



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 60 OF 2014
(FORMERLY KISII HCCR NO. 75 OF 2014)

BETWEEN

REPUBLIC PROSECUTOR

AND

KENNEDY OCHIENG AMBITHO 1ST ACCUSED

CHARLES CHACHA GIMASE 2ND ACCUSED

RULING

1. According to the information dated 1st July 2014, two Administration Police officers, **KENNEDY OCHIENG AMBITHO** and **CHARLES CHACHA GIMASE** were charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. They are alleged to have murdered **IRENE ADHIAMBO OLUOCH** (“the deceased”) on 27th June 2014 at Nyalganda Village, Suna-Raha Location within Migori County. They pleaded not guilty and the prosecution called 11 witnesses to prove its case. After the close of the prosecution case I am now called upon to determine whether the accused have a case to answer.
2. On 27th June 2014, Zakayo Owuor Rieba (PW 1) was at his home in Nyalganda Village. The deceased had come to see him over a Kshs. 50/- debt he owed her. He told her to sit and as they chatted, he heard a motorbike come outside the house. He saw two officers in police uniform. One of the officers came into the house and asked whether he was Eli. The officer started assaulting him causing him to fall on the lady who was seated next to him on a plastic chair. He heard a gunshot and the deceased started screaming. The officer stepped on him and left. Before he could get up, he heard another gunshot outside. He saw the deceased bleeding profusely.
3. Upon cross-examination, PW 1 stated that both officers were armed and one of the officers remained outside and while the other one came into the house. He stated that the officer who got into the house grabbed and threw him down and although he heard the gunshot he could not tell which officer fired the shot. He stated that only one shot was fired inside the house and while the other one was fired outside the house.
4. Earlier on, PW 1’s mother, Lucia Anyango Rieba (PW 2) testified that she met the deceased going to her homestead to see her son. While in the shamba she heard the sound of a gunshot. She heard another gunshot whereupon she realized the sound was coming from her homestead. She went to her homestead and saw two police officers standing apart; one was standing near a mango tree

- outside PW 1's house and the other was at the corner of PW 1's house. She heard the deceased screaming, went into the house and found her bleeding. The deceased requested for assistance and told PW 2 she had been shot but could not tell who shot her. PW 2 went out and raised alarm causing people to come to the homestead.
5. At about the same time, the deceased's husband, Bernard Oluoch Okumu (PW 3), recalled that at around 5.30 pm, the deceased went to PW 1's house to collect a debt of Kshs.50/- for *omena* she had sold to him. While he was in his house, he heard a gunshot and people screaming. The screams were coming from PW 1's place and when he reached there, he found the deceased lying in the sitting room. Her right thigh was bleeding. She told him that she had been shot by a police man. He quickly rushed back home to get his motor bike. He put her on motor bike and while on the way to Migori, she died.
 6. The deceased's father in law, Elisha Okumu Odinya (PW 4), was at home that evening when he heard gunshot followed by PW 2 screaming. He rushed to PW 1's house and found her crying. She was bleeding on her thigh and she told him that she had been shot by an administration police officer whom she did not know. She said that one of the officers was inside the house and one outside.
 7. PW 4 called the Assistant Chief, Jared Kidiga Odhiambo (PW 5), who was also a brother in law of the deceased. PW 5 confirmed that he received the call from PW 4 while at Migori. PW 4 informed him that AP officers came and shot the deceased. After a while, PW 4 called again to inform him that she had died. After receiving the report, PW 5 went to Migori Police Station to make a report. He came back to the village accompanied by police officers from Migori Police Station. They first collected the deceased's body from the place she had died while being taken to hospital. They proceeded to the scene of the incident and later took the body to the Migori District Hospital Mortuary.
 8. On 3rd July 2014, Dr Jared Ndege (PW 7) conducted the post mortem on the deceased's body at Migori District Hospital Mortuary after it had been identified by PW 5. The significant observation was that the deceased had two wounds on the right leg; an entry and exit wound. He noted that on the right middle third of the lower limb, the thigh tissue, blood vessels and nerves had been destroyed. He evacuated large blood clots and found that she had a compound fracture of the middle third of the right femur with massive destruction of soft tissues. Although he did not recover any bullet, he certified the cause of death as a compound fracture on the thigh which destroyed the blood vessels resulting in massive bleeding caused by a gunshot wound. Dr Michael Mokuia (PW 8) was requested to examine the accused to determine whether they were mentally fit to stand trial. He certified that they were both mentally fit to stand trial.
 9. After Chief Inspector David Kemboi (PW 6) received the information that a person had been shot by an administration police officer on 27th June 2014 at about 8.50pm, he proceeded to the scene of the incident accompanied by among others, the investigating officer Chief Inspector Evans K. Sang (PW 11) who also received a report from PW 5. On the way to the scene, they found the deceased on the road side as she had died on the way to hospital. They noted a small visible incision on the right front thigh and large wound on her buttocks. They collected the body and proceeded to Nyalganda village. In a mud walled house, they found fresh blood stains at the door where it was alleged that the deceased had been shot dead. There was a burnt motor cycle outside the house which had been used by the two AP officers. They were informed that it had been set ablaze by members of the public. PW 11 recovered two spent cartridges.
 10. On 27th June 2014, Senior Sergeant Solomon Tororey (PW 9) recalled that he was working at Bondo Nyarongi DO's Office where he was in charge of issuing weapons from the armory. On that day at about 4.30 pm, a woman came to report that she had been assaulted by one Eli Arido. He sent the accused to go and arrest the suspect at Nyalganda village. The two officers left using a motor cycle. At about 8.30 pm, the 1st accused called him to inform him that they had been attacked and they needed help. Together with other officers, he immediately left the camp in a

