



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 23 OF 1997

REPUBLIC.....STATE

VERSUS

GEORGE GICHIA NGANGA.....ACCUSED

JUDGMENT

The accused, George Gichia Nganga is charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code. This arises out of a shooting incident which took place on the 28th day of September 1996 at Alnjoro Reserve in the Kajiado district of Rift Valley province in which David Kimeu Ndolo and Peter Ngugi died as a result of bullet wounds. The accused denied both counts.

The summary of prosecution case was as follows:- On the morning of 28th September, 1996 Paulina Wayua Kaloki (PW6) a businesswoman was in a lorry which was being driven by her driver Gilbert Maina Muhia (PW7). In the lorry, there was one David Kimeu Ndolo (deceased) sitting next to Muhia (PW7) in the driver's cabin. Kaloki (PW6) was in a bed at the back of the driver's seat. As the lorry proceeded and between 5.00 am and 6.00 am, the driver Gilbert Maina Muhia (PW7) saw four people who tried to stop the lorry but he did not stop. The four people started shooting at the lorry while Muhia (PW7) drove on. PW7 heard Kimeu Ndolo (deceased) crying that he had been shot. They went to Alnjoro Chief's Camp where they asked for assistance. The deceased Ndolo who had been shot was taken to Loitoktok Hospital and then the matter reported to Loitoktok Police Station. As a result of this report Inspector Samuel Onkwani (PW4) together with other police officers proceeded to the scene where they found yet another dead body. This was the body of the deceased Peter Ngugi. Next to the body was a mask (exhibit 1). Inspector Onkwani (PW4) collected the empty cartridges from the scene and then drew a sketch plan. The injured Ndolo died upon arrival at Loitoktok Hospital. That same evening of 28th September, 1996 the accused was arrested at his house. An identification parade was conducted in which the accused was a suspect and Gilbert Maina Muhia (PW7) and the wife of the deceased Peter Ngugi were the witnesses. At the identification parade Muhia (PW7) identified the accused as one of the four people that had shot at the lorry killing Ndolo and Ngugi while Naomi Wangari Ngugi (PW3) identified the accused as the person who had collected her husband (Peter Ngugi) on the morning of the incident.

David Njenga (PW1) testified to the effect that on 28th September, 1996 he received a report that Peter Ngugi had been attacked by robbers and that as a result, Peter Ngugi died. Hence, on 8th October, 1996 PW1 identified the body of Peter Ngugi to the doctor who performed postmortem examination.

AP Sillas Marete (PW2) told the Court that in 1996, he had been attached to Alnjoro AP Camp Kajiado and that on 28th September, 1996 at about 5.30 am he received a report from the complainants in this case that they had been attacked. PW2 then took the injured person to the hospital but the injured person died

on arrival at the hospital. Then at the scene of this shooting there was another person who had been shot dead and his body was taken to the mortuary.

Naomi Wangari Ngugi (PW3) was the wife of the deceased Peter Ngugi. She testified that on 27th September, 1996 at about 10.00 pm, she was at home with her husband Peter Ngugi and at about 4.00 am there was a knock at the door. When PW3 opened the door, the accused entered and after half an hour, the accused left together with Peter Ngugi. At about 6.30 am on 28th September 1996, PW3 heard people making noise and at about 8.00 am she was told that her husband had died. Then on 1st October, 1996, she went to Loitoktok Police Station where she identified the accused as the one who had called her husband.

Ndolo Makau (PW5) stated that David Kimeu Ndolo (deceased) was his son and that on 29th September, 1996 he received information that his son had been killed by thieves. As a result of that information, he left Yatta for Emali where he found Pauline Wayua (PW6) who had employed the deceased Ndolo. Then on 4th October, 1996, Ndolo Makau (PW5) identified the body of the deceased Ndolo to the doctor who performed postmortem examination. After the postmortem examination the body of the late Ndolo was released to Ndolo Makau (PW5) for burial.

Sgt Aloys Kimani (PW8) testified that on 4th October, 1996 he conducted identification parade at Loitoktok Police Station. In the parade the suspect was the accused and Gilbert Maina (PW7) was the witness. During the identification parade the accused was identified by the witness Gilbert Maina (PW7). The parade form which the accused also signed was produced as exhibit 3.

Then on 4th November, 1996 Sgt Kimani (PW8) escorted the empty cartridges to CID Hq, Nairobi. He filled the exhibit memo form which he produced as exhibit 4. The empty cartridges were produced as exhibit 5.

