



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)
Criminal Case 90 of 2006

REPUBLIC..... PROSECUTOR

VERSUS

VICTOR JAIRUS NABWENYA..... ACCUSED

JUDGMENT

The accused, **VICTOR JAIRUS NABWENYA**, is charged with the offence of murder **contrary to section 203 as read with section 204 of the Penal Code**. It was the prosecution case that the alleged murder took place on 24th July 2006, at Kariobangi Light Industries, within Nairobi Area. And the victim is **GEOFFREY SALANO SIMITI**.

In an endeavour to prove the case against the accused, the prosecution called eleven (11) witnesses. Thereafter, when he was put on his defence, the accused gave unsworn testimony. The accused did not call any witness, other than himself.

In ascertaining whether or not the prosecution proved the case against the accused, I will now re-evaluate all the evidence on record. I will also give due consideration to the submissions made before me.

PW 1, HARISON SIMITI KURACHE, is the father to the deceased, Geoffrey Salano Simiti. He received information from one, Hatuha Noah, that his son, Geoffrey was lying dead, near a Chemist shop.

By the time **PW 1** reached the spot where the body had been lying, the body had already been removed to the mortuary. However, **PW 1** did see blood stains at the spot where he was told his son was found lying down, dead.

PW 1 first saw his son's body at the City Mortuary, when he identified it, for purposes of a Post Mortem.

When asked by the court, how far the Chemist shop was from Lily Visions Secondary School, **PW 1** said that was about 85 metres.

PW 2, ALEX MUDINDI MWANDAWIRO, is a firearms examiner attached to the Ballistic Laboratory at the C.I.D. Headquarters, Nairobi.

He examined a model 85B Cessca Pistol; a magazine; 13 rounds of 9mm ammunition; and a fired bullet.

After carrying out tests, **PW 2** concluded that the pistol was in working condition. In effect, the pistol was capable of being fired.

He also concluded that the fired bullet had been fired by the Cessca Pistol G.3242. He arrived at that conclusion after microscopically examining the markings left in the barrel of the gun; and comparing those to the markings left in the same gun by the bullets which he used for test firing.

During cross-examination, **PW 2** said that a Cessca Pistol had a range of 75 metres.

He also said that each firearm had individual characteristics; meaning that bullets leave particular signatures in the barrel, which cannot be the same with any other. He also explained that no two guns would have the same markings from the bullets fired by them.

PW 3, CONSTABLE BEN CHEPKOR, testified that on the material date, 24th July 2006, the OCPD Kariobangi, Inspector Mutiso, informed him about ongoing chaos at Lily Vision Secondary School.

PW 3 accompanied the OCPD, **PW 10** and the accused, to the said school. Each of the four police officers was armed with a gun.

On arrival at the school, the OCPD and the accused entered the school building, and went to the principal's office on the 4th floor. They later emerged with **PW 8**, the school principal.

Meanwhile, **PW 3** and **PW 10** remained outside the building.

When the OCPD, the accused and the headmaster reached down, the students were throwing stones. According to **PW 3**, one stone hit the accused, prompting the accused to shoot in the air. The students then scattered.

Thereafter, a civilian informed the police and the principal that someone had been shot along Outering Road, which was about 100 metres from the school.

PW 3 went with the civilian towards the place where the person had been shot.

Whilst on their way, they met one person who had been shot in the shoulder: that was about 40 metres from the school compound. Thereafter, **PW 3** came upon the body of the deceased, after another 10 metres.

During cross-examination **PW 3** said that the students at the school had locked up the principal inside his office, and that they wanted to burn down the school.

He also said that the Kariobangi area was crime-infested, and that it was possible for students to hold guns. His said observation was drawn from one experience when the police recovered guns from students.

PW 4, PC SUATETI JEREMIA, was the police officer who attended the Post Mortem examination, which was done by Dr. Okemwa at the City Mortuary. He said that the said Post Mortem examination was done on 2nd August 2006. His sole responsibility was to verify that the witnesses who could identify the deceased to the doctor, did so.

After the Post Mortem, the doctor gave to **PW 4** a bullet-head which had been recovered from the body of the deceased.

PW 5, EDWARD MUKHAYA, was an Uncle of the deceased. On 2nd August 2006, **PW 5** identified the body of the deceased, at the Mortuary.

Although he initially stayed inside the room where the doctor did the Post Mortem examination, **PW 5** eventually had to leave when he was overcome with emotions.

The doctor told him that the deceased had been shot with a bullet, but **PW 5** did not wish to see the said bullet.

PW 6, DR. MINDA OKEMWA, is a pathologist. He testified that he carried out a post mortem examination on the body of the deceased, Salano Simiti, on 24th July 2006.

His findings were that the body had a gun-shot wound on the right side of the chest. Inside the chest cavity, **PW 6** found blood, with injuries resulting from the bullet.

