



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO.7 OF 2000

REPUBLICPROSECUTOR

VERSUS

**1. FRANKLINE
GICHUNGE MANYARA**

**2. JUSTUS SAMUEL
MUSEMBI
.....ACC
USED**

JUDGEMENT

The two accused persons Frankline Gichune Manyara and Justus Samuel Musembi are police officers. Both stand charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge state that on the 28th February, 1999 at Korogocho Estate in the Nairobi area they jointly murdered Ibrahim Kullow Hussein. They denied the charge. That being the case, the Republic was duty bound to call evidence to prove the charge against the two accused.

A total of 14 witnesses were called to give evidence against the accused. The two accused have also presented their respective defences by way of unsworn statements. After the submissions by both learned counsel for the accused and Republic there followed the summing up to assessors. The three assessors returned a verdict of NOT GUILTY in favour of both accused. However, as the said verdict is not binding on this court. I have had to go over the entire evidence, evaluate the same and come to an independent conclusion.

Some of the witnesses have given more or less the same evidence and where that is the position, I do not deem it necessary to address individual testimonies.

The two accused were among five police officers attached to Ruaraka Police Post and detailed to patrol Korogocho area on the night of the 28th February, 1999. This area was said to be notorious for muggings and robberies. Among the group of officers there were P.C Aziz, P.C Kisisi and P.C Nchoe

who together with the two accused made the number five.

The police officers laid an ambush in wait for any suspects when at about 9.00p.m about 10 to 15 people, going by the evidence of P.W10 P.C Benson Tunuka Nchoe, appeared. The place was dark. This group of people was ordered to stop and the Police identified themselves. However, the group fired at the Police who in turn returned fire injuring two people in that group. The rest ran away. This witness P.W10 did not know who among the Police officers fired. The two injured people were searched by P.C Kisisi and P.C Aziz whereby a toy pistol and a Somali sword were recovered from them. This witness saw the suspects bleeding but he did not know where from. Police re-enforcements came after radio communication and the two injured people were taken to hospital in the company of the two accused herein.

Other than P.C Nchoe, excluding the two accused, no other police officer who was present at the scene at the time of the encounter, was called to testify in the trial.

PW.1 Yerron Allow Abdi was with the deceased on the night in question. The two were on their way home after prayers in a nearby mosque when they met a group of five people. Two out of the group shot at them whereby PW.1 was injured on the left arm while deceased was shot on the left thigh. This witness said he was able to identify the two accused in court at the ones who shot at them with the aid of electric lights.

After some time a police motor vehicle arrived with some police officers. The deceased boarded the motor vehicle on his own while PW.1 was carried into the motor vehicle and they set off towards the police station. This was however, not before the police shot in the air to clear the way after members of the public had gathered.

According to PW1, a Police Officer, I.P Sharmaboy, who had boarded the motor vehicle at the scene alighted before they reached the police station.

They were then driven towards Kenyatta National Hospital but before they reached the hospital, the motor vehicle was stopped and switched off. Both PW1 and the deceased were then shot at close range while in the motor vehicle and then driven to the mortuary. Doctors were summoned and on examination found PW1 still alive while his colleague was certified dead. PW1 was admitted for nine days and discharged only to be charged in court.

PW3 Abdow Ibrahim, PW6 Abdul Alokel and PW7 Isaak Adan Mahad were at the scene soon after the encounter narrated by PW1. they all said the scene was lit as there was an electrical post nearby with a strong light. They saw five police officers armed with pistols and the two young men who had been shot - PW1 to the arm and the deceased to the left thigh. PW3 said he went back to the scene on the following day and recovered a spent cartridge and an identity card which he handed over to the police.

The evidence of the civilian witnesses who went to the scene and that of police officers who were present does not tally in respect of the nature of light thereat. Whereas the civilian witnesses said the scene was well lit by aid of electricity light nearby, the police officers said it was dark and in fact they had to use torches to see.

Be that as it may, I believe there is no dispute that there was some shooting at the scene whereby the two people were injured. In fact, according to the investigating officer, PW13 Inspector Anthony Macharia, he believed there was a second shooting that led to the death of the deceased. It would appear that the accused persons and their colleagues are not being blamed for the shooting at Korogocho but thereafter as alleged by PW1 and the focus of the investigating officer.

