



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL CASE NO. 39 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER KARANJA.....ACCUSED**

**J U D G M E N T**

**A. Introduction**

1. The accused was charged with ten counts of the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the offence were that on 6<sup>th</sup> November 2010, outside Coconut bar in Siakago town of Embu County, he murdered **Ephantus Muthini Munyi** in count 1, **Rachael Muthoni** in Count 2, **Domiciano Machira M'Impui** in Count 3, **Agustino Kinyua Kithumbu** in count 4, **APC Wilfred Gitonga Kinuu** in count 5, **APC Fredrick Okwako** in count 6, **George Nganga** in count 7, **Kenwin Muthoni Namu** in count 8 **Antony Mwaniki Nyaga** and **Fridah Ngendo Nyaga** in count 10.

2. It is important to briefly state the background of this trial. The accused on his first arraignment in court, the accused kept quiet and stood mute and subsequently a plea of not guilty was entered on all counts. During the accused's second appearance in court, the state requested that the accused be taken to Mathare Mental hospital to ascertain fitness of his mind.

3. Subsequently vide a mental assessment report dated 3<sup>rd</sup> December 2010, the accused was deemed to not be mentally fit to stand trial as he was diagnosed with mental abnormality most likely post traumatic stress disorder. He was thus committed to Mathare mental hospital for treatment.

4. On 23/2/2012 the hospital reported that he had recovered and was capable of standing trial whereupon the DPP elected under Section 163 (2) of the Criminal Procedure Code that the proceedings would continue. On the 30/4/2012 he pleaded not guilty on all ten counts. The prosecution subsequently called 27 witnesses to prove their case which is summarised below.

**B. Prosecution Case**

5. The prosecution called 27 witnesses to testify in this case. It was the evidence of PW3 that he identified the accused as the one who shot Frederick Okwaro, one Gitonga, George Nganga and Ngendo outside Coconut Bar in Siakago. PW6 testified that on the material day the accused had been drinking at his bar during the day to an extent he became disorderly to a point that PW6 forced him out of the bar at around 4.00 pm. At around 1.00 am PW6 was sleeping in his house when he was woken up by police and taken out to the front of his bar where he saw several dead bodies of several people including two of his employees Rachel Muthoni and Wanja. The bar had closed at 10.30 pm that evening.

6. PW7 testified that on the material date at around 10.00pm, he met the accused carrying a rifle near Wakai Bar. After passing the accused, he heard gunshots which prompted him to go and make a report at Siakago Police Station and he later left the station. About 5 metres from the station he saw the accused, still armed and moving towards the station prompting him to run back for safety to the station. It was his testimony that the accused entered the station, sat down on the floor and put his rifle down saying he had no more bullets.

7. PW10 testified that on the material date at around 11.00 pm he heard gunshots coming from Siakago market forcing him to proceed there to find out what was happening but on his way he met his colleague APC Cornelius Sigor who was running from Siakago market. He further testified that his colleague informed him that the accused had shot several people at a bar in Siakago market. He also testified that the accused also shot at them but missed the target.

8. PW12, an Administration Police Sergeant attached to South Mbeere Sub-County testified that the accused was issued with G3 rifle serial

No. 403933 which was loaded with 20 rounds of ammunition at around 6.00 pm on the material evening which he later repossessed from him after he surrendered himself at Siakago Police Station.

9. PW15 carried out ballistic examinations on exhibits forwarded to him and concluded vide a report dated 26<sup>th</sup> November 2010 that cartridge cases exhibit C1-C16 were fired from the G3 rifle that had been allocated to the accused person.

10. PW20 a bar attendant testified that he witnessed the accused shoot APC Gitonga and APC Fredrick outside Coconut bar after which he ran away. He testified that the accused also fired at him but missed him. PW21 testified that the accused after surrendering at the police station informed him and another colleague that he was on his way to Siakago market to have a meal and did not want to see anything on his way so he shot at anyone on sight.

11. PW23 testified that on the material date he was on duty at the District Commissioner's residence with the accused from 6.00 pm up to around 11.00 pm when the accused excused himself on account of going for a short call but did not return. PW23 subsequently heard gunshots coming from Siakago market.

12. PW25, Dr. Sylvester Maingi testified on behalf of Dr. Johansen Oduol and himself. It was his testimony that Dr. Oduol carried out post-mortems on the bodies of the deceased persons. He said that Dr. Oduol carried out post mortem on six of the deceased, the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> deceased persons and in all cases concluded that the deceased persons died as a result of multiple injuries due to gunshot wounds. The same was the conclusion of PW25 in regard to the cause of death for the deceased persons in counts 1, 2, 3 and 8.

13. PW26, Dr. Joseph Thuo testified that he first examined the accused on the 9/11/2010 and found him mentally fit to stand trial. He subsequently examined the accused on the 3/12/2010 and found him not mentally fit to stand trial recommended that he be referred him to Mathari Mental Hospital for treatment.

