



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 5 OF 2010

REPUBLIC.....COMPLAINANT

VERSUS

PETER NGILU.....ACCUSED

JUDGMENT

Peter Ngilu, the accused herein was charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars of the offence were that; on the 26th of January 2010 at Sikata/Ndengelwa area along Bungoma /Webuye road within Bungoma South District of Western Province then, now Bungoma County, he unlawfully shot dead **Michael Sululu Wafula**. The accused denied the charge and the matter went to full trial, with the prosecution calling twelve witnesses and the defence two.

This trial went through the hands of several judges with three of us taking evidence at different stages of the trial. Hon. Mr. Justice Onyancha heard the bulk of the prosecution witnesses, 10 of them. Hon. Mr. Justice Muchelule 2; this court heard the two defence witnesses and has now the privilege of writing the judgment. The case also passed through the hands of various state counsels. Learned state counsel Mrs Njeru concluding the matter. The accused was represented by learned Counsel Mr. Bw'Onchiri

In brief, the Prosecution case is that; on the 26th day of January 2010, at about 6.30 P.M a collision occurred between an oil tanker, a lorry and a matatu along Bungoma/ Webuye road at a place known as Sikata, where two people died and several were injured. A surging crowd siphoned oil from the tanker and became unruly forcing the police to shoot in the air in a bid to disperse the rowdy crowd. In the process two people were shot by stray bullets, one Michael Sululu died and the other Kevin Muteyo was injured. The deceased was a Red Cross volunteer assisting those who had been injured in the accident when the stray bullet hit him. It is the case of the prosecution that the bullet that hit the deceased was from the gun in possession of the accused in this matter.

The prosecution witnesses gave the following testimony:-

PWI Dr. Mohamed Said

Former Chairman Red Cross Society Bungoma Branch

A member of the Executive Committee, of the National Red Cross, and its medical advisor.

Known to the deceased who was one of their volunteers

While in a supermarket on the 26th of January 2010 he received information of the accident at Sikata area

He called PW6 and requested that she gets a team together to the scene to assist

In the company of PW2 and 4 he arrived at the scene.

They heard gun shots. PW2 & 4 left him in the car a short distance away.

The time was about 7.45 p.m.

There was commotion

He learnt that two people had been shot.

He put the two injured persons in his vehicle and took them to Bungoma district Hospital

One of the two was Michael Sululu whose condition got worse and he subsequently died.

The other Kevin Buteyo was not seriously injured

In cross examination he said that he had seen people carrying Jerricans and the police trying to control the crowd.

He did not know the accused.

He did not know who shot the deceased.

PW2 Roselyn Wanyama Wafula

A Red Cross volunteer & a blood donor

She knew the deceased who was also a Red Cross Volunteer

She also knows Kevin Buteyo who is a relative

On the 26th of January 2010 at 7 p.m. while at home she received news of the accident at Sikata from **PW1**

She was asked to reach other volunteers

PW1 picked her from the road side and they proceeded to the scene of the accident

Before reaching they heard gun shots.

Together with **PW3** they walked as they left **PW1** parked a distance away.

She learnt from one Rose that the deceased had been shot.

She went back for **PW1** and they drove the car to the scene of the shooting

Both victims of shooting were taken to Bungoma District Hospital in **PW1**'s vehicle

At the hospital the doctors tried to resuscitate the deceased in vain

The other victim **PW3** Kevin Muteyo was treated

PW3 Kevin Muteyo

He did not know the deceased

He is known to the accused, a police officer based at Ndengelwa Patrol base

On the 26th of January 2010 at about 7 p.m. while in a matatu he found an accident had occurred at Sikata.

A Nissan matatu had collided with a tanker.