PW 6 recovered a bullet head lodged in the body, and he handed it over to the police officer who attended the post mortem.

In his considered view, the cause of death was fatal chest injuries due to a single shot wound.

PW 7, DR. ZEPHANIA KAMAU, is the Police Surgeon, Nairobi.

On 25th September 2006, **PW 7** examined the accused, and found that he had no physical injuries. He also assessed the accused to be of sound mind.

PW 8, ONYANGO PETER AYIEMBA, was the Headmaster of Lily Vision High School.

It was his evidence that on 24th July 2006, the Form Four (IV) students, at his school, were rioting. He therefore called the police after contacting the Director of Schools.

PW 8 said that the police responded promptly, and they then ordered the students to

go home.

The students and some civilians are said to have engaged the police, using stones.

When asked how far apart the police and the students were, **PW 8** said that it was about 400 metres.

PW 8 saw a civilian fall down after the police shot in the air to scare the students. In his evidence, the civilian was among the group that was charging at the police.

PW 8 identified the accused as the police officer who had fired in the air.

During cross-examination, **PW 8** said that some of the students did sometimes carry firearms to school. Indeed, one of the students was imprisoned, after being found to be so armed.

However, on that particular day, **PW 8** did not see any student who was armed. He was therefore unable to say whether or not any student was armed with a firearm.

Secondly, **PW 8** reiterated that the accused shot in the air. As far as **PW 8** was concerned, he did not see the accused shoot the deceased. If anything, the headmaster was of the view that anyone could have fired a shot in the stampede.

In that regard, **PW 8** explained that there were at least two banks within the area where the incident occurred. Each of the said banks was always guarded by Administration Police Officers, who were armed with guns.

PW 9, INSPECTOR GEORGE MUTISO, was the officer-in-charge at the Kariobangi Police Post. It is he who summoned the accused, **PW 3** and **PW 10** to accompany him to Lily Vision Secondary School, with a view to quelling the students' riot.

On arrival at the school, **PW 9** went with the accused to the principal's office, on the 4th floor. After agreeing with the headmaster that the students be summoned, so that **PW 9**

could address them, the headmaster accompanied **PW 9** and the accused downstairs to the main entrance.

Before the group reached the main entrance, **PW 9** received a message that he needed to attend to another matter at Outer Ring Road.

PW 9 went with the other 3 officers to Outer Ring Road, where they found one person bleeding from his arm, and another person lying dead.

PW 9 testified that he did not know how the deceased met his death.

When asked about the arms which each of the police officers carried on the material day, **PW 9** testified as follows;

“We were all armed. The other officers – Kimeu- G3 rifle. Cheboro – G3 rifle. Myself – a cessa pistol. Accused – a cessa pistol.”

And when asked the range within which a cessa pistol could be fired effectively, **PW 9** said:

“A cessa pistol has a shooting range of.....I don’t know. I am not a firearms expert. But a pistol can make it at a distance of 200-250 metres. Pistols are usually for short range. It is possible in the confusion any person might have fired a shot.”

PW 10, PC JOHN MAKAU KIMEU, was one of the four officers who responded to the request by the Headmaster, for help in quelling the riots.

He confirmed that on the material day, he was armed with a G3 rifle.

According to **PW 10**, when the students first ran out of the school, they re-grouped about 50 metres from the school compound. The students then started throwing stones at the police officers.

In response to the stoning, **PW 10** cocked his gun, ready to fire. But before **PW 10** fired, the accused

“fired two shots in the air.”

Although the two shots caused the students to disperse, **PW 10** testified that the police officers chased them. As they chased after the students, **PW 10** heard another shot, at Outering Road, which was about 200 metres from where the police were.

When the police got back to the school gate, they were told that there was a body lying off Outering Road.

During cross-examination, **PW 10** testified that he had never witnessed a bullet that had been fired in the air, coming down with sufficient force to kill.

And in this instance, **PW 10** reiterated that the accused had directed the bullets in the air.

Therefore, in his opinion:

“It is possible for any other person to have shot during the tense situation, apart from the Police Officers.”

PW 11, A.S.S.P JOSEPH MWAMBURI, visited the scene after the incident. He took possession of the gun which the accused had used, and he verified from the Arms Movement Register that the gun had been issued to the accused.

Later, when the bullet-head that was removed from the body of the deceased was examined by a Ballistics Expert, the said Expert concluded that the bullet-head had been fired from the pistol issued to the accused.

As a result of that conclusion, **PW 11** formed the opinion that the accused had not fired into the air, but that he had fired into the crowd. Consequently, **PW 11** recommended that the accused be charged with murder.

During cross-examination, **PW 11** said that only the accused had been armed with a cessa pistol on the material day.

He also said that the body was lying about 75 metres away from the main gate.

Finally, **PW 11** testified that there were no other independent witnesses to the shooting, save only for the man whose arm was injured. And that man did not know who injured him.

