, they also went to the home of Nicole and also explained what had happened. Eventually, PW3 drove with Said, Mohamed, and Ali along Ngong road to look for the deceased. On arrival at the scene they found the deceased lying by the side of the road. Ultimately police officers came to the scene where they collected the body of the deceased which they took to the city mortuary. From there they went and reported the matter at Kilimani Police Station. In her evidence, PW4 Nicole Caroline Njeri who is a student at USIU confirmed and corroborated the story of PW1, PW2 and PW3. She also confirmed that she had been shot on her hand and became unconscious. She also confirmed that she had been admitted at Mater Hospital for a week. Both PW4 and PW3 confirmed that they never saw who was shooting at them. Similarly PW7 Alexia Wambui Thuo also confirmed and corroborated the stories of PW1, PW2 and PW3. In his evidence PW5 William Oduor Oloo introduced himself as an officer with EARS Security Company. He also recalled that on 31st December 2001 at around 7.30 p.m. while he was on duty he was informed that an alarm had been raised at Elf Petrol Station along Ngong Road. From there, PW5 proceeded to the petrol station while accompanied by two police officers from Kilimani Police station. Among those police officers was the accused person. It was his testimony that the same was the first day for him to see the accused. On arrival at the petrol station, they were told that there was a vehicle that had been fueled but the owners had refused to pay for the services rendered. Apart from the above, PW5 also stated that before reaching the scene they left the police officers about 50 meters away. On driving into the petrol station, they found a vehicle that was being driven away towards town. According to PW5 a petrol attendant by the name Ndegwa told him that he had fueled a vehicle with fuel of Kshs.1000. However, the occupants had refused to pay the said amounts. Ndegwa described the vehicle to be a white pickup. While still at the petrol station, PW5 saw a woman who claimed to have been robbed of her vehicle along Ngong-Ring road Kilimani. It was the evidence of PW5 that they later reported the matter to their office and that earlier he had heard gun shots before they reached the petrol station. He also emphasized that while they were at the petrol station he never heard any gunshots. On the other hand, PW6 David Ntela Maitai introduced himself as a security officer with EARS group. Further to the above, PW6 recalled that on 31st December 2001 at around 6.00 p.m. he was at Elf Petrol station. Later at around 11.45 p.m. he heard noise and on going to the petrol attendants he saw an argument between them and customers. The attendants complained that they had fueled a pick up though the customers had refused to pay. According to PW6 the occupants of the pick up were young men and women. Some of them were carrying wipers. When PW6 enquired from the customers what was wrong they threatened to assault him. Seeing the above, PW6 pressed an alarm so that they could get reinforcements. After a few minutes a car belonging to EARS was driven to the petrol station and immediately PW6 heard gun shots from different directions. It was the evidence of PW6 that one of the young men broke the windscreen when he was trying to assault an attendant. He also noted that the young men never took anything away. However, shortly later on, a woman complained of having been robbed of cash and a mobile telephone. PW6 further stated that the EARS car turned around but never pursued the pick up. Subsequently the security officers from EARS inquired as to what had happened. Before the EARS car was driven to the petrol station, PW6 never heard any gunshots. PW6 confirmed that the accused was among the police officers who were on duty on that day. On the other hand, PW8 Chief Inspect Immanuel Lagat introduced himself as the firearms examiner based at the Forensic Ballistic section CID headquarters Nairobi. He recalled that on 9th January 2002, he received the following exhibits from Cpl. Josiah Gichoki. These were; two G3 rifles, S/No. F21037 and 6928077 marked exhibit (a)

and (b) respectively, Exhibit (c) 32 rounds of ammunition (D1 to D3) and two magazines, exhibit E and F. Apart from the above, PW8 was also requested to ascertain whether exhibit (a) and (b) had been fired. That apart, he was also requested to ascertain the calibre of exhibit 3 and thirdly whether exhibit (a) and (b) are in good mechanical condition and whether the exhibit (c) had been discharged by exhibit (a) or (b). After examining exhibit (a) and (b) he found them to be in calibre 7.62mm and in fair and general mechanical condition. He also formed the opinion that they were also complete in their components parts and capable of being fired. PW8 successfully test fired each of the rifles by means of three rounds of ammunition that he picked at random. He also formed the opinion that D1 to D32 are in calibre 7.62 mm x 51mm. He was also of the opinion that they were suitable for use in exhibit (a) and (b). Besides the above, PW8 formed the opinion that exhibit (a), (b), and (D1 to D32) are firearms and ammunitions respectively as defined by the Firearms Act Cap 114 Laws of Kenya. He also found that exhibit (c) was a fired cartridge case in calibre 7.62mm x 51mm. Thereafter, PW8 carried out a comparative examination of exhibit (c) in conjunction with the six cartridge cases fired in the exhibits rifle (a) and (b) which revealed that exhibit (b) – S/No. 6928077 was used to fire exhibit (c). On examination, he found exhibit (e) and (f) were two detachable box magazine designed to be used in exhibit (a) and (b). Each of them was in good working order. Eventually he prepared his report dated 18th June 2002 and produced a photocopy as exhibit 1.

