



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO 94 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH MARANGU M' MURIITHI ALIAS

KIHARA ALIAS JAMES MWANGI NDIRANGU.....ACCUSED

JUDGEMENT

1. The accused together with one **GERALD WAHOMÉ MAINGI** (deceased) was charged with the offense of murder contrary to section 203 as read with Section 204 of the Penal Code, the particulars of which were that on 13th day of September, 2012 at 5th parklands avenue in parklands within Nairobi County, jointly with others not before the Court, murdered OMIT SHAH.
2. They pleaded not guilty before Ombija J. as he then was, on 23rd November, 2012 and after several false start at hearing before, both Ombija and Korir JJ, during which period of time his then co accused died, on 26th September, 2016, his trial commenced before me.
3. To prove its case against him, the prosecution called and examined a total of seventeen (17) witnesses and when put on his defence, the accused gave unsworn statement in his defence without calling any witness.
4. The prosecution case against the accused was that on the material day, the deceased who was a businessman, living in parklands, had driven back to his home, when at the gate to his house, he was attacked by three gunmen and in the process he reversed his motor vehicle onto one of the attackers who died on the spot. The other gunmen escaped in a waiting motor vehicle, which was later on recovered from the accused person.
5. **PW2 JOSEPH MICHAEL OTUTU** was employed as a watchman at the deceased home. While on duty at 4.00 pm, he saw someone standing within the area of the home. At 4.45 pm, the deceased got home and the person whom he had seen earlier came into the compound with the deceased immediately he opened the gate for him.
6. The said person pointed a gun at him and ordered him to lay down and as the deceased was reversing his motor vehicle, he heard gunshot before the motor vehicle came to a stop. He thereafter saw the same person enter into motor vehicle registration number KAT 126V which sped away from the scene.
7. It was his evidence that immediately thereafter, he saw the flying squad motor vehicle at the scene, who collected a mobile phone and a gun from where the body of the deceased was. The only thing he noticed of the person, was that he had an Islamic cap and a jacket and was seeing him for the first time on that day.
8. It was his further evidence that the getaway motor vehicle had five people in it. In cross examination, he stated that the only thing he noticed was that the accused had an Islamic cap on and that he moved into the compound immediately the deceased entered and as he was closing the gate behind him.
9. **PW9 PETER WACHIRA NDUNGU** was selling charcoal next to the deceased compound, when at about 5.00pm he saw someone talk on phone, before going to stand at the deceased gate. He shortly thereafter saw two motor vehicles following each other. When the watchman opened the gate for the deceased, the person he had seen standing at the gate entered into the compound with the deceased, who reversed his motor vehicle knocking down someone.
10. He then heard the deceased cry that he will die and he saw someone come out of the motor vehicle that was following him and shot him inside his motor vehicle. He testified that the accused was wearing an American jacket (PEXT 7) and a Muslim cap (Pexh 8) and that he

immediately entered into the gateway motor vehicle, which drove off towards Limuru road. In cross examination, he stated that the person who had stood at the deceased's gate is the one who died at the scene.

11. PW11 SHAHALIM NAZMUDIN ESMAIL was at his garage which was next to the deceased's gate, when he saw the deceased reverse his motor vehicle outside the gate, suddenly he saw a white Toyota 110 come and stopped next to the gate and blocked the deceased, before two people came out of it and ran towards the deceased, opened fire, and then jumped back into the said car and speed away.

12. He rushed towards the deceased, whom he found bleeding on the face. He then called the family members of the deceased, before the police came to the scene. On the 4th October, 2012 he went to Pangani headquarters of the flying squad, where he identified the gate away car. It had been damaged on the front left head side mud guard and bumper, but with a different registration number plate.

13. It was his further evidence that one of those who attacked the deceased, had a blue khaki jacket and an Islamic cap. In cross examination stated that he was between 50 - 100 meters away from where the deceased was and that he was able to confirm that the motor vehicle he had identified was the same because it had been freshly repaired and painted at the point which had hit the deceased's motor vehicle.

14. PW8 RUPENG SHAH on 13th got a call from his sister in law, with inform of the shooting and later on identified the body for purposes of post mortem examination at MP SHAH, which was conducted by **DR JOHANSEN ODUOR**, whose report was produced by **PW1 DR.NJAU MUNGAI**, who stated that the deceased had a gunshot wounds, one which entered by the nasal bridge without exiting, the second on the left groin area which exited from through the left thigh and a third on the inguinal region without exit, the head also had multiple skull fracture. As a result of the examination he formed an opinion that the cause of death was due to gun shot from low velocity firearm.

