



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.78 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

TITUS NGAMAU MUSILA KATITU.....ACCUSED

JUDGMENT

INTRODUCTION

1. The accused **TITUS NGAMAU MUSILA** was charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were that on the 14th day of March, 2013 at Githurai 45 bus Stage in Nairobi County murdered **KENNETH KIMANI MWANGI**.

2. The accused was at the time of the alleged commission of the offence herein a police officer attached to the SPIV section of the police force at Kasarani police station manning Githurai bus stage (this is a specialized police force tasked with fighting crime). From the evidence tendered before me he took his job with such a passion and so popular was he that when he was arrested and charged it triggered three days protest along the busy Thika road by the matatu operators and residents of Githurai 45 demanding that all charges be dropped as he was helping them ruthlessly in fighting crime which was prevalent in the area.

3. He was and is still so popular that the press calls him “vigilante crime fighting police officer” and crime “buster cop”. He goes by the alias: - “Katitu” and Kangei. His popularity was captured by one Sandra Ochola Advocate of the High Court writing in the People Daily of September, 21, 2014 of the residents thus:-

“Their reasons are nothing but altruistic. To them he is a hero who has hitherto risked his all to ensure security in their neighbourhood and as such it is irrelevant how he went about his business.”

His popularity can further be confirmed by the fact that when he was released on bond by this court, none other than the current Governor of Nairobi County then Senator personally paid the bond. As will be seen from this judgment the residents called as prosecution witnesses ended up supporting the defence case!

4. The accused first appeared in court on 5/9/2014 almost one and half years after the commission of the offence before Muchemi J, - when he took his plea and a plea of not guilty was recorded. On 7th October, 2014 R.L Korir J dismissed his application to be released on bond and on 25/01/2016 his trial commenced before me and after hearing eleven prosecution witnesses was released on bond by this court having been in custody for almost three years.

PROSECUTION CASE

5. To prove its case the prosecution called a total of eighteen (18) witnesses who testified to the effect that on the material day the accused was manning the Githurai Road about stage when he shot dead the deceased. PW1 (named A since he was a protected witness) testified that he was at Cashmart Super market at about 4.00 p.m. when he met the deceased together with PW2 and after forty minute he received a cellphone call from PW2 who informed him that the deceased had been shot and he wanted him to go and confirm. PW2 told him that the deceased had been shot by “Katitu” a police officer stationed at Kasarani and whom he knew. It was his evidence that being in shock he did not go to confirm the death but went back to Anthony’s pub where he had been watching football.

6. It was PW1’s evidence that the deceased had earlier told him that he accused had called him to tell him to warn his brother to return a mobile phone he had stolen before he is shot dead. Under cross examination he stated that the deceased had informed him when they met that he was going to meet his mother and that PW2 and the deceased were together at the time.

7. **PW2 SHILTON GALDWIN INDIMULI SIKOBE** testified that he was at Anthony’s pub together with PW1 up to 4.00 p.m. when he

left to go for food at 44 side of Githurai when he met the deceased in the tunnel. He then saw the deceased talk to someone wearing a jungle green half coat as if in an argument and that since there were motor vehicles passing by he would not hear what they were saying but would recognize the accused whom he knew as "Katitu or kangee" and who use to get protection money from them at the said bus stage. He stated that suddenly the accused pushed the deceased down removed his pistol and shot him. He then noticed the other police officer running towards his direction after he heard three gun shots causing him to run away from the scene to his sister's place where he called PW1.

8. In cross examination he stated that the deceased was dressed in blue jeans trouser and blue and white stripped T-shirt. He stated that the accused was known to him having arrested him several at the stage where he was operating as a tout and that he did not see him shoot the second and third time. He stated that when the first gun was shot, he saw the deceased raise his hands up as his begging for mercy and thereafter saw another man holding a gun towards him causing him to run away in fear.

9. **PW3 ANTHONY MUTIE KATUMO** stated that he was at the stage together with **PW8 MARY MURUE MWEKE** in a Matatu from Ruiru to town when PW8's mobile phone was snatched from her by one young man who ran behind the Nissan Matatu and upon the passengers in the said motor vehicle raising alarm by shouting the driver drove off. He later on called the said phone which was answered by someone who introduced himself as a police officer who told them the phone has been recovered and directed them to report to the police station where they identified the deceased as the person who had taken the phone and that he police who had answered the call introduced himself as **TITUS MUSILA** and who had the phone with him at the police station.

