



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 3 OF 2013

REPUBLIC PROSECUTOR

V E R S U S

IBRAHIM BILLE JELLE ACCUSED

RULING

In all criminal trials, after the close of the prosecution case, the court is required under the law to determine whether or not to put the accused person on his or her defence, depending on the strength of the prosecution case. The court may or may not put the accused on his or her defence. In criminal trials at the High Court, the relevant provision is section 306(1), which provides as follows:-

306(1) “when the evidence of the witnesses for the prosecution has been concluded, the court if it considers that there is no evidence that the accused or any several accused committed the offence shall after hearing if necessary, any argument which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty”.

The accused herein has been charged with three counts of murder. Count 1 is that on the 19th of November 2012 at Garissa in Garissa County in the Republic of Kenya, jointly with others not before court murdered No. 57796 Lance Corporal John Wachira Wangombe.

Count 2 he has been charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the same day and place jointly with others not before court murdered No. 72326 Snr Private David Areman Ekalale.

Count 3 is also for murder. The particulars of the offence are that on the same day and place jointly with others not before court murdered No. 76817 Snr. Private Antony Michieka Mukami.

The prosecution has called eleven witnesses.

PWI is Sergeant Jason Mosigisi of the Kenya Defence Forces. It was his evidence that on 19th November 2012 in the morning, he left Garissa Military Camp with other officers to repair tyres about 400 metres from the gate of the military camp, near the Cooperative Bank Branch Garissa, on the left side of Kismayu road. They went to the garage with the deceased Tony Michieka, and Areman together with other officers. As they were performing their duty at the petrol station, he heard pistol fire, took cover and ran to the Cooperative Bank and called the Military Camp on the phone. He then proceeded to the military camp. He later learnt that Michieka, Wangombe and Areman had been shot dead. He identified the deceased military officers in photographs, which were taken from the scene of the incidence.

In cross examination, he stated that he had no documents to support the tyre repair assignment. He maintained that he heard three pistol shots which came from the left side. He however stated that he did not see the person who was shooting. He also stated that the rifles of the deceased military officers were found at the scene. He stated that he saw the accused person for the first time at an identification parade.

PW2 is Dr. Sila Kisili of Kenya Defence Forces Memorial Hospital Nairobi. It is his evidence that on 23rd November 2012 he conducted a postmortem on John Wangombe who had bullets wounds in the head and a wound on the back shoulder. X-rays were conducted on the body. According to him the cause of death was injuries multiple gun shots. He signed the postmortem report and produced it as an exhibit.

It was also his evidence that on the 26th November 2012 he conducted a postmortem examination on the body of David Areman Ekalale. He noted several bullets wounds and the head extensively shattered. He formed the opinion that the cause of death was multiple gunshot injuries. He filled and signed the postmortem report, which he produced as an exhibit.

On the same 26th November 2012, he conducted postmortem examination on the body of Antony Michieka Mukami. The body had several bullets wounds. He formed the opinion that the cause of death was extensive head injuries from bullets. He filled and signed the postmortem report which he produced in court as an exhibit.

In cross examination he stated that the fatal injuries to all the three deceased's, were on the heads. He stated that there were burning marks or wounds on one of the bodies, which indicated that the injuries were caused at closed range.

PW3 was Superintendent Lawrence Nthiwa a firearm examiner at Nairobi CID headquarters. It is his evidence that exhibits in the form of cartridges and bullets were submitted to him by Corporal Peter Mwangi of CID Garissa together with an exhibit memo. These were nine expended cartridges A1 – A9 together with 22 fired bullets marked B1- B22. He was asked to determine the calibre of the firearm used.

It was his report that on examination he found that A1 – A9 were fired cartridges of 9 x18mm. He found that A2, A4 and A5 were fired from the same firearm used in another incident reported at Garissa Police Station under OB 105/5/10/2012. A1, A3, A6, A7, A8 and A9 were fired from the same firearm used in shooting reported at Garissa Police Station under OB 67/30/9/2012, and OB 36/10/2012.

He also found that B1 and B2 were two fired bullets of calibre 9x18mm. B1 had two land engraved areas impressions, while B4 had four land engraved areas. Analysis showed that B1 had been fired from the same firearm with C2. B4 was fired from the same firearm as C1 and C8 and that the firearm used was a pistol 9x18mm calibre. He prepared and signed the ballistic report. He produced the same as an exhibit.