14. PW27, a girlfriend to the accused at the time of the incident testified that on the material date at around 10.00pm the accused threatened her that she would know who he was. After closing up the bar and leaving, PW27 heard gunshots behind her. She further testified that the accused called her on phone and said that "he had killed all of them". She further testified that she had not quarrelled with the accused though she had informed him that she had found a man who wanted to marry her.

### **C. Accused's Case**

15. The accused gave an unsworn statement and pleaded the defence of insanity. It was his case that in the 1990s he was posted to Isiolo where some of his duties included pursuing cattle raiders and escorting convoys and that some of his colleagues were killed which traumatised him. He further testified that he was taken for a mental check-up by his mother and declared to be insane for which he was under medication for 3 years.

16. It was his testimony that he occasionally became violent and attacked his wife and children. The accused denied any memory of the events of the material date and that he only came to his senses in February 2011.

### **D. Analysis of the Law**

17. I have carefully considered the evidence adduced in this case and the arguments in submissions by both parties. The accused faces a charge of murder contrary to **section 203** of the **Penal Code**. That section defines murder as follows:

***"Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder"***

18. The accused relied on the defence of insanity in that he was of unsound mind at the time he committed the offence.

19. **Section 12 of the Penal Code** provides: -

***"12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."***

20. On the evening and night, the accused was on security guard duties where he was required to be armed. He was allocated a G3 rifle and reported on duty around 6.00 pm. He stayed at his duty station until 11.00 pm when he left and went to Coconut Bar and Dashrek Club where he shot dead ten (10) people.

21. It is important to look at the motive of the killing at this stage. The evidence of PW27 the girlfriend of the accused, the two who used to stay together as lovebirds had parted. The accused went drinking during the day at Coconut Bar where PW27 worked. The witness told the court that the accused had threatened her that she would know who he was on that day. She told the court that she had already told the accused that she had found another man to marry her. Of course, this was not pleasant news to the accused.

22. When the accused went to Coconut Bar that night, he found it closed and PW27 and other bar attendants had left. He decided to shoot everyone on sight and then call PW27 to inform her that he had "killed all of them". By the term "all of them" the accused may have been referring to all the men he suspected were either intimate to his girlfriend or had shown interest in her. It is important to note that he also shot

two ladies who were found in the company of some of the men.

23. PW26 the doctor who assessed the accused on his mental status about 3 days after the commission of the offence found him mentally fit to plead. About 26 days after the commission of the offence, the accused was found to be suffering from post-traumatic stress disorder and therefore declared not fit to plead. He was treated at Mathare Mental Hospital and fond recovered from the mental illness. He was declared fit to plead thereafter when the trial then began.

24. It is my considered view that the accused was mentally fit when he committed the crime. He spent time on the material day with his colleague PW23 on one hand and girlfriend PW27 who knew him well and did not show any signs of abnormality. The doctor confirmed that the accused was fit to plead just a few days after the alleged offence.

25. The accused was taken for a second mental assessment after he showed signs of stress later. The doctor confirmed he was suffering from post-traumatic stress disorder and was not fit to plead. I have reason to believe that the accused suffered stress after the commission of the offence. The killing of ten (10) people including his two (2) colleagues who were innocent must have haunted him and affected him psychologically. It is my view, that the second report that came after the accused had been charged cannot be relied to assess the mental status of the accused at the time of the offence.

26. The accused told the court that he had suffered mental illness several years back and treated at Mathare Mental Hospital. He did not produce any records to support this claim. However, the nature of most mental illnesses are such that one may be treated and heal so as to be declared mentally fit. If a person commits an offence when he is in his right mind as assessed by an expert, then he ought to deal with the consequences.

27. For defence of insanity to stand, the accused must satisfy the grounds set out under the **McNaughten rule** in **McNaughten Case (1843) 10 C1 & Fin 200**. The test is purely cognitive and the defence must show as to whether the accused understood her/his actions or that her/his actions were wrong. The **McNaughten Rules** require that the following three tests should be proved:

*i. That an individual suffers from a “defect of reason,*

*ii. That it was caused by a “disease of the mind”,*

*iii. That as a result, he or she does not know the “nature and quality” of the act or that it is wrong.*

28. In **Richard Kaitany Chemagong v Republic; Criminal Appeal No 150 of 1983** the Court of Appeal had sought to distinguish a malfunctioning of the mind from non-functioning of the mind due to epilepsy and held:

*“There was ample evidence that the defendant was acting unconsciously and involuntarily when he inflicted the injury, but cause of his condition was psychomotor epilepsy. Where the effect of a disease was so to impair the mental faculties of reason, memory and understanding that the sufferer did not know the nature and quality of his act or, if he did, did not know he was doing what was wrong, it was a ‘disease of the mind’ within the meaning of the Mc’Naghten Rules in Mc’Naghten’s Case (1843) 10 C1 & Fin 200, even if the effect was transient or intermittent. On the evidence the defendant was therefore ‘insane’ at the time of his act, and the only possible verdict was that provided for by the Act of 1883 as amended.”*

29. I reach a conclusion that the accused was mentally fit to plead when he killed the ten deceased persons and that the defence of insanity is not available to him in the circumstances of this case.

