



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL CASE 113 OF 2005

REPUBLIC

-VS-

PAUL MUIGAI NDUNGI

JUDGEMENT

The accused has been charged for the offence of Murder, contrary to Sec. 203 as read with Sec. 204 of the Penal Code, Cap. 63, Laws of Kenya. The particulars of the offence as stated in the information are as follows:

“On the 30th day of October, 2005 at Mundoro Trading Centre in Thika District of the Central Province, murdered ISAACK KIMIRI MURIITHI”

In his evidence, ***PW1 APC Abraham Kitilit*** introduced himself as an administrative police officer who was attached to Mundoro, Gatundu Division in October 2005. He recalled that on 30th of October, 2005, he went to Mundoro at around 4pm where he found his colleague called Isaack sleeping while his house was locked from inside. At around 4.40pm PW1 went to the shop to buy some goods. Later at around 10.45 pm, PW1 went to Matheri Bar where his friends bought him two beers. After drinking one beer, Paul Muigai Ndungi who is the accused went into that bar and ordered for a beer for himself. After a few minutes, three young men went into the bar and ordered for alcohol but they were not served. In response, they started exchanging words with the accused who later slapped and kicked the young men before removing them from the bar. Consequently, PW1 intervened and the accused left the young men before sitting down. Subsequently, the young men started throwing stones and PW1 went out of the bar to cool them down. Thereafter the accused left the bar while saying the following words “*Ngojea kidogo*” Subsequently the accused went back to the bar and PW1 observed that he was now armed with a rifle. Surprisingly one of the young men went to the accused and dared him to shoot. At that stage the young man was carrying a broken bottle. In response the accused shot him and PW1 left the bar and proceeded to Mutondo Tea Factory where he was allowed to ring Gatundu Police Station. Eventually many police officers went to the scene and PW1 showed them the victim, who was known as Isaack Kimiri Muriithi. From there, they proceeded to the house of the accused whom they found asleep. At that stage the OCPD and other officers decided that they break into the house and disarm the accused. After breaking into the house, they arrested the accused and recovered two G3 rifles, cartridges, rounds of

