



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**MURDER CASE NO.2 OF 2017**

**(Formerly of Nakuru Murder No.46 Of 2015)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PATRICK WAFULA MANYASI.....ACCUSED**

**RULING**

Patrick Wafula Manyasi (accused) faces a charge of murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 30/10/2013 at Maralal Town, within Samburu County, murdered Tom Rono Lekishorumongi alias Thomson Rono.

The accused denied the offence and the case proceeded to trial. So far, the prosecution has called a total of nine (9) witnesses in support of their case. The prosecution has closed it's case and this court has to determine whether or not the prosecution has made out a prima facie case against the accused for him to be called upon to defend himself.

What constitutes a prima facie case was discussed in the celebrated case of Romanlal Trambakalal Bhatt v Republic Cr.A.76/1957 [1957 EA 334 – 335] which has been adopted in many other decisions. The court said:

*“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one, which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether, there is some evidence, irrespective of its credibility or weight sufficient to put accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a prima facie case but at least it must mean one on which a reasonable tribunal, properly directing its mind on the law and the evidence would convict if no explanation is offered by the defence.”*

In the English case of Republic v Galbraith 1981 1 WLR 1039, the court said:

***“(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will of course stop the case.***

***(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence;***

***(a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, on a submission being made to stop the case.***

***(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts, there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”***

I am guided by the above authorities.

Turning to the case before me, I now wish to summarize and analyze the evidence tendered by the prosecution to determine whether the threshold in the above cases has been attained.

The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Section 203 of the Penal Code provides:

*“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”*

At the close of the prosecution case, the prosecution ought to have proved that the accused person caused the death of the deceased, that the death was by an unlawful act or omission and that the accused possessed malice aforethought.

Lasip Latiwa, PW1 an Assistant Manager at Samburu West CDF was a classmate of the deceased. He knew the accused as OCS Maralal Police Station. On 30/10/2013, while on his way to work, he met a group of people carrying placards with the message ‘give us our cows back’. He joined them, they marched to the County Commissioner’s Office but he was not present and they decided to march to the Police Station; that the group grew big to over one thousand people. They found Police Officers blocking the gate; that the group was making a lot of noise and the police shot in the air and people dispersed; that the gates were opened and police pursued the group. He was left behind because he is lame. He heard accused say that he would kill someone, took a gun from Alice, a lady officer who had fallen down, ran past him holding the pistol in his left hand and the G3 gun in the right hand; that accused ran past him and about 8 metres away, shot Tom on the head at close range; that several other people were shot and injured. He recorded a statement with the police and later with IPOA.

According to PW1, those who planned the demonstration were University Students but they were joined by other people; that the deceased was one of the students but he did not see him address the crowd. He knew that the cattle held at Police Station were exhibits.

In cross examination, PW1 stated that when the police dispersed the crowd, the deceased was one of the last people to run; the deceased ran into an ‘open space’. He saw the accused chase the deceased with the G3 rifle in the right hand and a pistol in the other and that when the deceased turned, the accused shot him on the forehead. He denied that the deceased was shot while on a road behind a building. He also described the accused as having worn a black T-shirt and black trousers. He said that he saw Thompson Rono address the crowd but not the deceased whom he referred to as Tom Lekishoromongi. He was shown photographs of the scene that showed that deceased wore a blue jeans and vest.

Although PW1 had vehemently denied that the deceased ever addressed the crowd, pressed in cross-examination and in reference to his statements made to the police, he admitted that the deceased was the leader of the demonstrators and addressed them severally; that he saw the deceased holding stones and later a stick. He also did admit that he never told police that the demonstrators never touched the police gate. He said that the demonstrators actually pushed the gate and forced themselves into the Police Station and he saw the demonstrators chasing cattle. He was shown clips of the scene and confirmed seeing many policemen at the scene all armed with guns.