15. PW13 JOSEPH MAINA a Police Officer, was at the material time stationed at parklands police station and when on duty heard an impact of a motor vehicle accident and a gunshot, some two hundred meters from where they were. They responded to the same and at the scene found two dead bodies including the deceased. From under the car they found a gun next to dead African man with six bullet. He called the scene of crime personnel to the scene, which was treated as a robbery with violence scene.

16. PW6 INSP. SILVERTER NDINGWA, a scene of crime officer, processed the scene where he identified the deceased motor vehicle registration number KBM 966F and a body stack between the gate and the main entrance, which was later on identified as the body of one Peter Kanywera. He then took photographs at the scene which he produced as exhibits in court.

17. PW5 HILARY KARANJA NJENGA was then a taxi driver, on 14th September, 2012 at 11.00 a, he had parked his motor vehicle at Upper Hill UAP building, when he was called by one JIMMY WAIMERI who told him that one of their mutual friend called PETER KANYWERA GACHOKA had died, he called him on phone to confirm his death, but his phone went unanswered.

18. It was his evidence that he called another friend of theirs called GICHOI, who gave him a cell phone number of another mutual friend called WAHOME, who used to work with the deceased(KANYWERA) who confirmed the death. He thereafter received information that KANYWERA had died at High ridge Area in Parklands where he was hit by a motor vehicle while attempting to rob the deceased.

19. PW4 BENARD WANJAU TAIKU finger print officer with the Ministry of Interior, on 16th October, 2012 was instructed to confirm whether ID Card No. 6269574 in the name of Ndirangu James Mwangi and finger print impression of JOSEPH MARANGU M'MURIITHI, were issued by the office. From their investigations, ID Card No. 6269574 and 8704497 were registered in details of ANNA MBENGWA MUTHUMA and JAMES MARANGU M'MURIITHI consecutively. It was confirmed that ID Card No. 6269574 was not identical to the genuine holder of the card held by ANNA MBENGWA MUTHAMA and was therefore not issued by the Department. It was his evidence that the finger print impression thereon were identical to ID Card No. 8704497 in the accused name and was therefore fake.

20. PW16 EDWARD KINYUA KIBARU was on 14th September 2012 at 11.30 pm, called by the adopted son of the deceased (PETER KANYWERA) who had been missing for two days, to confirm whether he had spoken to him, he later on called the said son who gave him the number of someone called Karanja, who confirmed that the deceased had died at his place of work. He stated that the deceased had died out of a gunshot wound.

21. PW15 SGT ABSALOM KANGASA was on 18th September 2012 instructed to take over the investigation in this matter. He proceeded to Gigiri police station, where he was handed over the mobile phone and the identity card of the deceased (PETER KANYWERA), collected from the scene. On 26th they arrested one SAMUEL NGAMAIRA and JAMES WAIMARI who were close friends of the deceased (PETER KANYWERA).

22. James Waimari informed them that he had received the information on the death from one jimmy and on 27th they tracked down the said Jimmy who told them that he had received the information from one Kihara, whom they arrested and who turned out to be the accused herein

23. At the time of his arrest they conducted a search at his house and took an inventory of the items collected thereat, which included one white Muslim cap, grey and white Muslim cap, blue white and brown Muslim cap and ID card. The identity cards were as follows: Number 6269574 in the name of **JAMES MWANGI NDIRANGU**, No 8704497 in the name of **JOSEPH MERINGUE M'MURITHI** and ID number 6453124 in the name of Peter Kanywera Gachoka.

24. They also recovered an old log book for motor vehicle Reg No. KAR186F and a sales agreement on the same dated 26th July, 2021 and another one dated 21st January, 2012, they also recovered two mobile phones from him. In cross examination, he confirmed that they arrested all those who were in constant communication with the deceased PETER KANYWERA and that the call data connected the accused to the deceased, as the person who was seen at the scene had a Muslim cap similar to the one recovered from the accused.

25. It was further his evidence that the motor vehicle recovered from the accused, was similar to the one used at the scene. He stated further that one Jimmy, whom they had arrested and who gave them the information on the accused, told them that they used to park the subject motor vehicle at Malango Bar at Mlango Kubwa, from where they found it.

26. **PW17 CORP. GERALD KAMWARO** was on 20th September 2021 instructed to join the investigation team and in the process of their investigation, they recovered from the accused a sale agreement in respect of the suspected get a way motor vehicle, which was witnessed by the deceased (Peter Kanywera) and the second one by the then second accused GERALD WAHOME who was later on shot dead by the police in pangani area.

