



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL (MURDER) NO. 112 OF 2010

REPUBLIC.....PROSECUTOR

-VERSUS-

JOSEPH MWENJI MWANGI.....ACCUSED

JUDGMENT

1. The accused **Joseph Mwenji Mwangi** was arraigned in court to face a charge of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the information was that on the 31st October 2010 at Bahati Division Nakuru North District murdered Joyce Waitthera Ngige.

He pleaded not guilty to the offence.

2. The prosecution called eight (8) witnesses.

Section 203 of the Penal Code defines murder as the unlawful homicide committed with “malice aforethought”, the killing of a human being by another by any unlawful act or omission.

3. Malice aforethought is deemed to be established by evidence proving anyone of the following circumstances.

Section 206

(a) – an intention to cause the death or to do grievous harm to any person whether that person is the person actually killed or not.

(b) Knowledge that the act omission causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not happen.

(c) an intent to commit felony

4. Against the above legal provisions, I proceed to analyse the evidence adduced before the court.

PW2 Benson Kariuki Karimi was a *bodaboda* rider and knew the deceased. His evidence was that on the 30th October 2016 while riding his motorbike along Maili Sita towards Bahati at about 11.00p.m. he found two men on the road in police uniform and one with a gun. They ordered him to lie down when another motorcycle came by and soon heard a gunshot and a woman's voice that she had been shot.

5. It was his further testimony that soon after a Land- Rover vehicle came by stopped and the occupants asked them whether they had shot a person. He was then escorted to Gilari farm locked up and later taken to Bahati police station where he recorded a statement and was released.

6. **PW3 Antony Karanja Kibe** testified that he know the accused as his neighbour and an Administration police officer at Ahero. He was with the deceased at a club at Joska.

He testified that later he carried the deceased on his motorbike at around 10.30p.m. and while going to Maili Sita they met **Mwangi the accused** and another officer but they did not stop when he flagged him to then within 20 meters away, he heard a gunshot and Waitheera the deceased was shot. She then fell from the motorbike.

He called the accused but he refused to come to help them. He testified that after an hour the Member of Parliament Gachuhi came to their help and she was taken to hospital but died before treatment.

7. On cross examination this witness stated that it was at night and did not see who shot the deceased that both police officers had guns and later the accused came to the scene of crime.

8. The autopsy was conducted by **Dr. Titus Ngulungu**, a consultant pathologist at Nakuru Provincial Hospital in the presence of Rose Nyambura and Patrick Njuguna on the 2nd November 2010. His conclusion on the cause of death was massive haemorrhage and pelvic organs injury due to a single gunshot to the pelvis. He further stated that a deformed bullet was removed from the deceased's abdomen and given to the police officer attending the postmortem for ballistic studies.

9. **PW5 was Corporal Paul Ochieng Ogwalo** formerly at Nakuru DCIO's office. He assisted the investigating officer. He went to the scene of crime and found the body of a woman with a gun shot wound on the waist and a motorbike, and took the body to the mortuary.

It was his evidence that at Bahati police station the OCS had repossessed the **gun Serial No. 00536** that had been assigned to Corpl. Mwangi – (accused) with 20 rounds of ammunition but one bullet was missing and that the other gun **Serial No. MFP 402873** issued to APC Moses had 20 rounds.

He produced the two guns as exhibits and added that they were taken for ballistic analysis.

He did not however have the arms movement register in court to show who had been assigned the two guns.

10. **PW6 John Ndungu Nduati's** evidence was that he did not witness anybody being killed though he had passed by the scene riding his motorbike but he was summoned to the police station the next day to record a statement.

11. **PW7** was a ballistic expert of 17 years experience, **Lawrence Nthiwa SSP**, then attached at CID offices at Nakuru.

He produced two exhibits and explained that **Exhibit A** – spent cartridges were fired from the gun and stated that they can be used by any G3 rifle and others like Liai and FN.

Exhibit D – was a deformed bullet Calibre 7.2 mm. Upon examination of the two exhibits it was his findings that **Exhibit D** was fired from **Rifle Ext A, Serial No. 005369**.

He filed this report – Ext No. 5(a) and (b).

12. Upon intense cross examination by the defence advocates it was his evidence that to determine which gun was used they test all of them, meaning the bullets and the cartridges. He stated that on **Exhibit D** - no accompanying cartridge was submitted that the firearm was damaged, was an incomplete firearm, and could not be compared with the bullets. He could not state where the damaged bullet was recovered from but stated it could compare with **Exhibit D**. He affirmed that **Bullet D** created sufficient markings matching **gun A, Serial No. 005369, Exhibit - A which** was not presented to court.

13. **PW8 Inspector Silas Maingi** a police officer at Bahati police station at the material time was assigned duties to issue firearms in the station.

His testimony was that they keep an arms movement register showing which officers are given what guns. On the 30th October it was his evidence that the officer in charge Corpl. Mwangi gave him two guns G3 FMD 008369 – with 19 ammunition and G3 FMB 402873 with 20.

