



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL (MURDER) CASE NO. 11 OF 2016**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**FRANCIS KIRIMA M'IKUNYUA.....ACCUSED**

**JUDGEMENT**

1. **FRANCIS KIRIMA M'IKUNYUA** hereinafter referred to as the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the charge are as follows: that the accused on the 16<sup>th</sup> day of February 2016 at Mto Mawe Area within Athi River Sub-County in Machakos County, murdered Peter Mwangi (hereinafter referred to as the deceased).

2. The accused pleaded not guilty to the charge. He was represented at the trial by Mr. Kenyatta and the prosecution was conducted by Mr. Machogu. The prosecution called a total of ten (10) witnesses in a bid to prove the ingredients of the offence beyond reasonable doubt constituting the following:

**(1) The death of the deceased.**

**(2) The death of the deceased was unlawful.**

**(3) That in causing death there was malice aforethought on the part of the accused.**

**(4) That the accused was positively identified as the one who caused or participated in the killing of the deceased.**

3. The evidence adduced by the prosecution witnesses can be summarized as follows: Pw1 was Donald Waitthaka Lua who testified that on 16.2.2016, he was at work at a field belonging to Portland Cement Company Limited when he heard two gun shots but he didn't see who had fired the shots. He ran towards Mto Wa Mawe and heard four gunshots and was then in the company of Pw2 who was injured. He testified that the following day he reported the incident to Athi River Police station and informed the police that the shooting incident had been led by the accused.

4. Pw2 was Lawrence Wiiio Munywoki who testified that on 16.2.16 he was fixing beacons on the Portland Cement Company's land and at around 12 noon, the accused came and emerged from a vehicle and fired shots into the crowd of people that were gathered on the land. He testified that the first shot hit Pw3 on the ear and the chest and later the police came and arrested the accused. He reported the matter to Athi River Police Station. On cross-examination, he testified that Pw3 gave him the work of fixing beacons and that in addition another man called Peter was hit in the stomach.

5. Pw3 was Peter Meti Ndunda who testified that he was a squatter on land belonging to Portland Cement and on 16.2.2016, at 12 noon he received a report from Daniel Kitema, a member of Kinani Self-Help Group that the accused had chased them from the land and thus he went to the scene and learned that the accused had attacked a young man and carried him in his car. He testified that the accused came back and fired shots in the air demanding to know what he was doing on the land and that the accused then fired at Pw2 and the shot grazed his ear and he fell down. He testified that the deceased who was next to him was hit and he fell down and he learnt that the deceased succumbed to injuries at Kenyatta National Hospital where he died. He testified that he knew the accused. On cross-examination, he testified that he recorded a statement the following day at Athi River Police Station and that on the material day he saw the accused emerge from a white car while armed with a pistol. He also testified that there is a case in court where the accused seeks to evict Pw3 and others from the land. He denied participating in the destruction of the accused's structure on the land.

6. Pw4, Stephen Muema Muthusi testified that he is a land dealer and on 16.2.16 the deceased informed him that there was land for sale in Athi River and being interested, he accompanied the deceased. He testified that he arrived on the land at around 11.00 am and met the deceased and later a white car arrived and one of the occupants emerged and one had a pistol and another a panga and the one with a pistol

shot towards the deceased. The deceased indicated that he had been shot and Pw4 saw blood oozing from his waist and later the deceased was on the ground and then he was taken to Shalom Hospital and later referred to Kenyatta National Hospital. He testified that the accused was one of the attackers and was the one armed with a pistol. He recorded his statement at Athi River police station. On cross-examination, he testified that he has been charged in Makadara Court for forceful entry.

7. Pw5 Titus Munywoki Kimanzi testified that he sells properties and on 16.2.16 he was at the land at Portland when the accused came and bundled a young man into his car and at 2.00 pm the accused came back and fired shots at the deceased who fell down. The deceased was taken to Shalom Hospital and transferred to Kenyatta National Hospital. On cross-examination, he testified that the deceased was shot on the waist.

8. PW6, CIP Peter Mwalali, testified that he is the OCS of Athi River Police Station and on 16.2.16, at 2.00 pm he received a call from Peter Kioko that there were people pulling down structures and later he received a call from Pw7 that there were skirmishes on the Portland Cement land and that the accused arrived at the station in the presence of police officers. He proceeded to the scene. He saw a group of people who told him that the accused had killed the deceased. He secured the scene and recovered two empty cartridges near Mombasa Highway and four other cartridges and another one thus in total collected seven cartridges and handed them over to Pw9 of the CID. He saw the accused being taken away by the police.