ammunitions and a strong box which is normally used to store rifles and rounds of ammunitions. From there, PW1 went to Gatundu Police Station to record his statement. On going back to his house, PW1 found that several bullets had been shot on his window and door. Though PW1 searched his house, he found everything intact. Further to the above, PW1 explained that during the incident, he was not armed with any rifle. During his evidence, PW1 was able to identify the rifle serial no. 6674593 – exhibit 1 which was used during the shooting. Apart from the above, PW1 also explained that by the time of the incident he had only worked with Paul Muigai for three months. In addition to the above, PW1 also testified that they had recovered thirty one cartridges from the scene and shopping centre. He also testified that they had recovered four magazines – exhibit 7. He concluded his evidence by stating that he did not know why the accused had shot at his window and doors since he never had any grudge against him. On the other hand, **PW2 John Muriithi Kimiri** introduced himself as a resident of Mutondo where he is a farmer. Besides the above, he also explained that the deceased is his son. Further to the above, he testified that on 31st of October, 2005, at around 2pm he went home and met his brother called Amos who told him that his son had been shot. That apart, he was informed that the son had died and that the body had been taken to Gatundu District Mortuary. After three days, PW2 identified the body of his son before the post-mortem was carried out. Subsequently the body was released to the family for burial purposes. In his medical evidence **PW3 Dr. Muya George** introduced himself as a medical officer attached to Gatundu District Hospital. Further to the above, he also testified that on 7th of November 2005, he conducted the post-mortem on the body of Isaack Kimiri Muriithi. He observed that the deceased was wearing a green shirt and blue jeans which were both blood stained. According to PW3, the deceased was 6” tall, pale and hence he must have lost a lot of blood. In addition to the above, he also observed that the deceased had wounds which were consistent with bullet wounds. The entry was on the lateral side above the waist while the exit was on the left side next to the hip. He also observed a remnant of the bullet. When he opened the body, he found torn mesenteric blood vessels with a lot of blood outside the small and large intestines. That apart, he also found that the small intestines and colon were torn. Eventually, he formed the opinion that the cause of death was due to massive haemorrhage – haemoperitoneum due to fatal bullet injuries. Subsequently, he handed over the bullet head to George Wachira who was the investigating officer. He also gave him the blood specimen of the deceased before signing the post-mortem report that he produced as exhibit 1. On his part **PW4 Ezra Wangungu Nduta** testified that on 30th of October, 2005 at around 2pm, he drank alcohol with Kimiri at Gorofa Bar till 7pm when he went to Theta Tea Factory. At around 9pm PW4 went back to Mundoro Trading Centre where he found Kimiri still drinking. However, at around 10pm, Kimiri left and PW4 traced him at Matheri Bar at around 11pm. By then Kimiri was accompanied by Gakuha Peter, Moses Kariuki and two administrative police officers. While there, the accused directed that no more alcohol should be sold. From there, PW4 went to Muguru Bar where he found that the same had been closed. Shortly later on, PW4 heard gun-shots. On going back to the scene, he found that Kimiri had fallen down and he and Moses went back to the family of the deceased and informed them of what had happened. From there, they went to Kuria Wabisha to explain to him what had happened. After seeing the body of Kimiri, PW4 heard four gunshots after twenty minutes. The said gunshots were coming from the AP’s Camp. On reaching the house of Kuria, he advised them to get transport to take Kimiri to the hospital. When they went back to the scene of the incident, they found that three CID officers had arrived and they were directed to go back to their homes since the officers had taken over the scene. In his evidence, **PW5 Johnson Musyoki Mwangela** introduced himself as a firearm examiner attached to the firearms laboratory Nairobi. He testified that on 1st November, 2005, he received the following exhibits from Sgt. Onesmus Mutunga of CID Gatundu. These were: -

- ? 2 G3 rifles – S/No. 6674594 and 6674593 which were marked exhibit (a) and (b) (MFI 1 (a) and (b).
- ? 4 magazines which were marked (d) 1 to (d) 4 (MFI 2 (a) (b) (c) and (d).
- ? 38 rounds of ammunitions which were marked (e) 1 to (e) 27 Ex (f), Ex q 1 – (9) 10 (MFI 3).
- ? 26 fired cartridges which were marked (h) 1 to (h) 27 and Ex. C (MFI4)

Subsequently, on 9th November, 2005, he received from PCPL George Wachira:-

? Damaged bullet – Ex. F (MFI5).

These exhibits were accompanied with exhibit Memo Form requesting him to examine them. Later he examined the exhibits like the 2 G3 rifles, 4 magazines, 38 rounds of ammunition and 26 fired cartridges that were produced in court. In addition to the above, PW5 found that Ex. 1 (a) and (b) were rifles that had been manufactured in Germany and were of calibre 7.62mm. The same are designed to chamber 7.62 x 51mm military rifle ammunition. The visual examination revealed that exhibit (b) had a lodged bullet in its barrel. Later he removed the bullet and marked it as exhibit 6. Further examination of the 2 G3 rifle revealed that they were in good mechanical condition and that the same had all their components parts. They were also capable of firing ammunitions. All the four magazines were also in good mechanical condition. He also found that (e) 1 to (e) 27, Ex. (f), Ex q (1) – 10 – are 38 rounds of ammunitions in calibre 7.62 by 51mm. That type of ammunition is used in G3 rifles. Later, he picked 12 rounds of ammunition at random and test-fired them an (MFI 1 (a) and (b). On each of them, he test-fired six rounds of ammunitions. Then he recovered test cartridges from each G3 rifle and marked them (f) to (t) 6 – (MFI 7). He retained them for comparison purposes. They have the S/No. of the G3 rifles. Based on the tests that he conducted, he formed the opinion that

? (MFI 1 (a) and (b) are firearms.