In his defence, the accused corroborated the testimony of **PW 9**, to the effect that the two of them went to rescue the Headmaster, from his 4th floor office, where he had been locked up by the students.

After rescuing the Headmaster (**PW 8**), the two officers walked with him, to the ground level. But as they approached the gate, the students threw stones at them.

Although the accused warned the students to desist from destroying window-panes on the school building, the students pelted the police with stones.

It is then that the accused drew his cessa pistol and fired two (2) shots in the air.

In response to the two shots, the accused says that one shot was fired from the direction of Outering Road. That shot was fired towards the school compound, and it caused the police officers to take cover.

Later, when the situation calmed down, a member of the public approached the officers and told them that they needed to attend to another scene, where a person was lying dead, off Outering Road.

As the accused was the duty-officer at the time, he called for personnel of the Scenes-of-Crime section, who arrived and took photographs. After that, the body was removed to the mortuary.

14 days after the incident, the accused was arrested. But the accused says that if the

police had investigated the matter properly, they should have un-earthed the killer, because he was not the one. In other words, the accused has persisted in his denial of guilt.

I have given careful consideration to the evidence adduced, together with the submissions made before me.

First, it is common ground that **GEOFFREY SALANO SIMITI** is dead. He died on 24th July 2006. And the cause of his death was the fatal chest injuries due to a single shot wound.

On the day that the deceased was shot dead, the accused had gone with three (3) other police officers, to quell a student's riot at Lily Vision Secondary School.

The witnesses for the prosecution testified that the accused fired two (2) shots in the air, with a view to disperse the students and some civilians who were pelting the police with stones.

The accused confirmed to this court that he did fire two shots in the air.

And the police officers were all in agreement that when a bullet is fired in the air, it was not possible for that bullet to then come down with sufficient force to kill someone.

It is because of that reason that **PW 10** therefore concluded that the accused did not actually fire in the air, but that he had fired at the group of students and civilians.

From a logical perspective, that would explain how the bullet which was fired from the accused's gun, was recovered from the body of the deceased.

But then, all the three police officers who were with the accused, and even the Headmaster who was with them, all insisted that the accused fired in the air.

Were the other police witnesses and the Headmaster giving evidence to protect the accused? There is nothing that is before me to explain why those four prosecution witnesses should have wanted to protect the accused.

Secondly, the victim was said to have been about 100 metres or more, away from the main entrance to the Lily Vision Secondary School. Yet the Firearms Examiner (**PW 2**) explained that a Cessca Pistol had a range of 75 metres.

In the circumstances, it is not explained how the accused could have used the gun to shoot the deceased who was outside the range of the gun which the accused is alleged to have used to shoot the deceased.

The accused appeared to suggest that some students were possibly armed, but that suggestion would not have explained how the bullet-head which was recovered from the deceased bore markings which showed that it was fired from the accused's gun.

Similarly, even if the Administration Police Officers who were guarding the banks in the locality were armed, their guns, if any of them was fired, could not have ejected a bullet which had the markings from the accused's gun.

But there are some very curious pieces of evidence in this case. For instance, whereas the doctor who carried out the post mortem examination testified that he did so on 24th July 2006, the father and the Uncle of the deceased both identified the body only on 2nd August 2006. That would imply that the post mortem was done before the body was identified to the doctor who conducted the said post mortem examination!

To make the issue even more muddled, the doctor (**PW 6**), indicated, in the Post Mortem Report, that the post mortem examination was conducted on 21st August 2006. Notwithstanding the discrepancy in the dates, the prosecution did not lead any evidence to clarify the position. Therefore, whereas **PW 6** testified that he conducted the examination on 24th July 2006, in his own report of the examination, he indicated that the said examination was conducted on 21st August, 2006.

Yet on the other hand, those who identified the body of the deceased said that they did so on 2nd August 2006; and also that that is the date when the pathologist conducted the post mortem examination.

In the event, this court is unable to ascertain the date when the pathologist conducted the post mortem examination. That leads me to hold that there is doubt about when the examination was carried out by the pathologist who is alleged to have ascertained the cause of death.

In the result, although it may appear that the accused could have fired the fatal shot which caused the death of the deceased, I find and hold that the evidence adduced by the prosecution did not conclusively prove his guilt. I say so because the body was outside the range of the pistol which the accused fired. Also, there were buildings between the school and the chemist outside which the body of the deceased was found. It would have been helpful to the court if a sketch was provided, to demonstrate that the point from which the gun was allegedly fired had a clear un-obstructed view to the place where the deceased was shot.

Finally, there was no explanation about how a bullet that was fired in the air could have landed with such force as to cause the death of the deceased.

For all those reasons, it would be unsafe to convict the accused. I do therefore give the benefit of doubt to the accused, and do now hereby find and hold that the accused is Not Guilty.

I order that he be set free forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi this 28th day of January, 2010

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FRED A. OCHIENG

JUDGE