



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL CASE 40 OF 2004[1]

REPUBLICPROSECUTOR

VERSUS

BARNABAS OBUNGA OMBOKO DEFENDANT

JUDGMENT

The Accused Barnabas Obunga 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). It is alleged against him that on 10th February, 2004 along Juja Road near Pangani Police Station he murdered Anthony Mwanzia (referred to as 'the deceased' hereinafter). It has emerged from the evidence led and not denied by the Defence that the deceased was a police officer and was, at the material time, attached to Pangani Police Station. Similarly it is sufficiently placed before the court that while in company of two other police officers (PW.1 and PW.2 in the case), the deceased received an injury on his neck from the gun shot on 10th February, 2004 and that occurred when they had held the Accused in their custody. It cannot be doubted and has been contended also by the Accused, that his vehicle was followed by another vehicle, occupants whereof were firing at his vehicle and during the chase the Accused received a gunshot injury on his back. The Accused was held by the three police officers from Pangani Police Station when they were on Patrol to chase the aforesaid two vehicles and after the Accused parked his own vehicle he was also running towards Pangani Police Station. In short the Accused and the three Police Officers were running towards each other and the Accused was caught along Juja Road near office of Pangani Flying Squad. The deceased on receiving the injury was rushed to nearby Guru Nanak Hospital and was pronounced dead.

His body was said to have been identified by the deceased's father who accompanied P.C. Josphat Mutua (PW.3) to City Mortuary after which identification Dr. Maundu performed autopsy on the deceased's body. The Post Mortem Report prepared and signed by the said Dr. Maundu was produced in evidence by IP Bernard Wambua (PW.6) after an application made by the Learned State Counsel under Section 77 read with Section 33 of the Evidence Act (Cap 80 of Laws of Kenya). The application was allowed after due consideration. The same was also not objected by the Learned Defence Counsel. The cause of death as per the Post Mortem report was shown as gun shot wound on neck.

Upon considering the above evidence, I do find that the Prosecution has without any doubt proved the death of the deceased, which did not occur under normal circumstances.

The circumstances leading to his death were witnessed by P.C. Solomon Makau (PW.1) and Cpl. Alfred Kimegwa (PW.2) who were with the deceased on that fatal evening. Cpl. Kariuki (PW.5) from Special Crime Prevention Unit arrived at the scene and found the deceased lying on the ground bleeding from his neck. He was the officer who was chasing the vehicle of the Accused.

As the Prosecution case rests on their respective evidence I shall endeavour to consider the same closely.

PW.1 was in a group of four police officers including the deceased under the command of PW.2. They were deployed to combat crime along Juja Road. At around 7.30 p.m. while they were preparing for their patrol duty in the compound of Pangani Police Station he heard gun shots which kept on approaching the station. When they neared the Police Station, he saw a 504 Peugeot Saloon being chased by a green Land Rover. The vehicles went towards direction of River Road, Ngara. They all went out and gave chase. At the junction of Ngara and River Road which is at a distance of about 200 meters from their station, the driver of Peugeot 504, finding traffic jam, abandoned his vehicle and started running towards the direction of the Police Station. The green Land Rover also stopped and its occupants came out and continued chasing the driver of the Peugeot Saloon car. There were many road users at the time and thus he could not see how many came out from the Land Rover.

Himself and his colleagues started running towards the direction of those two vehicles and met the Accused running towards them shouting 'catch him'. He was speaking in Kiswahili. The Accused was pointing ahead but there was no one ahead of him and that is why they confronted the Accused. Cpl. Kimengwa (PW.2) held him by his waist and he himself ordered the Accused to raise his hands. The Accused did so and was searched. That time PW.1 was facing the Accused who was found to be unarmed. While the Accused was standing in front of him, suddenly he grabbed his fire arm, a browning pistol which was already cocked, obviously, because they were on the chase. The Accused twisted the firearm and squeezed its trigger. It first caused injury to the left hand of Cpl. Kimengwa (PW.3) and hit the deceased on his neck.

