



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CR CASE No. 66 OF 2008**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**GEOFFREY MUREGA ALIAS BALAH.....ACCUSED**

**JUDGMENT**

1. The accused **GEOFFREY MUREGA KIRIMI** is charged with one count of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 22<sup>ND</sup> October, 2011 at Kambi Garba area of Isiolo County jointly with others not before court murdered Romane Losike.
2. The prosecution called 8 witnesses. The facts of the case are that on the material day, a group of Borana men dressed in jungle clothing descended on Turkana people living in Kambi Garba. In the case of the deceased, they set his house a blaze and when he came out of the house burning with his son PW2, they shot dead the deceased.
3. The accused denied the charge. He said that he was a Mumeru man by tribe and that he did not understand any Borana language. He admitted living partly in Kambi Garbra, at his employer's house and at a place where carmels sleep. His role was to deliver milk to his employer from where he slept and to sell it to customers.
4. The accused stated that when the fighting broke out between the Borana against the Turkanas, his employer who was Somali sent him off with his children to Kiwanjani area to stay in his daughter's house. He said he went to Kiwanjani and did not return until 3 days later. He denied the charge and said he did not know the deceased or where he lived.
5. The accused faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. That section defines murder as follows:

**“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

6. Under section 206 of the Penal Code the circumstances which constitute malice aforethought are set out as follows

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

**(a). an intention to cause the**

**(b). death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

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

**(d). ...**

**(e) ...”**

7. The prosecution must adduce evidence to establish that the accused with others, inflicted injuries upon the deceased out of which he died and that at the time the injuries were inflicted, the accused had formed the intention to cause grievous harm or the death of the deceased.

8. The issues which arise are whether the accused, was among those who caused the deceased death. Mr. Ringera submitted that the accused was implicated in the offence by PW1 who said she saw accused on the day of the offence. Counsel urged that PW1 said she saw 7 men wearing jungle uniform but she could not identify any.

9. Mr. Mungai submitted that the prosecution had established the case against the accused as he was recognized by PW1 who also picked him out to police the day he was arrested. Mr. Mungai urged that the accused admitted familiarity between him and the witnesses.

10. PW1, Elizabeth, was the wife of the deceased. She said that the time the attack erupted she first received a call warning her of movements of Borana tribesmen from West direction to East direction she then saw 7 Borana men in jungle uniform. The 7 aimed their guns at her and her husband, at their home.

11. She and the children managed to escape. However, her husband and son, deceased and PW2 respectively decided to remain. After escaping to the Isiolo/Marsabit Highway, PW1 could hear gun fire from where she left. Later she learnt of her husband’s death.

12. Regarding the accused, PW1 stated

**“In my statement I said that Balah which is his nick name when I left my house, I left him at the gate of my house with a camel and three liters. He was with Adesh Kuku, Berry Shiko, Kari Kwela”**

13. PW1 said she did not know what the accused was carrying in the jerry can but she was sure he had a camel with him.

14. PW2 was left with his father the deceased in this case at their home. PW2 testified that soon thereafter they heard gun fire and he and deceased decided to lock themselves inside their home. He said he peeped outside and saw people he recognized holding firewood. Soon their home was on fire. When they could not put it out, they decided to ran out.

15. It is PW2’s evidence that he saw Shiko Berry holding a firearm. He said the seven he was with fire were Adesh Kari Bwera, Farah and Balah and Abdil Waham. He said all were his neighbours of 3 years and well known to him. He identified the accused as the one he saw called Balah.