PC Benedict Kioko (PW9) who was the investigating officer in this case testified to the effect that on 28th September, 1996 he was attached to Loitoktok Police Station and that on the said day (28.9.96) at about 7.20 am two people - Pauline Wayua (PW6) and Gilbert Maina Muhia (PW7) reported to him that they had been attacked by four gangsters. As a result of this report, PC Kioko (PW9) visited the scene where he found dead body of one Peter Ngugi. Then on 29th September, 1996, the accused was brought to the Police Station by PC Sillas Marete. On 4th October, 1996 PW9 escorted the accused for medical examination and the report by Dr Tusho was produced as exhibit 6. PC Kioko (PW9) produced two postmortem reports (exhibits 7 and 8) together with the report from ballistic expert (exhibit 9).

At the close of prosecution case, a submission was made by Mr Mburu for the accused to the effect that no *prima facie* case had been established to warrant the accused being put to his defence but that submission was, after due consideration, rejected. Hence the accused was put to his defence.

The accused in defending himself chose to make unsworn statement. He stated that he was in the business of selling *mitumba* (second hand) shoes and that on 27th September, 1996 he took his *mitumba* shoes to a town known as Ilasit. While there the deceased Peter Ngugi who was accused's friend came and chose two pairs of shoes and asked him (accused) to take the shoes to his (accused's) house as Peter Ngugi was going elsewhere. In the evening, the accused went home where he reached at about 6.30 pm. Then at 7.45 pm he went to Ngugi's house where he remained until 8.30 pm when Ngugi escorted him. On the following day (28.9.96) the accused was at Ngama trading centre where he stayed until 5.30 pm and then went home reaching there at about 6.30 pm and that is when he was arrested by administration policemen who searched his house but recovered nothing. That is when the accused learnt that his friend Peter Ngugi had been killed.

As regards identification parade, the accused said that this was held on 4th October, 1996 and that when he appeared on the parade, he was very different from the other members of the parade who were smartly dressed while he was not as he had just been taken from the police cells. He also said that the identification parade was held in the open. It was the accused's contention that he was not involved in this offence and that he was sorry about the death of his friend Peter Ngugi.

After final submissions by the learned state counsel and the defence counsel, I did the summing up of the evidence and the law to the assessors who returned a unanimous verdict of guilty.

In this case, the accused is charged with two counts of murder. From the evidence on record, this case arises out of a shooting incident which took place on the morning of 28th September, 1996. We have evidence to the effect that Paulina Wayua Kaloki (PW6) a businesswoman was with her driver Gilbert Maina Muhia (PW7) and a worker David Kimeu Ndolo (deceased) in a lorry at about 5.00 am when as they drove on, a gang of four people who were armed with guns started shooting at them. The deceased Ndolo who sat next to the driver Muhia (PW7) was shot and as a result died on arrival at Loitoktok Hospital. The deceased Peter Ngugi was found lying on the road with bullet wounds. He too had died as a result of these bullet wounds. It was the prosecution case that the deceased Ngugi was one of the gangsters and so was shot by his colleagues by mistake. The accused is said to have been identified as one of the gangsters. The evidence of identification is provided by the testimony of Gilbert Maina Muhia (PW7) who said that he saw the accused and that he had known the accused before. The accused in his defence denied any involvement in the crime and as far as he was concerned, he was elsewhere. Hence the accused put forward alibi as his defence. In *Sekitoleko v Uganda* [1967] EA 531 at p 533 Sir Udo Udoma CJ said:-

“In *R v Johnson* [1961] 3 All ER 969 the general principle of the law applicable to the defence of an alibi was enunciated. It was laid down as a general rule of law that if an accused puts forward an alibi as an answer to a criminal charge, he does not thereby assume a burden of proving the defence: and that the burden of proving his guilt remains throughout on the prosecution”.

Once the accused in this case put forth an alibi as his defence it was upon the prosecution to disapprove that defence and go on to show that the accused was indeed at the scene of crime and that he committed the offence as charged. Prosecution case is based entirely on the evidence of identification by Gilbert Maina Muhia (PW7). This is the witness who said that he saw the accused as one of the four gangsters who confronted them that early morning. This evidence must be closely examined because that is the only evidence implicating the accused as the search in accused's house yielded nothing incriminating. This is evidence of identification by a single witness. In the well known case of *Abdalla Bin Wendo and Another v R* (1953) 20 EACA 166 at P 168 the Court of Appeal said:-

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error”.

The above was cited with approval in the later case of *Roria v R* [1967] EA 583 but in this case of *Roria* the issue of identification was taken a step further when the Court of Appeal said:-

“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner LC said recently in the House of Lords in the course of a debate on s 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the Court to interfere with verdicts:

‘There may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity’.

That danger is of course greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this Court to satisfy itself that in all circumstances it is safe to act on such identification.”

And in the English case of *R v Turnbull* [1976] EA 3 All ER 549 (a case relied on by Mr Mburu for the accused) Lord Chief Justice gave the following directions:-

“First whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of identification or identifications. In addition he should instruct them as to the reason for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way as for example by passing traffic or a press of people? Had the witness even seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?”