9. Pw7 was Pc Bernard Lagat who testified that on 16.2.16 at 8.00 am he was on patrol within Portland Cement Factory farm when he received a call that a wall was being damaged at the area and thus he rushed to the scene and heard three gunshots. At the scene, a crowd was chanting against the accused and the crowd cooled down when they saw the accused being arrested.

10. Pw8, CIP James Onyango testified that he is a firearms examiner for the last seven years and testified that on 12.2.16 exhibits were received for examination and the said exhibits were a pistol, a magazine, 7 spent cartridges and 3 rounds of ammunition. The exhibits were received together with an exhibit memo. He testified that he examined the items and prepared a report dated 23.3.16, and clarified that the report has an error, that though the date of receiving exhibits is indicated as 12.2.16 instead of 19.2.16. In the said report he concluded that three bullets were fired from the pistol that was presented to him but the other four were fired from another firearm that was not submitted to him.

11. Pw9 was Cpl Jackson Mbithi who testified that on 16.2.2016 he was alerted of fighting along Mombasa Road and he rushed to the scene and was informed that the accused had shot somebody. He disarmed the accused and placed him in custody. He received exhibits from the OCS that had been recovered from the scene and took possession thereof. On cross-examination, he testified that he submitted the firearm on 19.2.16 to the Ballistics Department and confirmed that the bullet that killed the deceased was not from the accused's firearm.

12. Pw 10, Professor Emily Adhiambo Rogena testified that she is a pathologist. She testified that on 27.4.16 a post-mortem report was signed by her with regard to a post mortem conducted on the deceased and noted that the body had a gun-shot wound. An opinion was formed that the cause of death was haemoperitonium due to a single penetrating abdominal gun injury. She produced the post-mortem report. The court established that the prosecution had made a prima facie case against the accused who was subsequently placed on his defence.

13. The defence called five witnesses. Dw1 was the accused who testified that he lived at Kasarani and Mto Wa Mawe for 25 years and that on 16.12.2016 he was at his farm and later left for Kitengela to have some meat when he was called by Mwenda who informed him that a large crowd of persons had gathered outside his premises. It was his testimony that he rushed to the premises and found a large crowd of persons who were baying for his blood and he fired gunshots in the air. He told the court that he is a licensed gun holder since 2009 and that he had a Ceska Pistol. He told the court that the police arrived and he accompanied them to the police station whereupon he was alerted that a crowd was regrouping at his premises and he returned together with the police to the premises and learnt that gunshots had been fired in the second invasion as a result of a quarrel amongst the attackers and that the police collected seven cartridges. He testified that he was disarmed and the police alleged that he had misused his firearm and that the instant matter is a frame up because persons wanted to evict him from the land that had garnered interest from Kenani Self Help group. He told the court that since 2015 there were squabbles on the land and he wrote a complaint letter (Dexh 2) and filed judicial review application 428 of 2015 against harassment by the area councilor and the OCPD and was granted protection orders (Dexh 4 and 5). He told the court that he did not know the deceased and that he was informed that the OCS had directed that the accused be charged with murder whilst he was in the police cells. He told the court that Pw3 had an interest in the land and Pw4 was hired to bring goons so as to have the accused out of the land by all means. He denied having shot anybody. On cross-examination, he testified that he did not fire a shot in the second visit for he was in custody. He told the court that none of his workers were armed and that the area chief was against him being on the land as he was considered an outsider. He produced letters indicating that he reported about harassment (Dexh 7).

14. Dw2 was Michael Mwenda Manyara who testified that on the material day he was at work on the scene and a group of persons assembled and wanted to burn a tractor he was using. He called the accused who came and fired a gunshot in the area to disperse the crowd and later the police came and took the accused away. It was his testimony that after the police left he heard four gunshots. On cross examination, he told the court that when he heard the four gunshots during the 2<sup>nd</sup> invasion the accused was not present.

15. Dw3 was Peter Kioko Ndiku who testified that on the material day he learnt that the accused had been arrested and that later the accused came with police officers who collected three cartridges and later the police arrested Dw3 and released him later. He told the court that during the 2<sup>nd</sup> invasion, he did not see anybody being shot but he heard gunshots outside the accused's compound.