PW2 Steven Jaziri Ekaura a businessman in Baragoi recalled that on 30/10/2013, he was at the cattle market in Maralal about 10.00 a.m. when he found about 40 boys talking of a demonstration over cattle that were detained at the Police Station. He joined them to the Police Station gate where there were several Police Officers. He had a camera with which he took videos but on hearing gunshots, he ran off but continued to take videos. He saw a Land Cruiser arrive with Police Officers; that he joined the media and police and 4 boys approached the police and informed them that it was a peaceful demonstration and asked why they were being beaten but the police said Tom should be arrested. It is then they ran off and the accused chased them as he shot at them; that it is only the accused who chased Tom while armed with a G3 Rifle; that when he turned the corner, he lost view of him. He then heard people shouting that he had killed Tom. PW2 went to where the body lay but did not see the one who had shot the deceased. He later informed Tom’s family that he had a video clip of Tom’s death and he recorded a statement with IPOA who took the camera and video clip and with memory card. He disowned his statement to the police which indicated that at the gate, people resisted; he stated that his statement to police dated 6/4/2013, he did not disclose that he had a camera and took videos and he did not describe the OCS or the person who chased the deceased. However, in his statement dated 4/3/2014 with IPOA he mentioned having had the camera and described the OCS as tall, dark, slim, wearing a greenish uniform.

PW3 Janet Leparashau, a business lady in Maralal Town recalled 30/10/2013, when taking her child to hospital at about 9.00 a.m. She met people carrying branches and placards. She did not hear what they were saying but heard that they were University Students demonstrating. She was joined by friends and they decided to follow the demonstrators to find out what was going on. She saw police firing tear gas dispersing the students who were heading towards the Police Station. She knew Tom. She heard him tell the police not to shoot because they were peaceful demonstrations; that Tom was in front of the students and told them not to enter the Police Station. She saw a dark tall man chase the students who ran in different directions and heard gun shots. She saw an officer shoot Tom and he fell; that the man who she learnt was the OCS Maralal Police Station and he walked away while she remained at Tom’s body. She was not able to identify the tall dark man in court because, then, he was in police uniform. She did not know the reasons for the demonstrations; that when the crowd ran, she ran the same direction as the crowd. She said the gunshots were many; that Tom ran ahead of the crowd and the Police Officer chased him. PW3 could not recall what type of gun the accused had, a rifle or pistol. In her statement to IPOA, PW3 stated that she saw the accused with a pistol and that she heard gunshots and saw Tom fall. PW3’s statement to IPOA and DCI were produced as P.Ex.1(a)&(b) in both statements, she never mentioned that she saw Tom being shot.

PW4 Ntooyo Leku Cherumongi, the father of the deceased was on 30/10/2013 about 10.00 a.m. at the CDF Offices when he saw about 500 people shouting ‘peace’; that tear gas was thrown at them and he saw somebody chasing his son Tom. He saw the son being shot by the accused who was carrying two guns a G3 Rifle and pistol; that he kept the pistol on the waist and shot with the rifle; that the accused then returned to the Police Station. He recorded his statement with the police next day. PW4 stated that though there was a fence between the CDF Offices where he was and the Police Station, one could still see the gate of the Police Station. He said that about 10 police officers were chasing the crowds and the son was in the middle of the crowd. He also said that he saw the son run behind the shops, he turned and was shot on the forehead and that by then he was at the corner of the shops. Further in cross-examination he admitted that he only heard that somebody had been killed and he rushed to the scene. PW4’s statement to police was produced as D.Exno.2.

PW5 Ambrose Disae Lenaimalda recalled that on 30/10/2013, with others, organized a peaceful demonstration because his people's livestock had been kept at the police station. They marched through the streets carrying placards and headed to police station. He left the group for about 30 minutes and on return, found people gathered a few meters from the Police Station and were demanding to be addressed by County Commandant over the cattle that were kept at the police station. He said that the accused whom he knew as OCS of Maralal Police Station and another lady officer came where he was with Tom (the deceased) told them to go away; when leaving, he heard two gunshots, he lay down to avoid being hit and the deceased who was behind him passed him and a few metres ahead, the deceased turned and was hit on the forehead by a bullet on the forehead and fell. He said that when lying on the ground, he raised his head and saw accused shoot Tom.

He stated that the accused had a pistol but took a rifle from the lady police officer which he used to shoot at Tom. He arrived where Tom fell, found he was dead and they went to report at the police station but the report was not booked.

Although PW5 said that the demonstration was about the cattle held at the police station, he denied being aware that there was Cr.707 of 2013 pending at the Maralal Court or that the cattle were exhibits in the case. He denied that the demonstrators broke into the station and released cattle.

