



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CRIMINAL CASE NO. 61 OF 2011

REPUBLICPROSECUTOR

VERSUS

WILFRED MWITIACCUSED

JUDGMENT

1. The accused **WILFRED MWITI** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on the 18th February, 2010 at Kariobangi Kiamaiko Junction along Outer-Ring Road in Nairobi within Nairobi County within the Republic of Kenya murdered **PATRICK NDAI MUNYUA** alias **SENIOR** alias **STEPHEN KAMAU MUNYUA**. The accused pleaded not guilty to the said charges
2. To prove its case against the accused person the prosecution called a total of eighteen (18) witnesses whose testimonies on oath was as follows:-

PW1 KENNETH CHEGE NGANGA stated on oath that on 19th February, 2010 being a driver of Motor vehicle Registration No. KBA 350A. He was instructed by his conductor one **MICHAEL KIARIE NJOROGE** to proceed to Huruma police post since one of their passengers had been arrested by a police officer and that he proceeded to the said police station where two people alighted from the motor vehicle into the police station. It was his evidence under cross examination that the person was arrested in the Matatu but he did not know the time when he was arrested. This evidence was corroborated by the statement of **MICHAEL KAIRIE NJOROGE** deceased produced as Pexh No. 7. Both PW1 and the deceased confirmed that they did not see the person arrested and the arresting officer properly and that they only saw their backside.

3. **PW2 GEOFFREY KARIUKI KIMANI** testified on oath that he had on either 15th or 16th of February, 2010 been arrested for being drunk and disorderly and locked at Huruma police post where he was until 18th of February, 2010 when in the afternoon someone was brought to the police post while handcuffed at the back. It was his evidence in chief that in the process of talking to the said person who later on turned out to be the deceased, he was given mobile phone No. 0721 924692 belonging to the brother of the deceased to call upon his release and to inform the same that the deceased who was the only person in handcuffs had been arrested by two police officers Vaite and Kamunde and locked thereat.
4. It was his further evidence that he was not released until 19th February, 2010. That on the 18th the deceased who was being called the "handcuffed man" was removed from the cell at some stage before being brought back and was subsequently taken from the cell at about midnight and was never brought back to the cell up to the time PW2 was released. Upon his release on the 19th of February, 2010 he called the number which he had been given of the brother of the deceased

- who informed him that the body of the deceased had been found at the City mortuary. They then made arrangements to meet leading to the subsequent recording of his statement.
5. Under cross examination he testified that he was booked into the police cell with the offence of drunkenness. He stated that he did not see the deceased being locked in and out of his cell but could only hear the movement. The deceased had told him that his name was Patrick. He further testified that he never heard anybody call the name of the deceased and that the police were calling him the "handcuffed man."
 6. **PW3 JAMES WAINAINA MUNYUA** a twin brother of the deceased testified that on 18/2/2010 at about 6.00 p.m. the deceased went to their parents' home where they met seeking financial assistance to expand his business. He was given by their mother Kshs.6000/-, a padlock and key before leaving the home. At about 6.30 p.m. he was called on his cell phone from unknown women from cell phone No. 0722 771045 and informed that his brother had been arrested and locked at Johnsaga police post. He proceeded to the said police station where though the deceased was not booked in the OB he was able to hear his voice and was able to talk to him through the vents at the back of the cell. The deceased told him that he had been arrested inside a matatu by two police officers namely Vaite and Kamunde. He went back to the OB desk where his brother was called out by name and as he was coming out was pushed back into the cell by one of the officers and the door locked. He was subsequently chased from the said station.
 7. It was his further evidence that before leaving the station he called his father PW4 and gave him the information. Under cross examination he stated that the deceased had found him at home with their mother in the absence of the father and that the same came home at about 6 p.m. He further stated that he received a cell phone call from a lady he did not know some thirty minutes after the deceased had left home and that he did not talk to his brother who was at home before leaving for the police station.
 8. It was his further evidence that the deceased told him that he was arrested by two police officers who did not book him in the OB. He further stated that he did not meet PW2 at the police station and that he only met him at Kilimani police headquarters. It was his further evidence that he had not known PW2 before the said date.
 9. **PW4 MUNYUA MBUGUA** the father of the deceased testified that he got home on the material day at about 5.00 p.m. when PW3 gave him the information on the arrest of the deceased on phone and that he had confirmed that the same was at Huruma police post though his name was not entered in the police occurrence book. He further stated that he was informed by PW3 that the deceased had told him that he had been assaulted by the police who threatened to kill him. It was his further evidence that the deceased had been beaten by a police officer named Vaite. He thereafter advised PW3 to return home.
 10. He further testified that the next day the 19th together with his wife they went to the police station to check on the deceased but since his name was missing from the OB he was referred to Kariobangi police station which referred them to Kasarani and name of the deceased was missing from the said police station. They returned to Huruma where the in charge PW8 called for the OB but the name of the deceased was missing thereat. He allegedly told them that there were only two groups of police officers who would bring people to the station without booking them, being the flying squad and kwekwe squad stationed at Pangani police station.
 11. The witness stated that they proceeded to Pangani CID office where they were told that there was nobody who had been brought for Kariobangi at the said station. He stated that they thereafter decided to check at City mortuary where they found the body of the deceased which had been brought there by police officers from Kariobangi the previous night at about 11.00 p.m., which they identified with bullet wounds all over the body. They informed their family members of the death and returned home through Huruma police station and informed the officer in charge. He subsequently after the burial lodged his complaint with the commissioner of police in respect of the shooting of the deceased and investigations launched by the CID Headquarters Nairobi County.
 12. Under cross examination he stated that he is the one who told PW3 to go check on the deceased and that PW3 left him at home. He stated that by the time when he went to the mortuary he had not received any information on the death of the deceased, neither had he received any report from the Area Assistant Chief that the deceased was a gangster but stated that there was a time when members of the flying squad had gone to his home looking for guns. He further stated that while