27. It was his evidence that they conducted a search on the registration of the said motor vehicle, which from the records of KAT 926V turned out to be for a matatu and during the post mortem conducted on the body of the deceased they recovered some bullet fragments.

28. It was his further evidence that in the course of their investigations, they arrested a suspect by the name Stephen Munyinyi, who informed them that on 13th September, 2012 he met with the accused at 8.00pm and he informed him that the deceased Peter Kanywera had been killed by the deceased (Omit Shah) who had hit him with the car, thereby confirming that they must have been together

29. It was further his evidence that **PW7 JOHN IRUNGU MAINA** had informed them that Peter Kanywera (deceased,) the accused and GERALD MAINGI (deceased) had informed him that they had bought a motor vehicle registration number KAR 186F, which they were using to commit robbery and that he had warned them not to continue with criminal activities based on their ages, he further confirmed that the accused was positively identified at the identification parade where the second accused (GERALD WAHOME MAINGI) was also identified .

30. In cross examination he stated that they connected the accused with the offence, since the person who had been seen at parklands, where the offence was committed was wearing a Muslim cap, similar to the one which was recovered from the accused house and that the seller of the gate away motor vehicle, had confirmed in his statement to the police, that he sold it to the accused who had responded to a newspaper advertisement which he had placed for the sale.

31. It was his evidence that they tried to link all the suspects they arrested with **PETER KANYWERA**, who died at the scene and that the accused was linked to the crime, because he knew that Kanywera had been killed at the scene, which information he gave to Stephen Munyinyi. He further confirmed that the accused was using fake identification cards to conceal his true identity

32. **PW10 C I JOSEPH MUTUA** on 30th September, 2012 conducted an identification parade, where the accused was positively identified in the presence of his Advocate, but indicated that he was not satisfied with the way the parade was conducted, since he suspected that the witness had been coached, which he denied

33. **PW12 SSP LAWRENCE NDHIWA**, a firearms examiner, examined the firearm and the bullet fragments recovered at the scene and concluded that they were not suitable for comparison and that the bullet fragments from the body of the deceased were not fired from the gun, which was recovered from the scene and that the cartridges that were collected from the scene matched the gun which was recovered thereat.

34. **PW 14 SP SAMBU WAFULA** a scene of crime officer produced a report dated 17th July, 2015 which included photographs taken on 14th January, 2013 in respect of motor vehicle registration number KAR 186F

35. When put on his defence, the accused denied committing the crime and stated that on 12th September, 2012, he woke up and took his motor vehicle to where he used to park it, he later on got his first client whom he took to the airport, the next client he took to industrial area and the last client to baba dogo up to 6.30 p.m, when he closed for the day.

36. On the 29th he woke up not feeling well and therefore stayed in the house until 1.00pm, when he left to see a Doctor at Mango Kubwa. Before he got to the Doctor, he saw two people who told him that they were police officers, who arrested him and took him to Pangani police station, where he was interrogated and locked into the cell until 4.00 p.m, when he was taken to his house, where a search was conducted and they took away his clothes and caps.

37. They also took his motor vehicle registration number KAR 186 From the club where he used to park it. He stated that the person who sold to him the motor vehicle, recorded his statement with the public but was not called as a witness. He further denied ever owning motor vehicle registration number KAT 163. He stated that he was locked up until the following day, when the officers asked him for Ksh.50,000 which he told them, he did not have.

38. He was thereafter charged with the present offence which he denied. It was his evidence that PW2 did not mention that he saw him at the scene and only stated that he saw the clothes he was wearing. He contended that at the identification parade they were about six and seven persons and that the identifying witness first passed, him before talking to the police officer and then returned back and touched him.

SUBMISSIONS

39. At the close of the defence case, the same filed written submissions, which were highlighted by Mr. Wakaba, while the prosecution through Mr. Okeyo, made oral submission and stated that there was a satisfactory identification parade conducted, where the accused was positively identified. On behalf of the accused it was submitted that the witness who identified him was not called to testify and therefore the report had no probative value.

40. It was submitted further that there was no evidence tendered to show that the accused had possession of the firearm, which was used to kill the deceased and that the prosecution failed to establish conspiracy between the accused and PETER KANYWERA (deceased) to cause the death of the deceased herein.

41. It was contended that there was no eye witness who placed the accused at the scene and that the Muslim cap was not sufficient to identify the accused as there were many caps of the same nature.

ANALYSIS AND DETERMINATION

42. To sustain a conviction on a charge of murder, the prosecution is under both legal and evidential obligation to prove beyond any reasonable doubt the following elements of the offence: -

a) the fact and cause of death

b) that the said death was caused by unlawful act on the part of the accused person

c) that the accused had the necessary malice aforethought as defined under section 206 of the Penal Code.