In cross examination, he maintained that he received 9 cartridges and 2 fired bullets. He stated that the cartridges had been fired from a pistol calibre 9x18mm which had been used previously as per the earlier OB entries. He stated also that OB 105/5/10/2012 was for three cartridges out of the 9 which were A1, A4, and A5. He stated that only the 3 marched with those submitted under OB 67/30/9/2012. He stated also that 3 separate incidences had occurred in Garissa, but that no firearm was recovered. He was however not sure whether the 3 OB entries referred to the same person or culprit.

PW4 was Superintendent Geoffrey Matete. It was his evidence that on 26th November 2012, he was asked by the Investigating Officer Inspect Kyeti to conduct an identification parade in which the suspect was Ibrahim Bille Jelle. He was informed that the witnesses were two ie Karanja George and Jason, both of Kenya Defence Forces.

He stated that witness Karanja George identified the suspect by touching the shoulder and the suspect said **“I don't know”** in Kiswahili. According to this witness the other identifying witness did not identify the suspect, and the suspect said **“that is right”** in Kiswahili. He filled the identification parade form and

signed the same. He produced the identification parade form as an exhibit in court.

In cross examination, he stated that only Karanja George identified the suspect though the two identifying witnesses were together during the incident. He stated that he did not enter the conduct of the identification parade in the OB. He also did record the participants in the parade in the OB.

In re-examination, he stated that it was not common to enter identification parade in the OB. He also stated that the accused or suspect did not ask for the presence of any third party during the parade.

PW5 was Chief Inspector Obadiah Rukira, the OCS of Garissa. It was his evidence that on 19th November 2012, he was called on phone at around 12 noon to go to the gates of Garissa Primary School. He took the station Landcruiser vehicle GKA 635G, with officers and rushed there arriving within 10 minutes.

At the scene, he found 3 Kenya Defence Forces officers having been shot dead at a garage. He noted that the deceased had several gunshot wounds on the head and chest and were lying on each other. He met other Kenya Defence Forces officers at the scene. He secured the scene and called the scenes of crime personnel to take photographs. He collected cartridges and also took the dead bodies to the Provincial General Hospital Mortuary. The CID Officers then took over the scene from him. He later learnt that a suspect had been arrested. According to him, the suspect was the accused in the dock.

In cross examination, he stated that he was not given a description of the suspect. He stated that he collected some of the cartridges from the scene while others were handed over to him.

In re-examination, he stated that he was not the Investigating officer. He maintained that the CID personnel took over the scene from him. He also stated that Kenya Defence Forces officers took control of the town.

PW6 was Mary Wanja the wife of Antony Michieka. She stated that on the 19th November 2012, she had talked to Antony on the phone but later the phone could not go through. The next day, she went to Gilgil Military Station and was informed that he had been shot. On 26th November 2012, she witnessed the postmortem examination of the body.

In cross examination, she stated that their marriage was a come and stay arrangements and that they had been together for seven years. She stated that she did not know the person who had shot him.

PW7 was George Karanja, a Corporal with the Kenya Defence Forces who was also a driver. It was his evidence that on 19th November 2012 which was a Monday, five officers left the Military Camp at Garissa at 10.30 am in a lorry to repair tyres near the hospital.

At the repair place as repairs were being carried out, two people suddenly emerged and he saw both. One was carrying a pistol covered on a sweater. He did not observe closely the other.

Soon thereafter he heard a pistol shot. He tried to take cover and then ran away. He observed that three other unarmed men emerged and chased, him but failed to catch up with him. He ran past the air strip to town where he heard additional sound of fire.

He then ran to the Military Camp where he met Sergeant Busigisi who had also escaped the attack and had already made a report. He entered the camp and did not do anything else. He identified the appearance of the deceased in the photographs in court. It was his evidence that after six days he was called to the police station, and an identification parade conducted, in which he identified one person by touching him. According to him, that person was the accused.

In cross examination he stated that Michieka who was the driver of the lorry carrying the tyres. He maintained that they left the Garissa Military Camp at 10.30 am to repair the tyres but that only the group commander who was the Sergeant, knew where the repairs were to be done. He stated that the Sergeant

was not killed. He also stated that he did not expect the attack and could not believe that any of the team of the military officers was involved in the killing incidence.

He stated that at the time of the attack all the military officers were on the ground and that none was on the lorry. He stated that the attackers approached from his right hand side and came running. He heard the sound of open shoes and then fire and then he ran away. He stated that he saw a pistol as the attackers came running.

According to him, initially there were two attackers, but an additional people followed him. He stated that one of the first two was tall and carried a pistol and that he was the accused in the dock. He stated that the accused had a grey pair of trousers and a long sleeved shirt and that he saw him for a duration of 3 seconds but did not observe the other attackers.

