



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MURDER CASE NO. 51 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

JUSTUS ANDANJE LINYURU.....ACCUSED

JUDGMENT

On the 24th of November, 2008 the then Assistant Chief of Tingare village **Francis Liyare** was shot at about 3 pm in the afternoon at the police patrol base within Tingare. Following the death the accused herein **Justus Andaye Linyuru** was charged with the offence of murder of the said assistant chief. The particulars of the offence are that on the 24th of November, 2008 at Tingare village in Siaya District within Nyanza Province the accused murdered the said **Francis Liyare**.

The accused pleaded not guilty and the matter proceeded to full trial. The prosecution called 10 witnesses. This has been one of the well investigated and well prepared cases, that I have come across so far in this station. I commend the prosecution and urge them to do similar investigations in other criminal cases. The defence on its part had only the accused as a witness.

The prosecution case is that on the material day, the 24th of November, 2008, the deceased went to the Tingare Patrol Base, sat a few meters from the accused's home in the company of two other persons and where they conversed in low tone. The accused, a police officer who stayed within the base came out of his house and soon thereafter a struggle ensued between the deceased and the accused. The accused had a gun and in the course of the struggle between the two, the deceased held the muzzle (tip) of the accused gun, shortly thereafter shots were fired from the gun. The deceased was shot in the process. The accused is said to have fired several gunshots and ran away only to surrender after sometime to a team of police officers who pursued him. It is the prosecution case that the assistant chief died as a result of the gun shots.

The evidence of the prosecution witnesses is as follows;

PW1 P. C. Enock Kipkosgei Kipruto recalled that on the 24th of November 2008 at about 3.40 pm, he decided to go home to take a bath. He saw the deceased and 2 boys as he brushed his teeth outside his house. He greeted them sat on a bench outside the house. He had known the deceased for about 5 months. He then got into his house. Thereafter he had people quarreling, he got out and found the accused outside his door quarrelling with the deceased who had stood from the bench, he also heard the accused ask the deceased why he had abused him. The deceased appeared to have been threatening the accused.

The witness then left for his house at which point he heard the deceased utter words in vernacular to the 2 boys he was with. He did not understand what the deceased had said. The witness got to his house dressed in civilian clothes and proceeded out again, when he saw the deceased move towards the accused. By then the accused had gone to his house and had come with a G3 rifle. The witness headed towards them, no sooner had the deceased moved towards the accused and held the Tip of the gun, the accused loaded the rifle and thereafter he heard a series of gunshots, when a second shot was fired he saw the deceased fall. The witness ran and locked himself in the house. He later heard a gunshot about 50-60 m away. He got out of his house and went to inform the in-charge of the patrol base of the incident. Later he assisted in hunting and arresting the accused.

PW2 P.C Denis Muhero based at the C.I.D Siaya. On 28th November, 2008, he filled the post mortem form and escorted the family of the deceased to identify the body. He attended the post mortem examination.

PW3 Alex Awanda Obonyo son to the deceased. On 28th November, 2008 he also attended a post mortem at Siaya Hospital. He identified the body of his father that was later to be released to the family.

PW4 Inspector James Cheptiony stated that on 24th of November, 2008 he was stationed at Ukwala Police Station when he received information of a death. He proceeded to the scene in the company of other officers namely; **P. C. Kosgei, Sgt. Amukole** and another. On reaching he witnessed the deceased had 3 gunshots on his chest and lying in front of the patrol base. He learnt that the gunshots were inflicted by the accused. He then mobilized officers including the ones at the base to hunt for accused. The accused was found about 2km away in a bush. The accused surrendered the rifle and they arrested him. The witness recovered a rifle which he handed to the C.I.D for ballistic examination. He also handed the suspect (accused) whom they had arrested to the Siaya Divisional headquarters.

In cross – examination the witness stated that on arrival at the scene the accused was not there. Further that, he recorded his statement and compiled statement of other witnesses.

PW5 P.C. Eugene Masika recalled that on 24th of November, 2008 he got word from a member of public that the Assistant Chief of Tingare had been shot. He informed the Sergeant in-charge and they then proceeded to the scene. They found the deceased's body lying down. The deceased was in uniform. He joined **PW4** as they search for the accused. They found accused ½ naked with only a trouser. The accused surrendered to the police. At the scene they recovered 5 spent cartridges and from the magazine they recovered 3 live ammunitions. He escorted the suspect to the police station.