His matatu stopped and helped ferry the injured to hospital

Many were injured and two people had died

He saw in charge of traffic who was in uniform arrive, he was in the company of other officers and they tried to control traffic

He saw the deceased attend to the tanker driver with other Red Cross volunteers

Shortly thereafter he heard a gunshot on his cheek. He fell down unconscious

Together with the deceased they were taken to Bungoma District Hospital

The next day he was discovered to have had a bullet lodged on the neck and he was operated on and the same removed

He could not tell who between him and the deceased was shot first

He was not siphoning oil at the time

PW4 Amin Ali Sheikh

He runs a pharmacy in Bungoma

At the time of the accident he was the treasurer of Kenya Red Cross Bungoma Branch

He knew the deceased as a volunteer member of Red Cross

On 26th January 2010 at 7.10 p.m. he received a call from PW5 and was informed of the accident at Sikata

He called a few volunteers and in the company of PW1 they proceeded to the scene and on the way they picked PW2

They heard gunshots as they approached the scene of accident

Together with **PW2** they walked to the scene as **PW1** parked at a safe distance

They found the deceased unconscious and **PW2** went for **PW1**

PW1&2 rushed the deceased and the other injured person to hospital

The crowd was charged and blamed the shooting on the police

After two hours he learnt that Michael had died

In cross examination he said he did not see the accused at the scene of accident, neither did he know who had shot the deceased

PW5 Evalyne Undisa, PW6 Janet Nanjala Barasa, PW7 Roselyn Nekesa Luturian, PW8 Cleophas Kiprotich Sego & PW9 Paul Barasa Butusi

Were all Volunteers of Red Cross society, who equally rushed to the scene of accident to assist

None of them knew who shot Michael Sululu

PW10 Chief Inspector Emmanuel Lagat

He is a firearm examiner based at the Ballistic laboratory, at the CID headquarters, Nairobi

He has 10 years' experience in firearm identification and tool marks analysis

A trained armourer

Also trained in forensic technology

On 28th January 2010, Chief Inspector Muchai of Bungoma CID submitted to him the following

1. A submachine gun serial number 2331 marked as Exhibit "A"
2. 3 Ceska Pistols serial numbers G 5812 marked as Exhibit "B", G 5783 marked as Exhibit "C", F4336 marked as Exhibit "D"
3. 2 G3 riffles serial numbers 6741592 marked as Exhibit "E" and 6741588 marked as Exhibit "F"
4. 57 rounds of ammunition calibre 9x19 marked

A1-A18

B1-B11

C1-C13

D1-D15

5. 5 expended cartridge cases in calibre 9x19mm marked S1-S5
6. 1 fired bullet marked as Exhibit Q1

He also received another fired bullet marked as Exhibit X1.

Through an Exhibit Memo he was asked to ascertain the following;

1. Make and calibre of Exhibits marked A,B,C,D,E & F
2. If Exhibits A-F could fire
3. Size & Calibre of;

A-A18

B1-B11

C1-C11

D1-D15

And if they could be fired by A-F

4. To match which Exhibit A-F fired S1-S5
5. If Exhibit A-F had fired
6. Size and Calibre of Q1
7. Which of A-F fired Q1

He examined the Exhibits and formed the opinion that;

1. Exhibit S2,3 &4 were fired from Sterling Patchet Machine gun serial number KR233I
2. Exhibit S1 was fired from Ceska Pistol Serial number G5812
3. Exhibit S5 was fired from Ceska Pistol Serial Number 4336
4. Exhibit Q1 & X1 were fired from bullets in calibre 9mm and were formerly components parts of 9x19 mm ammunition.

On doing a microscopic examination he found that;

1. Sterling Patchet Serial Number KR 233I fired bullet Q1 &
2. Ceska Pistol Serial Number G5812 fired X1

PW11 Chief Inspector Jacob Muchai

Based in Garrissa Provincial Administration.

On 27th January 2010 he was based at the Bungoma Provincial Administration

The DCIO asked him to join in the investigation of the shooting at Sikata the previous day

He went to the scene in the company of others and they reconstructed the scene

One Michael Sululu was shot as he assisted victims of the accident

All exhibits collected during investigations were taken to the ballistic expert.

