



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

Criminal Case No. 14 of 2000

REPUBLIC PROSECUTOR

VERSUS

P.C. SAMSON MURIUKI MBUI ACCUSED

JUDGMENT OF THE COURT

The accused, former Police Constable Samson Muriuki Mbui is charged with one count of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that:-

“On the 4th day of June 1999, at Gitimene Market in Meru Central District within Eastern Province murdered John Muriungi Mberia.”

The accused has denied the charge.

The brief facts of this case are that on the night of 4.6.1999 at about 11.30pm the deceased was among a number of other patrons at Museveni Bar at Gitimene Market. While there, he was shot and fatally wounded by a gunman's bullet. Police who were at the market on that night removed his body to Meru General Hospital for treatment. On the 25.6.99, the body of the deceased was identified by his father, Joshua M'Rimberia M'Irura for postmortem. Later, the accused was arrested and charged with the offence.

The prosecution has alleged that it is the accused who fired the shot that killed the deceased. The accused on the other hand says that he never fired even a single shot on the night in question though it is not denied that he was at Museveni Bar looking for robbers who were reportedly at Gitimene Market at the time when the deceased was shot dead.

The first witness was M'Rimberia M'Irura PW1, father to the deceased. It is him who identified the deceased's body to the doctor on 25.6.1999 for post mortem examination which was carried out at the City Mortuary in Nairobi.

PW2, Joel Mwiti Manyara, the owner of Museveni Bar, testified that on the fateful night, he saw the accused, whom he knew before, enter the bar. The accused stood at the entrance to the rear door. After ordering everyone in the bar to lie down, the accused allegedly shot twice into the bar. That the first shot hit the deceased while the second shot hit the wall. On the following day, PW2 recovered a spent cartridge which he handed over to the area Chief. According to PW2, there was sufficient light (from electricity) both inside and outside the bar for easy identification of the accused. He stated that he knew the accused as a police officer attached to Kiirua police station.

PW3, John Murerwa Mutiga, stated that he was seated outside in the corridor at the rear of the bar when he saw the accused fire two shots into Museveni Bar while standing at the door leading into the bar. After firing the shots, the accused started shouting that there were robbers in the bar. Like PW2, PW3 stated that there was enough light both inside and outside the bar for easy identification of the accused.

A testimony similar to that of PW3 was given by PW10, Lucy Kajira who was in PW3's company at the time of the shooting. She stated that she saw the accused, whom she knew as Mbui and who was a police officer attached to Kiirua Police Station, enter the bar from the rear side. The accused positioned himself at the door leading into the bar and from there the accused fired twice into the bar. She also says she saw a man from the bar making for the door where the accused was standing. The man fell down as the accused's bullet hit him. It was PW10's testimony that there was enough light both inside and outside the bar to enable her see all that was happening not only at the point where the accused stood but also right into the bar, including the counter and that she was also able to see the deceased as he walked towards the door where the accused was standing.

There was the evidence PW5 Francis Guantai who was also among the patrons at Museveni bar that night. He said he saw the accused come to the rear door leading into the bar. The accused ordered everyone to lie down and immediately thereafter, he heard two gun shots. Then he heard the accused asking whether any of the patrons was armed. PW5 managed to escape from the bar when the front door was opened by one of the other patrons. He stated that he was able to see right through to the rear door from the counter where he was sitting before the shooting incident. This piece of evidence from PW5 tallies with that of PW10 to the effect that from either the rear corridor where both PW3 and PW10 were sitting or the counter inside the bar one could see right through to the other side. PW8, Japhet Kiriinya gave a similar testimony, saying the accused was about 4 metres away from him as he fired the two shots.

Other evidence came from PW6, one Mbogo Donald Mugo, a Firearms Examiner attached to the Forensic Ballistic Laboratories, CID Nairobi. He stated that for the last 30 years, he has been examining firearms and ammunition, fired bullets and spent cartridges. On 24/6/99, he received the following exhibits from Inspector Amos Kambo (PW13):-

- A. 38 calibre Wembley & Scotch Revolver NO. A. 44324 – Marked as Exhibit A
- 2 rounds of ammunition – Exhibit B
- 1 fired bullet - Exhibit C

After examining the three exhibits, under comparative microscopy and after successfully testing the live ammunition being exhibit B in Exhibit A, he formed the opinion that the fired bullet was fired in the revolver, Exhibit A. The duly completed Ballistic Expert Report was produced as Pexhibit 3. This witness did not however carry out any tests to confirm whether Exhibit A had fired any shot before it was taken to him for examination. He however added that such a test would have been of no evidential value.