30. It was the evidence of PW3 that he stood outside Dashrek Club where he had found two Administration Police officers APC Fredrick and APC Gitonga. The accused came with his gun and as Fredrick asked him where the gunshots he had heard were coming from, the accused just shot Fredrick three times killing him.

31. As APC Gitonga ran towards the Administration Police Camp from Dashrek Club, the accused shot at him on the back which injuries resulted in his instant death.

32. PW3 said there was security light outside the club that enabled him to see the accused shooting at his two colleagues. PW20 also witnessed the killing of APC Gitonga and Fredrick outside the bar by the accused.

33. PW3 ran to the bar where one George and Ngendo were seated. The accused followed him there and shot his two friends Ngendo and George dead. One Mwaniki who was seated next to George was also shot dead by the accused.

34. PW12 testified that he allocated G.3 riffle No. 403933 with 20 rounds of ammunition to the accused at 6.00 pm. He signed for the rifle and proceeded to work at the District Commissioner’s office with a colleague PW23. Later PW12 recovered the rifle from the accused with an empty magazine having spent all the bullets.

35. The ballistics expert PW15 confirmed that sixteen of the recovered spent cartridges were fired from the rifle of the accused S/No. 403933.

36. PW21 was in the investigations team. He visited the scenes of the crime at Dashrek Club and Coconut bar where he found bodies of the deceased persons all with gunshot wounds. He bodies were later taken to the mortuary where postmortem was conducted.

37. PW25 Dr. Maingi testified that he and a colleague Dr. Oduol conducted autopsy on all the bodies and formed the opinion that the deceased persons died of gunshot wounds.

38. I find that the evidence on record establishes that the ten (10) deceased persons were shot by the accused at Siakago town in the night of 6/11/2010 and died of gunshot wounds.

39. The evidence of PW3, 10, 12, 15, 20 and 21 leaves no doubt that the accused's unlawful acts of shooting led to the death of the deceased persons.

40. Consequently, I find the accused guilty of the unlawful acts that led to the death of the deceased named in Counts I, II, III, IV, V, VI, VII, VIII, IX and X.

41. The court is obligated to determine whether the accused had he intention to kill the deceased persons. I have already found tht the accused was mentally fit to plead as confirmed by PW26.

42. Malice aforethought is described in Section 206 of the Penal Code. Under section 206 it shall be deemed to be established by evidence proving any one or more of the following circumstances:

***“a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.***

***b. Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.***

***c. An intention to commit a felony.”***

43. The evidence of PW27 is that the accused had threatened her that she would know who he was. The accused went to Coconut Bar and where PW27 worked and found the bar had closed and PW27 had left. She told the court that the accused called her on phone and said he had dilled “all of them” and that it was only PW7 remaining. She was warned too that he was going to kill her and that he did not want to find a man in the house.

44. PW27 hid her baby in a neighbour's house and went to sleep in a lodging to escape the wrath of the accused. The accused may have missed his first target, extended his wrath to other people. This scenario is covered by Section 206 of the Penal Code.

45. By shooting the victims some three (3) times like he did to one of his colleagues, his act was intended to cause death or grievous harm to them.

46. The accused was a police officer who is trained in weaponry and understands the full effect of a fired live bullet which if it hits certain parts of the body would cause death instantly.

47. The victims were shot on the chests, spine, upper limbs and abdomen which bullets hit and fractured the ribs and other bones into fragments. A G3 rifle is a gun of high velocity and the accused was well aware of the consequences of the shooting that would instantly end the lives of the victims.

48. In the case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63***, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. In the ***Ogelo v Republic [2004] 2KLR 14*** the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held *interalia* that by dint of section 206 (1) an intention to cause death or grievous harm. Malice aforethought is deemed to have been established by evidence presented by the prosecution and can also be inferred from the manner of killing among other things.

49. I am of the considered view that the evidence on record proves that the accused had malice aforethought when he executed the unlawful acts in regard to the deceased persons in all the counts.

50. I find that the prosecution has proved the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code against the accused beyond any reasonable doubt in counts I, II, III, IV, V, VI, VII, VIII, IX and X.

51. He is accordingly convicted of the said offences.

52. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 4<sup>TH</sup> DAY OF DECEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mbwiria for Andande for Accused**

**Accused present in person**