In his defence Jackson Lekushula, now the accused, testified that prior to his arrest he was a constable with Kenya Police based at Kilimani Police station. He also testified that he had worked in the police force for 21 years. He recalled that on 31st of December 2001 at around 11.30 p.m. while they were in Muchai road, they were called by the controller of EARS security company who told them that there was a robbery that was taking place at Elf Petrol Station. According to the accused, before arrival at the scene they heard gun shots and hence they alighted from their vehicle. Subsequently they heard noise from the petrol station. Thereafter, the accused saw a motor vehicle that was leaving in high speed from the petrol station without the lights being on. While there, one of the petrol attendants shouted that robbers were leaving. According to the accused, one of his colleagues who was ahead stopped the said motor vehicle. However, the vehicle never stopped and hence his colleague shot once at the vehicle. On rushing to the petrol station, they were informed that the vehicle was carrying robbers. Apart from the above, they were also told that the vehicle had been filled with fuel of Kshs.1000 though the occupants refused to pay for the services. In addition to the above, one Ndegwa complained that he had been assaulted by the driver of the vehicle that had left. Consequently, a woman went there and complained that she had been robbed of cash, ignition keys and mobile phone by armed gangsters. From there the woman took them to her car and they later called the duty officer namely Sgt. Matende. Thereafter, they went to Kilimani Police Station where they booked a report and proceeded with their work. On the following day, they were told that a shooting incident had occurred along Ngong road. Later the accused and one Samson Otieno were directed to record their statements before they were later arrested and arraigned before the court. It was the evidence of the accused that he did not know where his colleague had gone to. Though the accused was released in the year 2003, he was later re-arrested on 28th of August 2007.

From the evidence on record, it is crystal clear that the incident took place at around 11.30 p.m. on the eve of the new year of 2002. Further to the above, there is no doubt that there was a quarrel between a petrol attendant and PW3 John Oduor Otieno over Kshs. 5/-. Unfortunately, each of them was supported by their friends. After the fracas, PW3 decided to drive away from Elf Petrol Station. Consequently, police officers decided to shoot at the pick-up that was being driven by PW3. There was no doubt that the said pick-up was carrying a group of young men and women who had planned to go and usher in the New Year. Unfortunately, that was not to be. It was the evidence of PW2 that one of the police officers who shot at them was the accused. The witnesses who gave evidence agreed that there were electric lights at the petrol station on the material night. The evidence on record also clearly showed that during the incident PW7 Alexia Wambua and PW2 Ali Mohamed were also shot. Both of them were later treated and discharged. While denying committing the offence, the accused explained how they had been called by the controller of EARS security company who told them that there was a robbery that was taking place at Elf Petrol Station. According to the accused, when they arrived at the scene, he heard gun shots before they alighted from their vehicle. After hearing noise from the petrol station, the accused saw a vehicle that was being driven away at a high speed without the lights being on. Though his fellow police officer tried to stop the vehicle, the same was in vain. In response, the said officer shot only once at the vehicle. It was the evidence of PW8, C. Insp. Lagat, a firearm examiner, that he examined two G3 rifles - S/No. F21037 and 6928077, and 32 rounds of ammunitions, 2 magazines. After examination, he concluded that exhibit (b) – G3 rifle S/No. 6928077 was used to fire exhibit (c). Unfortunately, the evidence of PW8 did not state specifically that the bullet that killed the deceased was from the rifle of the accused. Neither was the investigating officer called to tie up the loose ends to confirm the forensic evidence of PW8. Though PW2 testified that he saw the accused shooting at their group, the distance from each other was not revealed. Apart from the above, the evidence of PW5 and PW6 materially contradicts that of PW2. According to PW5, they had left the police officers about 50 metres away from the petrol station. Besides the above, he also stated that he heard gun shots even before they reached the petrol station. Apart from the above, PW6 testified that he heard gunshots from different directions. He gave the impression that robbers were fighting back after being shot at. In addition to the above, the prosecution never adduced any evidence to prove malice aforethought on the part of the accused. Neither did the prosecution adduce any medical evidence to prove the cause of death. That issue was left hanging in the air. In addition to the above, the prosecution never even availed any doctor to testify on the mental ability of the accused. In view of the contradictions and sketchy investigations, I hereby find that the prosecution has failed to prove its case beyond any reasonable doubt. Under the circumstances, the defence of the

accused is reasonable and plausible. The accused is found “not guilty” of the offence of murder, contrary to section 203 as read with section 204 of the Penal Code, Cap 63, Laws of Kenya. The accused is hereby “acquitted” and hence should be released forthwith unless held lawfully.

Those are the orders of the court.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open court in the presence of;

.....State Counsel
.....Defence Counsel

MUGA APONDI

JUDGE

2ND OCTOBER 2009