



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAKURU

**Criminal Appeal 102 & 103 of 2002**

- 1. **BENSON LIMANTEES LESIMIR** ..... 1<sup>ST</sup> APPELLANT
- 2. **WALINO LELESARA ARAKAN** ..... 2<sup>ND</sup> APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (D.M. Rimita, J.) dated the 26<sup>th</sup> June 2002*

in

**H.C.CR.C. NO.7 OF 2000)**

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**JUDGMENT OF THE COURT**

These two appeals, which we have consolidated for convenient disposal, are from the convictions of murder entered against the appellants by the High Court of Kenya at Nakuru (Rimita J.) on 26<sup>th</sup> June, 2002.

The two appellants, **Benson Limantees Lesimir** and **Walino Lelesara Arakan**, were jointly charged and tried with five others of the murder of **Father Luigi Adeni**, the deceased, at Archers Post Mission Centre in Samburu District within Rift Valley Province on the night of 14<sup>th</sup> and 15<sup>th</sup> September, 1998.

The facts presented by the prosecution before the trial court are brief and may be stated as follows. During the fateful evening the deceased together with Father Otieno (PW3) had held a meeting with the Catholic sisters in charge of the local health centre. The meeting ended at about 10.30 p.m. and the priests retreated to a tree within the mission compound for conversation before going into their respective houses. They had switched off the generator. PW3 then heard approaching footsteps behind them. He turned and saw three persons dressed in what looked like police or game warden uniforms. Those people carried long guns. The gang cocked its guns and ordered the priests to lie down. The deceased approached the gang and shouted in Kiswahili: **“Who are you? Where are you coming from and what do you want?”** As there was no response, the deceased further advanced towards the gang and attempted somehow unsuccessfully, to repulse it. It retreated. In the commotion that ensued PW3 jumped over a nearby concrete wall and hid. He then heard three quick successive gunshots. The deceased shouted:

**“They have killed me.”** The attackers then ran away. PW3 and the nuns, including PW2, ran to where the deceased lay groaning. They tried to administer first aid and as the deceased appeared gravely injured he was rushed to Wamba Hospital but succumbed to his injuries before reaching hospital.

Chief George Leariwaso (PW5) lived about 1½ km from the mission. At the material time he heard gunshots from that direction. He rushed there and found that police were already at the scene conducting a search for the raiders. PW5, the police and some local elders assembled a team of expert trackers. They were able to trace some footmarks all leading from the mission to the manyatta of Arkan Lelesara. They concluded that the footmarks had emanated from the manyatta to the mission and from the mission to the manyatta.

PW5 testified further that the prints were of boots and tyre sandals (akala shoes). He told the court that Lelesara’s manyatta was surrounded by a fence of thorns.

On the following day, i.e 15<sup>th</sup> September, 1998, Dr. Mario Sjorza performed a postmortem on the body of the deceased. The deceased had suffered a cut wound in the right index finger and a bullet wound in the stomach. The cause of death was haemorrhagic shock from bullet and knife wounds.

After investigations, the two appellants and five others were arrested and placed in custody. On 19<sup>th</sup> December, 1998, the appellants made Statements Under Inquiry. In them they stated that they and other morans were at the manyatta when they heard gunshots from the direction of the mission. They had been enjoying dancing and traditional songs. They hurriedly dispersed and went to sleep. When they learned that the police were looking for the killers of the deceased they were frightened and went into hiding. They were later informed by one Koyaso that David Lenamunyi and one Lenkare had killed the deceased. It is significant that these named persons were the appellants’ co-accused. The appellants, however, denied committing the crime charged.

In convicting the appellants the learned trial Judge held that he could safely conclude that the deceased was attacked by three persons, among them, the appellants. The basis of his holding was the testimony of PW3 who had testified having seen three persons just before the attack on the deceased; the footmarks which led from the manyatta to the mission and back to the manyatta and the Statements Under Inquiry which were made by the co-accused of the appellants.

The learned Judge held:-

**“In his statement under inquiry, the 7<sup>th</sup> Accused (the first appellant) admitted that he went into hiding with Koyaso to avoid arrest by the police.**

**I have looked at the evidence in its totality. I have considered the defence of each of the accused.**

**The evidence has disclosed some important matters. P.W.3, saw three people who attacked the deceased. Accused number two saw the three morans who left the Manyatta of Mzee Lelesara. Two were armed with guns. The footmarks of the assailants led to the Manyatta of Mzee Lelesara. They also led to the mission.**

**From the evidence before me I can safely conclude that Father Luigi Adeni was attacked by three people. These three included the first and the seventh accused persons.**

**But it must be noted that the cautionary statements produced by the police are self-serving and they are statements from accomplices. They were also repudiated.**

**The fact that they were repudiated despite the fact that they did not implicate the makers can be viewed in two ways. They were true and had to be denied or their effect was not well understood.”**

From the synopsis of the trial court's judgment it is noted that the case against the appellants was built on the following premise:-

- a) the alleged Statement Under Inquiry.
- b) circumstantial evidence.

and

- c) implication in co-accused statements.

It is apparent from the record of appeal that the appellants had a common ground of appeal stating that the learned trial judge had failed to evaluate all the evidence before him and in not finding that the prosecution had not proved its case against them beyond all reasonable doubt.

We will now consider the Statements Under Inquiry made by the co-accused. It is true that the appellants were mentioned in the statements made by the co-accused. What is their probative value? Indeed this is evidence of the weakest kind which can be taken into account under **section 32(1)** of the **Evidence Act: Raphael Oduor Ngoya & 5 Others v. Republic Cr Appeal No 136 of 1981** (unreported), and **Stephen M'riungi And 3 Others v Republic Cr Appeals Nos 134, 135, 136 and 137 of 1982** (unreported). It is accepted that such evidence, nevertheless, lends assurance to an otherwise strong case against the accused, but, that is not the position here. Firstly, the statements were repudiated on the ground that they were not voluntary; and secondly, the learned trial Judge treated the evidence of the footmarks corroborative of those statements. In our view, the evidence about footmarks was deficient to lend corroboration in that the terrain from the mission to the manyatta was uneven. It is said that it was sandy, rocky and uneven and the footmarks were not continuous. Moreover, also, according to the evidence of **Namaru Lelesara** (PW6), the appellants and the morans who had slept in the manyatta never left the manyatta during the material night. Further, the manyatta was surrounded by a not so secure fence of thorns and there were several entries into and out of it. There is, in our view, no evidence from which it can be safely concluded beyond reasonable doubt that the footmarks belonged to any of the appellants.

In the circumstances, then, the evidence tendered by the prosecution does not irresistibly point to the appellants to the exclusion of all others within the meaning of **R V Kipkering arap Koske & Another** 16 EACA 135 where it was, inter alia, held that:

**“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”**

In our considered judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellants on the basis of the evidence on record. It must follow that we are unable to uphold the convictions entered by the learned trial judge.

We think that the prosecution had not proved its case against the two appellants beyond any reasonable doubt.

In the result, we allow the appeals, quash the appellants' convictions and set aside the sentences of death.

The appellants shall be entitled to their liberty forthwith unless they are otherwise lawfully held.

**Dated and delivered at Nakuru this 29<sup>th</sup> day of September, 2006**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**