They collected empty cartridges at the scene

From the expert report Exhibit Q1 was fired from the sub machine gun which was with the accused on 26th January 2010

The movement register from Ndengelwa Police Patrol Base showed that the accused was issued with 25 rounds of ammunition and he expended 7 rounds

The cartridges spent matched the bullet head fired from the accused gun

The same was collected 3.4 meters from where the deceased was shot as all the other firearms were eliminated

In cross examination;-

He stated that members of public were siphoning oil from the tanker and threw stones at the police and threatened to set ablaze the tanker which forced the police to shoot in the air to scare them away but accidentally stray bullets injured two people.

He further stated that SP Kaneke fired 2 rounds of ammunition 9mm from Ceska S5782

C.I Kulamboi fired 4 rounds of ammunition from Ceska G5812

CPL Ngilu 7 rounds of ammunition from Patched KR 2331

He arrested all officers who fired but after the ballistic expert's report only the accused was charged

There was circumstantial evidence against the accused other than other than the report

He charged the accused seven days before the date of the ballistic expert's report

He also stated that witnesses stated that a uniformed police shot; He gave names of said witnesses as Evalyne, Rosemary and Cleophas

X1 was found in hospital. The bullet head of the same is what hit Kevin Buteyo

PW12 Dr. Francis Maina

A pathologist base at Moi Referral and Teaching Hospital in Eldoret

As at the 28th January 2010 he was based at Bungoma Hospital Mortuary where he performed post mortem on the body of Michael Sululu

He found;-

Externally- injuries culminating from gun shots

Injury on lap nostril at the exterior of the nose 8mm in diameter Compound exit wound on the left sub-modular region 12 mm in diameter Superficial tract connecting the 2 wounds

A gun shot entry wound on the left buttock 9cm in diameter and

A corresponding exit wound on the superior anterior left thigh measuring 4x2 cm

Bruises on the chest medial 7x12 cm

Internal injuries- Laceration of the femoral artery

He formed the opinion that the cause of death was severe haemorrhage due to gunshot injuries. The gun wound on the leg was more severe.

At the close of the prosecution case, the accused was found to have a case to answer and he was put on his defence. The defence called two witnesses their evidence was as follows;-

DW1 Peter Kiilu Ngilu

Gave a sworn statement as follows;-

Before his arrest he was the officer in charge of Ndengelwa Police Patrol Base, which was under Bungoma Police Station

On 26th January 2010 at about 6.30 p.m. he receive information from a member of the public about an accident that had occurred at Sikata

Shortly thereafter O.C.S. Bungoma Police Station communicated to him via V.H.S Radio

He was asked to go to the scene of accident with other Police Officers armed

He got a Patched sub Machine gun and issued his two colleagues with G3 Rifles each

Due to challenges of transport two of them were able to hike a lift and got dropped near the scene at about 7.20 p.m.

He saw a tanker that had overturned in the middle of the road. There were two other vehicles that had overturned as well

He heard repeated gunshots near the tanker.

As he moved closer to the tanker he met the O.C.S Bungoma Chief Inspector Mugambi who directed them to disburse the crowd that was getting oil from a ditch.

They cut sticks from the bush and scared the crowd away

There were several police officers armed with G3 rifles

One other had a Patched Gun

He tried to stop the oil from spilling but did not succeed

Another person helped stop

He saw the tanker driver

He also learnt that a person had been shot

He left the scene after 9 p.m.

He returned his gun with all the 25 rounds of ammunition

In cross examination he said;-

On arrival they found a commotion

Citizens were siphoning oil from the tanker

Some had their clothes soaked in oil

The crowd was uncontrollable

There were about 200 people

On receiving instructions he tried to disperse the crowd to avoid people burning

He did not know who fired the shots near the tanker

He did not shoot

The following day his gun and those that had been in possession of his colleagues, and the movement register were taken

DW2 Bernard Mandala

He is a resident of Sikata

He is known to the accused. He knew him as an officer based at the Ndengelwa Police Patrol Base.