PW7, Police Supt. Maclus Mwara formerly attached to the Meru CID conducted an identification parade on 10/8/99. The parade was conducted at the office of the Deputy Officer Commanding Station Meru police station. During the parade the accused was identified by John Murerwa PW3, Japhet Kiruja, PW8 and Joel Mwiti, PW2. According to this witness, the accused remarked that both PW2 and PW3 knew him before the parade. The accused is said to have complained that Japhet Kiruja had been shown the accused by some unidentified person before the parade. The witness produced the ID parade form as Pexhibit 4.

PW13, Mr. Amos Kambo, former Inspector of Police, produced the following exhibits:-

- Wembley Pistol S/N A 44324 as Pexhibit 5
- Ballistic Examiners Report as Pexhibit 3

· Post Mortem Report as Exhibit 7

PW13 testified that on 5.6.1999 at about 10.00am he accompanied the DCIO, one Maclus Mwara (PW7) and the OCPD, to Gitimene Market following receipt of a shooting incident at Museveni Bar within the market. By the time they got to the bar, it had already been cleaned. He also confirmed from the scene that other police officers had already been to the scene on 4.6.1999 during night hours. PW13 is the one who interviewed John Murerwa, PW3. He was also the investigating officer and in addition to collecting exhibits and interviewing witnesses, he recorded a statement from the accused.

It was also the evidence of PW13 that he examined the firearms movement register, (exhibit 8) which showed that the suspect firearm, (exhibit 5) had been issued to the accused.

In his further evidence, PW13 testified that he had stated in his statement to the police that the deceased had been shot by an unidentified gunman. He also stated that the three expended cartridges recovered at the scene were not sent for ballistic examination nor does the statement contain any information on the expended ammunition.

Regarding the recovery of the suspect firearm (exhibit 5) PW3 testified that the same was recovered from Kiirua police station on 16.6.1999, though one of the earlier entries in exhibit 8 showed that the firearm had been taken by the CID. On whether or not there was any entry showing that exhibit 5 had been returned without some of its ammunition, the witness said there was none. He stated however that it would surprise him if he was told that the firearm was returned to the armoury with all its ammunition intact.

In his further evidence, PW13 testified that though the suspect firearm was said to have been returned on 4.6.1999, there was no acknowledging signature by the armourer confirming return of the firearm. It was also his evidence that the firearm was not returned to the armoury until 16.6.1999.

The bone of contention regarding the Firearms Movement Register is that the Receiving Officer (Armourer) never signed the register in the remarks column to confirm that the accused had returned the firearm on the date indicated as the return date, i.e. 4.6.1999.

PW9 was No. 62570 Corporal Harriet Kinya who was attached to Meru Police Station at the time of her testimony. She testified that at about 11.00pm on 4.6.99 while on duty at Meru police station, she received a 999 telephone report from one Joseph Gitonga. The report was to the effect that four men, who said they were police officers from some unnamed police station in Nyeri had taken beer at Viazi Rider Bar in Gitimene market for Kshs. 670.50/= but had refused to pay for the same. The reportee also informed PW9 that three of the men were armed with pistols, while the other man was armed with a short-gun.

PW9 booked the report and informed the crime stand by team. Efforts were also made through PC Musavi who was manning the switchboard that night to inform Kiirua Police Station about the report. DW9 was informed later by P.C. Musavi that the Deputy O.C.PD had directed CID personnel to go to the scene so as to reinforce the efforts by Kiirua Police Station in dealing with the situation. On the following day, DW9 learnt that one person had been killed at Gitimene Market. She then recorded her statement.

PWII was police sergeant Charles Maluki. He stated that at about 9.30pm, while he was within the police lines at Meru Police Station, he was given a report by one PC Kinyua that there were suspected robbers at Viazi Rider Bar at Gitimene market in Naari area. Together with CPL Nyaga, and CPL Mathiu they went to the scene in a vehicle that was driven by PC James Naruti. They arrived at the market at about 12.30am.

On arrival at Viazi Rider Bar they found police officers from Kiirua Police Station already at work, with four suspects under arrest. When PWII and his colleagues enquired about the robbers who were said to be at the bar, he was informed that the robbers had already fled to the eastern side of the market. No

names of the suspected robbers were given to PW11 and his team.

