



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 53 of 2006

REPUBLIC..... PROSECUTOR

VERSUS

P.C. ROBERT CHAKA..... ACCUSED

JUDGMENT

The accused, **PC ROBERT CHAKA**, was charged with the offence of murder **contrary to section 203, as read with section 204 of the Penal Code**. It is the prosecution case that on 17th September 2000, at Kiserian Reserve, within Kajiado District, the accused murdered **STEPHEN MULUPO SEPEYO**.

During the trial, the prosecution called fourteen (14) witnesses, whilst the accused person did not call any other witness save for himself.

PW 1, SAMUEL MEMUSI KUSERU, was a transporter. He owned and drove a Mitsubishi Canter, registration No. KYT 353, which he used in the course of his transport business.

On the material day, the 17th of September, 2000, **PW 1** was hired by the deceased to drop him home. At that time, when **PW 1** was taking the deceased home, **PW 3** and **PW 5** were also in the vehicle.

But whilst still on their way, the vehicle which **PW 1** was driving was forced to stop.

According to **PW 1**, it was a police Landrover which forced him to stop. And after **PW 1** stopped, the occupants of the Landrover accused **PW 1** of having knocked the side mirror of the Landrover.

When the deceased got out of the Canter, to inquire what was happening, he was shot dead.

The occupants of the police Landrover then drove off.

It was the evidence of **PW 1** that two of the occupants of the police vehicle had guns.

It was also the evidence of **PW 1** that he did identify two of the occupants of the police vehicle. The two persons whom he identified, as they talked to him, were **PW 11** and Socrates. But **PW 1** made it clear that neither Socrates nor **PW 11** shot the deceased.

When asked if he saw who had shot the deceased, **PW 1** answered in the negative.

PW 2, PHILIP NGARUIYA SUPEIYO, was a brother of the deceased. He testified that he identified the brother's body, for purposes of post mortem.

PW 3, ALICE LASOI, was a sister to **PW 1**, and she was with him when the deceased asked **PW 1** to drop him home.

In her testimony, two occupants of the police vehicle went with **PW 1** from the Canter towards the police Landrover. The other two occupants of the police vehicle are said to have remained close to the Canter.

PW 3 heard the two officers who went with **PW 1** telling him to admit that he had knocked-off the Land rover's side mirror, if he wanted to save his life. **PW 3** then heard two gunshots.

However, **PW 3** was unable to identify any of the four occupants of the police vehicle. But she testified that the said occupants had two pistols.

According to **PW 3**, when the deceased got off the Canter vehicle, he was told, by the persons who had come from the police vehicle, that it is he that they wanted. But there was no explanation regarding the reasons why they wanted the deceased. Instead, the deceased was simply shot dead.

PW 4, CHIEF INSPECTOR LAWRENCE NTHIWA, was a firearms Examiner. He had not personally examined the guns or the ammunition in issue in this case. The said examination had been carried out by Mr. William Lubanga, who then retired before the trial herein.

But, as **PW 4** had worked with Mr. William Lubanga for four (4) years before the latter retired, **PW 4** was familiar with Lubanga's signature and work.

From the report prepared by Mr. Lubanga, it was evident that the spent cartridge that had been recovered from the scene at which the deceased was shot, had been fired from the sub-machine gun No. 27057. That conclusion was arrived at after comparing the spent cartridge to other cartridges that were test-fired from that gun.

PW 5, PAUL MAINA KAHIU, was a turn-boy on **PW 1's** vehicle. He was in **PW 1's** vehicle when the police Landrover overtook them and then blocked their path.

PW 5 observed five (5) persons in the Landrover. He also testified that one of the said five persons pulled out **PW 1** from the Canter, whilst accusing him of having broken the side mirror of the Landrover.

When the deceased got off from the Canter, to find out what was happening, **PW 5** heard a gunshot. Thereafter, **PW 1** returned to the Canter vehicle and reported that the deceased had been shot.

According to **PW 5**, the deceased was shot as he stood close to the Canter. In other words, the deceased did not go anywhere near the police Landrover.

But **PW 5** did not see the person who shot the deceased.

PW 6, CHIEF INSPECTOR JOSEPH RINGERA, was in-charge of the Ngong Police Station at the material time.

At about midnight, on 17th September 2000, he received communication that there had been a shooting incident at Kiserian. The communication was from police personnel at both Kiserian and Ngong Police Stations. He instructed the duty-officer to proceed to the scene.

