



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 99 OF 1998

REPUBLIC.....APPLICANT

VERSUS

1. DAVID AKIKI KIWANUKA

2. CHARLES MUHANJI WAMUTHONI

3. CHRISTOPHER LUBANGAMLONDO.....RESPONDENTS

J U D G M E N T

The three accused persons, David Akiki Kiwanuka,, Charles Muhanji Wamuthoni and Christopher Lubanga Mlondo were charged with two counts of murder c/s 203 as read with section 204 of the Penal Code.

In Count one, the particulars of the charge state that, on the 16th day of may, 1998 at the junction of Limuru/Forest Road in Parklands Nairobi within Nairobi area, jointly with others not before the court, they murdered Sanda Shonga Seth.

In count two, on the same day and at the same place, the three accused, jointly with others not before the court, were said to have murdered Bosco Nkuliyubu Keye. Each of the three accused persons denied the offences.

The three accused h aving denied the offences, the republic was duty ound to prove the same against each of he three accused persons.

The late Sendashonga Seth the deceased in Count one of the charge was a self employed businessman running a Forex Bureau at Gigiri Nairobi in partnership with other people. The said business had been running for about 6 months before his death.

Going by the evidence of Pw11 Cydriaque Nikuze ssndashonga, the wife of the deceased, her husband was involved in political activities in Rwanda between 1993 and 1995, having joined the Rwandese Patriotic Movement in August, 1993.

A peace agreement was signed in Arusha, Tanzania whereby sharing of power was agreed upon between the Government and the rebels Sandashonga, the deceased was designated to become a member of the New Fransitional Government and so he left his job at habitat Nairobi to return to Rwanda.

The peace agreement was not implemented and a new war broke out in April, 1994 following the death of President Habiarimana whose plane was shot down.

Between April and July, 1994 genocide was the order of the day in Rwanda. The Government was ousted and a new one formed.

The deceased Sendashonga became the Minister for Interior from July 1994 to July, 1995 after which he resigned in August, 1995 after he disagreed with the military about security matters.

In November, 1995 he came to Kenya and continued political activities with other Rwandese living abroad. They tried to form a political party to address the situation human rights.

On 26th February, 1996, there was an attempt on the life of the late Sendashonga at Nairobi West. A suspect one Francis Mugabo was found in possession of a gun. This man then an attaché in the Rwandese Embassy in Nairobi, was arrested. The Kenya Government asked for the waiver of the Diplomatic immunity of the suspect from the Rwanda Government but was refused. A Diplomatic row followed which led to the closure of the Rwandese Embassy in Nairobi.

While in Nairobi, the deceased Sendashonga sought dialogue for the Rwanda crisis. He met several dignitaries in Nairobi between February and April, 1998. By then the Rwandese Embassy in Nairobi had been re-opened.

Strange people started following the deceased. At one point some people went to his residence posing as police officers but when asked to identify themselves they left. The Special Branch was kept informed of all these matters.

On 13th May, 1998, Ali Abdul Nasser (Pw2) who is a Taxi Driver was approached by a man who wanted to hire killers to eliminate a man who had allegedly swindled his father of some money. It is not clear what exact figure the witnesses talked about because whereas he mentioned a sum of Kshs. 50,000,000/- some material before the court talks of US\$50 Million.

Be that as it may, Pw2 Ali, was to be shown the victim on whose head a sum of Kshs. 100,000/- was placed. Pw2 Ali who doubles as a police informer, decided to report to the police. He informed Chief Inspector Daniel Songol Seroney (Pw17) of C.I.D Nairobi. This was on 14th May, 1998.

Seroney in turn detailed two police officers Cpl Oburu and P.C. Ewoi to pose as killers ready to take up the assignment, with a view to eventually apprehend the hirer. The two police officers in company of Pw2 Ali, went and saw the man who wanted to hire the killers. This man has now been identified as David Akiki Kiwanuka, the first accused in this case.

The two police officers posing as killers are said to have accepted the assignment but the first accused informed them that he was expecting some guns from Uganda and a meeting was arranged for the next day, the 15th day of May, 1998.

