



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL CASE NO. 13 OF 2008**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**ABDUL ISMAEL GUTU .....ACCUSED**

**RULING**

I have considered the evidence on record as well as submissions made by the defence Counsel Mr. Muranje.

The prosecution's case is that on 22<sup>nd</sup> June 2008 long Bamba Kidemu road of Bamba Location, within Kilifi District, the accused Abdul Ismael Gutu murdered Kaingu Kiranga Unda.

The case revolves around the following scenario as alluded to by Mr. Kemo, the learned counsel for the State – that on 22-6-08, mourners had gathered at a funeral wake within Bamba village. The accused, who was an AP at Bamba D.o's office was also at the wake and was drunk from palm wine as a result of which he was disturbing the mourners. A group of young men decided to escort the accused to Bamba police patrol base, and handed him over to the duty officer at the base.

The accused returned to the camp, picked his G3 rifle, and shortly thereafter went and shot the deceased. He then returned to the D.O's camp and surrendered the firearm to the D.O.

Police then moved deceased's body to Kilifi District hospital and the prosecution intended to prove that the deceased died as a result of gunshot wounds.

PW2 Mutawali Nyuchi Kahindi who was at the funeral wake, confirmed that he was among those who escorted accused out of the gathering to the police patrol base, on account of his drunken conduct which was interfering with the activities at the wake.

PW8 Pc Philip Toroitich confirmed receiving the accused from villagers who complained that accused had consumed a lot of palm wine and was drunk so they had escorted him because he didn't seem to know where he was going. PW8 observed that accused appeared drunk though coherent.

PW6 Kenga Fondo told this court that he had left the funeral wake at about 3.00am, accompanied by the deceased. He branched into the bush to relieve himself, leaving deceased to walk ahead. Shortly he heard a gunshot, and he ran way passing a body which lay on the ground. However he eventually returned to the scene after mistaking a tree for an elephant, and realized that the body he had left on the ground was the very person who had been in his company.

PW5 Zerafin Kaingu (a daughter of the deceased) eventually came cross her father's body at 6.00 am, and

she is the one who broke the news to other family members.

The sound of gunfire was also heard that night by PW8, PW4 (Zera Kaingu Kiraya). PW7 (Gabriele Kuri, who was then a D.O. in Bamba.

Each of these witnesses confirm that the area had experienced security challenges from “shifta” bandits who usually attacked at night while armed and also attacks from marauding elephants, such that when the gun shorts rent the air, their presumptions were that it was either one of these.

However a curious situation arose from the AP camp, where the accused was based – in that he had been assigned guard duties, armed with a rifle and rounds of ammunition, yet instead of remaining on guard assignment at the station, he left the station with the firearm. His colleagues were alarmed and at 2.40m one Snr Sgt John Chonge Mwakali had gone to PW1’s house to brief him of that fact – when there was a sound of a gun cocking, followed by many shots. Twenty minutes after the gunfire had stopped, accused appeared from between the office and his house. He demanded that PW7 and the other officers identify themselves, and upon confirming their identity, accused surrendered his weapon to them. PW7’s observation was that twelve bullets were missing from the magazine, apparently having been fired, and only eight bullets were left.

Prosecution witnesses who observed the deceased’s body, all confirmed that he had a gunshot wound.

From the evidence, no one actually saw the accused fire the shot or shots which allegedly led to the deceased’s death. PW7 confirmed that apart from the accused, there were two other officers who had been assigned duty that night, and who had also been issued with a firearm each.

PW7 confirmed on cross examination that the officers had been issued with firearms 3 days earlier, to go and repel the elephants which had invaded a school, but there had been a procedural lapse by the assigning officer who did not get back the firearms, after the assignment and so the officers still had possession of the firearms three days later.

The prosecution closed its case without calling the firearms expert, the doctor and the assigning officer who had issued the firearms – this was after several adjournments had been granted to prosecution in their endeavour to get the relevant witnesses but all in vain.

The issue then is whether prosecution has established that the gunshot wound observed on the deceased’s body was inflicted by the firearm which had been issued to the accused.

Mr. Muranje for the accused submitted that there was no evidence placing the accused at the scene of the alleged murder, pointing out that PW7’s evidence was that accused was found between his house in the APs camp and their office in the camp, yet the scene was on a road away from the camp.

That observation cannot be faulted. There is evidence that apart from the accused, two other officers were issued with guns and that given the security concerns in the area, regular police and game rangers also had guns as the area is bandit prone and also has a high propensity for wildlife attacks. No arms movement register was produced to confirm how many rounds of ammunition had been issued to accused, and how many were recorded as being left when he surrendered the gun. I concur with Mr. Muranje that there is no evidence that the firearm issued to the accused was fired, no evidence of any spent cartridges recovered from the scene or that such spent cartridges were fired from the accused’s gun. Indeed there is no evidence that any bullet originating from the accused’s firearm is the one that killed the deceased given the scenario offered by PW7, the bullets or gun fire heard and one which felled deceased, could well have been from guns other than the one issued to the accused. There was no ballistics report to confirm that a bullet had been recovered from deceased’s body on the scene and that it matched those issued to accused, or had been ejected by the accused’s gun. The circumstances, though suspect, do not point inculpably on the guilt of the accused, to the exclusion of anyone else – the circumstances in fact created several possibilities and probabilities - hence the evidence was not water tight.

The deceased's daughter Zerafin, (PW5) the deceased's colleague Kenga Fondo Kenga (PW6), the deceased's wife Zera (PW4) and deceased's brother (Julius Kiraya PW1) who identified his body to the doctor for postmortem confirming that the body collected from the scene was that of Kaingu Kiraga. I have no doubt that Kenga Kiraga is dead – but so far no medical evidence has been presented to this court to confirm that the cause of death was a gunshot wound, as no postmortem report was even produced, and as earlier noted – there is no evidence to prove beyond reasonable doubt that the wound observed by witnesses was inflicted by a shot from accused's gun. Certainly there is suspicion, even a likelihood, but it is such that if the accused were to elect to remain silent in his defence, this court would still arrive at the same conclusion as I will now. It is such that to ask accused to make his defence, would be tantamount to calling upon him to fill up the loopholes left by the prosecution. It is for the foregoing observations that I rule that accused has no case to answer. I record a finding of NOT GUILTY under section 306(1) of the Criminal Procedure Code.

Delivered and dated this 7<sup>th</sup> day of **February 2011** at Malindi.

**H. A. OMONDI**  
**JUDGE**

Mr. Shujaa holding brief for Mr. Muranje for accused.