43. The fact and the cause of the death of OMIT SHAH was not disputed throughout this trial. All the prosecution witnesses confirmed that on the material day, while the same was entering his home at parklands, he was attacked by armed gun men, who shot him and that in the process of the attack, he reversed his motor vehicle knocking one of the attackers who died on the spot.

44. The cause of death was further proved through the post mortem report prepared by Dr. Johansen Oduor but produced by consent by PW1 Dr. Njau Mungai, to be head injury due to gunshot from low velocity firearm. The said death was therefore unnatural and not self-inflicted, as confirmed through the evidence of PW2 his watch man, PW3 his nephew, PW8 his cousin and PW11 his neighbour. I therefore find and hold that the fact and cause of death were proved beyond any reasonable doubt.

45. The only issue in controversy and for determination by this court is whether the said death was caused by unlawful act on the part of the accused person. As submitted by the accused, the only evidence placing him at the scene is the identification evidence of PW2 who was the watchman at the gate whose evidence was that he had seen someone wearing Muslim cap and a jacket next to the deceased gate, who later on ordered him to lay down, which he did before the deceased was shot.

46. This identification evidence was corroborated by the evidence of **PW9 PETER WACHIRA NDUNGU** whose evidence was that he had also seen someone wearing an American Jacket and a muslim cap talking on phone next to the deceased gate and could not see his face. He was able to identify the two items were recovered from the Accused house in court.

47. The other item which connected the accused to the offense was the alleged gateway motor vehicle which was recovered in the possession of the accused and which was positively identified by PW11 whose evidence was that using his knowledge as a mechanic.

48. It was easy for him to identify the subject motor vehicle which was recovered from the Accused since it was damaged on the front left hand side mudguard and bumper which was freshly painted. He had also noticed the clothings the person was wearing as a jacket and light muslim cap and that it is him who shot the deceased.

49. The law on identification in Kenya is now well settled. The court in the case of:- **WAMUNGA v REPUBLIC (1989) KLR 424** at 426 had this to say:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.”

50. The courts have held that there is a need to conduct identification parade so as to support and corroborate the evidence of identifying witnesses as was stated in **Samuel Kilonzo Musau vs Republic (2014) eKLR** thus:-

*“The purpose of an identification parade, as explained in **KINYANJUI & 2 OTHERS VS REPUBLIC (1989) KLR 60**, “is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion.” It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness’s attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification.”*

51. In this case the accused was positively identified and placed at the scene through an identification parade conducted on 30th September, 2012 at which he was represented by an Advocate, this to my mind corroborated the evidence of the three witnesses who had testified to the effect that one of those who attacked the deceased had put on Muslim cap and a jacket similar to that recovered from the accused.

52. The accused was further placed at the scene through circumstantial evidence adduced by the prosecution, which I shall proceed to analyse

herein under.

53. To convict on circumstantial evidence, the following must be satisfied, as was stated in the case of **SAWE v REPUBLIC [2003] eKLR** had this to say: -

“In order to justify on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

54. This court in the case of **REPUBLIC v ELIZABETH ANYANGO OJWANG [2018] eKLR** had this to say:-

“22. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions, see NAVANEETHA KRISHNAN v THE STATE BY INSPECTOR OF POLICE – SUPREME COURT OF INDIA, CRIMINAL APPEAL NO. 434 OF 2013.

23. From the line of authorities on circumstantial evidence the court has to judge the total cumulative effect of all the proved circumstances each of which reinforces the conclusion of the guilt of the accused person and if the combined effect of such circumstances is taken to be conclusive in establishing the guilt of the accused the conviction would be justified.”

55. In this matter the following circumstantial evidence stands out linking the accused irresistibly with the offence herein: at the time of the commission of the offence one PETER KANYWERA was killed at the scene, and a copy of his identity card was found on him together with his mobile phone.

56. The said Peter Kanywera (deceased) turned out to be a friend and an associate of the accused herein together with his then co-accused one GERALD WAHOME, who died before the trial herein commenced. It is through the link between the deceased (Kanywera) and the accused which led to his arrest.

57. When the accused was arrested, the following items were recovered from his house: a) a sales agreement in respect of motor vehicle registration number KAR 186F in which the deceased Peter Kanywera and his then co-accused Gerald Wahome were the witnesses. The accused confirmed having bought the said motor vehicle and according to the evidence of PW6, he was told that the said Peter Kanywera had been killed in the High Ridge area in the process of robbery when he was shot dead by one of the accomplices.

