



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Case 61 of 2003

STATE PROSECUTOR

VERSUS

1. THOMAS SANGARE KELOLONG

2. JOHNVEY ATERA MARIERA.....ACCUSED

JUDGMENT

THOMAS SANGARE KELOLONG was charged jointly with JOHNVEY ATERA MARIERA for the offence of murder contrary to S.203 as read with Section 204 of the Penal Code in that on 14th July 2003 at Ntimaru Trading Centre in Kuria District they jointly murdered MICHAEL ONYANGO APITI. MARIERA was acquitted after the close of the prosecution case.

The prosecution case was as follows: The accused was a police constable stationed at Ntimaru Police Station in Kuria District. On 14th July 2003 at about 4.45 p.m. the district co-ordinator of Maendeleo ya Wanawake went to the office of the O.C.S one I.P. HESBON BARAZA (PW2) and reported to him that there was a small child being mistreated by the Headmaster of St. Anne's Academy and she requested police assistance so that the child and the mother could be collected and interrogated.

The O. C. S. instructed the accused and P.C. JOHNVEY MARIERA – who was the said accused, to go and collect the said headmaster. The two went to the armory and P.C. Thomas Bii who had the keys to the armory issued an AK. 47 rifle serial No.794617 with one magazine with 30 rounds of ammunition and P.C. MARIERA was issued with a webley Revolver serial No.133300 with 5 rounds of ammunition. The two left the station for Ntimaru Town. They went to the medical clinic of the deceased which was in Town where they met his wife NELLY AKINYI WAGANDA (PW4).

She is also a nurse. They asked her for the certificate of the clinic which she gave them. They said it had expired. The deceased arrived at that time.

The two officers told him they were on duty and asked for his certificate. He told them it was the one they were holding. They insisted that it had expired. One told him to give them shs.1000/= but he refused.

They said they will arrest him if he failed to give them the money.

Deceased gave money to accused's colleague who went out.

However accused was left inside and asked for more money but the deceased refused to give him. Accused was holding the rifle he had been issued with. His colleague returned and told PW4 to get back the shs.1000/= he had been given.

He put it on the counter and told the accused that they leave. He left but accused was left inside. He aimed the gun at the deceased and shot him once and he fell down. PW4 went out screaming. Accused and his colleague left in different directions. Members of the public went to answer the screams but found the deceased already dead. P.C. Mariera ran back to the police station and reported what had happened. The O.C.S. and other officers rushed to the scene and found the deceased already dead.

Accused had disappeared. He mobilized officers to track down the accused but did not get him. Later that evening P.C. Bii found the rifle accused dropped near his house. The deceased's body was removed from the scene to the mortuary. Post Mortem was carried out on 15th July 2003 by

DR. AGGREY IDAGIZA (PW1) who found the bullet completely severed the left carotid artery and internal jugular vein. This led to severe haemorrhage which in turn led to the collapse of cardio vascular system resulting to his death.

The accused person was arrested at Kehancha the following day. After all investigations he and P.C. Mariera were charged.

In his unsworn statement of defence the accused told court that he and P.C. Mariera went to look for the Headmaster of St. Annes Academy as detailed by the O.C.S They did not get him at the School and were directed to her house behind the clinic. They found her and they asked her to accompany them to police station. She said they wait for her husband who was the deceased. Deceased came and as the accused was talking to the headmistress the deceased rushed out shouting. He got hold of the accused who was holding the gun. They started to struggle and in the process the gun fired and deceased was hit. He fell down and died. P.C. Mariera told him to guard the scene as he went to report. Deceased's wife was screaming. Many people gathered some armed with stones. He moved from the building but the people followed him, saying he was a robber.

His route to police station was blocked. He ran in other directions.

Other policemen started looking for him. They were firing at him.

He later went and handed rifle to P.C. Bii and went to report to the O.C.P.D. in Kehancha. He was later arrested.

I have thoroughly evaluated all the evidence both by the prosecution witnesses and what accused said in his defence. There are no dispute that the deceased died as a result of a gun shot. Dr. Idigiza (PW1) who performed the Post Mortem confirmed that.

In fact even the accused himself in his defence admitted as much.

The only main issue is whether it was the deceased who shot him deliberately or he got shot accidentally as they struggled. To decide on that I find the evidence of NELLY AKINYI (PW4) the most direct. She witnessed the incident and candidly narrated to court what exactly happened.

Accused and his colleague P.C. Mariera went to the clinic and asked for the licence. When it was handed to them they said it had expired and demanded money. Accused arrived and they said they will arrest him if not given money. She told the court that when the deceased refused to give more money the accused cocked his gun and cold bloodedly shot the deceased once and he died. The evidence of PW4 was not shaken even on cross-examination by the defence counsel. She said there was no struggle between the accused and the deceased before he shot him. She said accused aimed the gun at the deceased and then shot him. She said she first heard some sound from the gun before the shooting. Possibly he was releasing the safety catch. The evidence of PW4 there was very clear and even though there was no other

eyewitness after examining the same I am satisfied that she told the truth and said what exactly happened. The shooting was intentional and accused must have known it would inflict grievous harm on the deceased which led to his death.

He was possibly incensed when the deceased refused to part with more money and shot him. They had not been detailed to check on the licence in the clinic but only to take the Headmaster of St. Annes Academy to the O.C.S. By shooting the deceased the accused intended to kill him or cause serious injury to him. There are no doubts about that. The holding in the case of R VS. MOLONEY (1986) 1 ALL ER 1025 cited by the defence counsel in fact supports that.

As stated above I did carefully consider what accused said in his defence. He had no duty to prove his innocence. However what he said did not at all dislodge the prosecution strong evidence. There was no evidence that he struggled with the deceased and the gun went off accidentally.

His was a deliberate act as stated by PW4. In fact LAWRENCE NTHIWA (PW10) the firearms examiner who examined the rifle and the spent cartridge found at the scene and confirmed it was fired from the rifle, told the court that an A.K. 47 rifle has safety mechanism and unless if the safety mechanism is defective it cannot fire accidentally. He did not find the safety mechanism of the rifle accused used to be defective. It therefore could not have discharged the fatal bullet accidentally as alleged.

The upshot of the above is that I find the prosecution have proved beyond reasonable doubts that the accused did murder the deceased.

I therefore find him guilty as charged and convicts him.

Dated 4th May, 2006

KABURU BAUNI

JUDGE

cc. Mobisa

Mr. Kemo for State

Mr. Nyambati H/B for Mr. Sunkuli for Accused.

Mr. Kemo

We do not have accused previous records. He be treated as a first offender.

KABURU BAUNI

JUDGE

Mr. Nyambati:

Accused is remorseful. He is a family man and bread earner.

Court: Indeed accused has been treated as a first officer. However there is only one sentence prescribed by law.

Sentence:

Accused is sentenced to death as per the law prescribed.

KABURU BAUNI

JUDGE