- Land Rover and along the way they saw the accused running and evacuated them.
11. PW 6 interrogated the accused about what happened. The accused told him that they tried to arrest PW 1 but he raised alarm. As a result people came and started attacking them with stones causing them to start shooting. The accused told him they had to shoot but did not know whether they shot anyone.
12. According to the Firearms Movement Register (“the Register”), PW 9 had given each officer 7.62mm bullets for G3 rifles. On 27th June 2014, according to the Register, he issued the 1st accused with a rifle G3, No. A3 - 6699120 and the 2nd accused a G3 FMP No. 405164 which they returned. Both officers signed that they had received the firearms. When the officers returned, he recorded that the 1st accused had used 6 bullets while the 2nd accused had used 4 bullets. He testified that he never received the remaining bullets since they were taken by PW 11 who also took possession of the Register and the guns.
13. A Firearms examiner, Chief Inspector Alex Mudindi Mwandawiro (PW 10) confirmed that he received an Exhibit memo on 1st July 2014 from PC Kennedy Mwachi of Migori Police Station accompanied by the following exhibits;
- Exhibit A1 – A G3 rifle bearing serial No. A3-6699120.
 - Exhibit A2 – A G3 rifle bearing serial No. FMP No. 405164.
 - Exhibit B1 – B30 – 30 rounds of ammunition.
 - Exhibit C1 – C2 – Two magazines.
 - Exhibit D1-D2- Two expended cartridges.
- The instructions in the Exhibit memorandum was to ascertain whether Exhibit A1 and A2 were firearms and whether exhibit B1-B30 were ammunition and also to determine whether Exhibit D1-D2 were discharged by either Exhibits A1 and A2.
14. PW 10 examined all the exhibits and found as follows; Exhibits A1 and A2 were manufactured in Germany and they were G3 rifles, caliber – 7.62mm and they are designed to chamber rounds of ammunition 7.62mm x 51 mm such as those exhibits B1 – B30. The general mechanical condition of Exhibits A1 and A2 was good meaning that none of them was prone to accidental discharge and that they were complete final component parts and capable of being fired. He proceeded to test fire Exhibits A1 and A2 using 6 rounds of ammunition, that is, 3 rounds for each gun. The 6 rounds were picked from Exhibits B1 and B30. He recovered the test cartridge case and test bullets for purposes of comparison. B1 and B30 were 30 rounds, caliber 7.62mm x 51mm and such were capable for use in Exhibit A1 and A2.
15. From this examination, PW 10 concluded that Exhibit A1 and A2 were firearms and Exhibits B1 and B30 are ammunition in reference to the ***Firearms Act (Chapter 114 of the Laws of Kenya)***. He examined Exhibit C1 and C2 which were the G3 rifle magazines. He found them suitable for use with and were component parts of Exhibit A1 and A2. At full capacity each of the firearms carry 20 rounds of 7.62 x 51 mm calibers. He examined Exhibit D1 and D2 which were extended cartridges of 7.62 mm and 51mm. He carried out microscopic examination in conjunction with each other. Exhibit No. D1 was fired with one gun and Exhibit No. D2 fired with another gun. He compared Exhibit No. D1 and D2 with the 6 test cartridge cases he fired from Exhibit No. A1 and A2. He concluded that Exhibit No. D1 was fired from G3 Rifle No. A3 – 6699120 and Exhibit No. D2 was fired from G3 Rifle No. A3 – 6699120 and Exhibit No. D2 was fired from G3 Rifle No. FMP – 405164. His findings were recorded in a report dated and on 22nd July 2014 Reference No. 418/2014. PW 10 testified that the serial numbers differ from what he had been given.
16. Chief Inspector Evans K Sang (PW 11), the investigating officer recalled that on 27th June 2014, he received a call from PW 5 reporting a shooting incident in his area of jurisdiction which had resulted in a death. He proceeded there with other officers. He investigated the matter and was informed that there were two AP officers who had come with a motorbike to arrest Eli, a son of