According to PW.1, Cpl. Kimegwa was on his right side and the deceased was on the right side of Cpl. Kimegwa (PW.2), who got hold of the Accused after the incident and retrieved his firearm and made it safe. He also took firearm of the deceased which was AK 47 Rifle. Thereafter Cpl. Kimegwa called for transport to take the deceased to the hospital. The deceased, on arrival of transport from nearby Pangani Flying Squad, was taken to Guru Nanak Hospital but was pronounced dead on arrival.

This witness confirmed that due to lights from shops and residential places, there was enough light and that the shooting was directed at the Peugeot Saloon, which was being chased and that was the reason he noticed the two vehicles. He clarified further that while the Accused was searched and held by PW.3, he (the witness) was pointing his Firearm at him (the Accused) and he was about 3 to 4 feet away from the Accused. He also demonstrated how the Accused grabbed and squeezed the trigger from his firearm. PW.2 Cpl. Alfred Kimegwa was in command of the group of other three officers. As per his testimony he heard gun shots at around 7.30 p.m. and saw a white Peugeot Saloon being chased by a green Land Rover. Those vehicles were coming from Pangani Shopping Centre and were negotiating Ring Road/Juja Road heading towards Park Road direction.

They got ready as the two vehicles were passing towards their direction and pointed their fire arms towards the Saloon car but it did not stop and sped off. While it passed through the Police Station he saw the driver as its sole occupant. Any way, he knew that the vehicle will face traffic jam at Ring Road – Murang'a Road and directed his officers to go on foot towards its direction. While going towards the said direction, he saw a person running towards them, others behind him. There were shouts of 'catch him – catch him'. As there were many persons on the road, he directed his officers to stop any one coming towards them. He saw a suspicious looking person going backwards shouting 'thief – thief' and he ordered him to stop and raise his hands. This part of his evidence varies slightly from the evidence of PW.1, but considering the relevant evidence as a whole, I do not consider that the discrepancy is material. I also say so because the incident occurred fast which culminated in death of one of their colleagues.

I also add here that at the end of everything it was the Accused who was ordered to be stopped, and while he was in their custody, a gunshot was fired which killed the deceased. Thus the discrepancy between the two testimonies may not be very relevant. In his further testimony, it was stated that although the person held did not look armed, he directed his officers to cover him while he made a quick search. The person seemed to be in a hurry to leave and he held him by his waist belt, and waited for persons/officers who were chasing him to arrive so that they could confirm whether the one held by them was the person being

chased. When he was looking back to see whether they were coming the Accused started struggling to free himself and at that time the person moved towards P.C. Mukui (PW.1) and before he could know what was happening he heard a gun shot. Immediately he pushed the person back pointing his gun and ordered the person to sit down. By that time he saw the deceased falling down and that made him realize that he (deceased) was shot. He also corroborated the testimony of PW.1 that PW.1 was to his left and the deceased was on his right side.

The officers chasing the person arrived that time and took him under their custody. The deceased was taken to Guru Nanak Hospital by Flying Squad staff and PW.1. He also testified that the person (identified as the Accused) was being chased for a drug case and the Saloon car had 130 stones of bhang. During cross-examination he did specify that he was holding the Accused with his right hand facing him and they all were on the left side of the road. The deceased was at an arm length on his right side. He reiterated that the Accused was struggling all the time even though he agreed that he had not recorded that fact in his statement. He showed scratch mark on his arm which was grazed during the incident. He denied categorically that the officers chasing the Accused were firing and also confirmed that the gun was snatched from PW.1 which fact the later had amply testified.

Emmanuel Lagat (PW.4) is Fire Arms Examiner and after testing the fire arm of PW.1 (Ex.1) and an expended cartridge (Ex.3) he came to the conclusion that Ex.1 was a firearm capable of being fired and Ex.3 was fired from Ex.1. This firearm was not dusted so as to lift finger prints therefrom.