- they were at the police station one of his neighbours called Owino Mawe said that the deceased had been killed by the police at the time when they went there in respect of an alleged dispute between his daughter and the said Owino Mawe.
13. **PW5 SAMUEL KAHURA MUNYUA** a brother of the deceased testified on oath that on 18th February, 2010 when he passed through his parents home to see his mother who had been unwell PW3 told him that he had been called on phone by an unknown lady who told him that the deceased had been arrested and locked up at Huruma police post and that he wanted to go and check to which they agreed that he should do so. While at the station **PW3 JAMES WAINAINA** called his father and informed him that though the deceased was at the station, he had not been booked in the Occurrence Book. On 19th February, 2010 he was informed on phone by their father that the body of the deceased had been found at the City Mortuary with gunshot wounds all over the body and that the same had missing teeth.
 14. It was his evidence that while they were at their parents' home waiting for them to return from the mortuary, he got a call from someone he did not know who told him that his brother who had been in the cell with him had given him the number to call upon his release to give the information of his arrest. He then informed the caller that the deceased had been found dead at City mortuary. The caller was shocked when he was given the information. On 27th he met with the caller who agreed to assist them with the investigation.
 15. Under cross examination he stated that when he went to visit his parents on the material day he found his father, mother, sister and brother PW3 at home when he learned that the deceased had been at home. He confirmed that he knew one Owino Mawe as a hostile neighbour but stated that he was not aware that the same had lodged several complaints against the deceased. He stated that he thereafter heard from members of the public that the deceased had been killed along the National Concrete Area.
 16. **PW6 AMINA MAHAT** testified that on 18th February, 2010 at about 4.00 p.m. she was with the deceased in a matatu when he was arrested by someone who had a pistol and a handcuff which made them think that he was a police officer and taken to Huruma police station (Johnsaga). It was her evidence that the deceased was arrested by the accused person who she identified at the dock. She confirmed in cross examination that she had known the deceased as "**Senior**" for ten years. She stated that she had not seen the accused before the material day.
 17. **PW7 ESTHER WAITHERA KIRAGU** testified that on 18th February, 2010 she was arrested and locked at Huruma police post at about 6.00 p.m. for failing to stand while the National flag was being lowered and put into the cell without being booked in the occurrence book and with her cell phone which she used to call her friend one Mwikali in the process of which another lady who was also in the cell requested to use her phone to call. It was her evidence that while in the cell she heard people saying that someone had been brought there having been beaten. She was released at about 7.00 p.m. but before reaching her home she received a call from unknown number who asked her whether she had been arrested which she confirmed and advised the person to go and check for his relative at the police station.
 18. The following day the same person called her and informed her that the person they had been looking for had been found dead. It was her evidence that she did not know the deceased neither did she see him at the police station. In cross examination she stated that she was not booked in the occurrence book and that she heard people say that there was someone who had been brought to the police station beaten up but she did not see him neither did she hear anybody call out his name.
 19. **PW8 CHIEF INSPECTOR AUGUSTINE MUTEMBEI** who was the officer in charge of Huruma police post confirmed having received the father of the deceased and his wife in his office. It was his evidence that all the suspects brought to the station must be booked before being handed over to the officer at the report desk and eventually transferred to the cell. He checked the OB but did not get the name of the deceased thereat. He therefore advised the parents of the deceased to check for him at Ruaraka and Muthaiga which was the mother station. They left his office and he did not hear of them until he received a letter of complaint by the OCPD Kasarani. In respect of the shooting of the deceased by police officers along Outer-ring Road. An inquiry into the alleged shooting was later on opened.
 20. It was his further evidence that thereafter the officers from the CID visited the station, took photographs and requested him to make a statement and that from the time he had worked in the

police force, there is no time a person has been locked in the police cells without being booked on the OB. Under cross examination he stated that at Huruma police post they also had a police officer by the name PC Mwititi. He stated that there is no way a suspect can be admitted into the police cells without the same being booked into the OB and cell register. He denied having told the parents of the deceased that officers from the flying squad and kwekwe could bring people into the cells without booking them in.