58. According to the evidence of PW7 the said Peter Kanywera had at some time been arrested for the offence of robbery with violence before he met his death while in the process of robbing the deceased herein. The evidence of PW10 who conducted the identification parade on the accused herein, stated that he had been arrested in a case of attempted robbery with violence.

59. According to the evidence of PW15, the Investigating Officer, through the mobile phone of the deceased Kanywera, they were able to arrest one Samwell Ngamaira and James Waimari both who were friends of the deceased, who led them to the accused herein and that from the mobile data, the accused had called the deceased many times immediately after the incident and that it is the accused who gave the information on the death of the deceased to his relatives.

60. This evidence was corroborated by PW17 whose evidence was that upon the arrest of the accused, he led them to the place where he had parked the motor vehicle which was positively identified to have been used by those who killed the deceased herein.

61. It was further his evidence that one of the people they had arrested called STEPHEN MUNYINYI, informed him that he had met with the accused on 13th September, 2012 and he informed him that the deceased Peter Kanywera was killed by the deceased Omit Shah, thereby confirming that he was present at the scene, so as to be in possession of this information.

62. This information was corroborated through the evidence of PW7 to the effect that the accused, Peter Kanywera and Gerald Wahome had bought motor vehicle registration No. KAR 186F for the sole purpose of committing robbery.

63. The other critical evidence linking the accused person herein with the offence is that the identity card of PETER KANYWERA GACHIKI (Deceased) who was killed at the scene of the attack on the deceased, found in the possession of the accused person herein. The accused in his defence did not offer any explanation on how he came into possession of the said identity card. When looked at against the evidence of PW7 John Irungu Maina, the court is left to draw the inference that they must have been together or were engaged in a joint enterprise.

64. There is also the issue of the two identification cards recovered from the accused persons which as per the evidence of PW4 confirmed that the accused person in addition to using fake Registration number plates was also using a fake identification card in execution of their activities as confirmed through the evidence of PW7, that they had purchased the subject get away motor vehicle for the purposes of executing robberies. The accused in his defence corroborated the evidence of PW7 as where the said motor vehicle was being parked.

65. I am not convinced by the accused defence herein and his allegation that some vital prosecution witnesses including the person who sold to him motor vehicle and the person who identified him at the parade were not called as witnesses, raised any doubt on the prosecution case herein as regards the circumstantial evidence linking him to the commission of the offence.

66. From the circumstantial evidence herein, I find and hold that the accused person was positively identified and placed at the scene of the attack of the deceased herein and that the said evidence irresistibly points to him as part of those who caused the death of the deceased herein.

67. The final issues for determination is whether the accused person had malice aforethought; it is not disputed that the deceased was killed in the process of an attempted robbery with violence. Section 206 of the Penal Code defines malice aforethought to include an intention to commit a felony which is adequate proof of malice afore thought.

68. Whereas it was submitted by the accused person , that there was no evidence that he had a gun on him and that he is the one who shot the deceased, Section 21 of the Penal Code provides that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

69. The prosecution led evidence to the effect that the accused and his group whereon a mission to commit robbery and in the process of the same the deceased herein was shot dead. I therefore find and hold that it matters not whether the accused is the actual person who shot dead the deceased, the same having been put at the scene through the circumstantial evidence stated herein.

70. I have taken into account the accused defence herein and in particular his confirmation of the items which were recovered from his house, including the sales agreement for the purchase of the motor vehicle, which was positively identified to be the getaway motor vehicle from the scene of the death of the deceased and his further confirmation that both the deceased peter Kanywera who was killed at the scene and his co accused Gerald Wahome, were his friends and were involved in the same business.

71. The accused was therefore placed under the provision of Section 111 of the Evidence Act to explain the circumstances under which he knew of the death Peter Kanywera which he stated had been killed by Omit Shah, how his identification card was found in his possession and further being his friend why he did not attend his funeral funds drive, thereby leading inot a reasonable conclusion that he had a guilty mind.

72. I have weighed the accused defence against the statement of PW7 to the police and I have come to the irresistible conclusion that the death of Omit Shah was cause by the accused person jointly and severally with his group who were engage in what PW7 called "KIWANJA" or what Kenyans from Nyanza called "PAP" a criminal enterprise known to the Flying Squad who easily traced him.

73. It therefore follows and I find that the prosecution proved beyond all reasonable doubt all the elements of the information of murder and accordingly find the accused guilty of murder of Omit Shah on 13th day of September, 2012 and convict the same.

74. It is hereby ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MAY 2021

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**J
JUDGE**

WAKIAGA

In the presence of:-

Mr. Okeyo for the State

Mr. Wakaba for the accused

Accused present

Gitonga court assistant