PW 6 testified that the Landrover registration KAK 093T was a police vehicle. Upon checking the vehicle, on the morning after the incident, **PW 6** found that its side mirror was broken, and that the vehicle had blood stains.

PW 6 then visited the houses of the police officers who had used the vehicle on the previous night. And, at the accused's house, he recovered a semi automatic gun, make No. 27057, together with 28 rounds of 9mm ammunition and two rounds of 38mm caliber.

It was the evidence of **PW 6** that from the Arms Movement Register, the accused had only been issued with 9 mm ammunition.

PW 7, WILLIAM OLE MASALE, is a relative of the deceased. In this case his role was to identify the body of the deceased at the mortuary, for purposes of post mortem.

PW 8, PAUL NDICHU MBURU, was attached to the Ngong Police Station as an informer, as at September 2000.

He had information that some people were holding suspicious motor parts. He reported to Inspector Koech, who organized that they should visit the persons concerned on the afternoon of 17th September 2000. **PW 8** and Inspector Koech went to Kiserian, together with the accused and **PW 14**. However, the persons believed to have the suspicious motor parts were not around.

Later that evening, at about 6.30p.m. PC Chokolade and PC Kasyula joined them at Kiserian.

After PC Kasyula (**PW 11**) and PC Chokolade had held some discussions with Inspector Koech, the latter directed CPL Ali Choya (**PW 14**) to drive **PW 11** to Magadi. **PW 11** was going to collect his household goods from Magadi, as he had been transferred to Loitokitok. He therefore wished to move some of his things to his rural home, in Matuu.

It was the evidence of **PW 8** that whilst on the way to Magadi, the police Landrover knocked an antelope, which they then picked up and carried to Magadi.

PW 8 also said that when they had reached Magadi, the side mirror of the Landrover had already been broken in the accident with the antelope.

After loading PC Kasyula's property on the vehicle, and after supper, the group set-off for Kiserian. **PW 14** was driving.

When they were almost back at Kiserian, **PW 14** swerved dangerously and then said that the vehicle which they had just met, had broken the mirror of the Landrover. **PW 14** then turned the Landrover around and pursued that other vehicle, eventually forcing it to stop.

According to **PW 8**, it was PC Ali and PC Kasyula who then got off the Landrover and went to the other vehicle, a Canter.

Meanwhile, **PW 8** and the accused are said to have got off the Landrover, to relieve themselves. As they did so, **PW 8** heard a gunshot, then another. Thereafter, **PW 8** heard **PW 11** order those who had been in the Landrover to leave.

It was the testimony of **PW 8** that **PW 14** and the accused were both armed. He also said that they were drunk.

PW 8 was candid enough to admit that he did not see who shot the deceased.

But when he later asked **PW 14** what had happened, he was told to forget the incident.

Meanwhile, **PW 8** was clear in his mind about the fact that the Canter vehicle did not break the mirror of the police Landrover.

PW 9, JANE LEPOSO, is the wife of **PW 10**. She confirmed that **PW 1, PW 3** and **PW 5** went to her house, to report the shooting incident.

PW 10, FRANCIS LEPOSO SUPEIYO, was a brother to the deceased. After he got the report that his brother had been shot, he went with those who were in the Canter, to report to the police. Thereafter, they accompanied the police to the scene.

Whilst at the scene, **PW 10** picked up a spent cartridge which was lying about one foot from the body of the deceased.

PW 10, who was a retired military officer, said that the wound on the body of his brother was most probably caused by either a pistol or a sub machine gun.

PW 11, SGT. NICHOLAS KASYULA, had been transferred from Magadi to Loitoktok just before the incident in question. He therefore decided to move some of his property to Matuu. To that end, he sought and was granted authority to use the police Landrover, provided he fueled the vehicle.

PW 11 went with **PW 14**, as the driver of the police vehicle. They were accompanied by the accused and PC James Socrates, together with **PW 8**.

According to **PW 11**, he sat in the front cabin, together with PC Ali Choya (**PW 14**) and PC Socrates.

Having collected his property from Magadi, Sergeant Kasyula, and the others, set off for Kiserian.

About one kilometer away from Kiserian, the police vehicle met with a Canter at a bridge.

It was the evidence of **PW 11** that the Canter knocked the right hand side mirror of the Landrover.