He could not remember the colour of the sweater which covered the pistol and could not recognized the three people who chased him, not even their clothes. He stated that he heard one sound of gun fire, but when referred to his police statement, he said that as he ran away from the scene, he heard other gun shots.

He stated also that on 26th November 2012 he was taken to Garissa Police Station and informed that a person had been arrested at Hullugho. He stated that he could not remember the position taken by the accused during the identification parade, which could be position 1, position 2 or position 3. He stated that the participants in the parade were not of similar heights. According to him, he could identify the accused by face, the beard and height. He stated that if the police said that the accused had a grey sweater, that was a mistake. He insisted that he had adequate time to identify the accused during the incident as he looked behind while running.

In re-examination, he stated that it was his first time to repair tyres in Garissa. He maintained that he saw the face of one of the attackers as the attackers were running toward them. He said that he was attracted by the gun which was covered in a sweater. He said that he knew the difference between the sound of gunshots and a pistol shot. He said that during the identification parade, he saw twenty people standing in the OB office and he touched the accused.

PW8 was Inspector Francis Kieti. It was his evidence that on 19th November 2012 at about 11.30 am while at Garissa CID Office, he received information through the police pocket phone on a shooting incident in town. He proceeded to the scene opposite to Garissa High School gate, and met the OCS who had cordoned the scene. With other officers, they gave chase to the attackers but did not trace them and returned to the scene. Thereafter the bodies of the deceased were removed. He went to the scene after two hours and found that fires had been lit in town with business stalls burning with allegations that the military had caused the burning.

It was his evidence that on 21st November 2012 the DCIO remitted the file to him to investigate and that he received eight cartridges.

On the 24th of November 2012, he received information that a suspect had been arrested at Ijara trying to flee to Somalia. On the 25th of November 2012, the suspect was escorted by police men to Garissa and he requested the DCIO to conduct an identification parade. He was later informed that one witness Corporal Wachira had positively identified the suspect.

It was his evidence that the suspect was brought with 2 mobile phones, 3 photocopies of National Identity Cards, and a memory card holder. He stated that he obtained a print out on data from the two mobile phones, and found that from the Nokia mobile phone, the contacts included those with the Somalia code which was 252. These were eighteen contacts.

He stated that during interview the accused, he said he had contacts with people in Kismayu where he had lost relatives including a brother called Hussein. Of the four photocopies of identify cards, one was his own, and he said that the others were of people who had been killed in Somalia aged between 20 and 25

years.

As investigating Officer he was convinced that at that time the Alshaabab gang recruited people of that age. Intelligence information was also that at that time Alshabaab were targeting Police Officers in Garissa and came to the conclusion that the Kenya Defence Forces officers killing was connected with Alshaabab.

He stated that the photocopies of the National Identity cards found on the accused, were in the names of Kheiro Yahya Shakol, Kassim Mohammed Digale and Hussein Mahat Shurie, and the accused himself. He produced the photocopies of national identity cards as exhibits.

He also testified that he forwarded the two phone to the ICT Department of ATPU Garissa. He forwarded the 2 mobile phones together with something he thought was a memory card. He received the report from the ATPU, that the phones contained Kenyan contacts, Somali contacts and contracts in other foreign countries. These contacts were only in the Nokia mobile phone which he produced as exhibit 8. According to him, the other phone had no relevant information. He said that the other mobile phone and the memory card holder could be released to the owner who was the accused, as they contained no relevant information.

He stated that the accused was not brought to court within 24 hours of his arrest as required by law, because of the long distances between Ijara and Garissa, and obtaining of witnesses for the identification parade. It was his evidence that an affidavit had been filed in court with regard to the delay.

In cross examination he stated that he had no information linking the accused to Alshaabab. He confirmed that he was the Investigating Officer and that the information regarding the accused was from a tip off. He stated however that the accused's Nokia phone contacts with South Somalia which was under the control of Alshaabab was suspect, and in addition, the accused had copies of identity card of people who had died in Somalia.

He stated however that the photographs taken at the scene of the incident did not link the accused to the incident. In addition the sms on the Nokia phone did not link him to the crime. He maintained that what connected the accused to the crimes was his contacts in Somalia and the identification parade on which he was identified by an eye witness.

In re-examination he stated that no recovery was made at the accused home in Garissa. He confirmed that the accused had a home in Ijara but that he did not visit the same. He stated that out of the 30 contacts on the Nokia mobile phone, 18 were from Somalia.