21. **PW9 PC MUSIMI MWANZIA** witnessed post mortem which was conducted by PW12 Dr. Johansen Oduor when a bullet head was recovered from the body of the deceased which he handed over to Sgt. Nyaosi PW18 who was in-charge of armoury and who testified that he had issued guns to the accused and his colleagues on the material day of the shoot-out. **PW10 PC ISAYA MIKWA** who was the duty officer at Huruma police post on 18th February, 2010 corroborated the evidence of PW8 that there was no report in the occurrence book in respect of the deceased and further that no minibus had gone to the station on the said date. This evidence was corroborated by that of **PW11 PC JACOB KIBOI**.
22. **PW12 DR JOHANSEN ODUOR** testified on how he performed the post mortem on the body of the deceased who was dressed in black trouser, brown jacket white shirt red boxer short and white socks. He confirmed that the deceased had contusion of upper and lower lips with lower incisor teeth missing. He had gunshots at the following points
 1. Entrance left cheek exit occiput where the bullet recovered in the occiput .
 2. Entrance left cheek 8 cm superlateral to left nipple with exit back right side 8 cm from the neck.
 3. Entrance chest 6cm superlateral to left nipple with exit left chest.
 4. Entrance lower back left side exit left loin 12cm lateral to uncillicus left side.
 5. Entrance upper right arm laterally dait medial
 6. Entrance right lower arm laterally exit medial.
 7. Entrance wrist laterally right side exit medial
 8. Grace would left thumb.
 9. Entrance right thigh anteriorly exit posterior.
23. He further testified that there was a bullet tracks on both lungs with haemothoral bilateral. The head had an entrance and exit fracture with bullet track in the brain. He formed an opinion that the cause of death was multiple injuries due to gunshots. Under cross examination he stated that most of the gun shots came from the front. **PW13 INSPECTOR MIKE OPICHO** testified that he was called to the scene of an alleged police shoot out with thugs and was instructed to take the body to the city mortuary and booked it as unknown male. **PW14 INSPECTOR JONATHAN MUNYWOKI** was briefed by constable Kalulu who was in the group of the police officers who had allegedly taken part in a shoot out with the thugs where the deceased was shot and later on recovered the guns used by the police officers and the bullet head recovered from the body of the deceased which he later on sent to the Government analyst for examination.
24. It was his further evidence that he later on recorded a statement form on **MICHAEL NJOROGE KIARIE** deceased which he later produced. Under cross examination he stated that the guns he was given in this matter together with the bullet heads had not been kept in proper chain of custody. He confirmed under cross examination that there was a recommendation that an inquest be conducted and further that he had been taken to the scene by PC Kalulu who was with the accused person at the time of the alleged police shoot out. **PW15 PETER MWANGI** a scene of crimes officer was called to the scene where he found the body of the deceased lying at a coral drainage facing up and was told that he was a thief who had been shot dead. He thereafter took the photographs of the body at different angles which he produced in court as plaintiff's exhibits. It was his evidence that at the scene he was with Chief Inspector Rengera the then OCS Muthaiga police station. He further testified that he went to the scene at night.
25. **PW16 CI EMMANUEL LANGAT** a ballistic expert testified that he examined the guns which were issued to the accused and his fellow police officers and that he formed the opinion that the bullet which was recovered from the body of the deceased was fired from the pistol that had been issued to the accused person. Under cross examination he testified that his work can be compromised if the exhibits are interfered with. **PW16 JOHN NYANZWII** testified that he had been assigned the duties of investigating a complaint against the police in respect of an alleged