As the Canter did not stop, **PW 14** decided to turn around and pursue it. When the police vehicle had forced the Canter to stop, **PW 14** is said to have gone to talk to **PW 1**, whilst **PW 11** remained inside the police vehicle. Within seconds, **PW 11** heard gunshots.

When **PW 11** went out of their vehicle to check what was happening, **PW 11** saw the accused and **PW 14** coming towards the Landrover. He asked them what was happening; and at that moment, a second shot was fired.

PW 14 then told **PW 11** to return into the vehicle, and **PW 14** drove off towards Isinya.

After driving for about 30 minutes **PW 14** told **PW 11** that the accused had killed somebody.

PW 11 asked **PW 14** to report the incident but the latter said that he would do so after returning from Matuu. **PW 14** then drove to Matuu, where **PW 11**'s property was left at his home.

PW 11 was arrested on 20th September 2000, and was detained at the Industrial Area Remand Prison for 6 months. He was then released.

When asked if he was in-charge of the Landrover, **PW 11** answered in the negative. He insisted that it was **PW 14** who was in-charge.

It was the testimony of **PW 11** that those in the police vehicle were drunk. Each of them had taken 3 to 4 beers each, at Magadi.

However, **PW 11** was clear in his mind, that the two persons who were at the back of the Landrover could not even have known why **PW 14** had decided to pursue the Canter. He was sure about that fact because there was no communication between those in the front cabin, and those who sat at the back of the Landrover.

PW 11 said that although he was the most senior police officer inside the vehicle, he did not report the incident because **PW 14** promised to do so later; and also because **PW 14** said that if they did not leave the scene, the accused would shoot them also.

PW 12, STEPHEN TEGERE BARNO, was a retired police officer. Before he retired he was attached to the scenes-of-crime section, at the CID Headquarters.

On 18th September 2000, at about 3.50a.m. he arrived at the scene of the shooting incident. He found the body of a male adult lying in a pool of blood. The body had a bullet hole in the left eye.

PW 12 took photos of the body and of a Canter vehicle that was nearby.

When asked why he took photos of the Canter, **PW 12** said that it was because the said vehicle was near the body.

When asked if there was a bullet next to the body, **PW 12** answered in the negative. That is significant because **PW 10** had earlier testified that the personnel from the scene-of-crime had even photographed the cartridge.

PW 13, SCAVAR MBOGO, was attached to the CID Headquarters at the material time. He was then in-charge of general investigation.

On the afternoon of 18th September 2000, he and two of his colleagues took over the investigations into the shooting incident. By that time, the OCS, Chief Inspector Ringera (**PW 6**) had already recovered two (2) firearms. The said firearms were a submachine gun and a revolver, which had been recovered from the accused and **PW 14**, respectively.

The submachine gun had 28 rounds of 9mm ammunition, and 2 rounds of .38mm. And the revolver had 9 rounds of .38mm.

PW 13 caused the firearms and the ammunition to be analysed by the Ballistics Experts, who then stated that the spent cartridge which was recovered from the scene, had been fired from the sub machine gun.

After that, the accused, **PW 11** and **PW 14** were charged. But **PW 11** and **PW 14** were later released.

Although **PW 6** told **PW 13** that the sub machine gun had been recovered from the accused, **PW 13** did not verify that assertion independently.

PW 14, CPL ALI CHOIYA, was a driver within the police force. On 17th September 2000, the DCIO, Inspector Koech, ordered him to go and collect **PW 11**'s belongings from Magadi.

Whilst he was driving, he was accompanied in the police Landrover by **PW 11**, Socrates and the accused.

During the trip to Magadi, **PW 14** says that he came across an antelope which had had its legs broken by another vehicle. He stopped the vehicle, and they carried the antelope.

According to **PW 14**, the right-hand side mirror of the police vehicle was later broken by a bird.

Later, on the return journey from Magadi, **PW 14** met another vehicle on a narrow spot of the road, near Kiserian. That other vehicle was swaying from side to side, and it knocked the right side mirror of the police Landrover.

PW 14 pursued the vehicle and blocked it.

According to **PW 14**, it is the accused and **PW 11** who got off the Landrover. The accused then went to the other vehicle and returned to the Landrover with **PW 1**.

After **PW 1** and the accused had seen the damaged mirror, **PW 14** saw them walk back to the Canter. It is then that **PW 14** heard a gunshot. The accused then ran back to the Landrover and told **PW 14** to drive – off immediately.