PW9 was PC Martin Antony Wekesa, of Masalani Police Station. It was his evidence that on 24th November 2012, he was called by the OCPD Ijara to arrest a dangerous criminal. In the company of other police officers and an informer, they proceeded to the junction of Hulugho and Kanyasero Manyatta. They then cordoned the Manyatta and met a Chief sitting with the suspect and he called the accused by name and the accused shot up and became very ugly and shouted "**shoot me**" in Kiswahili. They arrested him and found that he had a small A4 size bag with some items. They took him to Hulugho Police Station, then to Masalani Police Station, then to Garissa Police Station. However he was not part of the escort team from Masalani Police Station to Garissa Police Station.

In cross examination, he stated that the arrest team was led by a Sergeant Dahill from Masala Administration Police Camp. He stated that surprisingly, the accused who was said to be dangerous person was not armed when they found him. According to him the accused had spent a night at the Chief's place.

PW10 was PC Antony Ngugi Kuria. He stated that on 24th November 2012 he received Nokia mobile phone from Inspector Kieti plus an exhibit memo and, as a person who had been trained by among others the American Embassy, was asked to exploit the phone and find if its owner was connected with terror activities.

He found several sms in Kisomali language which he did not understand. He also found several foreign contacts such as Somalia, Ethiopia, America, Canada and Zambia. He prepared a report on the data which he managed to extract from the phone, signed the report, which he produced it in court as an exhibit.

He stated that the mobile phone did not have any data.

In cross examination, he confirmed that the sms were in Somali language. He stated that he did not follow up to know what those sms's actually said. He stated that he did not have any photograph linking the accused to terror activities.

PW11 was Sergeant Peter Mwangi of Serious Crimes Unit. It was his evidence that he took photographs of the scene. He processed the photographs, identified them in court, and produced them in court as exhibits.

In cross examination, he stated that he did not indicate the names of the deceased persons on any of the photographs.

After the close of the prosecution case, counsel for the accused Mr. Nyasani stated that he intended to file written submissions on a case to answer. Mr. Okemwa for the State said that he would make oral submissions. On 21st January 2016 when the matter came up in court Mr. Nyasani said that he would file his written submissions later because they were not yet finalized and asked for a ruling date. Mr. Okemwa made oral submissions.

Mr. Okemwa submitted orally that the prosecution had called sufficient evidence to establish that the accused had caused the death of three persons. According to counsel, the death of the three was proved, cause of death proved, and the connection or involvement of the accused in causing the death was also proved by the prosecution.

Counsel emphasized that PW7 Sergeant George Karanja ,who was at the scene, identified the accused at an identification parade. PW4 Chief Inspector Marete corroborated the evidence of the identification. PW8 PC Wekesa added value to the identification as he arrested the accused in Ijara. Counsel stated that the appearance of the accused matched the description given by police officers in Garissa.

Counsel submitted that the accused had a case to answer, and that the prosecution wanted to hear his side of the story including calling the Chief from whose homestead he was arrested. Counsel urged this court to put the accused on his defence.

At the time of writing this ruling, I have not seen the written submissions from defence counsel Mr. Nyasani. My inquiry from the court registry indicated that the same have not been filed.

At the close of the prosecution case, the prosecution is required to have established a prima facie case against an accused for him to be put on his defence. Establishment of a prima facie case is not the same as proof of a case beyond any reasonable doubt. In the Garissa High Court case **Republic –vs- Abdi Ibrahim Owl 2013 e KLR** wherein Mutuku J cited with approval what was stated in the case of **Ramanlal Bhatt –vs- R(1957) EA 332 at page 334** in which the court of Appeal for East Africa stated as follows:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is one which on full consideration might possibly be thought sufficiently to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence ----- . It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on

which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”

I have seriously considered the evidence on record. The prosecution has made a lot of effort by calling 11 witnesses and producing several exhibits in the case.

Indeed the death of the three deceased, military officers has been established by the prosecution. They were brutally killed at a petrol station where they were on duty as military officers repairing tyres for their transport vehicles. They were shot severally at close range and their heads shattered. In my view death of the three deceased persons was established by the prosecution.

Secondly, the cause of death is not in question. The deceased died instantly of the massive multiple injuries from the bullets. I have no doubt that both the death of the deceased's and their cause of death has been proved by the prosecution.

In determining whether to put the accused on his defence, the issue is whether the prosecution has on the evidence on record, brought out a sufficient connection between the death of the three deceased persons and the accused so that if the accused doesn't say anything in defence, then the court may actually convict him.

The accused was identified at an identification parade by PW7. Another witness who was present at the shooting did not identify him. PW7 said in evidence that he saw and identified the appearance of the accused at the scene of the incident. The evidence is that the incident occurred in broad daylight at around 11.00 or 11.30 am. The witness was certainly there at the scene as one of the military officers who were repairing tyres.