PW5 denied knowing what happened at the time he left the demonstrators because when he returned to the demonstrations, he found there had been teargas thrown at the demonstrators and they had scattered. PW5 also told the court that before they ran, there were many police officers at the scene but it is the accused that ran after them holding the rifle with both hands. PW5 stated that he recorded his statement after a week but denied that the statement shown to him included some information he did not give, although the statement had his signature. He denied having recorded that he did not see accused shoot the deceased. Even in the statement taken by IPOA, PW5 admitted that he did not record that he saw accused shoot the deceased, but that he saw deceased fall. He also did not state that Tom looked back before he was shot. The statement was produced in evidence as D.Ex.No.5. He admitted that he did not see the accused shoot the deceased but that when he heard two gun shots, he lay down and when raised his head he saw Tom fall down. PW5 totally denied the statement recorded by PW8 on 6/11/2013 and alleged that somebody used his particulars to record it.

PW6 Stephen Maniki Lekimain a Deputy Director in charge of Social Services in County Government of Samburu was on his way back to Maralal on 30/10/2013 when he was informed that there were riots in Maralal. He found the town deserted and was informed that his friend/relative Tom had been shot. Next day he went to the mortuary and confirmed that indeed it was Tom's body and postmortem was done in his presence together with police officers. He noticed a bullet hole on the forehead. He described the scene of crime as being between the 1st and 2nd row of shops from the Police Station.

Dr. Peter Mwaniki Ndegwa (PW7) performed postmortem on Thomson Rono on 2/11/2013. On examination of the body, he found a gunshot wound on right temporal skull, left side of the head which was stitched and the exit gunshot wound on the occiput (back of the head) which was stitched; there was also fragmented and exposed fractures of the skull on right temporal, right parietal and the occiput; brain laceration, displacement and loss of brain on right temporal region; bruises on back of the head and there was intracranial haemorrhage.

He formed the opinion that the cause of death was severe cranial cerebral injuries due to a single gunshot from a high caliber weapon.

PW8 PC Kenneth Kirwa Kemei an officer working with DCI in Nairobi was part of the team that went to investigate the shooting incident at Maralal. He recorded statements from witnesses. He confirmed having recorded a statement from Ambrose Disae (PW5) on 6/11/2013. He recognized a copy that is in his handwriting. He said that he put questions to the witness who answered as he recorded. He said that he could not get the witnesses' personal details without him availing them because he did not know PW5 before; that he first recorded Ambrose's father's statement which led him to invite Ambrose to record a statement (D.Ex.5).

PW9 Kelvin Onkendi one of the Investigating Officers was working with IPOA between 2014 and 2015. He said that a complaint had been received from the ODPP Maralal and politicians from Samburu over a fatal shooting of a University Student. The politicians complained that the OCS Maralal shot the said student, Tom. Together with 2 other investigators, they proceeded to Maralal where they gathered evidence from witnesses. They complied their report, took a statement from the accused and forwarded it to the DPP with their recommendations which the DPP agreed with and preferred the present charges against the accused.

PW9 told the court the functions of IPOA which is a Civilian Oversight authority established to investigate indiscipline or misconduct of the police; that it can take over it can take over investigation from other investigative bodies if there is inordinate delay in investigating the matter; that there had been inordinate delay in this matter from October, 2013 when the incident occurred and January, 2014 when they took over investigations.

PW9 further stated in cross-examination that the accused being the OCS of Maralal Police station, had the duty to protect Government property at Maralal Police Station and that if the demonstrators had wanted to take the 23 cattle which were court exhibits from the station, the OCS had a duty to use reasonable force to protect them.

From his investigations, PW9 found that the demonstrators were moving towards the Police Station gate while armed with traditional clubs, sticks while others had stones which were not implements of a peaceful demonstration. PW9 also noted that the gate of the police station was twisted.

PW9 further said that though he visited the scene, he could not tell if there was any recovery from the scene. He confirmed that on checking the Arms Movement Register, they found that the accused had been issued with a firearm but they did not investigate the weapons at the armory as the Arms Movement Register would have shown which weapon was issued to accused and whether he used it in the shooting. It was also not investigated whether other people may have been issued with weapons.

PW9 denied having been aware of Criminal Case No.707/2013 in which the subject cattle were exhibits.

Although PW9 was aware of the allegations that the accused took a weapon from another officer, he did not make any follow up on it.

I have set out a summary of the testimony of each witness and I need to analyze all the evidence tendered and submissions of counsel.