On 15th May, 1998 the two police officers and Ali Pw2, turned up as agreed but the first accused never turned up. They again went back on 16th May, 1998 but once again the first accused failed to turn up.

In the meantime, the first accused is said to have shown Pw2 Ali, the house of the victim to be and his business premises – a Forex Bureau at Gigiri. He was also shown the man driving his car along one of the City Roads. This man turned out to be Sendashonga Seth, the deceased in Court one herein.

On 16th May, 1998 at about 4.00p.m, two occupants in Motor vehicle Reg NO. UNEP 108K were shot at the junction of Limuru/Forest road. Police received information and immediately rushed to the scene of the shooting. S.S.P. Joseph Kimaru Chumo Pw1, the then D.C.I.O Gigiri was one of the first Police officers to arrive at the scene.

S.S.P Chumo noticed that the man seated on the passenger seat was already dead while the driver who was seriously wounded was still breathing. He organized for the injured driver to be taken to Aga Khan Hospital. Police received information that the attackers sped away in a getaway car whose description

was given.

At the scene of the shooting, S.S.P Chumo recovered one spent cartridge. He also noticed that the dad man had a name tag reading "Sendashoga Seth UNEP". He then went towards the direction taken by the suspects' car along Wambugu Road. About 2 to 3 kms. Away from the scene of the shooting, the suspects's car reg NO. KAJ 426Z had been abandoned. Inside the said car, Mr. Chumo recovered two more spent cartridges similar to the one he had recovered earlier at the scene.

Pw3 Nimish Shah and Pw4 Agnes Ngina resided near the place where the suspects' car had been abandoned. Both saw the suspects – two in number leave the car hurriedly. These two people were very tall.

The injured driver who had been rushed to hospital succumbed to other injuries sustained and was pronounced dead on arrival at the hospital. His name is Bosco Nkuliyubu Keye, the deceased in count two of the charge herein. Pw15 Dr. Alex Onzere Kirasi Olumbe performed postmortems on the bodies of the two deadmen. Both men sustained injuries to the head consistent with gunshot wounds from a distance, inflicted by a high velocity firearm. In the opinion of Dr. Olumbe, the cause of deaths in respect of the two men was due to gunshot wounds to the head. He produced the autopsy reports as exts 10 and 11.

Chief Inspector Daniel Songol Seroney Pw17, was one of the first police officers to receive the report of the shooting. He also went to the scene. The particulars of the deceased Seth and his car tallied with the information already in his possession. He sought Ali Abdul Pw2, with a view to arresting the first accused.

Ali Abdul Pw2, who knew the home of the first accused led the police thereto and an ambush was laid. The first accused was arrested on 19th May, 1998. He then led the police to Ngara where Accused two and three were arrested.

On his arrest and subsequent interrogation, the first accused allegedly confessed to Chief Inspector Seroney that he had now accomplished his mission and was ready to die. It also transpired that the accused two and three were in the plot to kill Sendashoga Seth. C.I.P Seroney to whom he also conferred then took the first accused to the former director of C.I.D Mr Too In the same words.

A search was conducted at the home of the first accused where a Baretta pistol and 26 rounds of ammunition were recovered concealed in a flower pot.

The first accused made a statement under inquiry to an Inspector of Police called Annie. It was self recorded after he was cautioned in respect of two offences; Murder c/s 203 as read with section 204 of the Penal code and conspiracy to commit a felony c/s 393 of the Penal Code. The felony was said to be murder.

In a nutshell, the thrust of that statement (Ext3) made on 19th May, 1998 is that, his father one Alaari Kakiza Kiwanuka worked both in Uganda as a Director of Immigration and in Rwanda in the office of the President.

When the father of the first accused worked in Rwanda the late Sendashoga was the Minister for Internal affairs and were good friends. They met every other day in the home of the first accused at Kigari and even did business together.

The father of the first accused and the late Sendashoga happened to push a deal earning a sum of U.S. \$50 million. The late Sendashoga took off with all the money and organized the elimination of the father of the first accused. The father was killed. The family met and agreed that Sendashoga should also be killed. The first accused took it upon himself to accomplish the mission on behalf of his family.