? (MFI 3) are ammunitions under the Firearms Act.

? (MFI 4) are 26 fired cartridge cases in calibre 7.62 x 51mm.

He examined the cartridges under a comparison microscope and found that Ex. C, (h) – 1 to (h) 7, (h) – 9 to (h) 25 were fired from one gun. Ex. (h) 8 was fired from another gun. Further, he examined the cartridge cases under a comparison microscope and compared them with the fired cartridges. He found sufficient markings between exhibit cartridge cases (h) 1 to (h) 7 and (h) 9 to (h) 25 and Ex. C. He concluded that they were all fired from MFI 1 (a). He also found sufficient matching pin markings between Ex. (h) 8 and test-fired cartridge fired from the G3 rifle (MFI 1 (b)). Based on the above analysis, he formed the opinion that Ex. (h) 1 to (h) 7 (h) 9 to 25 and Ex. C were fired from G3 rifle S/no. 6674594 (MFI 1 (a)). Ex. (h) 8 was fired from the G3 rifle S/no. 6674593 (MFI 1 (b)). Ex. (f) (MFI 5) was fired bullet in calibre 7.62mm which was damaged and hence unsuitable for comparison purposes. Based on that observation, he formed the opinion that (MFI 5) could have been fired from any of the two rifles. Eventually, he prepared a report which he signed and produced – Ex. 8. He also produced the exhibit Memo Forms – Ex. 9 and 10. The damaged bullet can be dislodged during firing. On the other hand **PW6 James Kuria Mwaura** introduced himself as a watchman guarding vehicles at Mundoro Trading Centre. He further testified that on 30th of October, 2005, when he reported on duty at 9pm and found his colleague Paul Gakuru whom he worked with upto 10pm when the last vehicle left. Thereafter, each of them went to rest in different vehicles. At around 11.30 pm PW6 heard two gunshots and later heard several shots in succession. Subsequently, PW6 saw many people running from the trading centre to residential houses. Thereafter PW6 heard many gunshots and the trading centre became deserted. Eventually PW6 saw the accused crossing the road while carrying a rifle on his shoulder before entering his house. Shortly later on, PW6 saw the accused come out with his rifle and heading to the matatu station where he fired three gunshots. Ultimately, the accused went back to his house where he started shooting in succession. PW6 reckoned that most of the shots were aimed at a GK vehicle that had been parked there for security purposes. Subsequently, police officers went to the scene and saw that Patrick had been surrounded by police officers. On going back to the car park, PW6 saw Patrick driving off with a vehicle registration no. KAU 671C. Thereafter, several police officers arrested the accused at around 5am before putting him in a vehicle and driving off. From there, PW6 went back to his house. Further to the above, PW6 testified that he saw the accused clearly through the electric lights which were outside his house. Prior to the incident, PW6 had known the accused very well since he stays next to the car park where he guards motor vehicles. In fact they were neighbours for about nine months and hence he was able to recognize him. In his medical evidence, **PW7 Dr. Kisiangani John Welime** testified that on 8th of November, 2005, he examined the accused and found him to be in fair general condition. However, he found some injuries on the neck and head region where there was periorbital oedema and inflammation (black eye). The injuries were approximately two weeks old and the probable type of weapon used was