- murder of the deceased by the police officers by the then PCIO Nairobi for which he constituted a team of investigators as a result of a complaint by the father of the deceased.
26. It was his evidence that in the course of his investigations he came across two witnesses who confirmed that the deceased had been held at Huruma police post with them. He stated that in the course of his investigation he interviewed the Area Chief who confirmed to him that the deceased had been involved in mugging people within Kariobangi Area and that the same had been arrested by the AP who recovered an AK 47 with five (5) rounds of ammunition for which he was charged in Cr. Case No. 1486/07 before being acquitted. That he compiled his report and recommended that an inquest be opened to establish the circumstances under which the deceased died. He further stated that he interviewed all the six police officers who were together with the accused person confirmed that they were involved in the shoot out with thugs at which the deceased died.
 27. Under cross examination, he testified that he opened inquest file No. 13 of 2010. It was his evidence that initially he had believed what the police officer had told him until he got the civilian witnesses. It was his evidence that the evidence of the deceased brother to the effect that he came home at 5.00 p.m. contradicted that of the witness who said that he was at the cell by 3.00 p.m. It was his evidence that the deceased had a lot of criminal activities which were being handled by officers from Huruma police station and not from Kariobangi where the accused was stationed.
 28. He further testified that no identification parade was conducted in respect of the accused person when the same was arrested. He further stated that the deceased went with the name STEPHEN KAMAU MUNYUA alias 'Kama' but their investigations confirmed that he was PATRICK NDAI MUNYUA and that the chief of the area confirmed that he was a gang leader who was feared and that it was only the bullet head that was fired from the gun of the accused person which linked him to the offence.
 29. **PW18 CHIEF INSPECTOR JARED NYAOSI** confirmed having issued the pistols to the accused person and his colleagues as the in charge of the army and also having received the same guns from them in good working order after each had accounted for his ammunition.
 30. When put on his defence the accused testified on oath and called three witnesses including his wife. It was the accused evidence on oath that he was assigned special duties by the OCS Muthaiga at a place called Gitathuru in Korogocho on the night shift between 6.30 p.m. – 6.30 a.m. That he was neither a member of the flying squad or kwekwe formation of the CID. It was his evidence that on the night of 18th February, 2010 he had woken up at 5 p.m. and prepared himself for work. He went to Muthaiga police station in the company of PC Kalulu DW2, when they were issued with guns and ammunition before proceeding to Kariobangi police post where they were briefed by the duty officer Sgt Ngolwa to combat crimes along the area. He was together with PC L. Kinyua, PC Kalulu, PC S. Njue, PC F. Iluku and PC S. Muchoka.
 31. It was his evidence that at 9.30 p.m. they were patrolling along Outer-ring road and upon reaching Sunflower Secondary school they saw a group of people coming out of a thicket upon which PC Kalulu challenged them to stop having identified themselves as police officers and asked the group to identify themselves but they started shooting at them. They shot back at the group who were more than (5) five in number and that they were able to see the group since there was moon light. They immediately formed an arrowed head formation of which he was leading.
 32. He stated that the thugs shot at them and they shot back killing the deceased while the rest of the group escaped. He stated that he fired more shoots since he was the one who was at the head of formation. After the shoot out PC Njue and Kalulu secured the scene while the rest of them followed the thugs who escaped without trace. PC Kalulu thereafter called the Duty officer who came with the OCS to the scene and called the scene of crime personnel who found a toy pistol where the deceased was lying. The scene of crime officers also took photographs before the body of the deceased was removed to City Mortuary.
 33. He testified that they continued with their normal operation until 19th when they returned their guns having cleared them to the armoury. He continued with his duties until 2/5/2011 when he was arrested and later taken to court on 25/5/2011 when he was set free without taking plea. On the 10th of August, 2011 he was again taken to court and charged with the present offence. It was his evidence that on 18/2/2010 he did not go to Huruma police post at 3.00 p.m. and that he was in his house sleeping which evidence was corroborated by **DW3 RUTH KERITO MWITI**.
 34. **DW2 LEONARD KINYUA MGANDA** testified that he was with the accused person on the material day on special duties patrolling an area in Kariobangi along outer-ring road where there

- had been cases of carjacking, muggings and robbery in which many police officers had been shot at and killed. They were alarmed when they saw a group of about five (5) people approaching them from a thicket next to Sunflower Primary School. They were challenged by PC Kalulu to stop but he heard a gunshot from them. They challenged them further by shooting in the air but the thugs responded by more shooting. They therefore formed an arrow head formation with PC Mwiti at the head, they then shot at the thugs at which point one of them fell into a ditch and died.
35. He further stated that they thereafter called the OCS Muthaiga who came with the scene of crime officers and when the body was turned over they saw a gun. The body was later taken to the city Mortuary while they continued with their duties until the following morning of 19th when they returned their guns. The incidence was reported and recorded as a normal police shoot out with armed criminals. He further stated that they accounted for the ammunitions they were issued with and that the accused discharged the highest number of ammunition because he was at the head of the formation while PC Njue did not discharge any because he had fallen down. He further stated that he later came to learn that there was a senior police officer called Mr. Mugo who was an uncle of the deceased who interfered with the investigations.
36. **DW4 PC J KALULU** corroborated the accused person's evidence. He stated that he was a neighbour of the accused at Ngomongo police lines and that they reported on duty together on the night of the shootout. He was the senior most officer in the group and that upon reaching Sun Flower Secondary School they saw a gang of people coming out of a thicket. He challenged them to stop but the thugs shot at them at which point PC Njue fell down. He rushed to his aid and saw one of the thugs fall down. After getting PC Njue up they rushed to where the deceased had fallen down and secured the scene. He then called the duty officer and the OCS who came with the scene of crime personnel and when the body of the deceased was moved a toy pistol was recovered at the scene.
37. It was his evidence that he did not know the deceased but when some members of the public passed at the scene they identified him as Patrick 'Senior' and that there was a case where the deceased had shot the wife of someone who had a shop at Kariobangi mwishe but the deceased who he did not know was not arrested. At the end of their duties they accounted for the ammunition they had been given and a signal sent in respect of the shoot out.