16. Dw4 was Alphonse Safari who told the court that on the material day at 11.00 am a group of people came and started beating him and later the accused arrived and shot in the air then later the police came and took the accused. It was his testimony that at 2.00 pm a group of persons came and caused mayhem whereupon he heard four gunshots but did not see anyone being hurt. On cross examination, he told the court that he did not see the persons who fired the four gunshots.

17. Dw5 was Daniel Gathu Njogu who testified that on the material day, a large crowd came and started harassing him for being a worker on the accused's farm then the accused came and fired three shots in the area that dispersed the crowd. He told the court that the police came

and took the accused and that later the crowd came back and he heard four gunshots then the police and the accused arrived. He told the court that nobody was hurt when the accused fired the three shots. The defence closed their case and the parties were directed to file submissions.

18. Prosecution urged the court to convict the accused on the evidence of the prosecution that he was at the scene, he was armed and he used his firearm to shoot. It was also argued that the shooting of the deceased with a bullet that led to his death was indicative of malice aforethought under Section 206 of the Penal Code. Counsel urged the court to find the accused person guilty of murder.

19. Counsel for the accused on the other hand pointed out that the murder weapon was not identified by the prosecution witnesses. Counsel submitted that the accused was not in the compound at the time of the shooting. It was further argued that circumstantial evidence was used to charge the accused. However the circumstantial evidence is not consistent with the guilt of the accused. Reliance was placed on the case of **R v Joseph Mwenji Mwangi (2019) eKLR**. The learned counsel submitted that the eye witnesses had an eye on the suit land hence had a motive to frame the accused and that the prosecution failed to prove the case beyond reasonable doubt. Learned counsel urged the court to proceed and acquit the accused under Section 215 of the Criminal Procedure Code.

20. The four ingredients that the prosecution is required to prove in a charge of murder are that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person.

21. In accordance with the elements of the offence of murder under section 203 as read with Section 204 of the Penal Code the State therefore has to prove that the accused person not only pulled the trigger of the gun that shot the deceased in the head, but also that in pulling the trigger, the accused person acted with malice aforethought. The burden of proof is beyond reasonable doubt. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. **Miller v Minister of Pensions [1947] All. E.R. 372**. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

22. The sanctity with which the law upholds the accused person's innocence until such time as the State has successfully discharged its burden, beyond reasonable doubt, is evident and was affirmed vide Lord Sankey's views in the English landmark case of **Woolmington v Director of Public Prosecution [1935] AC 462**, to the effect that:

*"It should be remembered that subject to any exception at common law, cases of insanity and to various statutory provisions, the prosecution bears the burden of proof on every issue in a criminal case."*

23. The measure of "proof beyond reasonable" is not one that easily lends itself to quantification however there is no doubt that it requires a high degree of satisfaction that the prosecution must, through the evidence it presents, create in the mind of the courts. The overall effect is that even if the slightest doubt as to the guilt of the accused is created in the mind of the court, he is given the benefit of the doubt and must have his innocence proclaimed. Criminal law, it should always be recalled, thrives on the noble principle that it is better to make an error in the sense of wrongly acquitting a hundred guilty men than to err by convicting and sending to an undeserved punishment one innocent soul. See **Woolmington v Director of Public Prosecution [1935] AC 462**

24. Once the prosecution establishes a prima facie case at the close of its case and the court finds that the accused has a case to answer, the defendant then bears the evidential burden of casting reasonable doubt on the prosecution's case. The incidence of the evidential burden in no way detracts from the State's responsibility in proving each and every element of the offence of murder.

25. Based on the evidence of the 10-prosecution witness as well as the Postmortem Report, it is the State's case that the accused person must have caused the death of the deceased because he was the only person equipped with a gun on the day of the deceased's demise on 16.2.2016 and he was at the scene on the material day. The State contends that the accused person actually fired the bullets and since the deceased died of gun-shot wounds caused by a bullet, the accused must be the responsible party. Further, the State has argued that the injuries suffered by the deceased were intended to kill him hence the killing was with malice aforethought.

26. The postmortem report on the examination of the body of the deceased has not been objected to nor controverted. This ingredient of the offence was duly proved by the prosecution.

27. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See **Republic v Boniface Isawa Makodi [2016] eKLR** that referred to the case of **Gusambizi Wesonga v Republic [1948] 15 EACA 65** where it was held:

*"Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property."*

28. Pw2 and Pw3 said that they saw the accused shooting the deceased. However the evidence of Pw8 is to the effect that the bullet that killed the deceased was not from the gun that the accused had. It was upon the prosecution to ensure that the allegation that this was the murder weapon was backed by supporting evidence. Hence I find it safe to presume that the death of the deceased was unlawful. However I find that the evidential lapse will have a bearing on the identification of the perpetrator and this poses the question as to whether the accused was the only person who carried a weapon?

29. The State's case is poised entirely on the premise that the accused was the only person carrying a gun on the material day. This line of argument is based on the evidence of the prosecution witness 2 to 5 who stated that on the material day they saw the accused fire some gunshots. Pw8 produced documentary evidence to the effect that this was not the weapon that was used and felt the evidence of Pw2 to 5

could have corroborated that the accused was armed but could not have corroborated that the accused fired the fatal shot.

30. The absence of the ammunition register also provided a very shaky basis for the contention that the accused was the only person who was armed with live ammunition on the material date since there were four cartridges whose presence was not explained or accounted for. The evidence of PW8 also provides a basis for an alternative theory to what actually happened on the material day and this is the theory that has been put forward by the defence. This theory largely contends that somebody else shot the deceased and the story was fabricated to implicate the accused. It would seem that the evidence of Pw8 weakened the prosecution's case as he confirmed that the fatal shot had not been discharged from the accused's gun. The witness further stated that there were other gunshots fired and that the cartridges were from a different firearm from that of the accused.

31. Further, the evidence of prosecution witnesses (PW2 to 8) indicated a lot of inconsistencies in the way that the accused came and approached the scene; the point of impact of injury and the position that the deceased was when he was shot. Was he standing or lying down? Had there been a record presented in court as to who was issued with the firearm that discharged the mysterious 4 rounds of ammunition it could corroborate the fact that the accused came back and shot the deceased. The police collected one Ceska with 7 spent cartridges and the source of 3 out of the 7 are explained while the source of the other four was not explained. I find the prosecution evidence was far from convincing.

32. Having considered all the evidence of the prosecution witnesses, it is very clear that the State has failed to prove beyond reasonable doubt that the death of the deceased was caused by the accused. To summarize, the cause of death according to the Postmortem Report, was caused by a gun shot. The type of gun used is not identified. The time of death is 9.30pm and he was indicated as having died at the casualty area of the hospital. In the absence of proof of an entry in the Rifles and Ammunition Movement Book indicating that the accused person was allocated the ammunition that occasioned the fatal shot the evidence of Pw2 to 5 can by no means be used to sustain a conviction. In my observation, PW2 to Pw5 were far from being credible witnesses and there is therefore no evidence before the court for it to conclude that the accused was the only person who was armed on the material day when it was clear that four more shots were fired from a different gun which was not recovered. The evidence of the firearms officer (Pw8) cast doubt upon the prosecution's case and the benefit of such doubt must be given in favour of the accused in any event.

33. I find that there was no direct evidence linking the accused to the crime and what was available was circumstantial evidence that the prosecution relied upon. It is the position of the law that for the court to base a conviction on circumstantial evidence it must irresistibly point to the guilt of the accused with no co-existing circumstances which would weaken or destroy that inference. For evidence to be capable of being corroboration it must:

(a) be relevant and admissible, **R v Scarrot, [1978]QB 1016;**

(b) be credible, **DPP v Kilbourne [1973]AC 729;**

(c) be independent, that is, emanating from a source other than the witness requiring to be corroborated, **R v Whitehead [1929] 1 KB 99,**

(d) Implicate the accused. **Abanga alias Onyango v Republic Cr. Appeal 32 of 1990(UR)**

34. In another case of **Republic v Kipkering Arap Koske and Another (1949)16 EACA 135,** regarding circumstantial evidence the court 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 hypothesis than that of his guilt.”***

35. The prosecution's case suggests that the accused had an opportunity to kill the deceased because he was armed. The accused testified that he did not shoot the 2<sup>nd</sup> time when he returned to the scene. On the other hand, the accused established that the eye-witnesses for the prosecution showed that they had every reason to frame him because Pw2 to Pw5 were persons who had an interest in the subject land. Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge and the accused has convincingly explained these circumstances. He explained about the land dispute and the court cases and produced documents in that regard. He also confirmed that on the material date a large crowd of people and land prospectors turned up at the land in question where some even embarked on demarcating portions thereof.

