

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 37 OF 2002

REPUBLIC.....PROSECUTOR

VERSUS

WYCLIFFE OTIENO KAHUMBA.....ACCUSED

JUDGMENT

The accused is charged with murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on the 21st February 2002 at Ting'ang'a village in Kiambu District within Central Province he murdered MARY NJERI.

Briefly the prosecution case is that on the 21st February, 2002 at about 10 pm while PW4 STANLEY MATHU was on his way to Ting'ang'a Shopping Centre, he was attacked at the Ndumberi-Githunguri junction and robbed of cash Sh.200/= and an ID Card. He went and reported the robbery to the Chiefs Camp. At that time the accused WYCLIFFE OTIENO and another Administration Police Officer were on duty. The accused and his colleague AP FREDRICK KALIVOLA and in company of the area Sub chief decided to rush to the scene and see if they could apprehend those thieves. They approached PW2 DAVID NJUGUNA who had a pick up to drive them to the scene. When they reached the junction of Ndumberi-Githunguri, they saw some two people jump into the bush. The accused fired 2 gun shots towards that direction and they drove away. One of those gun shots hit the deceased and killed her. The matter was reported to the police at Kiambu Police Station. The police from Kiamba Police Station visited the scene and collected the body of the deceased. Later the accused was arrested and charged with this offence. The prosecution called 10 witnesses who testified.

PW4 STANLEY MATHU in his evidence told the court that on the material date at about 10 pm while he was on his way to Tinganga Shopping Centre, he was stopped by 2 men who were in police uniform and robbed of cash Sh.200/= and an ID Card. He went and reported the robbery to the accused and his colleague AP FREDRICK KALIVOLA. The area Subchief also happened to be around. They decided to rush to the scene and see if they could arrest those thieves. The two Administration policemen and the sub-chief approached PW2 DAVID NJUGUNA who had a pick up to rush them to the scene. PW2 DAVID NJUGUNA in his evidence told the court that as he rushed them to Ndumberi-Githunguri junction but before they reached there, the 2 APs who were on the pick up shouted "SIMAMA WAKORA NDIO WALE" Stop, there are the thugs. But before he stopped he heard two gun shots from the pick up. He then remarked "The thugs have escaped. He then drove them back to Ting'ang'a Trading Centre. The next day he came to learn that there was a woman who had been shot dead at the scene of the shooting the previous night. He visited the scene and confirmed that that was the spot where the APs had shot twice while he carried them in his pick up.

PW1 GITAU who was with the deceased in his evidence told the court that on the material date while he was on his way to Githiora Trading Centre in company of the deceased two vehicles came following one another. This was at about 10 pm. Through the head lights of the second vehicle they were able to see the 2 Administration policemen on the pick up as they were in uniform. Fearing arrest he jumped into a Napier grass plantation. He then heard shouts from the pick up. "WAKORA NDIO WALE SIMAMA" "There are the thugs stop" This was immediately followed by two gun shots and that pick up drove away. When he went to check where he had left the deceased, he found that she had been shot on the chest and he went and informed PW3 PETER NJOROGE. They went back to the scene and confirmed that the

deceased was dead. They reported the matter to the police.

PW8 DONALD MUGO who is the Firearms Expert in his evidence told the court that he did examine the exhibits and formed opinion that the 2 bullets, one of which shot the deceased were fired by a G3 rifle S/No. A14463 the fire arm which had been issued to the accused. PW9 DR. JANE WASIKE who performed the post mortem on the body of the deceased formed opinion that the cause of death was due to chest injury following a bullet wound. When the accused reported the incident to Kiambu Police Station, they informed PW7 C I CLIFTON ANAMI that they had received a report of a robbery which had taken place within Ting'ang'a Village near the main junction along Ndumberi-Githunguri Road. They visited the scene and saw some people who ran away when they saw them. They fired two rounds of ammunition but they did not arrest anybody. They also told him that there was tension in the area because a girl had been shot dead. They went to the scene and recovered the body of the deceased. He arrested the accused and APC Kalivola and withdrew the guns from them. The accused was later charged with this offence.

The accused WYCLIFFE OTIENO KIHUMBA in his unsworn defence denied the charge and told the court that he was attached to the Chiefs camp Ndumberi location. On the material date at about 10.30 pm PW4 STANLEY MATHU reported that he had been robbed cash Sh.200/= and an ID Card by two thugs who were in police uniform at the Ndumberi - Githunguri junction. They booked the report. Another man who had been robbed at the same spot also came and made a report. He was with AP Kalivola. They decided to rush to the scene. They requested PW2 Njuguna Njoroge who had a pick up to drive them there. But before they left, the area sub-chief also came there. They proceeded to the scene. When they reached near Ndumberi - Githunguri junction they were blocked by another vehicle and two people came out of that vehicle and advanced towards them. He cocked his gun and also APC Kalivola did the same. When those people realized that they had cocked their guns they drove away.

PW 4 decided to drive them back to Tinganga Trading Centre. They were confronted by 4 people who reported to them that there was a lady who had been shot by thugs near Ndumberi-Githunguri junction. They went and reported the incident at Kiambu Police Station. Accompanied by police officers from Kiambu Police Station they visited the scene and managed to trace the body of the deceased. They were placed in the cells by the OCS Kiambu Police Station and their guns taken away.

The accused admits to have been at the scene the night the deceased was shot dead and he was present when her body was traced. But denies to have shot her. He admits that they were threatened by some 2 people who had blocked them but when they cocked their guns those people drove away but denies to have shot any one or shot at all.

But there is evidence by PW 2 Njuguna who had drove the accused to the scene that the accused had shot twice at the scene where the body of the deceased was discovered. There is also evidence by PW 7 CLIFTON ANAMI that the accused had reported to him that they had shot twice at the scene and this was confirmed by PW 2 Njuguna who had driven the accused to the scene to trace the thugs.

There is also evidence by PW 8 DONALD MUGO the fire arms examiner that it was gun G3 S/No A 14463 which had shot the two bullets. This is the same gun that had been issued to the accused.

I am satisfied that it was the bullet fired by the accused that killed the deceased. The next question is whether from the evidence on record the prosecution have proved that the accused had committed a murder. To prove this the prosecution have to establish that the accused of malice aforethought caused death to the deceased by an unlawful act or omission. There is evidence that a report of robbery along Ndumberi-Githunguri junction had been made by PW 4 Mathu. He said he was attacked by 2 thugs who were in police uniform. The accused proceeded to the scene. When they reached the scene they saw some one jump into the nappier plantation. This was PW 1 Gitau who was with the deceased. The deceased just stood there. She was a girl of about 15 years and she was not in police uniform. The accused could not have mistaken her for the 2 thugs who had robbed PW 4 Mathu since those thugs who robbed PW 4 were in police uniform and they were men. There was no danger of eminent attack to warrant use of a gun. Although there is no evidence that the accused had formed an intention to kill the deceased but the killing was unlawful. Section 202 of the Penal Code provides that any person who by an unlawful act or

omission causes the death of another person is guilty or the felony termed manslaughter

. I find the accused guilty to manslaughter. All the assessors returned a unanimous verdict of guilty to manslaughter. The accused Wycliff Otieno Kahumba is convicted of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

Dated at Nairobi this 9th day of June 2004.

J.L.A. OSIEMO

JUDGE