PW 14 left immediately. Whilst still driving, **PW 14** asked **PW 11** what had happened, but **PW 11** told him to be silent.

According to him, the trip to Matuu, (thereafter), and the trip from Matuu back to Ngong Police Station, was in silence. His explanation for that silence was that there had been an order that there should be no questions. And the order had been given by **PW 11**.

Later, both **PW 14** and the accused were arrested because of the incident in which a person had been shot dead at Kiserian.

PW 14 said that he did not see anybody shoot the deceased. He just heard the gunshot.

After the prosecution closed its case, the accused was put on his defence.

He confirmed that on 17th September 2000, he was in the company of **PW 14**, when Inspector Koech ordered **PW 14**, to drive **PW 11** to Magadi to enable **PW 11** collect some of his household goods. The accused accompanied **PW 11** and **PW 14** in the police Landrover registration No. KAK 093T. Also in the vehicle, was **PW 8**.

After collecting **PW 11**'s goods from Magadi, the whole group left for Kiserian.

By that time, the police Landrover already had its side mirror cracked. The accused had verified the crack when they had reached Magadi.

But when they met **PW 1**'s Canter at a narrow bridge, near Kiserian trading centre, **PW 14** shouted that the Canter had hit the Landrover. **PW 14** then made a U-turn and pursued the Canter; eventually forcing it to stop.

By the time that the accused alighted from the Landrover, **PW 11** and **PW 14** were already talking to **PW 1**. But when the accused checked on the side mirror of the Landrover, he found that it was in the same state as when the vehicle was at Magadi.

Shortly thereafter, the accused heard gunshots. Then **PW 11** said;

“Twende.”

Both **PW 11** and the accused boarded the Landrover, and **PW 14** drove-off fast.

Interestingly, whilst the accused said that he had armed himself with a revolver No. A 67347; when Inspector Koech ordered him to surrender the sub machine gun, the accused gave it to him. Thereafter, he said that he had never been issued with a sub machine gun, as such guns are normally issued only to commanders.

As far as the accused was concerned, the sub machine gun was behind the seat in the front cabin of the Landrover. He did not know who handled it on the material night.

The foregoing is the sum total of the evidence on record.

The court is aware that in law, it is the responsibility of the prosecution to prove to the court that the accused person is guilty.

The accused does not have to prove his innocence. He might as well choose to remain silent: and if he were to do so, that could not be held against him, unless the prosecution had satisfied the court that the accused was guilty.

The standard to which the prosecution is to prove the guilt of the accused is beyond any reasonable doubt. I will now evaluate the evidence on record, together with all the submissions, with a view to arriving at my judgment on the guilt or innocence of the accused.

In arriving at its decision, the court is obliged to bear in mind the fact that the assessors in this case, have already returned a verdict of **“Guilty”**.

Both assessors told the court that it is the accused who killed the deceased.

In my considered view, that finding, by the assessors, reflects their respective assessment of the facts presented before the court. In other words, the assessors were persuaded that it was the accused who fired the bullet which caused the death of STEPHEN MULUPO SEPEYO.

Does that imply that the accused is guilty of the offence of murder?

The offence with which the accused was charged, and in respect to which he was tried, is murder. He was not charged with the offence of “killing”, nor am I aware of any offence in the statutes, known as “killing”.

In section 203 of the Penal Code, murder is defined as follows;

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

In effect, before the accused could be found to be guilty of that offence, the prosecution was obliged to prove that

the death of the deceased was caused by an unlawful act or omission, on the part of the accused. Secondly, the prosecution was obliged to prove that the accused had malice aforethought.

In this case the prosecution did not produce the post mortem report. Ordinarily, it is the post mortem report which provides the court with proof of the cause of death.

Therefore, when no post mortem report was adduced in evidence, there appears to be a gap between the bullet-head which was analysed by the Ballistics Expert, Mr. William Lubanga, and the source of the said bullet. When I talk about the source herein, I am not making reference to the gun which is said to have fired the bullet, but whether or not the bullet was recovered from the body of the deceased.

Had the doctor who carried out the post mortem examination testified in court, and had he verified that he removed the bullet from the body; and that it is the bullet wounds that caused the death of the deceased, that would have provided the nexus between the bullet from the sub-machine gun and the cause of death.

In this case, Chief Inspector Lawrence Nthiwa (**PW 4**) testified that the cartridge had markings which showed that it was fired by the sub-machine gun No. 27057.