Although PW1 claimed to have seen the accused chase and shoot the deceased, his evidence was riddled with contradictions. PW1 told the court that when the police fired in the air, all people dispersed in all directions. According to him, there were over 1000 demonstrators. He said that he could not run because he is lame but he saw the deceased run away last; that deceased ran in “*an open space*” and he saw the accused shoot the deceased. According to him, the deceased turned and was shot on the forehead. Firstly, PW1 could not run because of his incapacity. One wonders how he was able to be so close to the deceased who was running that he was able to see accused shoot the deceased.

PW1’s evidence that the deceased was shot in an open space totally contradicts the evidence of all the other prosecution witnesses who claim to have seen the deceased being shot. PW2 Jaziri told the court that the accused chased the deceased who turned a corner so that PW2 could not see him and he heard people say deceased had been killed. PW3 on the other hand said the deceased ran ahead of the crowd not behind the crowd. PW5 confirmed that the deceased turned a corner to where PW5 followed and that is where he was shot. The evidence of PW2 and PW5 totally contradicts PW1’s evidence as to the actual place where the deceased was shot.

Further to the above in his evidence in chief, PW1 said that the deceased wore a black T-shirt and a black trouser. When confronted with pictures of the scene in cross-examination, it turned out that the deceased wore a white vest and blue jeans. PW5 confirmed that deceased wore a white vest and blue jeans. If PW1 could not tell how the deceased was dressed, how could he identify him in the crowd of over 1000 people that was fleeing from the police?

When confronted with the various statements made to the police soon after the incident and IPOA, PW1 kept shifting goal posts as to what actually happened. Whereas he had denied that the deceased addressed the crowds, it turned out that he had recorded that the deceased addressed the demonstrators several times and was their leader; PW1 also changed in cross-examination and admitted that in fact the demonstrators pushed open the police gate and entered the Police Station and he even saw them chasing some cows.

PW1 had also stated that the accused snatched a G3 Rifle from a lady officer by name Alice; that he carried both a pistol and G3 in either hand and that he shot the deceased with the G3 using the right hand. When shown his statement made to the police, which was recorded when the facts were still fresh in his mind, he stated that he only saw accused carrying the G3. PW1 was so inconsistent in his testimony that he impressed the court as an untruthful witness. To confirm his demeanor, when asked by defence counsel whether he had ever been charged with any offence in court, he denied till counsel confronted him the court proceedings, that he admitted. He is not a creditworthy witness.

In respect of PW2, he did not see accused shoot the deceased. He claims to have seen accused chase the deceased round the corner and the accused turned back after shooting the deceased. He purported to take a video of the incident which was not produced in evidence. Though PW2 said that only accused chased the deceased, PW1 and PW3 admitted in cross-examination that there were many police officers who were armed who chased the demonstrators.

PW3 claimed to have joined the over 500 demonstrators. She repeatedly described the scene as being chaotic. At first, she claimed to have seen accused shoot the deceased. However, PW3 changed and told the court that she heard gun shots then saw Tom fall. When confronted with the statement she made to the police and IPOA in cross-examination, it turned out that she never mentioned having seen the accused shoot the deceased.

PW4, the father of the deceased told the court that he was at the CDF Office when he saw the demonstrators going towards the Police Station, then saw someone chase the deceased and shoot him. He testified that he was not able to see how the son (deceased) was dressed because he was far off in the crowd. Having said so, it follows that he could not have been in a position to see someone chase his son and shoot him. PW5 when cross-examined, told the court that one cannot see the front of the Police Station from the CDF Offices because there are buildings in between and that main door of CDF does not face Police Station. PW4 was at pains to explain how he could see the demonstrators and his son being chased. There are serious doubts as to whether PW4 was able to see the deceased being chased.

PW4 also told the court that he saw over 10 police officers chasing the crowd and his son was in the middle of the crowd. In view of the crowd, I believe PW4 could not have been in a position to see anybody being shot. PW4 also impressed the court as an unreliable witness because in cross-examination, he denied making the statement to police but when pressed further, he admitted having made them. Even though the court may sympathize with PW4 for losing his son, yet that should not be reason for him to tell lies.