This court must now examine the evidence from that angle. From the scene of shooting at Korogocho, the two accused persons boarded the same motor vehicle with the deceased, PW1, Inspector Sharmaboy PW12 AND P.C (W) Christine Chebon PW9. There were other police officers who were not called to give evidence but who according to the other witnesses were in the same motor vehicle. These

were P.C Gichuki of Muthaiga Police Station who was on crime standby with P.C (W) Chebon PW9, Cpl. Wesonga Duty Officer, Ruaraka Police Post and the Police driver, P.C. Gichera. There is evidence that after the motor vehicle left the scene, it was driven towards Muthaiga Police Station where P.C (W) Chebon and P.C. Gichuki alighted leaving the two accused herein, Cpl. Wesonga and I.P Sharmaboy to proceed to Kenyatta National Hospital with the two injured people. P.C Gicheru was still driving the motor vehicle. It is the evidence of I.P Sharmaboy that, he was dropped at the gate of Kenyatta National Hospital and went to his residence near the hospital and the motor vehicle was driven inside. His evidence was in direct contrast with that of PW1 who said that he (I.P Sharmaboy) alighted before the motor vehicle reached the hospital.

The deceased died on the same night and according to Dr. Alex Kivasi Olumbe PW2 and Dr. Michael Karume PW14, he died of a gunshot wound to the chest. Mr. William Lubanga, a firearm examiner was handed over several exhibits for examination. Among these were four revolvers, Serial Nos.v.639873, v.341962, v.334418, v.278630 marked Exhibits 4 to 7 respectively together with some fired cartridges. This witness confirmed that the firearms were in good general condition complete with all the component parts and capable of being fired. He successfully, testified the same. Of the four firearms the firearm examiner examined, he found that two Smith and Wesson Revolvers S/No.s v.639873 and v.278630 had been used to fire one and two cartridge cases respectively. Two revolvers S/Nos.v.341962 and 334418 had not been used to fire any of the exhibit cartridge cases.

The investigating officer also produced an extract of Occurrence Book (OB) Entry No.53 which contained the details in respect of this case and in particular the shooting of the suspects. From that entry, it is P.C Abdalla Kisisi and P.C Safari Aziz who fired two and one rounds of ammunition respectively on that night.

The motor vehicle that carried the injured persons to hospital was also examined and photographed and the report produced in Evidence - Ext.21. There was no track of any bullet holes.

In their respective defences, the two accused denied the offence. It is true, they said, they were on duty with the others as stated by I.P. Muthiani, PW8, their Incharge and P.C Nchoe PW10 who was in their company. There was an exchange of fire between the police and some thugs and two of the thugs were injured while some disappeared. They accompanied the injured to hospital where one died. On the following day, the two accused reported back to station and surrendered their firearms to the officer-incharge of the armoury. None of them had used any of the firearms and ammunition issued to them.

In a case of this nature, it was incumbent upon the Republic to prove beyond any reasonable doubt that it was the accused who pulled the trigger that discharged the bullet which hit the deceased causing his death. It must also be proved that they had the intention so to do and that they had a common intention.

The arms movement register was not produced in evidence. Up to now we do not know which police officer handled which revolver on that night or the number of ammunition issued. The O.B entry No.53 Ext.19 does not say it is the accused who fired at the scene. Those who did so are not before this court.

If the deceased was killed on the way to hospital as alleged by PW1, I.P Sharmaboy who was in the motor vehicle up to the hospital gate would have witnessed this. If on the other hand he was shot after the motor vehicle was driven into the hospital compound, there is no evidence that anyone witnessed this

It was conceded by prosecution witnesses that if there was any shooting within the hospital this could have been heard, no one heard this. There must have been guards at the hospital gate. If on the other hand, the motor vehicle left the hospital gate after I.P Sharmaboy alighted, the guards would have been called to say so.

There were two crucial people who remained in the motor vehicle from the scene up to the time two injured people were eventually handed over to the hospital personnel. These were Cpl. Wesonga and the driver of the said motor vehicle. For some reason these two people have not been called to testify.

This was a serious case yet the investigations were simplistic to say the least. The investigating officer alleged that his colleagues were engaged in a cover up. That was a serious allegation. He however did not take any steps to report this to his seniors with a view to charging whoever was involved in the cover up with the offence of conspiracy to defeat the course of justice contrary to Section 117 of the Penal Code.

The motor vehicle used to transport the injured people to hospital was also examined. There was no trace of bullet holes.

With that quality of evidence presented in a serious charge of murder, I am unable to agree that the Republic has discharged its duty under the law.

The charge has not been proved and the two accused must be acquitted. I therefore agree with the assessors in that regard. I therefore, find the two accused NOT GUILTY of the charge of murder as charged. I order that both shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2000

A.MBOGHOLI MSAGHA

JUDGE

Miss Nyamosi holding brief for Miss Shiundu for the Republic.

Mr. Mogikoyo for the Accused

Kugwa court clerk

Both accused called out present

ASSESSORS

Amos Ndolo

Josephine Onginjo

Charles Etemesi

COURT

Judgment read and signed in open court.

MBOGHOLI MSAGHA

JUDGE

31/7/2001

MR MOGIKOYO

We apply for a certified copy of the judgment

MBOGHOLI MSAGHA

JUDGE

COURT

Order as prayed

MBOGHOLI MSAGHA

JUDGE

31/7/2001