blunt. He assessed the degree of injury as “harm”. He also did a mental status assessment on the patient and found him to be oriented in time, place and person. The accused could do simple arithmetic and he found him to be of sound mental status. PW7 eventually filed and signed the P3 forms which he later produced as Ex. 11 and 12. On the other hand, **PW8 Peter Gakuha Wanjiru** introduced himself as a casual worker at Mundoro Trading Centre. He testified that on 30th of October, 2005 at 4pm he went to Gathiru for a visit and later proceeded to Mundoro Trading Centre where he found Kimiri drinking alcohol. When PW8 ordered for allsoaps beer, the bar attendant declined to serve him on the ground that it was late. From there, PW8 went to another bar and then he heard gunshots. On going back to the scene, he found Kimiri lying down. And thereafter PW8 combined forces with Moses and Ezra to call the relatives of Kimiri so that they could take him to hospital. However, when they went back to the scene, they met police officers from Gatundu Police Station who told them that Kimiri had been shot dead. The said officers also advised them to go back to their homes. In conclusion, PW8 conceded that he was not present when Kimiri was shot dead. In her evidence **PW9 Jane Waithera Mumbi** introduced herself as a bar maid working at Matheri Bar within Mundoro Trading Centre. She also testified that before the incident, she had known the accused for about one year. She recalled that on 30th of October, 2005, the accused entered the bar at around 10pm and ordered for two beers. According to PW9, after the accused finished one beer, he carried away the other beer. It was her evidence that subsequently three young men viz, Gakuha, Echara and Moses entered the bar and also ordered for beers. Since it was already closing time, PW9 declined serving them. She further testified that in response the three young men went away and the accused told them to close the bar and leave for their homes. From there, PW9 went to her house to sleep and at around 11pm she heard many gunshots. At around 3am, several police officers went to her house and informed her that somebody had died outside the bar. The said police officers later directed PW9 and Teresia Muthoni to accompany them back to the bar. On arrival, PW9 saw somebody whom she could not recognize lying down on the road. From there, they were taken to Gatundu Police Station where PW9 recorded her statement. On the other hand, **PW10 Paul Karugi Gakuro** introduced himself as a watchman guarding cars at Mundoro Trading Centre. That apart he also testified that on 30th of October 2005, he reported on duty at 7pm and at around 9pm James Kuria also reported on duty. After guarding vehicles upto 10.30 pm, PW10 went to rest in a vehicle while his colleague went to another vehicle. At around 11.30 pm, PW10 heard gunshots which emanated from the market. Later on, he heard several gunshots next to the AP lines. PW10 admitted that having heard those shots he remained in the vehicle where he was in. At around 3 am PW10 saw six GK cars which were driven towards the market. Subsequently, PW10 came out of the car and police officers asked him what had transpired. Consequently the police started looking for the accused and later PW10 learnt that somebody had been killed. Eventually, the police arrested the accused from his house and whisked him away using their landrover. On the other hand, **PW11 Teresia Muthoni Ngugi** also introduced herself as a barmaid working at Matheri Bar. She recalled that on 30th of October 2005 at around 10 am she went to work. Later at around 10.30 pm she saw the accused entering the bar and after drinking one beer he ordered for another. It was the evidence of PW11 that after she opened the second bottle, the accused decided to walk away while promising to return the empty bottle the following day. Subsequently, the accused advised them to close the bar and they complied. However, before they closed down, about six customers who included Gakuha, Moses and Echara entered the bar. In response they told the last three customers that they were closing down. Later, the three customers started hitting the windows and doors with stones. Seeing the above, the barmaids closed down and went to sleep. According to PW11, when the three customers were throwing stones, the accused had already left. She also testified that she never saw the customers exchanging any words with the accused person. At around 11.30pm, PW11 heard several gunshots and later she was woken up by police officers from Gatundu Police Station. Thereafter, the police officers took them to the scene where she saw the deceased lying down and they informed them that they could not identify him. In his evidence, **PW12 Sgt. Jestmore Maliti** testified that on 31st of October, 2005, at around 4am, he went to the scene of crime where he took five photographs. Subsequently, he printed the said photographs and produced a photo-booklet exhibit 13 and a report exhibit 14. On the other hand, **PW13 Joseph Kuria Kimiri** testified that the deceased is his nephew. That apart, he recalled that on 31st of October 2005, at around 1am, while he was asleep at his home, Ezra Wandungu and Paul Kaguha went and informed him that his relative had been shot at Mundoro Shopping Centre. From there, he accompanied them to the scene where he confirmed the information. He observed that the deceased had an injury on the right side of the waist. From the scene, PW13 went back home to