The evidence adduced by the prosecution was that the sub-machine gun No. 27057 had been issued to the accused, and also that it is the accused who surrendered it to **PW 6**, after the shooting incident.

But the accused has categorically denied having been issued with the said sub-machine gun. He said that he had only been issued with a revolver No. A 67347.

Secondly, the accused testified that the sub-machine gun was at the back of the seat in the front cabin of the police Landrover, on the material night.

As the prosecution witnesses all said that the accused was seated at the back of the Landrover, that implies that if the sub-machine was inside the front cabin, he would not have accessed it without the knowledge of **PW 11**, **PW 14** and PC Socrates. Yet none of those persons said that the accused accessed the sub-machine gun during the journey to and from Magadi.

That would mean that if the accused used the sub-machine gun, he must have had possession of it, throughout the trip. But there is no evidence to that effect.

That leads me to conclude that although the sub-machine gun could have been in the police Landrover at the material time; and even though the bullet that may have killed the deceased could have been fired from that sub-machine gun, there is no evidence to show that it is the accused who fired that gun. It is possible that the gun could have been fired by any of the other persons who were in the vehicle.

In the event that the prosecution had proved that the deceased was killed by a bullet fired from the sub-machine gun, which was fired by the accused, the next issue for consideration would have been the question as to whether or not the accused had malice aforethought.

In section 206 of the Penal Code, malice aforethought is defined 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 death of or to do grievous harm 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 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 harm is caused or not, or by a wish that it may not be caused;**
- (c) an intent to commit a felony;**
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

If it was the accused who fired the gun which caused the fatal injuries to the deceased, I believe that he cannot have had any other intention other than to either kill the person or to cause him grievous harm. I say so because the deceased was shot in the eye.

In those circumstances, I would have found that malice aforethought had been established.

But, as I have already held, the prosecution did not adduce evidence to prove the cause of death. That alone is sufficient to warrant the acquittal of the accused.

Sad though it may be, that the unfortunate demise of Stephen Mulupo Sepeyo will go un-punished, I have no alternative but to find the accused herein “Not Guilty”.

But before concluding this judgment, I wish to make a few observations, which I hope the Attorney General and the Commissioner of Police will find useful.

First, and by their own admission, the police officers who went from Kiserian to Magadi and back, were all drunk. That means that **PW 14** was also drunk. Yet, he was driving. Surely, that calls for some action to be taken against him.

Secondly, although **PW 11** was senior to the accused and also to **PW 14**, he appears to have subordinated himself to

those officers, if **PW 11** is to be believed. I cannot help but wonder why, if the accused had shot the deceased, **PW 11** did not either report the incident immediately thereafter, or even order that the accused be arrested. Instead, he permitted the police Landrover to be driven away from the scene of crime, at Kiserian, upto Matuu. Surely, such a blatant interference with the scene of crime should be discouraged. To that end, the Commissioner of Police or the Attorney General ought to take such action as would convey a clear message of displeasure at the conduct of the police officers concerned.

Furthermore, **PW 14** gave two versions of the events leading to the breakage of the side mirror of the Landrover. He first said that it was broken by a bird. But later, he said that it was the Canter vehicle which hit the Landrover, breaking the side mirror. Both versions cannot be correct; leading me to conclude that **PW 14** was being economical with the truth. That is even more so, when it is borne in mind that **PW 14** did accuse **PW 1** of driving recklessly and causing the Canter to collide with the police Landrover, resulting in the breakage of the Landrover's side mirror.

Had **PW 14** not made that false accusation against **PW 1**, there would have been no need for **PW 14** pursuing the Canter, and forcing it to stop. And in those circumstances, the deceased would not have been shot dead.

The fact that the police did originally arrest **PW 11** and **PW 14**, alongside the accused herein, is, to my mind, clearly indicative of the fact that those police officers were initially deemed accountable for the death.

I am convinced that the police officers who attributed the breakage of the side mirror to the collision with the Canter merely wanted to create a foundation for building the story that would justify the pursuit of the Canter Vehicle.

I strongly recommend that the police should re-open the investigations into the senseless killing of Stephen Mulupo Sepoyo, with a view to bringing the culprits to book.

Having found the accused "Not Guilty", I do now hereby order that he be set at liberty unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 18th day of February, 2010.

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FRED A. OCHIENG
JUDGE