Immediately thereafter, PW11 and his colleagues were informed by a man who came running from Museveni Bar and who introduced himself as an army officer that there were robbers at Museveni Bar and that the robbers had already killed one man in the bar. PW11 and the other officers proceeded to Museveni Bar. On arrival there, they found the patrons thereat lying down under the tables. At the scene were police officers from Kiirua Police Station, among them the accused, PC Karue, Insp. Mitau (DWI) and PC Mwangi. There were many broken bottles on the floor of the bar. One of the patrons was lying down next to the rear door of the bar bleeding. PW11 was informed by DW1 and his team that the injured man had been shot by robbers who had then fled from Museveni Bar through the front door. The injured man (now deceased) had been shot on the left side of the head. On further enquiry, the officers from Kiirua police station informed PW11 that none of them had fired any shot during that night. Thereafter, the deceased was rushed to hospital for treatment. PW11 produced the Wembley & Scott Revolver issued to the accused earlier that evening as exhibit 5 and three spent cartridges as exhibit 6.

During his further evidence in cross-examination, PW11 stated that according to information received from DW1, there was no confrontation between officers from Kiirua police station and the robbers who were said to be at the market, but later on he learnt that it was the accused who was alleged to have shot the deceased. He also testified that during the whole time he and his team were at the market, he never heard any gun shots.

PW12 was one Stanley Gitonga who testified that on the night in question at about midnight, he was at Museveni Bar preparing to leave for his home, when suddenly someone fired two shots into the bar from the rear door of the bar. After the shots, the person who had fired the shots ordered those with guns to surrender, otherwise they would be shot down. According to this witness, the first shot hit the wall above the witness head. He also testified that after the shots were fired some police officers entered the bar and ordered all the patrons to get up for interrogation. That was also the time that PW12 noticed that the deceased had been shot and was lying down.

In his further evidence, PW12 stated that he did not see the person who fired the shots, though he alleges to have seen the man walking around the bar room as he (witness) lay under the table. He admitted however that because he was quite drunk that night, he could not say whether it was the police or thugs who had fired the shots.

In his sworn testimony, the accused admits that on the night in question he was on duty at Museveni Bar, Gitimene Market where he and other police officers, led by Insp. Mitau, DW1, were dispatched after the station had been informed that there were robbers at the market. The accused admits further that he indeed was at the rear door leading into Museveni Bar. He stated that while he was so stationed near the door, one of the patrons in the bar opened the very door which he was guarding, but he denies that he ever fired a shot at him. He stated that when that man saw him, he went back into the bar shouting that police officers had come. At that point, the accused says, he heard a gun shot from inside the bar. He dived for cover. Then there was a second shot, again from inside the bar. The accused then started shouting to Insp. Mitau that there were robbers in the bar. On hearing the shots, the accused says he moved some six metres away from the door for cover. He also saw Inspector Mitau, DW1 taking cover. The accused says he then shouted to the bar patrons that they were police officers and ordered anyone with a gun to surrender.

After the two shots, the accused says he heard some banging at the front door of the bar followed by commotion inside the bar. People started running away. The accused discounted the evidence given by both Murerwa and Lucy (PW3 and PW10 respectively) arguing that the two who looked drunk could not possibly see into the bar from where they were seated.

Regarding the Firearms Movement Register, the accused testified that the same was not a true copy of the entries made on the day in question. He particularly questioned entry No. 813 which shows that the firearm was returned on 4.6.1999 but with a rider that the pistol was with the CID Meru as per OB entry No. 20 of 16.6.1999. He also says that the remarks against the entry for return of firearm does not show

that some of the ammunition he had been issued with was missing.

The accused called one witness, DWI, one Chief Inspector of Police, Josephat Mitau, the then Deputy OCS, Kiirua Police Station. His testimony was that in the evening of 4.6.1999, a report reached the station that there were robbers at Gitimene market. He marshaled other officers, among them the accused and went to the market. They first went to Viazi Riders Bar but on searching the patrons who were drinking behind closed doors, no arms were recovered from them. They arrested the patrons for drinking beyond authorized hours.

Soon thereafter, they heard noise from Museveni Bar which was nearby. They headed for the same but on arrival there, they found the front doors locked from inside. They could hear people talking loudly inside the bar. While PC Mwangi guarded the front door, DWI, the accused and one PC Karue went to the rear of the bar. It was there in the verandah of the bar that they saw a man and a woman drinking (PW3 and PW10 respectively). The accused was stationed to take charge of the rear door of the bar to ensure that nobody entered the bar to alert the patrons inside. DWI then entered one of the rear rooms where there were some other patrons taking beer.

After interrogating those patrons, among them one Solomon Mburugu, DWI was informed that none of the patrons had firearms. Then DWI heard the first shot. He dived for cover. He also stated that from the position he had been standing before he heard the shot, he could only see the back of the accused who was standing some ten (10) metres away from him.

