



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE NO. 21 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MURIUKI GICHIRA.....1ST ACCUSED

JOSEPH LEMOI KARUJA.....2ND ACCUSED

RULING

The accused person herein **DAVID MURIUKI GICHIRA** and **JOSEPH LEMOI KARUJA** are charged with murder contrary to the provisions of section 203 as read with those of section 204 of the Penal Code Chapter 63 of the Laws of Kenya.

The particulars of the offence are that on the 5th day of May, 2008 at Lorian Trading Centre in Uasin Gishu District within the Rift Valley province jointly murdered **PHILEMON KIPROTICH SINGOEI**.

PW1 DAVID KIMUTAI was a shopkeeper at Lorian Trading Centre and he knew the deceased as well as the two accused persons who were Administration Police officers stationed at Lorian AP camp for three months prior to the incident of 5/5/2008. On that date at about 6.00 p.m. the witness was inside his shop when he heard noise emanating from a bar directly opposite his shop. Shortly afterwards he saw the first accused come out of the bar shouting “**mtaniona leo**” Kiswahili for, you will see me today. The 1st accused then proceeded to the AP camp about 50 meters away and after about five minutes the witness heard gun shots emanating from the AP camp. The witness closed his shop and ran away for safety. When he came back thirty (30) minutes later he saw the deceased lying outside at the trading centre, with a bleeding hole at his back. The witness did not know if the deceased was inside the bar. He did not know who shot the deceased. The accused persons were part of the Administration Police officers brought to the area to help keep the peace after the 2007 Post Election Violence. The Lorian AP camp where the accused persons were based was established in January, 2008, the witness concluded.

PW2 WILLY KIPROTICH was also a shopkeeper at Lorian Trading Centre. He knew the accused persons as AP officers based at Lorian AP camp and he also knew the deceased. On 5/5/2008 he heard a loud noise like a tyre burst coming from the AP camp which was situated about 30 meters behind his shop. He then heard people shouting that the deceased had been hurt. He came out, found the deceased breathing heavily and called a matatu to take the deceased to hospital. The next day he heard that the deceased had died and that he had been shot by the 2nd accused. What he heard as tyre burst noise was

gun shots coming from the AP camp was, his further evidence. He himself did not know who shot the deceased

Councillor Elijah Lagat of Tarakwa ward gave his evidence as **PW3** and he was telephoned by a person called Kiprono to be told that there was gun shooting from the AP camp at Lorian and someone had been shot. He advised Kiprono that they take the injured person to hospital. He later attended the postmortem on the body of the deceased on 8/5/2008 and he saw a bullet being removed from the deceased's body. He did not know who had shot the deceased.

PW5 Dr. Edwin Nyaura examined the accused persons and found them fit to stand trial.

PW6 Dr. Ndegwa Macharia Benson conducted the postmortem on the body of the deceased and found an entry gunshot wound at the back of the deceased's chest and that the bullet had passed through soft tissues around the spinal cord and entered the thoracic cavity then went through the left lung before getting lodged in the front side of the chest causing total collapse of the left lung. He formed the opinion that the cause of death was massive bleeding due to chest injury due to a gun shot wound. He retrieved a single bullet from the body and he said that he could not tell the approximate time of death.

No. 232738 Inspector Joshua Emuroth was the arresting officer and he gave evidence as **PW7**. He was based at Langas Police Station and by the time he got to Lorian AP Camp, the two accused persons had been disarmed by Inspector Mburu the head of the AP camp. His earlier attempt to enter the AP camp was thwarted by gunshots inside the camp. He said that he was told by Inspector Mburu that one of the AP officers had picked a quarrel with some youth at the bar upon the realization that the officer was a Kikuyu. The officer got annoyed went into the AP camp, armed himself and started shooting aimlessly. He was joint by another officer. The two are the accused persons before court. The witness said that he was handed over two G3 riffles which were said to have been those the accused persons were disarmed of, some 48 rounds of ammunition and four magazines. He said that he was only the arresting officer and merely relied on what he was told by Inspector Mburu. His further evidence was that there were many AP officers in the Camp and he could not tell who shot the deceased.

PW8 was the firearms examiner, one **EMMANUAL LAGAT**. He gave evidence and produced the report made by J.M. Mwangela the officer in charge of ballistics and who on 19/06/2008 had examined the two G3 rifle serial numbers A 3659626 and FMP 402802. The ballistics report was that the bullet that was removed from the deceased's body could have been fired from any of the two G3 riffles but that it was not suitable for microscopic comparisons.

PW9 was No. 51861 Corporal Virginia Mwangangi and she was part and parcel of the investigating team. All her investigations involved was to collect the firearms and ammunitions as she admitted in cross examination, and further that she did not even take a statement from inspector Mburu who was in charge of the AP camp.