PW5 claimed to have been with the deceased before the shooting; that after they were dispersed using tear gas, they ran into the same direction with the deceased as the accused chased them; that on hearing gun shots from behind, he lay down to avoid being hit but the deceased passed him with accused in hot pursuit; that he heard gun shots and on looking up, saw the deceased fall. In the same breath, he said he raised his head and saw the deceased look back and accused shot him on the forehead. PW5 renounced the police statement which was produced as D. Exhibit.5 which he allegedly made to the police. The said statement was produced by PW8 who recorded it. PW8 was categorical that he asked questions and recorded answers to the questions which he put to PW5. The said statement which was recorded on 6/11/2013 soon after the shooting incident contained all the witnesses’ personal details as in the statement he later made and IPOA on 30/1/2014. PW5 alleged that somebody may have changed some details but those allegations are baseless. In that statement, he never said that he saw accused shoot the deceased but that he saw accused chase the deceased. He said he lay down and on raising his head, saw the accused going away. Even in the statement to IPOA, PW5 did not indicate that he saw the accused shoot the deceased. He said he lay down to avoid being shot and on raising his head, he saw Tom had fallen and the accused was walking back. PW5 was therefore not a credible witness.

Although PW1, 2, 3, 4 and 5 alleged that the demonstration was peaceful, PW1 admitted in cross-examination that the demonstrators were making a lot of noise and he saw the deceased carrying a stick and stones. Kelvin Onkendi PW9, the Investigating Officer also confirmed, from investigations, that the crowd was large between 500 – 1000 people and the people were armed with clubs, sticks and stones and some

people were injured, which does not amount to a peaceful demonstration. PW1 also confirmed that the demonstrators actually forced the police gate open and he saw cows being chased yet those cows were exhibits before the court. PW9 also noted that the Police Station gate was twisted which goes to confirm PW1's testimony that it was forced open. Those inconsistencies in the prosecution evidence goes to show that the witnesses were generally not truthful and one would wonder whether they told the court the whole truth as to how the shooting took place and whether it is the accused who shot deceased or it may have been another officer.

To demonstrate further that the witnesses were not credible, the question remained as to what weapon the accused had. PW1 saw accused with a pistol, he snatched a G3 from Alice, chased the deceased with the G3 in the right hand while the pistol was in another.

PW3 saw accused holding a pistol. It seems she never saw the G3 which is a big gun. PW4 also saw accused with a pistol which he tucked on his waist and used the rifle to shoot. PW2 & 5 saw accused holding the G3 with both hands at the time he chased the deceased. Who amongst them actually witnessed the incident?

The accused was the OCS Maralal. Ordinarily, he would be armed with a firearm in the course of duty. There was evidence that at first he was armed with a pistol but that he snatched a G3 from one Alice, another police officer which he used to shoot the deceased.

PW9 checked with the Arms Movement Register and established that indeed the accused was issued with a firearm but he did no more.

He did not investigate the armory to establish which firearm the accused was issued with and if it tallied with what the witnesses alluded to.

The Investigating Officer did not tell the court whether or not any spent cartridges or bullets were found at the scene. If so, what happened to them and which weapons were they fired from. Whereas the doctor found as a fact that the deceased died from a single bullet wound. The doctor noted that the shot was from a high calibre weapon. Did that describe the G3 that the accused is said to have used? There are still many unanswered questions in the prosecution case.

The prosecution also failed to call the Armorer as a witness to confirm what weapon accused was issued with, a pistol or G3. What of Alice, what weapon was she issued with and was it ever snatched from her and used by the accused? No explanation was given why this people were not called. What of the other police officers who had been issued with guns on that day? Did they use them? The investigating officer left many ends open.

At the end of this analysis, though accused is indeed a prime suspect of the offence, the question that still lingers is whether it is the accused who shot the deceased or might there be a possibility of another person?

If the accused were placed on his defence and he opted to remain silent, which is his right to do, this court would still have no option but acquit him. The prosecution has the burden of proving its case beyond reasonable doubt and the defence has no duty to fill in the gaps in by the prosecution case. For all the above reasons, I find the prosecution has not established a prima facie case against the accused for him to be called upon to defend himself. He is hereby acquitted under Section 306(1) of the Criminal Procedure Code.

**Dated, Signed and Delivered at NYAHURURU this 17th day of October, 2019.**

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

**Mr. Wandugi for accused**

**Ms. Rugut holding brief for Mr. Maroro for State**

**Nyagah – Court Assistant**

**Accused - present**