There was no evidence however, from the police at Garissa or any of the surviving military officers that this witness PW7 had said or told any of them that he was able to identify any of the attackers physically. The police from Garissa, including the Investigating Officer, maintained that the information which led them to the arrest of the accused was intelligence information. Neither the giver of that information nor the Chief from whose house or residence the accused was arrested, was called by the prosecution to testify in evidence.

It cannot thus be said that the accused was arrested because of a description given by PW7, nor can it be said that before the arrest, PW7 had stated that he would be able to identify the accused. In my view therefore the purported identification of the accused in a parade is so shaky that on itself, it cannot make a reasonable court directing itself on the facts and the law convict the accused person. This witness PW7 could not even remember the position of the accused in the identification parade.

Another hypothesis that the prosecution has put across is that the accused was arrested because he was a dangerous and armed person and attempting to escape to Somalia. The officer who participated in his arrest and who came to testify in court stated that he was surprised to find that the accused was not armed. Therefore in my view the allegations that the accused was a dangerous person was not proved or supported by the prosecution evidence.

In addition the issue of him attempting to escape to Somalia was also not pursued by the prosecution. They did not tender any evidence, including calling the chief with whom the accused was found when arrested, to tender evidence on the alleged attempt by the accused to escape to Somalia.

The other hypothesis of the prosecution to connect the accused with the offence was the communication on the Nokia mobile phone. Indeed the Nokia mobile phone which was examined closely by the police was in the possession of the accused. He did not deny ownership, or possession. However a few things stand out with the information herein. Firstly, the written messages therein are said to be in Somali language. No one tried to translate what was contained therein in order to connect the accused to the incident of the killing of the three military officers.

Secondly the telephone communication is to and from various destinations. Kenya is mentioned, Somalia, Ethiopia, America and Zambia. In my view, the fact that some of the accused communication points were to Southern Somalia perse did not connect him to the death of the military officers. Even assuming that Southern Somalia was under Alshaabab at that time, the accused was not charged with being a member of Alshaabab or in engaging with terrorist activities with Alshaabab. He was rather charged with the killing of three military officers on a particular date at Garissa.

If the prosecution wanted to charge him with being a member of Alshaabab or engaging in terrorist activities, they should have done so. They did not. Therefore even here there is no connection between the accused and the death of the 3 military officers. The allegation that he had photocopies of identity cards of young men who died in Southern Somalia would also not connect him to the incident.

Again on the issue of reliance on electronic data. The law is quite clear that under the Evidence Act (cap.80) there are certain requirements to be fulfilled before such electronic evidence can be admissible in court. Print outs of data from use of mobile phones is electronic evidence under the Evidence Act (cap.80).

Section 106B(1) provides that for electronic evidence to be admissible in evidence specific conditions regarding the state or condition of the gadget or computer are listed under subsection (2).

In addition to the above, subsection (4) requires that a certificate be made to support such evidence either identifying the electronic record and describing the manner it was obtained, or giving particulars of any device involved in production of the electronic record, or dealing with any matters to which subsection (2) relates, and purporting to be signed by a person occupying a responsible position in the operation of the relevant device or the management of the relevant activities (whichever is appropriate). The effect of failure to comply with the above requirements of the law was stated in the case of ***R –vs- Mataguda – Ruling. Msa. HCCr. Case 6/2008 [2011]eKLR*** whose reasoning I fully agree with.

It is thus not enough merely to be trained by the American Embassy to be qualified to produce in evidence information or data from a mobile phone or electronic information or data. There is also need for strict compliance with the above provisions of the Evidence Act. Failure to comply with the legal requirements will mean that the electronic information or data will not be admissible as evidence and will thus be of no evidential value.

No certificate was produced in court to support the production of the electronic data herein from the Nokia mobile phone. In effect therefore the electronic data relied upon from the mobile telephone is not evidence which can be relied upon to connect the accused to the offence charged.

Having re-evaluated the evidence on record and considering the law, I am of the view that the prosecution has not made out a prima facie case which would require this court to put the accused person on his defence. The prosecution cannot ask the court to put the accused on his defence merely in order to hear his story and expect him to call the chief to testify, in order to fill the gaps in the prosecution case. That would amount to shifting the burden of proof to the accused, which is not acceptable.

To conclude, I find that the prosecution has not established a prima facie case against the accused person and as required of this court under section 306(1) of the Criminal Procedure Code (cap.75), I find him not guilty. The effect of this finding is that the accused is acquitted of all the charges herein.

Dated and Delivered at Garissa this 16th day of February 2016.

GEORGE DULU

JUDGE