16. PW2 said he saw accused at a distance of 20 meters behind a fence which was 5 feet high. He said he was with six others and they were taking and throwing stones. He said that Berry Shiko shot his father as the two of them ran out of the burning house.
17. In cross examination, PW2 stated that he saw accused with five others lifting a stick with fire. He said he never saw anyone with a Carmel or carrying a jerry can.
18. From the evidence of PW1 and 2, there are different descriptions of the accused; PW1 saw accused with a camel and jerry can. PW2 saw accused with firewood with fire and throwing stones. The difference in time between when PW1 allegedly saw accused and when PW2 saw him was not long.
19. From their evidence, PW1 walked to the highway and soon gunfire was heard. Soon after that, houses were burnt and deceased walked out of his burning house only to be shot.
20. Apart from disparity of the evidence, PW2 was clear about role he saw accused playing at the scene. He said he saw accused lifting firewood and throwing stones. PW2 was sure that the one who shot deceased was standing alone armed with a gun.
21. The prosecution's evidence clearly shows that the deceased was shot dead by one Berry Shiko. PW2 who saw Berry Shiko shot the deceased said he was standing alone and only one armed with a gun at that point in time.
22. The issue is whether the prosecution has established that the accused had a common intention with Berry Shiko to cause the deceased death. Section 19 and 20 of the Penal Code provides as follows.

**“19. A married woman is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of her husband; but, on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband.**

**20. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-**

**(a) every person who actually does the act or makes the omission which constitutes the offence;**

**(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**

**(c) every person who aids or abets another person in committing the offence;**

**(d) any person who counsels or procures any other person to commit the offence; and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.**

**(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.**

**(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.”**

23. PW2 said accused was with five others behind a fence 5 feet tall, holding firewood and throwing stones. Berry Shiko was alone facing deceased home armed with a gun. PW2 did not say accused burnt their home PW2 did not see accused doing anything that would show he had a common intention with Berry Shiko to cause deceased death. Such evidence must be cogent and firmly established not mere conjecture or suspicion.

24. In SAWE –V- REP [2003] KLR 364 The court of Appeal held:

**“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”**

25. The mere fact accused was within the area of the incident may be capable of the innocent explanation. PW1 said accused had a Carmel and jerry can. The accused explained he sold milk in jerry cans and was accompanied by camels as he supplied milk to customers. Since PW1 saw accused with a camel, accused explanation is reasonable and acceptable.

26. PW2 saw accused with firewood throwing stones. PW2 did not say against whom the accused was throwing stones. Throwing stones and firewood is not enough to establish a common intention between accused and Berry Shiko.

27. Besides PW1 saw accused behind a 5 feet high fence. Visibility has not been described and that is an issue as according to PW2 accused was on the other side of the fence.

28. PW2 is only eye witness of accused being at the scene at the time of the shooting of the deceased. Incident was at 1 pm or so, therefore in broad day time. However, PW2 was peeping through the burning house and accused is alleged to have been on other side of the fence.

29. As the court of Appeal held in the case of ABDULLAH BIN WENDO VS. REX [1953]20 EACA 166,

**“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”**

30. The circumstances under which PW2 saw allegedly accused was in difficult circumstances. There was gunfire in the area. There was burning of PW2’s home, so the attendant heat and smoke created difficulties respecting conditions affecting visibility. In such circumstances mistake or error cannot be ruled out.

31. I also considered another factor. Accused was not in any danger on account of being a Meru as fighting was between Turkana and Boranas. How accused could behave is not the same as PW2 could as no one was after his life. Lifting sticks and throwing stones was not the cause of deceased death. The accused connection to deceased death in accordance to PW2’s account is very remote.

32. I considered fact PW1 did not implicate accused with the offence until after his arrest and in a subsequent statement to police. PW2 delayed to make a statement due to incarceration in hospital after this attack. None the less, he was sure accused was not armed with a firearm nor was he carrying any jerry can.

33. I find the evidence adduced against the accused was that of mere suspicion. There was no evidence to implicate him with the deceased death. There was no evidence either to show accused acted with one common intention with Berry Shiko who shot deceased. Even remotely accused was not implicated with

the arson on deceased home.

34. The accused has given a reasonable explanation of his presence with a jerry can and camel at the scene on the material day. PW1 even stated accused worked for her opposite neighbor. The accused was therefore at home in the area where the attack occurred.

35. I find that the prosecution has failed to prove the charge against the accused on the required standard of proof beyond any reasonable doubt. I give the accused the benefit of doubt and acquit him for this offence.

**DATED, SIGNED AND DELIVERED AT MERU 31<sup>ST</sup> DAY OF JULY 2014**

**LESIT, J**

**JUDGE**