



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA PEAL AT MOMBASA**

**CRIMINAL CASE NO.158 OF 2004**

**REPUBLIC ..... APPELLANT**

- **VERSUS** -

**EDWIN KIPKEMBOI TOMNO ..... ACCUSED**

**JUDGMENT**

The accused Edwin Kipkemboi Tomno is charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.

The particulars are that on the 3<sup>rd</sup> day of December, 2004 at Masalani Police Lines in the Ijara District within North Eastern Province murdered No.74883 P. C. Wesley Koros.The accused denied the offence. The prosecution called five [5] witnesses in support of the state case.

**PW1 No.81932 P.C. David Kurtoni Uka, Uka**, recalled that on 3<sup>rd</sup> December, 2004, he reported on duty at 6.00 p.m. in the company of P.C. Mark Sagaram, Cpl. Robert Kandagor, P.C. Benjamin Lalmen, PC Dasi Bwabwa, a P.C. Rotich Kipngeno and the deceased Welsey Koros. The accused passed them seated and headed for his house. Accused (Kipkemboi) blurted that he was going to deal with each and everyone seated on the bench. He returned with an AK-47 and holding in his hand a police smoke jacket. He was bare-chested. He ordered Uka to book him on duty. When he (Uka) delayed he (Kipkemboi) asked the deceased to give him the occurrence book. Before the deceased could do so accused raised the rifle to a firing position and opened the safe and squeezed the trigger in the direction of P.C. Wesley Koros who fell down in a hail of bullets. Hell broke loose. P. C. Kiprotich Kipngeno went on the offensive trying to disarm the accused. Uka put down his G-3 Rifle and joined PC Kiprotich Kipngeno. In the process of disarming the accused, the rifle discharged a bullet which bust on the right hand of Uka who was rendered unconscious Uka regained consciousness in the hospital. He crowned his testimony that the accused shot the deceased twice in his presence.

**PW2, No.2003059032 A. P. Constable Kirimi Silas**, Silas was on duty at the main gate of the DC’s residence in the company of A.P. Joseph Ndirangu, AP John Saibulu, AP Moses Kangongo. He heard a gun shot and took cover. When he heard the second gun-shot he changed position. In that position, he saw a civilian holding a G3 rifle. He challenged him to surrender the rifle. Other AP’s equally challenged him to surrender. The gun man threw down the gun, raised his hands on top of his head. He (kirimi) grabbed the rifle, confirmed the number as 96558 (G3) with a magazine of 16 rounds of ammunition. He confirmed that the rifle in court was the same one. He tendered the same as MFI – 1 with assistance of other AP’s they arrested the gun man and took him to the police station. Silas knew the gun man as Constable Kipkemboi Tomno - the accused in court. He had known him for six (6) months prior to this incident.

**PW3, No. 79977 P.C. Joseph Kibet, Kibet**, stationed at Masalani Police Station. He had gun-shots from

the direction of the Police Station. He started moving towards that direction. When he was about to reach he heard another gun shot. He then went for his gun at the house and on the way met a colleague Joseph Tiabe running away from the police station. He took cover. About 7.00 p.m. he went to the health centre where he found P.C Uka being attended to. While still at the health centre O.C.S Inspector Gacharu ordered him to escort the body of the deceased to the City Mortuary Nairobi. He complied.

**PW4, No.81887 PC Rotich Kipngeno, Kipngeno** and his colleagues were relaxing on a beach outside the main gate of Masalani Police Lines. He saw the accused outside the main gate coming from the direction of Masalani Town. The accused was carrying his shirt in his hands and was bare-chested. As he headed for his house, accused said he was going to report on duty at the radio room. He came back carrying an AK-47 assault rifle with two magazines. He asked Constable Uka to book him on duty. Uka said he had no pen. Accused said he would book himself. Accused shouted out to be given a pen. He shouted for the second time. He placed his rifle at the ready position and fired two shots that hit the deceased Wesley Koros through the stomach. When accused retreated about three paces Kipngeno approached him from the back, grabbed the muzzle and the butt of the rifle from the back. Then directed the rifle to face upwards. Another officer, Uka (PW1), joined the disarming mission. As the disarming mission continued the rifle discharged a single bullet which hit Uka thereby injuring him. Constable Bwabwa at this juncture joined the disarming mission. Bwabwa managed to remove the magazine and took away the gun. They joined hands and took the injured colleagues Koros and Uka to Ijara District Hospital. According to Kipngeno the accused appeared to be drunk.