PW6 Chief Inspector Emanuel Langat. A forensic firearm examiner of the ballistic section at C.I.D Headquarters in Nairobi. He compiled a report in respect of exhibits sent to him; a G3 rifle No. 06740836, a magazine, 5 spent cartridges and 5 rounds of ammunition. He found the gun to be in good working condition. He also tested 3 rounds of ammunition picked randomly. The magazine had a capacity of 20 rounds of ammunition and was in good working condition. He formed the opinion that the spent cartridge were fired from the gun he examined. His report was dated 27th November, 2008. He confirmed in cross – examination that the rifle he examined had no sling which he categorized as an accessory and not part of a gun.

PW7 Dr. Kennedy Rapenda. He produced the post mortem report on behalf of **Dr. Esiaba** whom he knew and whose handwriting and signature were familiar to him. The post mortem was dated 24th November, 2011. In the report the following was noted:-

- Severe conjunctival pallor.
- Laceration on the right shoulder and left waist.
- Bullet wound on right elbow with entry anterior 0.5 cm and exit posterior 0.8 cm approximately.

- Fracture of ribs on the left side.
- Lacerations and tears on the sides of the lungs.
- Haemathorax 2 cm in blood.
- Tearing of the heart.
- Two bullet wounds on the abdomen.

The Doctor formed the opinion that the cause of death was due to internal hemorrhage with tearing of the heart, lungs and liver due to the bullet wounds that shot through the abdomen.

PW8 – Chief Inspector Mutinda Kariuki currently O.C.S Tharaka Police Station and previously of Siaya Police Station recalled that on 27/11/2008 he recorded a statement under inquiry from the accused. The accused requested for his family to be around. His wife and one Kiplagat were around when he recorded the same at 4.15 pm

The accused was cautioned. He read the caution and signed the same and proceeded to record a statement that the witness produced in evidence.

PW9 Inspector Jack Wafula. On 24th of November, 2008 he received information of the death of the Chief of Tingare. He later accompanied **Mr. Johnston Ibare** O.C.S of Siaya to the scene where he found a crowd of people and the deceased lying in a pool of blood. The deceased was dressed in official uniform. He also learned that the suspect had escaped and that members off public and police officers were in pursuit, he was instructed to join the search and after a kilometer he found that the suspect had surrendered under the leadership of **PW4**. He was handed over 5 rounds of ammunition, 5 spent cartridges of 7.6 mm. He also stated that the public was baying for the suspect's blood in the company of 3 other officers they took away the suspect to Siaya to save his life. He contacted a scene of crime officer to photograph the scene. He later in the company of **P. C Mohammed Hadi** escorted the G3 riffle with 5 live ammunitions and 5 spent cartridges to a ballistic expert at the C.I.D Headquarters in Nairobi for examination.

The same were examined and on 29/11/2008 he returned with the exhibits. He also came back with a report. He received back 3 tested cartridges, 2 live ammunitions and 5 spent cartridges. He kept as exhibits, the uniform of the deceased, the G3 rifle, the arms movement book. He confirmed further that he was the investigating officer in this matter.

At cross examination he confirmed that no dusting was done on the gun. According to him this was unnecessary. He also confirmed recording the statement of 2 youths who were in the company of the deceased.

PW10 Chief Inspector Stephen Kemboi recalled that on 24th November, 2008 he was at Siaya District Hospital Mortuary. He took several pictures of the deceased which he produced as exhibits. He however did not take photographs of the scene of crime, nor the gun.

At this juncture the prosecution closed its case. The court found that the accused had a case to answer. The accused was put on his defence, he chose to give an unsworn statement as follows;

DW1 JUSTUS ANDAYE LINYURU he recalled on 24th November, 2008 at about 3 pm he returned to his house at Tingare Patrol Base, while seated near the door and preparing his rifle for evening patrol he heard 3 people talking outside. He went out as he continued to clean his rifle, he found the deceased and 2 other people seated near his house and talking among themselves, he greeted them but they did not answer him, one of them was in administration clothes, the said person moved closer to him, staring with anger, he stepped backwards as he sensed danger and inquired what the problem was, instead the said person jumped on him and grabbed the rifle by the sling at the muzzle and violently pushed him away in a

way so as to get the riffle. The other 2 stood and took position as if ready to intervene. Due to the impact of the attack part of the sling hit the accused eye. **PW1** witnessed this but did not intervene to assist. As he was in a difficult situation and with limited control of the riffle he discharged rounds of ammunition in the air. Which were 3 blanks in order to scare the attacker, however the attacker grabbed the gun in an effort to reposes the same which triggered the rifle into rapid fire, the rifle was an automatic one, it went off attracting a crowd of people, who arrived with all many of crude weapon with the intention of lynching the accused which forced him to discharge shots in the air to scare them after which he took refuge in the nearby bush as his life was in danger. Later when police arrived and he surrendered peacefully.