SUBMISSIONS

38. At the close of the defence it was submitted by Mr. Njanja that the prosecution case was full of conjunctures, speculation, theories and surmises and at the end of their case left three theories that were completely irreconcilable. It was submitted that none of the prosecution witnesses gave evidence that pointed to the two ingredients of murder that is to say that accused killed the deceased with malice aforethought.
39. It was submitted that the prosecution advanced three theories which contradicted each other and no effort was made by the State to connect them. The first theory was that the deceased was arrested somewhere in Huruma and locked up at Huruma police post from where he was removed and later executed by the accused person. It was submitted that the theory could not stand since there were contradictions in the prosecution evidence as to what time the deceased was arrested and the evidence of the civilian witnesses and the police witnesses called by the prosecution as to whether or not the deceased was arrested and locked at the said police post.
40. It was further submitted that PW6 Amina Mahat the only eye witness to the arrest of the accused person did not positively identify the accused as the person who had arrested the deceased and neither was an identification parade conducted in respect of the said witness when the accused person was arrested. She only attempted to identify him in the dock which in the case of **NJOROGE v REPUBLIC 1987 KLR** has been described as worthless and must be confirmed by police identification.
41. It was submitted that the second theory was that the deceased was never arrested and brought to the Huruma police post as was stated by all the prosecution witness who were police officers and that the deceased was shot at Kariobangi Kiamaiko junction in which the accused and four other police officers were accosted by the robbers and in a shoot out with the robbers the deceased was shot dead. It was therefore submitted that the court is not in law allowed to set up its own theories in a bid to reconcile the contradictions in the prosecution case and in support thereof the case of

- ALUTA v REPUBLIC (1985)** and **OKETHI v REPUBLIC (1964) EA 549** were submitted.
42. It was submitted that whereas the charge sheet indicated that the accused murdered the deceased the evidence of PW13, PW14, PW15 and PW17 stated that all the six police officers shot at the deceased and therefore the evidence on record did not support the charge sheet and the case of **YONGO v REPUBLIC (1983) KLR** was submitted in support. It was further submitted that the prosecution did not tender in other independent and corroborative evidence to support their case. It was submitted that since the exhibits produced herein were never subjected to proper chain custody there was a possibility of the said evidence having been manipulated.
43. It was submitted further that crucial prosecution witnesses such as Inspector Sato and Chief Inspector Catherine Ringera were never called, the court was urged to make an inference under the principle in **BUKENYA v UGANDA** that their evidence would have been adverse to the prosecution case.
44. It was submitted that the accused gave sworn evidence in which he explained that he was the lowest rank of a police officer and therefore had no power to arrest any person and take him to another police station. It was submitted that the same gave an alibi defence of his whereabouts on the day the deceased is alleged to have been arrested. It was submitted that under **Section 212** of the **Criminal Procedure Code** if an accused person adduces evidence in his defence introducing a new matter which the prosecution would not by exercise of reasonable diligence have foreseen, the court may allow the prosecution to adduce evidence in reply to rebut the matter.
45. It was submitted that the alibi defence had been raised by PW1 up to PW18 and thereafter the prosecution brought the alibi evidence itself. Reference was made to the cases of **JOHN ODERO OMENDA & ANOTHER v REPUBLIC (2014) eKLR** and **SOLOMON KIRIMI MIRUKARIA v REPUBLIC (2014) eKLR**. It was submitted that the prosecution evidence did not corroborate the evidence tendered and therefore under the provision of Section 124 of the Law of Evidence Act the prosecution failed to prove its case to the required standard.
46. It was submitted that the prosecution case was founded on circumstantial evidence that had no nexus to the accused having arrested the deceased. It was further submitted that the court should not ignore the evidence of the police officers who testified that they shot the deceased in their line of duty having been shot at by a group of men including the deceased. In respect of the submission on circumstantial evidence the following cases were referred to:-
- a. **SAWE v REPUBLIC (2003) KLR**
b. **MWANGI v REPUBLIC (2004) KLR 28**
47. It was submitted that the prosecution did not prove the case against the accused person beyond reasonable doubt and that too many questions remained unanswered at the conclusion of the prosecution case.
48. On behalf of the prosecution Mr. Mwenda submitted that in making the decision to charge the accused person the State relied upon circumstantial evidence since there was no eye witness as it was a case of the police investigating each other and therefore it would not be known whether the gap in the custody of exhibit was deliberate. He further submitted that this matter was initially treated as normal police shoot out and therefore the exhibits were never presented until civilian witnesses came up to confirm that the deceased had earlier been arrested. It was submitted that the police witnesses who testified in court that the deceased was never arrested therefore pointed out to a cover up and the court was urged to look at their evidence against those of the civilian witnesses.
49. It was submitted that there was evidence that the deceased was in actual police custody though not booked in the occurrence book and should have therefore been arraigned before court of law but he was not. It was submitted that the ballistic evidence clearly showed that the bullet head recovered from the head of the deceased person was matched to the firearm issued to the accused person. Reference was made to the following case.
- **REPUBLIC v ANDREW MUECHE OMWENGA 2009 eKLR** where Justice Maranga as he then was relied on circumstantial evidence.
 - **REPUBLIC v MICHAEL MURIUKI MUNYIRI Meru High Court Criminal Case No. 71 of 2010** where Justice Lesiit applied statutory rebuttable presumption under Section 11(j) and 119 of