PW10 No. 51981 Corporal Fredrick Walela was the last prosecution witness. He is the one who produced the firearms in evidence and he was the one who had earlier taken them to J.M. Mwangela the ballistics expert for examination. His evidence was that it was the two accused persons who fired their guns alleging that they had been attacked by members of the public with whom they had a misunderstanding in a bar but that the deceased was not among those that the accused persons said they had disagreed with. He said that the shooting was inside the AP camp which was about 50 meters from where the body of the deceased was lying.

Learned Counsel Mr. Magare appearing for the accused persons submitted that no prima facie case was made out to require the accused persons to offer any defence. Mr. Chirchir Senior State Counsel on the other hand submitted that the prosecution had made out a prima facie case because of shooting randomly the accused persons had acted with common intent and they are culpable.

The above is the prosecution evidence that has to be assessed to show whether or not a case is made out to require the accused persons to be placed on their defence. The accused persons are charged with the offence of murder and available evidence must show that they, with malice aforethought caused the death of the deceased. Anything short of that and falling below the test of **beyond reasonable doubt** will not do.

PW1 said that it was 1st accused who left the bar saying that “mtaniona leo.” It was not established who was supposed to see what. What came out clearly is that the deceased was not in the bar where the 1st accused was drinking and where he got into some misunderstanding with local youth upon their discovering that he came from the Kikuyu community. Available evidence showed that the Lorian AP camp was established in January, 2008 to quell the 2007 Post Election Violence and to help keep peace and to undertake the “Operation Rudi Nyumbani.”

The undisputed facts are that the deceased lay dying and was soon dead behind a shop near the Lorian AP camp soon after one of the accused persons herein left a bar at the Lorian Trading Centre shouting “mtaniona leo.” That the deceased person’s death was caused by a single bullet shot into his body through the back of his chest. The bullet was fired from a G3 rifle. That bullet could have been fired from any of the two G3 rifles produced in court. That no one saw any of the accused persons shoot the deceased. That no one told of which of the two rifles fired the fatal bullet.

I find further that there was no evidence whatsoever as to what rifle was issued to each of the accused persons. No rifle movement records were available to court to prove that it was the two accused persons herein who were issued with those rifles. Inspector Mburu who was said to have disarmed the accused persons was not called as a witness to show what rifle he disarmed any of the accused persons of, if indeed he disarmed them. Inspector Mburu’s statement was not even recorded by PW9 Virginia Mwangangi and her investigating team. This was a fatal omission as it would have been inspector Mburu who could have connected the accused persons to the rifles and possibly to the shooting. It was agreed that there were many AP officers at the Lorian AP camp and each had a gun. Not a single of those AP officers were called as witnesses. None of their guns were inspected to find out if they were also shooting. Witnesses gave evidence that gunshots were heard everywhere in the camp. If those witnesses be believed, and nothing was shown to the contrary, it was not shown that those gun shots only came from two rifles. It was admitted by all relevant witnesses that shooting was at AP camp. The person shot dead was at the trading centre. No evidence was called that the deceased was shot by a bullet from the AP camp. Not an attempt was made to prove that point.

Only one bullet was recovered from the body of the deceased. From what rifle was that bullet fired? That was not shown. The two accused persons herein are charged with “jointly” murdering the deceased. There was no evidence led to show that the two accused persons “jointly” pulled the trigger of some rifle from which a bullet was fired and which single bullet caused the unlawful death of the deceased. There was no attempt by the prosecution to show that the two accused persons acted in common intent with a common purpose – that of causing the death of the deceased. And that one bullet fired from whatever rifle was so extensively damaged that it was not suitable for microscopic comparison with the ones available to the ballistic expert. In these circumstances therefore there was not shown to be any nexus firstly between the accused persons and the rifles as it was not shown which rifle was issued to what accused person or what rifle was recovered from what accused and secondly there was not shown any nexus between the rifles and the fatal bullet.

If ever there was a case of murder that was poorly investigated by the police, this must be it. No evidence as was produced in any way connects any of the accused persons to the commission of the offence. No joint criminal intent was shown to have existed commonly with the two accused persons. No single act of any of the accused persons or any joint/common act or omission of both accused persons was shown to be attributed to the accused persons to make out a case to require the accused persons or any of them to be placed on their defence. To place any of them on his defence would be to make the accused persons fill the gaping lapses in evidence left by the prosecution evidence which is the result of some extremely poor police investigations. The onus is for the prosecution to prove the case against the accused persons beyond any reasonable doubt. It is not for the accused persons to prove their innocence by their defence.

It is my finding that the prosecution have totally failed to make out a prima facie case against the accused persons and I accordingly record a finding of not guilty and find that the accused persons have no case to answer. Accordingly I hereby acquit each and both of the accused persons of the charge of the murder of Philemon Kiprotich Singoei under section 306(I) of the Criminal Procedure Code. I order that the accused persons shall forthwith be released from custody unless they be otherwise legally held.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 23RD DAY OF DECEMBER, 2010.

P.M. MWILU

JUDGE

In the presence of;

Mr. Chirchir - Counsel for the State

Mr. Magare - Counsel for the Accused persons

Grace - Court Clerk

P.M. MWILU

JUDGE