PW.5 is Cpl. Kariuki from Special Crime Prevention Unit. According to his testimony it was on 10th April, (not February), 2004 (I find that it is an error), that he was on patrol in a Land Rover Registration No. KAP 225 Q and he received information that a vehicle registration No. KZP 075 Peugeot Saloon was carrying bhang. He described in detail how that vehicle was chased and blocked at one point near what he described as Eldoret Bus Stage. There were two occupants in the said saloon car and the passenger got away. In a confusion that arose as a result of their bid to pursue that passenger, the driver sped away in the vehicle. He was chased up to the point where the driver abandoned the vehicle near Pangani Flying Squad office and started running towards Pangani Police Station. The driver while running was shouting 'thief – thief' and they could have lost him in the crowd but they heard a gun shot and went to its direction passing through a crowd. He saw a police officer lying down bleeding from his neck. He also confirmed that the Accused, who was apprehended by officers from Pangani Police Station was the driver of the vehicle he was chasing. He also testified that from that vehicle 1030 stones of bhang were recovered.

Although there is no evidence before this court of recovery of that big haul of bhang from the Peugeot saloon, I may not consider it fatal or material only because the accused in his sworn testimony had stated that he was carrying cartons in his vehicle which he transferred in his vehicle from the stranded vehicle of a friend. The accused also has conceded that he was chased by a Land Rover which he believed to be that of thugs and that he received a gun shot injury as a result of firing by occupants of that vehicle. He also stated that he abandoned his vehicle due to traffic jam and ran towards Pangani police station. Though his reasons to do so was said to get protection from the police, he did corroborate in all material aspects the testimonies of all the police witnesses of the chase which ended when he was held by police officers coming from opposite direction.

In the premises what is in issue is whether the deceased died as a result of the accused firing the fire arm of PW.1 or as a result of someone just emerging from the crowd and firing at him and disappearing once again in the crowd.

It is not denied by the defence that the accused was a retired Army officer. That means that he is well trained to use Fire Arms. The accused also stated that when he was running, the people were shouting 'thieves, thieves' and in any event he has not stated that he was fired at while running on the road towards the Pangani police station. He has also conceded that he was detained by police officers. In view of those circumstances I shall not accept the defence of the accused, when he said that someone emerged from the crowd, shot the deceased and again disappeared. There were many people around (crowd as described by all) four officers who had kept him as well as the officers who were chasing him. With all these people

around it would not be possible for someone to have just disappeared after shooting the deceased.

I do not have any doubt that it was the accused, in desperation to run away, struggled with PW1 who was armed and during this struggle the fire arm was triggered which killed the deceased person.

The question shall remain whether the accused had an intention to kill him? That may not be but being an Army officer he knew or ought to have known that he was struggling to get a firearm which, if triggered, could cause death of a person. With this knowledge, I could find that the accused had malice afterthought as per sec.206 of the Penal Code.

In the premises, I do enter a finding of guilty against the accused and find him guilty of offence of murder of the deceased as charged.

The assessors opined that the accused is not guilty on reasons tendered by them. Those reasons included (a) how the bullet fired hit left hand of the PW2 and then hit the deceased who was on his right hand. To this I shall say that one has to recall that he was holding the accused with his right hand and looking back to check whether the officers chasing the accused were on their way, (b) they also wondered how the accused could be strong enough to struggle when he was hit at the back. Once again it is the accused who agreed that he was avoiding the chase even after he was hit. He drove the vehicle in speed, even stopped and ran towards the Pangani police station. He only came to realize that he was hit, when he was in the police station after his arrest. These facts as noted by me, do negate their grounds on which they found the Accused not guilty. On the said observations I made on the assessors' opinion as well as my reasons for arriving at my finding of guilty, I do not agree with their opinion. Due to mandatory sentence imposed by Sec.204 of the Penal Code, I sentence the accused to death as per law.

Right of appeal within 14 days.

Dated and signed at Nairobi this 20th day of December, 2005.

K.H RAWAL

JUDGE

20.12.2005