the evidence Act.

- **REPUBLIC v JOSPHAT KIPRUTO BETT High Court of Kenya at Eldoret Criminal Case No. 42 of 2011** on when to convict upon circumstantial evidence.

50. It was submitted that the prosecution evidence showed that the accused arrested the deceased and also shot him and that there was an attempt by the police to cover up for the killing which was an extra judicial killing meant to eliminate the deceased who was suspected as a dangerous criminal.

51. Mr. Mbanya for the family of the deceased made the following submissions:- That this was a case where the police being unable to successfully arrest and prosecute a person they considered a notorious criminal resorted to arresting the same unlawfully and killing him extra judicially. He submitted that the defence was full of inconsistencies and further that the alibi defence was not raised at the earliest time and was therefore very weak.

DETERMINATION

52. The accused person herein is charged with the offence of murder contrary to section 203 as read with Section 204 of the penal code which provides that “any person who with malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.” The following ingredients must therefore be proved by the prosecution beyond reasonable doubt in order to sustain a conviction of murder:-

- a. The fact of death of the deceased.
- b. The cause of such death.
- c. Proof that the deceased met his death as a result of an unlawful act or omission on the part of accused.
- d. Proof that the said unlawful act or omission was committed with malice aforethought.

53. The fact and cause of the death of the deceased are not in dispute. Most of the prosecution witnesses and the accused person and two of his witnesses confirmed that the deceased died on the night of 18th February, 2010. PW4 MUNYUA MBUGUA identified the body of the deceased at the city mortuary where it had been registered as No. 538 in the company of his wife PW13. PC MIKE OPICHO confirmed having taken the body of the deceased to the city mortuary and booked it as an unknown person. PW12 Dr. JOHANSEN ODUOR testified that he conducted post mortem on the body of the deceased on 25/2/2010 in the process of which he recovered a bullet head from the body of the deceased which had a total of nine bullet holes. It was his evidence that most of these bullets had entered the body of the deceased from the front. He formed an opinion that the cause of death was multiple injuries due to gun shots.

54. Did the deceased meet his death as a result of an unlawful act or omission on the part of the accused? The prosecution case is that the deceased was arrested on 18th February, 2010 by the accused person and locked up at the Huruma police post from where he was taken out and later on in the night shot dead. PW1 confirmed that his matatu conductor Michael Kiarie Njoroge at 4.30 p.m. instructed him to drive to Huruma police post since someone had been arrested in the said motor vehicle and that he drove to the post where two people got out of the motor vehicle into the police post but he did not see their faces. PW2 JOEFFREY KARIUKI KIMANI who had earlier been arrested and locked up at the said police station confirmed that the deceased whom he had not known at that time was brought to the police cells handcuffed.