The foregoing led to the hiring of accused two and three to carry out the task of killing the late Sendashoga. The two were paid some money and with it purchased a small pistol. On being tested it was

fond to be weak and so they went for some more money to buy a better gun. They returned the small pistol to the first accused. They undertook to end the mission within the shortest time.

The second accused Charles Muhanji Wamuthoni also gave a statement under inquiry where he said he had been recruited by the third accused to join the plot. The gun that was to be used to kill the late Sendashonga was however returned to the first accused. He did not know anything about the killing on 16th May, 1998 and only read about the same in the newspaper the following day.

The third accused Christopher Lubangu Mlondo also gave a statement under inquiry. The totality of the said statement is that he denied any involvement in the crime.

All these statements were admitted in evidence as Exts 3,4 and 4 without any objection from the defence.

The Pistol and ammunition that were recovered from the house of the first accused in a flower pot were examined by Pw12 Mbogo Donald Mugo a firearm examiner. The pistol s/NO B258362 was a Crvena eastava made in Yugoslavia. It was in good general and mechanical condition, complete in all component parts and capable of being fired.

Another firearm, examiner Benson Gichuki Nduguga Pw13 examined 3 spent 762 Mm caliber cartridges. They were all fired from one Ak47 assault rifle.

Another expert John Kimani Mungai Pw5 a Government Chemist examined some hair recovered from a comb found in the car abandoned by the killers alongside samples obtained from the three accused. His findings were that they were unrelated.

An identification parade was conducted where at Pw3 Nianish Shah and Pw4 Agnes Ngina were the witnesses. Both had seen two people run off from the abandoned car. None could identify any of the suspects.

Inspector of Police John Kathae was the investigating officer. From the material gathered he investigated three key leads: revenge, assassination and political. In his opinion, the murder was political. He did not believe the first accused. By his statement, he intended to deceive the investigators.

Inspector Kathae revisited the shooting of the late Sendashonga in 1996 by a Diplomat whose arrest and prosecution was blocked by refusal to waive his diplomatic immunity. He also interrogated the wife of the first accused who revealed that a Rwandese, one Alphonse working at the Rwandese embassy was sponsoring their family. He wrote the authorities to waive his diplomatic immunity so that he could interrogate him. There was no reply. He wrote to P.C. 10 Nairobi so that authority could be granted to extend the investigations outside Kenya. There was no reply. This officer concluded that investigations were frustrated by the Rwandese Government.

When put on their defences, each of the three accused persons denied any involvement in the offences charged. They were each at their respective homes and not at the scene of the killing.

After submissions and summing up to assessors, the three assessors returned a verdict of Not Guilty in respect of each of the three accused persons. The said verdict was unanimous. However, as the verdict of the assessors is not finding on this court, I have made an independent evaluation of the entire evidence on record to come to an independent conclusion.

The Republic has proved beyond any reasonable doubt that the two deceased persons died. They both died of gunshot wounds. The single spent cartridge recovered at the scene of the shooting and the two recovered from the abandoned car were examined and found to have been fired from one rifle an Ak47. And so, the two deceased persons were killed by use of an ak47 assault rifle. It is the people in the abandoned motor vehicle who fired the fatal shots. These are the people who were seen by pw3 Nimish and Pw4 Agnes escaping in a hurry after abandoning the motor vehicle.

However, those are not the same people now before this court. The assailants were described as very tall people. The three accused were asked to stand in the dock. The two witnesses were emphatic that they were not the people they saw on that day. The identification parade produced negative results.

The comb recovered in the abandoned car had some human hair. The hair was subjected to scientific analysis alongside samples obtained from each of the three accused persons. There was no relationship.

The ownership of motor vehicle registration NO KAJ 426Z used by the killers and later abandoned was also investigated by Inspector of Police John Kathae. A search at the registry of motor vehicle revealed that the records of the said motor vehicle were missing.

The irresistible conclusion is that, none of the three accused was at the scene on 16th May, 1998 when the two deceased persons were killed. The firearm Ext 6 and ammunition Ext 7 found at the home of the first accused were not used in the killing. To date, the murder weapon which was established by the examination of the spent cartridges recovered to be an AK47 assault rifle, has not been recovered.