He was a passenger in a matatu that was on the said road.

The passengers alighted and the said matatu helped ferry the injured.

He saw the tanker and the other vehicles that were involved in the accident

The oil tanker lost control and hit a lorry and the Matatu

Several people were injured two people died

He witnessed the Red Cross volunteers help the victim of the accident

He heard gunshots and attributed the same to the uniformed police who arrived in a land cruiser

He saw DW1 and his colleagues using sticks to disburse the crowd.

After close of both the prosecution and the defence filed written submissions. The submissions may be summarised as follows;

Mrs Njeru for the state submitted that at the close of the prosecution case the offence of murder against the accused had been proved; she said that it had been proved that at the time of the shooting the deceased was at the scene of the accident together with **PW5, 7 & 8** as they assisted victims of the accident. Further that there was an admission by the accused that he too was at the scene armed with a Patched Submachine gun Serial Number 2331 and with 25 rounds of ammunition. That **PW10** the firearm expert suggested that the fatal shot was from the bullet head picked at the scene.

The state further submitted that the defence merely denied shooting and the evidence that the accused had used sticks to disperse the crowd was a blatant lie; further that in order to control the surging crowd the police shot in the air but two stray bullets were fired towards the Red Cross personnel leading to the death of the deceased Michael Sululu and where a civilian Kevin Butenyo were shot.

Further that **PW10** by carrying out a comparative microscopic examination of bullet heads Q1 & X1 was able to find sufficient markings which enabled him to form an opinion that the Sterling Patched Serial Number KR 2331 was used to fire Q1 which bullet head was collected 3.4 meters from the scene of shooting and therefore this confirmed that the accused fired the killer bullet.

On his part defence Counsel Mr Bw'onchiri submitted that in a charge of murder the prosecution must prove

- a. The Act was by the accused
- b. That the accused had intention to cause death or to do grievous harm

Further that the prosecution has a duty to prove its case beyond reasonable doubt, yet there are several gaps in the prosecution case in that;-

No DNA analysis was done on the bullet and the deceased blood samples Police officers who were present at the scene were not called as witnesses

The arms movement register from Bungoma Police station was not produced in court

Evidence of the rifle issued to Muchai was contradictory

One bullet head could injure more than one person

And that there is no direct or circumstantial evidence linking the accused to the death of Michael Sululu

Having considered the evidence adduced and submissions by both sides the issue before the court is whether or not the prosecution proved the charge of Murder facing the accused herein beyond reasonable doubt.

The prosecution must prove the two ingredients of the offence of murder. First the offence of murder is committed when a person causes the death of another by some unlawful act or omission. And at the time of the act or omission the person is motivated by malice aforethought.

Malice aforethought is defined by Section 208 of the Penal Code as being established by evidence proving one or more of the following circumstances; an intention to cause death or to do grievous harm to any person whether that person is the person actually killed;

knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether the death or grievous bodily harm is caused or not, or by a wish that it may not be caused, or intent to commit a felony.....

In a criminal case the onus of proving the case beyond reasonable doubt squarely lies on the prosecution.

In the famous House of Lords case of **Woolmington V DPP (1935) AC 462** Viscount Sankey made his famous "Golden thread" speech as follows;

"Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exceptions. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused."

The above is as much the position in our jurisdiction as well. In the much celebrated Eastern African Case of **Okale Vs R (1966) E.A at 555** the court of appeal stated.

"In every Criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable to put forward a theory not canvassed in evidence or in counsels' speech."

".....the burden of proof in criminal proceedings is Throughout on the prosecution, and it is the duty of the trial To look at the evidence as a whole"

The prosecution called 12 witnesses and submitted that there was both direct and circumstantial evidence linking the accused to the death of the deceased.