55. PW2 further testified that during their stay at the cell he talked with the deceased who gave him the cell phone number of his brother to call the same upon his release and inform him that he had been arrested and locked up at the said post. PW6 Amina Mahat who had known the deceased confirmed having seen the deceased in the matatu being handcuffed by someone who had a gun and whom she assumed was a police officer before being taken to the Huruma police post. At the dock she identified the accused as the person who had arrested the deceased. **PW7 ESTHER WAITHERA KIRAGU** confirmed having been arrested at about 6.00 p.m. and locked up at Huruma police post without being booked in the OB and that when she used her cell phone to call a friend of hers to inform her of her arrest a lady in the cell who was unknown to her requested her to use her phone to enable her call someone which she allowed but did not hear what she said to

- the person she had called. Upon her release on her way home she received a call from someone she did not know who asked her whether she had been arrested. The next day the same caller called her and told her that the person she had been locked with in the cell had been found dead.
56. **PW3 JAMES WAINAINA MUNYUA** confirmed having received cell phone call an unknown woman who informed him of the arrest of the deceased who was at that time being held at Huruma police post and that he proceeded to the said police post where at the report desk he was told that the deceased had not been booked at the station. While still talking to the police officers at the report desk he heard the voice of his brother whom he later talked to and who informed him that he had been arrested by two police officers namely Kamanda and Vaite. This evidence was contradicted in material particulars by all the prosecution witnesses who were police officers namely PW8 CHIEF INSPECTOR AUGUSTINE MUTEMBEI, PW11 PC JACOB KIBOI and PW3 INSPECTOR MIKE OPICHO who were manning the report desk.
57. The critical issue for determination in this matter is as to whether the deceased was arrested and locked up at the Huruma Police post and later removed and killed and if so whether the same was arrested by the accused person. There is corroborative evidence from all the civilian witnesses who were not related to the accused person which confirms and I find that the deceased was arrested and later locked up at Huruma Police post. Though not recorded in the OB the evidence of PW1 supports this finding. There is however doubt raised and therefore the prosecution failed to prove that the same was arrested by the accused person. The only material witness was PW6 Amina who said that the accused arrested the deceased in the matatu but I have noted that no police identification parade was conducted to enable her identify the accused person upon his arrest. The dock identification is therefore not reliable. See the case of **NJOROGE v REPUBLIC 1987 KLR**.
58. The deceased told his brother that he was arrested by two police officers whose names he gave as Kamunde and Vaite. The prosecution did not tender in any evidence to prove that the accused person was either Kamunde or Vaite. Whereas the deceased was arrested as stated herein there is no evidence tendered to show that he was arrested by the accused person. There is further contradiction in the prosecution case as to the time the deceased was arrested with some witnesses placing him in the cell at 4.00 p.m. while his brother's evidence is that he was at home at 6.00 p.m. This therefore discounts the theory that the accused arrested the deceased person who was a known criminal in the area, locked him in Huruma police post and later on removed him therefrom before killing him as there is defence evidence to confirm that the accused was not at the place of an alleged arrest between 4.00 p.m. - 6.00 p.m.
59. The prosecution evidence is that the deceased who was a known criminal in the area was being investigated by the officers from Huruma police post whereas the accused was not based at the said station. From the rank of the accused person, unless it was a wide police conspiracy, as submitted by Mr. Njanja, there is no way he would have locked the deceased in a police station where he was not serving without the name being entered into the OB. There is further evidence that there was a police officer at the said police post who shared a similar name with the accused and no evidence was tendered by the prosecution to discount the possibility of him having arrested the deceased and would therefore give the accused the benefit of doubt.
60. Since the dead tells no tale and therefore the deceased cannot tell us what happened, this therefore leaves the court with purely circumstantial evidence in addition to the defence evidence which is that while in the normal police patrol the accused together with his colleagues on special duties to combat crime assigned by the OCS Muthaiga police station on the night shift which means that they went to report on duty from 6.30 p.m. – 6.30 a.m. in an area where complaint had been received from members of the public in respect of robberies, kidnapping, mugging and carjacking, when they reached Sunflower Primary School a group of people five (5) in number emerged from a thicket thereat.
61. The accused and his group identified themselves as police officers to the people who had emerged from the thicket and they started shooting at the accused and his fellow police officers forcing them to shoot back killing the deceased who was part of the gang while the rest of the gang escaped. It was because of this that the said shoot out was reported and recorded as a normal police shoot out and that they had not violated police standing orders and procedures on the use of firearms and further that the shooting was done by the accused and his colleagues save for one who had fallen down while approaching the gangs. This is why PW16 recommended for an

- inquest which was never done by the time the accused was charged.
62. It is therefore not disputed by the accused that the deceased met his death as a result of gunshot injuries, the only dispute is as to whether it was intentionally done by the accused or as submitted by Mr. Njanja for the accused jointly with his colleagues some of whom testified on behalf of the accused and who have not been charged and confirmed that they shot the deceased but in the line of their duties. The court is therefore called upon to determine whether the accused had and if the prosecution has proved beyond reasonable doubt the intention or malice aforethought to kill the deceased.
63. In **REPUBLIC v MOSES WANJALA NGAIRA** in the High court of Kenya at **Eldoret Criminal case No. 9 of 2011** reported in (2015) eKLR Kimodo J had this to say on malice aforethought:-

“17. Malice aforethought on the other hand is the mens rea or the intention to kill another person. Section 206 of the Penal Code defines it as follows:-

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances.