**PW5, No.218502, Chief Inspector John Gitau**, took the accused for medical examination at Garissa Provincial Hospital. After examination he was given the report from Dr. Adan. He kept the report which he produced as exhibit 1.

Gitau also took possession of the G3 rifle and the AK 47 to the ballistic expert. He produced the ballistic expert report as exhibit 2. Gitau later obtained the guns AK 47 and G3 rifle from the OCS Ijara who had had custody of the same. He produced the AK 47 as exhibit 3 and the G3 rifle as exhibit 4. Last but not least Gitau also retrieved post-mortem report of the deceased from Dr. Joe Gachuki, which was admitted as exhibits 5.

At the close of the prosecution case neither the defence counsel nor the prosecution made by any submission.

After considering all the evidence on record, I put the accused on his defence after explaining section 211 of the Criminal Procedure Code. The accused chose to make unsworn statement.

In his unsworn statement the accused recalled that he woke up in the morning and went for a cup of tea at Masalani Trading Centre. At the hotel he met a friend of his who used to ferry him from Garissa to Ijara. This friend invited him for a drink in his vehicle. He produced a bottle of merricane spirit. Normally accused was not a spirit taker but on this occasion he decided to take because for the previous two (20 months there had been shortage of beer in North Eastern Province. Accused and his friend went to a shop where there were seats on the verandah. From about 8.00 a.m. to 2.00 p.m. the accused drunk about 8, 205 ml bottles of merricane spirit. His friend suggested that they go for lunch before continuing but accused interjected that since he was going on duty at 6.00 pm they should continue drinking and sum up with a late lunch.

Accused then set on another 6, 205 ml bottle of merricane spirit. It was the accused's testimony that at the end of the day he had taken 14 bottles of 205 ml merrican spirit. Unfortunately, the accused had no watch. A good Samaritan told him it was 6.10 pm. Since he was late he left without taking the late lunch. The accused started jogging towards the police station. It was a hot day and as he started sweating accused removed his shirt and carried in his hand. He passed a group of officers seated at the gate which included the deceased. When he reached the house his eye sight was blurred. He could not distinguish ordinary clothes from uniform. He took what came first, a jungle jacket, and a AK 47 which he had in the house. He walked towards the radio-room. He did not reach. Things happened that later he could not account for. He found himself in police cells. When he sobered up P.C. Sakaran who came to see him at

the cells shocked him with the news that he had killed some of his colleagues. He could not fathom the magnitude of the problem. Later he was charged with the offence of murder. He crowned his testimony by saying that he did not intend to kill the deceased. That the deceased was his drinking mate and friend. They were enlisted together in the force and coincidentally both were sent to North-Eastern province where they had worked together for 4 years before that unfortunate incident. That they had never quarreled before this incident. That he was sorry for what he did.

At the close of the defence case, I summed up the case for the assessors who returned a unanimous verdict of guilty but to manslaughter as opposed to murder.

All prosecution witnesses are agreed that the accused fired the bullets that ended the life of Wesley Koros. The accused in his defence admitted so but claimed he was under the influence of drinks. The prosecution witnesses too shared the view that the accused was drunk at the time of the incident. The offence was thus committed when the accused was under heavy influence of drinks.

In the foregoing circumstances, I agree with the unanimous verdict of the assessors that the accused is guilty of manslaughter as opposed to murder.

Accordingly, I reduce the charge of murder to manslaughter. I convict the accused of the offence of manslaughter contrary to section 202 as read together with Section 205 of the Penal Code.

On full consideration of the mitigating circumstances disclosed, I sentence the accused to five (5) years imprisonment. Right of Appeal of 14 days explained to the accused.

DATED at NAIROBI this 14<sup>th</sup> day of July 2005.

**N. R. O. OMBIJA,**

**JUDGE.**