What is clear from the evidence on record is that several police were called to the scene of accident, to take charge and control a surging and unruly crowd that was siphoning oil from the overturned lorry. The deceased was present at the scene attending to the injured as volunteer Red Cross personnel. The accused was also there as one of the police officer armed, as several others were. Due to the behaviour of the

crowd, siphoning of oil and threatening to set ablaze the tanker, the police were directed to shoot in the air in order to scare the crowd away.

It was admitted by the prosecution both in evidence and in its submission that stray bullets among the bullets fired by the police hit the deceased and one other civilian.

None of the prosecution witnesses saw who fired the bullet towards the deceased. Indeed not even PW3 Kevin Buteyo the other injured person could tell where the bullet came from. It is therefore not correct for the prosecution to say that PW5, 7&8 saw the accused shoot at the deceased.

PW5 said;

“When I stretched up I heard gun shots. The person who stood by my side fell. I later knew him to be Kevin. Michael stood and raised his hand up and said we were red cross volunteers. Then I saw him fall . We then saw him bleeding. I got frightened too.

the shooting came from.”

Upon cross examination she said

“..... Shots came from the front. I got frightened.

I fell down. I never saw the accused at the scene at any time”

PW7 said;

“.....after Michael finished dressing the driver, I exchanged with him and began attending the driver’s head. That is when I heard a gunshot from far. Another person Kevin then crossed the road and came to where we were. At that moment we heard gunshots bleeding and fell. Then Michael announced with his hands up that we were Red Cross volunteers. Then I saw police coming and I believe Michael was addressing him. Then Michael said Rose ‘nisaïdie’. I turned to his side. He had fallen on

On cross examination she said;

“.....I did not know where the shots came from. I saw a police officer in uniform. I do not see the officer today.”

PW8 on his part said

“.....It was about 7.20 p.m. We then heard gunshots from the right side as we face Webuye. We were on the left side.

I then saw Michael kneel down and say “don’t shoot me” he addressed the crowd standing there. He then fell down bleeding from the middle”

From the above evidence referred to by the prosecution as offering direct evidence, it is so obvious that no such direct evidence was available.

The prosecution has heavily relied on the report of the ballistic expert and the evidence gathered during investigations.

PW10 had this to say;

He was given 6 fire arms to test

1 Submachine gun serial Number 2331

3 Ceska pistols serial numbers G5812, G5753 AND F4336

2 G3 Rifles Serial Nos. 6741592 & 6741588

He was given fired cartridges S1-S5 formerly components of round of ammunition 9x19mm

His examination revealed that S2, 3&4 were fired from Sterling Patched Submachine gun KR2331

S1 was fired from Ceska Pistol G5812 S5 was fired from Ceska Pistol Serial No. G4336 Bullet heads Q1 and X1 were fired from two bullets in calibre 9mm and were formerly components parts of 9x19mm ammunitions.

A comparative microscopic examination revealed that the Sterling Patched Serial No, KR 2331 was used to fire the bullet Q1 and Ceska Pistol Serial No. G5812 was used to fire X1

In cross examination he said

“My duty was to test and link a bullet to a firearm..... I received 5 cartridge cases. I do not know when they were fired and the time of firing is never determined exactly.”

From the above it can be deduced that the expert firearm examiner received 6 firearms, 5 fired cartridges and 2 bullet heads apart from other rounds of ammunitions.

The accused submachine fired 3 of the 5. Q1 was also fired from the submachine. It is not clear whether Q1 was part of the 3.

The other 2 were from Ceska pistols. As X1 is from one of the two.

PW11 the Investigating Officer said;

The movement register from Ndengelwa showed that the accused had been issued with 25 rounds of ammunition and he expended 7 At the scene of shooting they collected spent cartridges and the matched the fire arm the accused had and the bullet head was found 3.4 metres from where the deceased was shot

In cross examination he said

“I see the investigation dairy. I see the base commander saying he saw members of public siphoning diesel from the lorry and they were throwing stones at the police and threatened to set the tanker ablaze and the police officers began shooting in the air to scare them and that accidentally stray bullet hit the member of public who were seriously injured. He stated that Kanake SP fired 2 rounds ammunition from Ceska No. 55782, CI Kulumboi 4 rounds of ammunition from Ceska G5812 and Cpl Ngilu 7 rounds from Patched KR 2331. I recovered 6 firearms.”