- a. ***An intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not.***
- b. ***Knowledge that the act or 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 be caused.***
- c. ***An intention to commit a felony.***
- d. ***An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

18. Malice aforethought can take various forms. It can be express, constructive, implied or inferred from a set of circumstances, where the homicide is committed in furtherance of a felony or when resisting or preventing lawful arrest, notwithstanding the absence of intention to kill or to cause grievous bodily harm, the accused is deemed to have constructive malice aforethought. See RAPHAEL MBUVI KIMASI v REPUBLIC Court of Appeal at Nyeri, Criminal Appeal No. 61 of 2013 (2014) eKLR. Generally, there are three main tests, the first is the intention to cause death, secondly the intention to cause grievous bodily harm and thirdly if it is shown that the accused knew that there was a serious risk that death or grievous bodily harm could result from his conduct but he proceeds to do so without any lawful excuse. See NZUKI v REPUBLIC (1993) KLR 171, REPUBLIC v ANDREW MUECHE OMWENGA (2009) eKLR, while the motive can strengthen the prosecution’s case it is not obliged to prove it. See generally REPUBLIC v SHARMPAL SINGH SIO PRITMA SINGH (1962) EA 13 at page 17.”

64. Having found as a fact that the prosecution did not prove that the accused had arrested the deceased, locked him in the police cells without booking him and later removing him and killing him in what the prosecution has submitted was extra judicial killing of a known criminal in the area, the next thing for the court to determine against the definition of malice aforethought as stated herein is whether the prosecution proved that the death of the deceased was caused with malice aforethought on the part of the accused? This can only be answered if the intention of the accused and his colleague in shooting at the deceased and his group is established.
65. From the defence case, it is clear that the area at which the deceased was killed was known to be a dangerous place, it was the accused evidence in chief that several police officers including PC Wycliff Wanyonyi, PC Kamunde had been killed in the same area while the likes of PC Muthoka, PC Wagane and PC Rotich had been shot and injured at the same area and therefore their shooting at the group must have been in self defence. It was therefore the defence case that since their life was in danger they were justified in shooting at the deceased and his alleged group of four as per

- the Forces standing orders. It was further the defence case as I understand it that though only a toy pistol was recovered from the place where the deceased had fallen, according to DW3 PC J.M. Kalulu if you saw it from afar you could believe that it was a real firearm.
66. In shooting at the deceased and his group, what was the intention of the accused person and his group? Was it to effect arrest or to protect themselves from attack? And did they use reasonable force therein? The evidence of the accused is that they saw a group of five and PC Kalulu DW3 challenged them and identified themselves as police officers but they started shooting at them. Since he was the one who was heading, he fired more shots than the rest. DW2 Leonard Kinyua testified that they shot at the group to disarm them.
67. Having contrasted the evidence of the accused person in his defence against the circumstantial evidence herein, I find and hold that the prosecution failed to place the accused person at the place of the arrest of the accused person which would have proved an intention to kill the same later on thereafter and in as much as there is strong suspicion raised that the deceased who was a known criminal in the area might have been executed by the police, mere suspicion however strong cannot lead to a conviction in a criminal trial. I therefore find and hold that the state did not prove beyond reasonable doubt the offence of murder against the accused person.
68. From the evidence of Dr. Oduor in respect of the gunshot wounds on the deceased, I find that even if the action of the accused and his group were justifiable, there was excessive use of force on the part of the accused and his group. The deceased as per the post mortem report was shot on the upper part of his body including his head. I therefore find that the use of the force herein was not necessary and was not reasonable therefore I hold and find that the prosecution has proved beyond reasonable doubt the offence of manslaughter which is defined under Section 202 of the Penal Code as follows:-

“Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

2. An unlawful omission is an omission amounting to any culpable negligence to discharge duty lending the preservation of life or health whether such omission is or is not accompanied by an intention to cause the death or bodily harm.”

69. The accused was under a duty to preserve the life of the deceased and having established that they had seen the group running away, the use of excessive force in shooting at the deceased herein was unlawful and reckless and in total disregard of forces standing orders. Based upon the accused defence and the evidence of his witnesses I find that the circumstances prevailing as stated by those witnesses did not justify the shooting of the deceased death and the force used therein as stated by Dr. Johansen Oduor.
70. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code** I find the accused person guilty of the offence of manslaughter contrary to **Section 202** of the **Penal Code** and therefore convict the same accordingly.

Dated, signed and delivered at Nairobi this 28th Day of **April, 2016**.

J. WAKIAGA

JUDGE

In the presence of

Mr. Mwenda for the State

Mr. Nyaganya for Mr. Njanja for the accused

Mr. Mbanya for the family of the deceased

Accused present

Tabitha court clerk