I believe however, that, the first accused made contact with Pw2 Ali Abdul Nassar. This was also confirmed by Pw19 P.C. Michael Ewoi, one of the police officers detailed by Chief Inspector Seroney to pose as the killers. But that contact ended when the first accused failed to turn up for subsequent appointments.

On his arrest, the first accused led the police to the second and third accused who he had allegedly hired earlier to kill the late Sendashonga but failed. On the same day he offered to give a statement under inquiry which was self recorded. I have already addressed the details herein above. However, the investigating officer Inspector John Kathae at the end of the day disbelieved the statement. The wife of the late Sendashonga Pw11 also did not believe the contents of the said statement.

After the late Sendashonga was killed, the Rwandese Minister for Finance is said to have issued a statement to say that even the country did not have the kind of money the first accused said his father was swindled of by the deceased. The Minister for Foreign Affairs on the other hand said the late Sendashonga was a straight forward man and not a thief. The Governor of the Central Bank in Rwanda also said there was not such money. Despite all those statements, the charge de affairs for Rwanda in Nairobi one Alphonse Mbaire said, the business connection should not be dismissed.

I know most of this evidence came from Pw11 Cydriague Nukuze Sendashonga, the wife of the deceased. They had been married for 23 years and must have known him very well. She talked of him as a man of high principles, believing in justice and high integrity. He was not a man who could swindle anybody. He resigned to press for respect for human rights. He knew a lot and his resignation was not taken kindly.

A French Commission had been established to investigate abuse of human rights in Rwanda. The International Criminal Tribunal was conducting hearings in Arusha. The deceased Sendashonga was due to testify before both establishments. According to the wife therefore the killing was political.

I saw the wife testify before me. I watched her demeanour. I believe what she said of her late husband was the truth.

The alleged confession by the first accused to Chief Inspector Seroney Pw17 would not have any relationship with the actual killing of the two deceased persons. The officer did not even caution the first accused before he allegedly made a confession to him. Even when the first accused eventually recorded a statement under inquiry, he did not say he killed the two deceased persons.

The first accused on his arrest, took a mental flight invited Chief Inspector Seroney on board and from there the investigations took a road into oblivion.

The head of investigation Inspector John Kathae was however more cautious. He addressed all leads

possible. His investigations were however hampered by the diplomatic limitations he faced in his quest to establish the truth.

I am persuaded by the evidence adduced that the murder of Sendashonga Seth was political. His driver Bosco was killed either by gunfire directed at eh late Sendashonga or to ensure that the identify of the killers could not be established.

The reasons for the foregoing are as follows: The late Sendashonga fell out with the authorities in Rwanda. He resigned as The Minister of Interior Affairs. He must have know a lot about the system.

While in Kenya he continued to criticize the establishment in Rwanda. He and other Rwandese abroad tried to form a political party to address the situation in Rwanda. He met foreign dignitaries some of whom were opposed to abuse of human rights in Rwanda.

There was an attempt on his life in Nairobi in 1996. The Rwanda Government refused to waive the diplomatic immunity of the suspect to facilitate prosecution.

The French Commission and the International Crimes Tribunal in Arusha were addressing issue related to genocide and abuse of human rights in Rwanda. The late Sendashonga was set to testify threat. His elimination was therefore imminent.

There is no evidence to connect any of the three accused persons to the political clues that I have set out hereinabove. The two basic ingredients of the offence of murder, mens rea and actus reus have not been established by the republic.

The most that one can say is that, the first accused may have known of the plot to kill the deceased. That alone is not evidence to conclude that he executed the plot.

In the end therefore, I find that eh Republic has not proved the two counts of murder against any of the three accused persons.

Consequently, none of the three accused is guilty; each one of them is acquitted of the charges of murder aforesaid. I order that all the three accused persons shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 31st day of May 2001.

A.MBOGHOLI MSAGHA

JUDGE

Miss Wanyama for the state

Mr Waiganjo for the 3 accused

Mrs Kasago holding brief for the family

Assessors present.