- Mzee Rieba. When Eli noticed the officers, he escaped from the homestead prompting the officers to go from one house to another. In the first house, one of the officers entered and found the deceased seated with one PW 1. The officers did not know Eli. They tried to arrest Eli, pulled him and tore his T-shirt in the process. Eli, who had escaped, raised alarm and the villagers gathered in big numbers and surrounded the officers. The officers fired several times and one of the bullets hit the deceased on the thigh. The angry villagers burnt the motorbike by the roadside and chased away the two officers who continued shooting in the air.
17. On 28th June 2014, PW 11 visited the scene and collected two spent cartridges. He also went to Bondo Nyarongi AP Camp and collected the two G3 Rifles, the Register and arrested the two officers who were later charged. He prepared an exhibit memo forwarding the two rifles with ammunition, the two spent cartridges. He received the ballistics' expert's report which confirmed that the two cartridges were fired from the firearm. PW 11 stated that he recovered a cartridge inside the house and another outside. After investigation he charged the two officers with murder. He established that one of the two officers got into the house but he was unable to establish who it was as the witness present was too terrified to identify the officer.
 18. At this stage I am only required to decide whether the prosecution has established a *prima facie* case to put the accused on their defence. What amounts to a *prima facie* case has been set out in several cases among them among them **Ramanlal Trambaklal Bhatt v R [1957]EA 332**, **Wibiro alias Musa v R [1960]EA 184** and **Anthony Njue Njeru v Republic NRB CA Crim. App. No. 77 of 2006 [2006]eKLR**). It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.
 19. Mr Kisia, learned counsel for the accused, submitted that PW 1, who was present when the fatal shot was fired, stated he never saw which accused fired the shot. That PW 9 issued the two guns which were used together with the rounds of ammunition. 10 rounds of ammunition were fired yet only one inflicted the injury. PW 10 received two firearms which he identified and 30 rounds of ammunition. He was not given the bullet that caused death and could not establish which firearm inflicted the injury. He contended that the gun issued to the 2nd accused as exhibited by the Register was never submitted for examination as confirmed by PW 11. In the circumstances counsel submitted that the prosecution has failed to establish which accused caused the fatal injury and that where there is sufficient proof that both fired shot but since there is no specific evidence pointing to either of the accused, they should be acquitted.
 20. There is no dispute that the deceased died and that she died as a result of one gunshot wound in her thigh that led to a shattered femur bone and excessive bleeding. There is also no dispute that the accused were the two officers who were sent to Nyalganda Village to arrest one Eli and in the process of effecting arrest, the deceased was shot by one of the officers. PW 1 is the only witness who was present and who gave direct evidence that one of the officers came into the house while the other remained outside but he was unable to identify which officer shot at the deceased. The testimony of PW 1 is corroborated by that of PW 2 who heard the gunshot and went back to her homestead. She found one officer outside standing near a mango tree and the other at the corner of PW 1's house.
 21. Since no witness could identify who discharged the fatal bullet that killed the deceased, it is necessary to examine the ballistic evidence. When PW 7 conducted the post mortem on the deceased's body he noted an entry and exit wound on the thigh. No cartridge or bullet was recovered from the body. PW 11 recovered two spent cartridges when he visited the scene on 28th July 2014. He stated that he recovered one inside the house and the other one outside.
 22. The testimony of PW 9 established that the accused were issued with G3 rifles and ammunition. The Firearms Movement Register confirms that both accused received the firearms and ammunition on the material date. I reject any suggestion that any of the guns in possession of the

accused were not submitted for examination. As PW 10 pointed out, any deficiency in the evidence was as a result of the failure by PW 9 to properly record the serial number of the firearms.

23. Although PW 10 ascertained that the G3 rifles issued to the accused were firearms and that they were fired at the scene of the incident, the question as to which of the accused discharged the weapon that led to the death of the deceased is still open. In proving murder the prosecution must establish that the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission. In this case the prosecution has not established which accused caused the unlawful act.

24. In order to find a case against both accused, the prosecution would have to establish that they acted with a common intention. **Section 21** of the *Penal Code* states as follows;

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

25. The East Africa Court of Appeal in the case of **Wanjiro d/o Wamerio and Another v Regina [1955] 22 EACA 521** defined common intention as follows;

Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.

26. In this case the evidence is inconsistent with a common intention. It is clear from the testimony of PW 1 and PW 2 that one officer was inside the house while the other was outside. This is corroborated by the testimony of PW 11 who found one cartridge in the house and another other outside. There is no evidence that points to the fact that the officer planned to shoot the deceased.

27. In the circumstances I must find that the prosecution has failed to establish a *prima facie* case. Even if the accused were to remain silent, there would be insufficient evidence to convict any of them of the offence of murder. Before I pen off this decision I must, for the record, reject any suggestion that the deceased was killed as a result of a riot. The evidence is clear and points to the fact that one of the two accused discharged a firearm in PW 1's house. Whether the discharge was accidental, deliberate or negligent is not for me to decide. While one of the accused was still in the house, the other officer discharged his firearm outside. PW 1 heard the two gunshots. PW 11 collected one cartridge inside and one outside the house. It is probable that the villagers then rioted in response to what happened hence the accused discharged more ammunition.

28. Be that as it may, I must now enter a verdict of not guilty under **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of Laws of Kenya)* which I hereby do against **KENNEDY OCHIENG AMBITHO** and **CHARLES CHACHA GIMASE**. They are acquitted and set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this 16th day of November 2015.

D.S. MAJANJA

JUDGE

Mr Kisia, Advocate for the accused.

Ms Owenga, Principal Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.