With the close of the prosecution case both counsel made submissions. It is the case of the defence that the prosecution witnesses raised doubt in the prosecution case. The deceased attacked the accused, injured his eye and pushed him. The defence submitted that the accused had a duty to guard the weapon in his possession. Secondly that he fired in the air to repulse the attacker and that it was unclear who triggered the gun as there was a struggle between the deceased and the accused. It was further submitted that the 2 youths in the Company of the deceased did not testify which gave the impression that they were crucial witnesses whose evidence would have been adverse to the prosecution case and also that it was doubtful as to the number of cartridges used. It was also argued that the post mortem report's authenticity could not be confirmed. The defence further argued that the riffle produced in court was different from the one used. That the riffle had been interfered with and had no sling. Further that the pictures produced as exhibits were taken by an officer who failed to prove that he was a gazette crime officer his report was incomplete as it had no rubber stamp, had alterations on the face of it, which alterations were not countersigned. It was the defence counsel's submission that all in all the prosecution had failed to prove its case beyond any reasonable doubt and he sought for the acquittal of the accused.

On his part the learned State Counsel urged that the prosecution had proved that the accused had in his possession a gun which he used to kill the deceased. That there was no proof of provocation to warrant the cold blood murder of the deceased. It was also submitted that, the accused was in possession of a gun and the firearm report indicated that the gun had been used. Further that there was proof that the accused shot the deceased. It was also submitted that there was no interference with the murder weapon as alleged. As a sling does not form part of the weapon. As to the scenes of crime officer, it was submitted that he gave details of his gazette notice which was sufficient. As regards the post mortem report it was submitted that the same confirmed cause of death. The said report was admitted under Section 50 of the Evidence Act. As regards the 2 witnesses who did not testify the learned State Counsel referred to Section 143 of the Evidence Act and argued that no set number of witnesses is required to prove a fact. He argued further that the conduct of the accused after the incident points to his guilt. Further that the accused as a Police Officer had a duty to safe guard life, he had no blanket right to shoot at all. The learned State Counsel urged the court to convict the accused

In responding to the prosecution's submissions the defence counsel argued that there was no eye witness to the shooting. That the deceased and the accused struggled and there was no evidence that the accused shot the deceased and the reason the accused escaped was to save his life from the crowd. He also argued that the document produced as evidence fell short of the required standard.

Having considered the evidence and submissions made herein, there is no doubt that the deceased herein died as a result of gun wounds sustained during the incident that involved him and the accused herein. The deceased received 3 gun wounds; a bullet wound on the right elbow and two bullet wounds in the abdomen that ruptured his heart, liver, gall bladder and burned the surrounding tissues. The post mortem report indicated that the deceased died of internal bleeding and tearing of his heart, liver and lungs.

Having established that the deceased died as a result of gunshots the issue for the court's determination is whether the gunshots were from the weapon in possession of the accused and if so who fired the shots that gave a blow to the deceased life. Is there sufficient evidence linking the same to the accused, if so was there a motive.

As in all criminal cases the onus of proving the case against the accused squarely lies with the prosecution and where there is a doubt, the benefit of the doubt must go to the benefit of the accused.

There was ample evidence that the accused was in possession of a gun when the altercation between him and the deceased occurred. **PW1** witnessed the accused go in his house and return with a gun, **PW1** stated in his evidence in chief:-

“I heard people quarrelling outside, I then came out still in a towel. I saw Justus Andaye Linyuru outside his door ---- The Assistant Chief had stood from the bench and they were quarrelling. What I heard from Justus was him asking why the Assistant Chief was abusing him. It seemed the Assistant Chief was threatening. The Assistant Chief told the officer that he had not come to his house he had a mission. He then said he could take action against the officer ----“

“--- I went into my house and dressed. I proceeded outside, dressed in civilian. I saw the area chief heading towards my colleague’s house. by then I saw my colleague coming from the house armed with a G3 riffle. I recognize the same to be similar as the one accused had.”

PW4 on his part stated:-

“We looked for the officer, we did not find him. I mobilized officers, the ones I went with and others from the patrol base to look for him. We found him in the bush about 2 km away. He surrendered the riffle and we arrested him.”

PW5 on his part stated:-

“We were informed that the assailant was at large and under the command of Deputy O.C.S. We started searching we found him ½ naked with only a trouser ---- He was ordered by Deputy O.C.S to surrender. Then when he surrendered P. C Kosgei & I moved near him and I took away the firearm.”