From the above evidence only details of who fired how many bullets has been given. The fact that a bullet was found 3.4 meters away or near the scene of shooting cannot *per se* make it the killer bullet as no evidence connecting it to the deceased was adduced. From the evidence of PW11 13 bullets were expended by 3 different police officers. There is also evidence by PW10 that he only received 5 spent cartridges and two bullet heads.

Which bullet killed the deceased? Would be the key question here. Is it Q1 found 3.4 meters away?

Could it have been any of the others that were not recovered? All these questions remain unanswered.

Although the accused stated that he did not fire but used sticks and that he returned 25 rounds of ammunition back, what is clear is that the crowd was so unruly that sticks could not have scared the crowd. There is ample evidence that gunshots were fired by the police to scare the crowd. Secondly there is also ample evidence that the accused was among the officers who fired in an attempt to scare the crowd. At least 3 out of the 5 spent cartridges were from his submachine gun. Indeed the movement register indicates clearly and with no alteration that he expended 7 rounds of ammunition.

I find therefore as a matter of fact that the accused together with other police officers fired in order to scare the rowdy crowd. I find further as a matter of fact that the accused expended 7 rounds of ammunition out of around 13 fired at the crowd and that one of the bullet heads recovered Q1 was from the submachine that was being used by the accused.

Having found as above I now turn to see whether the circumstantial evidence on record is capable of establishing the guilt of the accused to the required standard..

What constitutes circumstantial evidence has been laid down in several cases.

In **Abanga alia Onyango v Rep, CR A NO. 32 OF 1990(UR)** the court of appeal set out the principles to apply in order to determine whether circumstantial evidence adduced is sufficient to sustain a conviction as follows;

“it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogent and firmly established,(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime committed by the accused and no one else.”

In **Sawe v Rep (2003) KLR 364** the court of Appeal once more said;

- 1. In order to justify circumstantial evidence, 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 .**
- 2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstantial evidence.**
- 3. The burden of proving facts which justify the drawing of inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains on the prosecution and never shifts to the accused**
4.
5.
6.
- 7. Suspicion, however strong , cannot provide the basis of inferring guilt which must be proved beyond reasonable doubt.”**

It is my opinion that in his evidence the expert witness did not link the accused to the killer bullet. Indeed there is no evidence of what or which of the fired bullets killed the deceased. The expert did not either link Q1 to the deceased. The evidence by PW11 that Q1 was found 3.4 meters from the accused does not make it the killer bullet. Indeed the whereabouts and what happened to the other bullet heads remains unclear? The theory by PW11 is too weak to meet the laid down principles. And in this regard I see no chain so strong as to link the accused to the death of the deceased.

The ballistic expert did a good job based on exhibits availed to him. However he was not able to give conclusive evidence linking the accused to the killer bullet. More needed to have been done in the circumstances of the case. A DNA analysis needed to have been done in the absence of any bullet found

in the body of the deceased, in order to remove any doubt as to whether Q1 was the killer bullet. The accused is either a sacrificial lamb or a victim of insufficiently investigated case. I do agree with the defence that the evidence place before court has left gaps.

Indeed suspicion alone is not enough to infer guilt upon the accused. Neither does the burden of proof shift to the accused to fill gaps left by the prosecution. The accused may have lied to the court, he may have denied the obvious but again he could as well have said nothing. The onus was entirely on the prosecution. I am of the opinion that the circumstantial evidence being relied upon by the prosecution is insufficient and cannot be safely relied upon.

Consequently I acquit the accused of the offence of murder. He is set free unless otherwise lawfully held.

Dated and Delivered in Bungoma this 26th day of January, 2016

ALI-ARONI
JUDGE

In the presence of

Advocate for the accused.....

State counsel.....

Court clerk.....