DWI went on to testify that after the first shot, he took cover in one of the rooms. He then heard a second shot. As he peeped out from the room where he was hiding, DWI saw the accused leaning against the wall next to the entrance into the bar. In his view, DWI thought the accused was also taking cover. DWI says he then heard the accused saying that the person who had fired the shots was inside the bar. At this point, it is worth noting that whereas the accused says he moved six metres away from the door after the first shot was fired, DWI says he saw the accused leaning against the wall next to the door.

After a while, DWI headed for the entrance to the bar. He then saw a man lying prostrate next to the door but inside the bar. DWI also noticed that the front door of the bar was now open. On searching the inside of the bar, DWI and his team established that one shot had hit the wall. He denied that any of the three officers who were on the beat with him that night i.e. the accused, PC Karue and PC Mwangi, fired any shot. He also testified that after the deceased, who was then only injured, was taken to hospital, he led his team back to the station where they handed back their firearms and all ammunition unutilized.

DWI was cross-examined at length by the learned state counsel, Mr. Muteti.

In his further evidence during cross-examination, DWI denied that the purported report about robbers at Gitimene market on the night in question was a cover up for what he and the accused had done, namely the unlawful shooting of the deceased. He however admitted that no report of a robbery was booked in the Occurrence Book (O.B.) at Kiirua Police Station. Regarding the events of the particular night, DWI stated that he placed PC Mwangi at the front door to Museveni Bar while PC Karue and the accused were assigned to the rear door. The witness also admitted that he was not able to say who had fired the first shot that he heard nor DWI also testified that even after he took cover in the nearby room on hearing the first shot, he was still able to see the accused when he peeped through the partially closed door to that room. He explained however that if any of the patrons attempted to shoot, that action alone would have prompted the accused to retaliate. DWI also confirmed that the armourer did not acknowledge receipt of the pistol that was issued to the accused on 4.6.1999 and as such he could not say with certainty whether or not the accused returned the firearm to the armoury after he returned from Gitimene market on that fateful night. Finally, DWI testified that the reason why he believed the accused did not fire any shot is because he did not see him do so, and that if the accused had fired any shot at all, he would have been able to see him.

Before going any further with this judgment, I must mention here that the evidence of DWI on the events just before he heard the first shot is that he was already inside a room with his back to the outside where

the accused was standing. My interpretation of this situation is that DWI would not have been able to see whoever Secondly, the defence contention that the person who shot the deceased escaped through the front door of the bar does not seem convincing when weighed against the evidence of PW11. PW11 clearly stated that when they arrived at Museveni Bar, the front door to the bar was still locked from inside.

It has been contended on behalf of the accused that the prosecution has not established its case against him beyond any reasonable doubt. The defence contention is premised on the ground that the prosecution failed to prove that the accused's firearm had fired any shot. Secondly, it has been submitted that the evidence of the purported eye witnesses and in particular the evidence of both PW3 (John Murerwa) and PW10 (Lucy Kajira) should be treated with caution because the two witnesses were too drunk to know exactly what happened that night. Mr. Gikunda submitted that the totality of the prosecution evidence created enough doubts as to the culpability of the accused and that the benefit of all these doubts should be given to the accused. He also submitted that the prosecution had not adduced evidence to prove mens rea either express or implied nor was any motive for the killing established. The defence cited the following two cases:-

(1) Gideon Miano –V- R

Criminal Appeal No. 13 of 1999.

(2) Tom Piemo Ombura – Vs- R.

Criminal Appeal No. 98 of 1992

(3) Republic – Vs – Philomena Kathunguchi – Meru High Court

Criminal case No. 27 of 2001

Mr. Muteti for the state submitted that there is more than enough evidence on record to connect the accused to offence with which he is charged. He submitted that since there is no dispute as to the facts of this case, the only issue to be determined is the identity of the person who fired the shot that eventually killed the deceased. Mr. Muteti cited the case of **Morris Aluoch – V – Republic** Criminal Appeal No. 47 of 1996 and urged the court to find that the weapon used in this case to kill the deceased namely a firearm showed that the accused's motive as he fired the shot was to kill the deceased.

After the summing up, the assessors who sat with me throughout the hearing returned a unanimous verdict of guilty as charged.

From the facts of this case and the evidence adduced before the court, the only issue for determination by this court is the identity of the person who fired the shot that eventually killed the deceased. There is no dispute that the accused was among other officers, led by DWI who were at Museveni Bar on the night in question after receiving what they called a report that there were robbers at Museveni Bar. The secondary issue for determination is what the motive for the killing of the deceased was and finally whether the prosecution has proved the necessary mens rea on the part of the accused.