36. I am unable to find whether or not, other than the accused person, there are other persons who equally had the opportunity to kill the deceased, who were not exonerated from suspicion of having committed the offence by the prosecution, so as to leave the evidence pointing unerringly towards the guilt of the accused. However I cannot rule out the possibility that there were other persons who would have an interest in the death of the deceased and the accused found himself as the sacrificial lamb. As such the evidence against the accused only raises grave suspicion against him of which as was rightly pointed out in the case of **Neema Mwandoro Ndurya versus Republic [2008] eKLR,** suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.

37. I accordingly, therefore, find that the availed circumstantial evidence falls short of establishing the offence against the accused beyond reasonable doubt.

38. The accused person did make a defence and provided evidence that further solidifies the defence case. The accused's version of events in his defence is very important such that even if such a version manages to convince the court, the prosecution will have failed to discharge its burden. This is very clear from the case of **Kiarie Vs Republic [1984] KLR.**

39. In such circumstances, the only question for the court to ask itself is: "Is the accused's story true or might it reasonably be true?"- with the result that if the answer is that the accused might be reasonably be telling the truth, the prosecution would not have in that case discharged the burden of proof beyond reasonable doubt imposed upon it by law.

40. I am also mindful in this case that a person lost his life and must be vindicated, in this case by sound reasoning on why the person accused of his death has been acquitted. It is for this reason why I shall proceed to analyze the defence evidence to determine if it is true or might reasonably be true. Further, whilst the accused person has not been proved to have caused the death, the deceased's killer is still at large and the evidence of the accused in this public record is important for bringing the real killer to justice. From the evidence of the investigator (Pw9) who investigated this murder, his investigation was far from complete when he handed over the file for prosecution.

41. According to the evidence of the accused as the first defence witness (DW1), he shot in the air thrice and when he returned on the 2<sup>nd</sup> invasion he was already under arrest and in custody and did not fire the four shots that killed the deceased.

42. The accused person's evidence is also very useful in gaining an understanding of the importance of recording the deployment of arms and ammunitions and the presentation of such evidence in court when the circumstances of the case demand. Firearm holders are obliged to individually sign the register upon being issued arms and ammunition so that if the weapons and ammunition are damaged or lost, or even wrongfully used, the person who took them out is held accountable. See Firearms Act CAP 114. The accused person's evidence was consistent with the evidence of PW8 and that of Dw2 to Dw5 that by the time he was arrested he had not shot anyone.

43. The accused person also shed more light as to what had happened prior to the murder. He gave an account of people who wanted him out of the land and produced several documents including a court order. It is clear from the accused person's testimony which withstood cross-examination that he was not the only person with a weapon with live ammunition on the material day. From the evidence on record, no one was injured during the time when the accused person fired the three gunshots.

44. The evidence of Pw2 to Pw5 seemed to be rather dubious; the accused person and his witnesses have, by contrast, consistently struck me as sincere in the course of their testimony. More to his credit, the accused's version of events was corroborated not only by his own witnesses but also by some of the prosecution witnesses, especially PW8. By all accounts, his version is more likely to be true than that of the State. The accused was able to inform the court that he was a licensed firearm owner and that he shot in the air and that he surrendered the same to the police. He told the court that on the 2<sup>nd</sup> return to the scene, he was already in custody and was accompanied by police officers and this evidence further casts doubt on the entire prosecution case.

45. The accused also went as far as to present a letter, purportedly that he alluded to a conspiracy to implicate the accused person so as to get him out of the subject land (See D Exh. 7).

46. This letter as well as the several others identified by the accused were only hearsay as they were not authored by him.

47. However I am therefore more inclined to believe the accused when he says this case was part of a conspiracy to deliberately implicate him, especially bearing in mind that the land in question seemed to be subject of a dispute. The defence evidence proves that the accused was not the only armed person during the incident. There is a possibility that someone else could have fired the fatal shot.

48. Having found the State's evidence as falling below the standard of beyond reasonable, it behoves me to acquit the accused person without further ado. I find the accused not guilty and is accordingly acquitted of the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. He is to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at **Machakos** this **18<sup>th</sup>** day of **December, 2019**.

**D. K. Kemei**

**Judge**