



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 187 Of 2003

REPUBLIC PROSECUTOR

VERSUS

GIDEON MUTHUURI ACCUSED

RULING

The Accused Gideon Muthuuri is charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap.63 Laws of Kenya) vide information dated 1st October, 2003. It is alleged that on 14th February, 2003 at Mathare North Area 4 in Nairobi, he murdered David Cheboi.

The Prosecution closed its case after calling thirteen witnesses. Submissions were made by the Learned Defence Counsel to the effect that this court should enter a finding of no guilty in favour of the Accused under Section 306(I) of Criminal Prosecution Code.

What this court should, at this stage, consider and determine whether the Prosecution has failed to produce any evidence connecting the Accused with the offence as per Criminal Law Jurisprudence. If I arrive at the conclusion that it is so, then I am enjoined by the provisions of the said Section to acquit the Accused without calling him to give his defence.

Obviously, I have to consider the evidence as led to determine the two important factors in the case of the murder, i.e. the fact of death of the deceased and then the fact that there is any evidence led connecting the Accused with the cause of the said death.

I do agree with the Learned Defence Counsel that there is no direct evidence led as regards the commission of the act by the Accused. None of the witness has testified that he saw the Accused shooting the deceased.

As the facts evolved before the court, the Accused on the material date around 10.00 p.m. had arrested PW.3 Antony Mugari Njagi at the NYS stage. He also handcuffed him due to some resistance from PW.3. PW.4 to PW.6 who were with the deceased in a white Saloon car Registration No.UAL 90313 on Patrol saw the scuffle while patrolling the area. They were five Police officers in the said vehicle. The Deceased and p.c. Otieno (PW.6) came out of the vehicle and talked to the Accused. None of the witnesses has testified that there was any exchange of words or misgiving during that talk. The two officers came back after asking the Accused to take the suspect arrested to the Police Station. After about 2 to 5 minutes (as per versions of these officers), they heard gun shots and going towards that direction saw an officer and the suspect running on two sides of the road going towards Thika Road. The deceased was seated on the right side of the vehicle behind the driver's seat. The driver (PW.4) slowed down or stopped the vehicle to enable two officers to come out and chase the running suspect who was

handcuffed. After sometime he heard the deceased scream that he was shot. They heard last gun shot when the vehicle was opposite the gates of Del-a-rue and Monetary Studies, the gate of Del-a-rue comes first.

The deceased was taken to the hospital after senior officers came and died later on. PW.4 stated that he saw blood on the jacket of the deceased. PW.5 only saw the deceased lying down on the road screaming.

PW.5 P.C. Mwema and PW.6 P.C. Otieno specifically stated respectively that the gunshot was heard after the vehicle had stopped and after the vehicle had passed Del-a-rue. These two officers also specifically stated that they did not see the Accused holding any fire arm (gun) when he was chasing or when the gun shot was heard PW.4 also said that the Accused denied having fired any round and stated that he presumed that the Accused shot because he was chasing the suspect.

As against this version from the officers who were with the deceased in the vehicle, I have evidence of two officers who were guarding gate of Del-a-rue. PW.1 P.C. Kimutai stated that around material time and date he saw “a huge and fat man” chasing a young man firing at him. This description of the man firing was corroborated by PW.2 P.C. William Gache who stated that he saw a fat man firing a shot towards Thika direction. Seeing this chase PW.2 fired a shot in the air.

I shall pause here to note two facts. The two witnesses have described the person firing as a fat and huge man. The Accused before me does not conform to that description. Secondly PW.4, PW.5 and PW.6 specifically stated that they heard one and the last gunshot after they passed the gate of Del-a-rue.

PW.1 reported firing by PW.2 to the superior officer, as according to him, an officer is not supposed to fire without an order being given. The fire arm of PW.2 was taken by the superior officer. I also note that the second fire arm is not produced before the court.

With these two versions before the court, a grave doubt is created as to veracity of the evidence of PW.2 that he fired in the air. Around that time and place no other gunshot was heard and that was the last one after which the deceased screamed and found wounded.

My aforesaid observations get complete support from the evidence of PW.10 Chief Inspector Raphael Gwa who testified that he recovered the firearm (Ex.2) from the Accused's house at 11.00 a.m. the next day after several visits. The fire arm had 15 rounds of ammunitions in its magazine which is its capacity. PW.11 Cpl. Victor Nambenya also confirmed that the fire arm a Cieska Pistol with fifteen rounds were issued to the Accused on 12th February, 2003 and the Accused was supposed to renew the same after two to three days. He also confirmed that the Accused had been very regular in renewal of his fire arms in the past.

The Prosecution thus has not shown at all that the fire arm issued to the Accused was used since 12th February, 2003. On the contrary, it has shown that it was not used at all. If so, how can he be found guilty of shooting at the deceased and killing him?

Although there is discrepancy in the dates of identification of the deceased before the Post Mortem, I do find the same was due to lapse of memory by PW.8 the father of the deceased. From the circumstances of the case, I do find that the Prosecution has proved the death of the deceased satisfactorily, but has not connected at all the Accused with its commission.

I therefore enter a finding of not guilty in favour of the Accused and acquit him of the offence of murder as per information dated 1st October, 2003.

I direct that he be released forthwith unless held otherwise as per law.

Dated and signed at Nairobi, this 2nd day of March, 2006.

K.H. RAWAL

JUDGE

2.3.06