I have carefully considered the evidence by PW2, PW3, PW8 and PW10 on whether or not it is the accused who fired the shot. The evidence shows that on arrival at Museveni Bar, the accused was assigned to guard the rear door and he stationed himself a few metres from the door leading into the bar. Mr. Gikunda argued that both PW3 and PW10 could not say for sure that they saw the accused at that rear door as alleged and further that their evidence was contradicted by the evidence given by PW2 and PW8 as to whether or not the accused wore a hat on his head or not. In my view and after observing the demeanor of all these witnesses, I am satisfied that all the four witnesses saw the accused fire the shots into Museveni Bar right from where he stood at the rear door. I also believe that the accused fired at the deceased as the deceased tried to open the door which the accused was guarding.

The defence contention that the accused could not have fired a shot is not supported by evidence on record. DWI who made the assertion testified that at the time he heard the shots, his back was turned towards the accused. DWI could therefore not say that the accused was not the one who fired the shot that hit the deceased because he could not see what the accused was doing at that particular moment in time.

The fact of the deceased trying to open that rear door is not denied by the defence. According to PW3 and PW10 and also PW8, each one of them saw the accused fire at that very moment. The evidence by DWI was to the effect that the accused was stationed at that door in order to ensure that none of the robbers from inside the bar could escape. At the same time PC Karue was keeping watch over both PW3 and PW10 to ensure that they did not enter the bar to warn those who were inside. Taking all this evidence together, I have no doubt in my mind that when the door was opened by what the accused must have believed was a robber, the accused's instant reaction was to shoot and he did shoot. The person who was shot was the deceased.

The defence has also contended that the evidence by the ballistic expert and also the evidence from the firearms movement register did not prove that any of the six rounds of ammunition had been fired from the firearm which was issued to the accused. I shall first deal with the firearms movement register which was produced as P exhibit 8. That evidence shows that the armourer did not sign in the "Remarks" Column against the accused's name on 4.6.1999 to acknowledge that he had received the firearm back from the accused. Such acknowledgement would also have shown whether the firearm was returned with all the six rounds of ammunition. In the absence of that signature and the fact that the firearm was not received back at Kiirua police station until 16.6.1999 brings to my mind a strong belief that there was an attempt by somebody, and most likely DWI to cover up the case. In my view, it was this attempt to cover up the case that led to the demonstration by residents of Kiirua area which finally led to the arrest of the accused. It was unusual, even as admitted by DWI for the armourer not to acknowledge receipt of a firearm if the same was returned to the armoury. I believe that the defence has doctored its evidence on the Arms Movement Register which evidence this court is unable to accept.

Regarding the ballistic expert evidence it was confirmed that the fired bullet that was recovered at the scene (exhibit C) was fired from exhibit A which was the revolver serial number A44324 which was the same firearm that the accused had in his possession on the night of the shooting. I am convinced that this ballistic expert evidence by PW6 corroborates the evidence adduced by PW2, PW3, PW8 and PW10 that the accused fired a shot that hit the deceased as the latter tried to open the door over which the accused was keeping guard.

Mr. Gikunda submitted that in any event the evidence of the post-mortem report (exhibit 7) does not show that the deceased died from gun shot wounds. In that report Dr. A.O. Kirasi Olumbe noted as part of the external appearance of the body of the deceased that there was an abrasion on the forehead (healing) with sutured lacerations of the left side of the hair line 4cm and bregma approximately 3cm. His opinion was that the deceased died from head injury due to blunt object. In the earlier part of that report, it was shown that the deceased died as a result of an armed attack by thugs. It is my considered view that the post-mortem report evidence does not fall short of confirming that the deceased died as a result of gunshot wounds.

Did the accused have the necessary mens rea for the offence of murder? There is evidence that prior to this incident a report had been received through radio call that there were armed men at Gitimene market, and that the team that went to the market including DWI and the accused went there as a result of that report. Although the defence laid great emphasis on the report that there were robbers at Gitimene Market the court finds that the initial report booked by PW9 only mentioned armed men who had refused to pay for their drinks at Viazi Rider Bar. The angle of robbery was magnified by the defence following the report forwarded to Kiirua Police Station by PW11. I however believe that whether accurate or not, it was because of that report that the accused found himself at the scene of crime. I therefore find that the accused fired at the deceased in the honest belief that the deceased intended to harm or attack him. In brief, the accused fired the shot at someone he believed was a possible robber and he did so in order to protect himself against being attacked, thereby removing the presence of mens rea on the part of the

accused.

In the result therefore, I find that the totality of the evidence on record is sufficient to support the lesser charge of manslaughter. I accordingly find the accused guilty of the offence of manslaughter and convict him accordingly.

It is so ordered.

Dated and delivered at Meru this 23rd day of February 2006.

RUTH N. SITATI

J U D G E