inform his relatives. In his evidence **PW14 Snr. Sgt. Samuel Kamau** introduced himself as the officer maintaining the arms movement register at Gatundu South Do's office. He was able to recognize the accused who is an administration police officer attached to Mundoro Police Post which was under his command. According to PW 14 he had issued the said post with two rifles S/No. G3 A3 no. 6674594 and no. 6674593. PW14 was able to identify the two rifles as Ex. 1 (a) and (b). He further testified that he had issued Ex. 1(a) in December 2004 to the accused person and Ex. 1(b) to Abraham Kitilit. Further to the above, PW14 testified that the said two transactions were reflected in the Arm's Movement Register as shown in the abstract Ex. 15. He further testified that since the accused was the officer in-charge of the post he was maintaining a metal strong box where firearms were kept. On the other hand, **PW15 PC George Ndegwa Wachira** introduced himself as one of the investigating officers. That apart, he also recalled that on 30th of October 2005, at around 11.45pm while he was in his house, he received a phone call from one Kiraba who told him that there was a shooting incident at Mundoro Shopping Centre. After booking the report in the OB he accompanied the officers called Selle and Sgt. Gichuki to the shopping centre where they met a group of about 6 to 10 people. PW15 also saw a young man lying on the ground while surrounded by a group of people. He was told that the young man had been shot by the accused person who had later proceeded to his house after the shooting. After confirming that the deceased was dead, PW15 called for reinforcements. PW15 observed that the deceased had been shot on the right side of the hip. He later on recovered an empty cartridge between Matheri Bar and where the deceased was lying. By 2 am, on 31st of October 2005, a contingent of 50 police officers arrived to disarm the accused. On going to the house of the accused, they found he had locked himself in his house. Subsequently they broke the door and entered the house where they found the accused sleeping while holding his gun. Immediately PW15 closed the safe of the gun and removed the magazine that contained the ammunitions. Though the accused woke up and tried to resist arrest, he was overpowered and arrested. Later the police officers took possession of the gun and found only one live round of ammunition. They also recovered another G3 rifle S/no A36674593 which belonged to AP Kitilit who had been assigned to supervise examinations. On 7th of November 2005, PW15 accompanied the father of the deceased to the mortuary where he witnessed the post-mortem. In his evidence, **PW16 Sgt. Joseph Gichuki** confirmed and corroborated in details the story of PW15.

In his defence, **Paul Muigai Ndungi**, the accused, testified that he was an administrative police officer at Mundoro Police Post, Gatundu Division. Further to the above, he also testified that on 30th October, 2005, he left the post at around 2pm and went to Blue Bar where he found a barmaid called Gathoni who served him with a Pilsner. Thereafter, the accused continued drinking and after 15 minutes four men went into the bar. Among them, he only knew Njuguna who was a teacher at Uchekeini Secondary School. After greeting them, they sat on the next table and at around 4pm, the accused got drunk and went back to the camp where he locked his house and slept. At around 9pm, he woke up and went to look for his colleague called Abraham Kitilit. From there, he went to Silent Bar to look for his colleague but he was told that he had not been seen there. Subsequently, the accused went to Matheri Bar and ordered for a Pilsner. Afterwards four men entered the bar and ordered for alcohol though the owner refused to sell to them as he was about to close down. In response the customers got annoyed and started abusing the bar owner. That apart the rowdy customers threatened to disturb the other customers if they were not served. The same customers went and shook the table where the accused was seated and as a result the alcohol poured on the other customers. Subsequently, Abraham went to the bar and they started talking to the rowdy customers and later on ordered for drinks and sat on different tables. According to the accused, after a short while the young men went back and started throwing stones and bottles and in response the bar owner locked the door and went to sit with Abraham. While leaving the bar the accused found Abraham standing with three strangers and he gave him the beer bottle so that he could go and urinate. When the accused went back, he never found Abraham and hence he decided to go back to their camp. On arrival the accused found that Abraham was not there, and hence he entered his house and put on his uniform. However, before finishing, he heard an alarm being raised at Mundoro Trading Centre and hence he armed himself with a gun and on reaching the gate, he found Abraham who told him that he did not know what was happening. Subsequently, the accused gave him keys to his house to enable him take his rifle and follow him. On reaching the neighbouring kiosk the accused waited for Abraham and saw three people approaching where he was. On challenging them to identify themselves, they stopped but they never replied. Though one of them told him that he wanted to talk to him, he immediately hit the accused on the left and as a result he staggered. Subsequently, the assailant started pulling the muzzle of