He could not state with clarity if the accused handled any guns nor did he produce the arms movement register in court.

14. **In his sworn statement of defence**, the accused testified that he was left in charge of the station on the fateful night when a round 11.00p.m. he received a report of an accident nearby and walked on foot to the scene. That on the way a vehicle passed by but after a few metres it turned back and stopped, that it was the M.P's Gachuhia who said he wanted to assist him and together in the vehicle they went to the scene of accident where they found a motorbike and one Antony who had made the report. He asked for help to take a person who had been shot to hospital. They took the deceased to the hospital, and they parted.

15. The accused further testified that on the following day at about 2.00p.m. an inspector of police one Mwaniki sent for the guns at the station for an ongoing investigation at the Maili Saba AP post. He testified that he was later arrested and charged with the offence of murder. It was his evidence that when the report of an accident was reported, he went on foot and did not have a gun nor was one assigned to him. He denied having shot the deceased.

16. The entire prosecution evidence is based on circumstantial evidence as no eye witness testified to have seen the accused or anybody else shoot the deceased.

The rider who carried the deceased on his motorbike (**PW3**) when she was shot only heard a gunshot at the back of the motorbike. He did

not see who shot her as it was at night but stated that they had met the accused at the club during the day and later near the scene of crime.

The rest of the witnesses were not at the scene of shooting.

17. In the absence of eyewitnesses, the prosecution sought to rely on circumstantial evidence though not direct to prove the guilt of the accused.

In **Kariuki Karanja -vs- Republic (1986) KLR**, the court held that

In order for circumstantial evidence to sustain a conviction it must point irresistibly to the accused and an order to justify the inference of guilt on such evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.

18. Further, in **Judith Ochieng -vs- Republic (2009) e KLR** it was held that

“It is settled law that when a case rests entirely upon circumstantial evidence such evidence must satisfy three tests

(1) The circumstances from which the evidence of guilt is sought to be drawn must be cogent and firmly established.

(2) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

(3) The circumstances taken cumulatively should form a chain so complete that there is no escape from conclusion that within all human probability the crime was committed by the accused and none else.

19. It would appear that the deceased and the accused were not strangers to each other looking at the evidence of **PW3** as his evidence was that when the accused and another stopped them, the deceased told **PW3** not to stop as it was Mwangi, (the accused) and he was only disturbing them.

Does this however point irresistibly to the accused as the person who fired the fatal bullet?

20. It was at night and **PW3** admitted that he did not see who shot the deceased. The court was also not told that the two – accused and deceased – had any bad blood at all to create a motive and intention to kill. No evidence in my view was adduced to prove either any intention or motive to cause the death of the deceased. - Section 206(a) Penal Code.

21. Coupled with the above, circumstantial evidence must be cogent, plain and clear and no doubt should be created by the said evidence as to the identity of the accused person his intention or the malice aforethought.

22. The bullet that caused the death of the deceased – **Exhibit D** – and which was removed from the deceased's abdomen during postmortem, upon ballistic examination was said to have been fired from a **G3 Rifle Serial No. 005369 (PW7) evidence**.

The Ballistic Expert (**PW7**) testified that the said gun which was not produced in court as an exhibit was not accompanied by the cartridge when it was handed over to him for analysis. He could not confirm from which gun the bullet was fired, but was heard to state that it had sufficient markings matching the gun serial No. 005369.

23. The prosecution failed to procure the Arms Movement Register at the police station to confirm which gun, if any, was assigned to the accused who in his defence testified that he had not been issued with any gun and had none when he was called to answer to a report of an accident on the fateful night. This piece of evidence was not challenged by any witness.

24. It is not enough to state that the accused had been issued with a gun without any cogent and firm evidence. It was not stated why the arms register could not be procured as an exhibit for confirmation of that fact. It was incumbent upon the prosecution to call evidence that **Gun Serial No.005369** from which the spent cartridge **Exhibit A** was fired indeed was issued to the accused person. I have stated above the said gun was not brought to court. That having not been done I agree with the defence submission that was fatal to the prosecution case.

25. As a whole, I find that the prosecution has fallen short of meeting the legally required standard proof as missing links and gaps were not satisfactorily explained thus the evidence lacks cogency. The cumulative prosecution evidence does not form a chain so complete that no escape from conclusion that with all human probability the crime was committed by the accused – **Judith Achieng -vs- R- (Supra)**.

26. Suspicion alone that the accused could be linked to the fatal shooting is not proof beyond reasonable doubt however strong the suspicion. It can not provide a basis for inferring guilt which must be proved by evidence beyond any reasonable doubt – **Mary Kamau Wanjiku Gichiria -vs- Republic (1998) e KLR and Republic -vs- Peter Waweru Kinuthia & Another Nakuru HCCR No. 11 of 2013**.

27. For the above reasons I enter a verdict of NOT GUILTY and acquit the accused under **Section 215 of the Criminal Procedure Code**.

The accused shall be set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered this 31st Day of January 2019.

J.N. MULWA

JUDGE