The accused on his part albeit having a different account of what happened stated:-

“I was on standby on the day. By then I was cleaning my rifle for preparation for evening patrol. I heard 3 people talking outside, I went out still holding my rifle ---

There is also evidence that gun surrendered by the accused is the one that shot or fired the shots that killed the deceased. **PW9** who went to the scene of crime received from **PW4** a firearm no. 06740836, G3 rifle, which rifle was taken to the C.I.D Headquarters for a ballistic examination together with 5 live ammunition and 5 spent cartridges. **PW6** a forensic firearm examiner a ballistic expert of 9 years confirmed examining a G3 rifle No. 6740836, a magazine, 5 spent cartridges and 5 ammunitions. He found that the ammunition is caliber that is designed to be used in the rifle he examined. He carried a microscopic examination and the same revealed that the spent cartridges same were fired from the firearm under examination. It is therefore evident that the gun described above recovered from the accused is the one that shot the cartridges at the scene of the crime.

Is there any evidence then linking the shooting to the accused. In his evidence the accused said he fired blanks in the air to scare the attacker who then grabbed the gun, but instead the attacker grabbed the gun, which went into rapid fire and they both fell to the ground. This piece of evidence in my view does not explain the injuries sustained by the deceased on his shoulders and his abdomen and I disregard the same. **PW1**’s evidence explains what transpired, had this to say:-

“The Assistant Chief had a swagger cane in his hand. The area Assistant Chief held the muzzle of the gun (tip of the gun)then the officer cocked/loaded the riffle. The mechanism of the rifle is automatic meaning it was then ready to fire if one opens the safe. However I did not see him open the safe. I heard gun sound volumes of shooting. The chief was still holding the muzzle. The

incident took a very short time. I was about 10 m away. I went fast towards them in order to separate them. I was not able to reach there, when I was about to reach them I heard gunshots. I was shocked and I stood to check where the shot came from. I saw my colleague pull the gun from the chief. I heard another gunshot and I saw the assistant chief fall down --- I ran to my house ---“

I found **PW1** to be a truthful and credible witness. He was consistent and detailed in his evidence. In my view he had no reason to lie as against his colleague. He was an eye witness, he saw his colleague the accused pull the gun from the deceased. He saw him shoot the deceased who thereafter fell down. This was a vivid description of what happened. The evidence of **PW1** was so graphic and detailed. The accused gave the death blow to the deceased no doubt.

In order to establish the offence of murder two ingredients are necessary. *Actus reus* (act) and *mens rea* (the intention).

Section 203 of the Penal Code provides:-

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

Section 206 defines malice aforethought as;

“a) An intention to cause the death of or to do grievous harms 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 of or grievous harms to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused;

c) Intent to commit a felony.

d) ---“

The accused person is a police officer. He knew or ought to have known the consequences of taking possession of a gun even if as he stated to scare an attacker, and the consequences of locking such a gun in an altercation like the one he was involved in. **PW1** was categorical that the accused came out with the gun. It is quite obvious that he had formed malice aforethought as he had the knowledge that any likely use of the gun would cause death or grievous harm but nevertheless he went out to meet his nemesis, and he cocked and later pulled the gun which ended up firing shots that fatally injured the deceased.

However having found as above there is evidence from both **PW1** and the accused that the deceased abused and attacked the accused. The incident of argument, abuse, struggle and shooting was within a short span of time, this leads me to form the opinion that there was clear provocation on the part of the deceased. He abused and headed towards the accused.

Section 208(1) of the Penal Code defines provocation as:-

“The term provocation means and includes, except as hereunder stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate case, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person whom the act or insult is done or offered.”

In the circumstances of the case I find that indeed the deceased abused the accused, jumped on him, grabbed the gun to an extent that the accused must have been provoked to the extreme so as to lose his self control.

Section 207 of the Penal Code provides:-

“When a person who unlawfully kills another under circumstances which but for the provision of this Section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereafter defined, and before there is time for his passion to cool is guilty of manslaughter.”

Having found that the accused triggered the gun and fatally wounded the deceased while under extreme provocation from the deceased. I accordingly find him guilty and for the reasons stated above in accordance with Section 207 of the Penal Code find him guilty and convict him of the offence of manslaughter

DATED AND DELIVERED THIS 8TH DAY OF MAY, 2012.

ALI-ARONI

JUDGE

In the presence of:

..... for State

.....Accused person(s) present