the rifle and he was joined by two of his friends. According to the accused, one of the assailants assaulted him on the hands to make him lose grip on the gun. They later struggled and there was an explosion though the accused explained that he never pressed the trigger and had not opened the safety catch. It was the evidence of the accused that the person who was holding the muzzle had let the same loose. Consequently, the said assailant pushed the accused and he fell down on his back. On getting back to his feet, the accused shot several times in the air in order to scare the assailants. When the accused went back to the camp, he never found his colleague Abraham. However, he found that the door to his house was open and then he lay on his bed while wiping tears from his injured eye. According to the accused, when it reached morning, several people stormed into his house and they later identified themselves as police officers. Eventually, the accused was arrested and taken to Thika Police Station where he was held for thirty five days before being charged for the present offence.

From the evidence on record, it is apparent that the deceased died due to a gunshot wound. The medical evidence by PW3 Dr. Muya George explicitly confirmed that the deceased had bullet wounds with entry of the same on the lateral side above the waist while the exit was on the left side next to the hip. That apart, PW3 also observed a remnant of the bullet on the body. In addition to the above, it was the evidence of PW1 that it was actually the accused who shot the deceased after they had differed in Matheri Bar. During the shooting incident, PW1 stated that the deceased was carrying a broken bottle and that he had dared the accused to shoot him. In response, the accused took up the challenge and shot the deceased. Apart from the above, it was also the evidence of PW4 that he had seen the accused drinking in the same bar where the deceased was shot on that particular night. When he rushed back to the scene, he found that the deceased had fallen down and he and Moses went to the family of the deceased and informed them of what had happened. In addition to the above, PW4 also heard four gunshots after twenty minutes which were coming from the AP's Camp. Apart from the above, it was also the evidence of PW9 that the accused was in the same bar with the deceased who was accompanied by other young men. From the above evidence of PW1, PW4 and PW9, it is apparent that the accused was seen clearly at the scene before the incident. In addition to the above, the evidence of PW5 clearly show that the spent cartridge – Ex. C was found near the body of the deceased. Apart from the above, the Ex. H1 – H25 (spent cartridges) were also recovered at the scene. Significantly, all the above twenty six cartridges were found to have been fired from the firearm the G3 rifle – Ex.1 (A) that was recovered from the accused person. The evidence on record clearly shows that after the accused quarreled with then deceased, he went to his house and armed himself with the G3 rifle. When the deceased dared him, he opted to shoot him in cold blood. From his conduct the accused had the malice aforethought to kill the deceased. Malice aforethought has been defined in Sec. 206 of the Penal Code 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 the 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 bodily 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.”

Had the accused wanted to disarm the deceased then he should have shot him in the leg or alternatively shot in the air to scare him. Apart from the above, the court entirely concurs with the unanimous findings of the two assessors that the accused shot the deceased when he could have disarmed him. Given the above overwhelming evidence, I hereby reject the defence case. The upshot is that I hereby find that the prosecution has proved its case beyond any reasonable doubt. I hereby find the accused “guilty” of the

offence of murder contrary to Sec. 203 as read with Sec. 204 of the Penal Code, Cap. 63, Laws of Kenya.
The accused is convicted accordingly.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open court in the presence of the accused:

MWANGIDefence Counsel

KIVIHIA.....State Counsel

MUGA APONDI

JUDGE

28TH JULY, 2009