These guidelines were found appropriate and have been followed by Kenyan Courts as stated in *Joseph Ngumbao Nzaro v R* [1988-1992] 2 KAR 212.

In this case we have the evidence of Gilbert Maina Muhia (PW7) to the effect that he recognized the accused among the gangsters that were shooting at them that morning of 28th September, 1996. It should be pointed out that the incident took place early in the morning between 5.00 am and 6.00 am. AP Sillas Marete (PW2) testified that on 28th September, 1996 he was attached to Alnjoro AP Camp and that it was 5.30 am when the complainants reported that they had been attacked. On being cross-examined on this point AP Marete (PW2) stated *inter alia*:-

“Complainants came to report at 5.30 am. I checked on my watch. When the complainants came at about 5.30 am it was still dark”.

Inspector Samuel Onkwani (PW4) who was the Deputy OCS at Loitoktok Police Station while giving his evidence in chief stated that he received information that thugs had raided a vehicle which was going to transport maize. On being cross-examined on this point Inspector Onkwani (PW4) said:-

“The two people reported that they had been attacked. They came to the police station at about 7.20 a.m. The attack was around 5.00 am to 6.00 am.

It is important to note that the attack was first reported to the Alnjoro AP Camp and thereafter to Loitoktok Police Station. AP Marete (PW2) who received the report at AP Camp said that the report was made at about 5.30 am and that it was still dark. Since the attack took place before 5.30 am, then it must have been dark when Muhia (PW7) said that he was able to recognize the accused. In view of the evidence of PW2 and PW4 can it be said that at the time the incident took place the prevailing conditions were favourable for a correct identification?

The only other evidence that can be considered against the accused is to the effect that that early morning the accused went to the house of the deceased Ngugi and then the two left at about 4.30 am and that soon thereafter there was this shooting incident. But why should the accused shoot his friend Peter Ngugi (the deceased)? It is rather puzzling how the deceased Peter Ngugi met his death. Then when we come to identification parades it was not clear as to who conducted the two identification parades. Inspector Samuel Onkwani (PW4) testified that he was the one who conducted the two identification parades. Sgt Aloys Kimani (PW8) in his testimony stated that he conducted identification parade in which the accused was the suspect and Gilbert Maina Muhia was the witness. Taking the evidence of PW4 and PW8 into account, it is certainly confusing as to who conducted the identification parades. In any case, perhaps,

identification parades might not have been necessary since the two witnesses Naomi Wangari Ngugi (PW3) and Gilbert Maina Muhia (PW7) said that they had known the accused before this incident. In her evidence in chief, this is what Naomi Wangari Ngugi (PW3) said about the accused:-

“When he entered I knew him. He is George Gichia and he is over there (accused pointed out). I had been seeing him as he was a neighbour. I had been seeing him for about two months. There was a time the accused had come home with my husband”.

And in his evidence in chief, Gilbert Maina Muhia (PW7) said:

“I saw those people who shot at us. I had been seeing those people before this incident. Visibility was clear as it was around 6.30 am. I can recognize one of those people over there (accused pointed out). The accused had no mask but the one who died is the one who had a mask.”

And on being cross-examined this witness (PW7) said:

“They were four people. I had been seeing them for about two months. The accused had a gun. I was able to recognize the accused. He was wearing blue jacket. I saw them as I drove towards them”.

Having carefully considered the evidence in this case, I find that this is a case based substantially on the evidence of identification by a single witness (PW7) in difficult circumstances. AP Marete (PW2) said that the incident was reported to him at about 5.30 am. He said that he looked at his watch. Hence the incident must have taken place before 5.30 am. This same witness said that when the incident was reported to him it was still dark. That means when the driver of the lorry Muhia (PW7) says that he recognized the accused he did so in darkness and perhaps it was due to his lorry's headlights that he saw those people. But Muhia (PW7) said that his headlights were not on. That means it was dark. Added to this is the fact that the accused was arrested at his home which was near the house of the deceased Peter Ngugi since the wife of Peter Ngugi said that they were neighbours. If the accused had indeed participated in the shooting incident could he have gone home? Ordinarily, if a man is involved in such a serious incident he would tend to hide at least for a few days after the event. The conduct of the accused would tend to show that he was not involved.

In view of the foregoing, I find that it would be unsafe to convict the accused on these two counts of murder relying on the evidence of a single witness in view of the prevailing conditions at the time the offences are said to have been committed. I find that prosecution have not proved the case against the accused to the required standard of proof in a criminal case. The accused is therefore acquitted on the two counts of murder and he is to be set free forthwith unless otherwise lawfully held.

Order accordingly.

Dated and Delivered at Nairobi this 6th day of October 2000.

E.O.O'KUBASU

JUDGE