10. **PW4 CI SAMUEL ODONGO MOSI** stated that the accused who was working in 'SPIV' duties in civilian clothes and had command of Githurai Area called him on 14/4/2013 on cell phone and informed him that there were robbers who were robbing passengers at the stage and that he had gunned one down and recovered the stolen mobile phone. He went to the stage and found the accused standing next to the deceased who had been shot in a pool of blood. In cross examination he stated that the area was not safe with high crime rate hence the "SPIV" policemen thereat. **PW5 PC JOSEPH KOSGEI** who was in charge of the officers in SPIV duties at the station on 14/3/2013 at 4.00 p.m. received information that there had been a shoot out at Githurai from members of the public. He later on received the same information from the accused who told him that someone had picked up a mobile phone from a lady at the stage and that there was a shoot out. He confirmed that the accused was on duty in the area and was armed.

11. **PW6 CPL TAJIRI LENGULUE** who was the duty officer at Githurai Kimbo police station went to the scene where he found a big crowd around the body of the deceased he was instructed by PW4 to go for the scene of crime personnel and a report thereon made. **PW7 CI ALEX ODINDI MWANDAWIRO** a firearms examiner examined the guns which were assigned to the accused and his two fellow officers together with the bullet head which was found in the body of the deceased and formed an opinion that they were firearms capable of firing and that none of the three firearms fired the exhibit that was recovered from the body of the deceased. In cross examination he stated that he received the exhibits on 1/8/2013. He did not know where they were before then.

12. **PW9 – INSP. MARTIN NYAGUTO** was on 20/5/2013 instructed to constitute a team of investigators in respect of this case and take over investigations where he confirmed that there were three police officers on duty at the time of shoot out namely **PC TITUS MUSILA NGAMAU** the accused, **PC STEPHEN BUNNET** and **PC GEORGE AMEMBA** who were assigned firearms and that from the records of the firearms movement register PC Bunnet had on the said date discharged one round of ammunition same with PC Amemba while the accused spent three rounds. It was his evidence that before he concluded his investigation he was instructed to handover the file to IPOA who took over and that he was at that time still conducting an inquest which was the normal procedure in matters involving firearms.

13. **PW10 JAMES MAINA** stated that he had known the accused for three (3) years and that on 14/4/2013 he was at the stage at 4.00 p.m. creating order when they heard a lady raise an alarm and before he got to the place he heard gunshot and when he went to check he found that it was the deceased known to them as "Mondo" who had been shot but he did not see the person who shot him. In cross examination he stated that the accused was someone they trusted at the stage and that before the shooting he saw five people running away while people were shouting that "thieves thieves" and that he had been asked to come and testify on behalf of the accused since they were happy with his work at the stage. In cross examination he stated that the deceased was a thief and that he has seen him at the stage standing near the wall of Thika super highway together with PW1 and PW2.

14. **PW11 CORP. CHARLES MUSIMU** stated that he received the mother of the deceased who had gone to the station to complain that she was not satisfied with the investigation. He therefore requested for the file from Githurai Kimbo from which he noted that the bullet that had been removed from the body of the deceased had not been handed over to him which was subsequently give to him wrapped in a rubber glove. He thereafter commenced investigations but on 20/5/2013 received a letter from CID Headquarters to handover the investigation. He confirmed having recorded a statement from the accused.

15. **PW12 DR. JOHANSEN ODUOR** performed post mortem examination on the body of the deceased who had gunshot wounds as follows:-

- 1) Entry gunshot wound on the forehead on the right side measuring 5cm from the midline. It was round with a diameter of 2cm and edges turned inward with blackening without an exit.
- 2) Entry gunshot wound below the mouth on the left side with exit on the lower side of the left ear.
- 3) Entry gunshot wound on the right cheek.
- 4) Entry on skull, under the entry gunshot wound or forehead with fracture of mandibles bilaterally with brain lacerations and a deformed bullet recovered at occipital region.

From the said examination he formed opinion that the death was due to gunshots from low velocity firearm from close range.

16. PW13 INS. NICHOLAS WAMBUGU a scene of crime officer testified that on 14/5/2013 he was requested by Corp. Rotich of SPIV Kasarani to process the scene which he did and took the photos at the scene. It was his evidence that there was a big crowd at the scene and that there was a mobile phone at the scene which he did not photograph. In cross examination he stated that owing to the big crowd it was not logically possible to secure the scene. He was unable to find any spent cartridges or bullet head at the scene. **PW14 PC JOHN BIKO** attended the post mortem examination and was handed over a bullet head recovered from the body of the deceased which he later on handed to Corp. Musindi from Kasarani.

17. PW 15 PETRONILA KAVESA testified that PW2 who was her son informed her that the deceased had been shot by a police officer who had told him to look for his brother who was wanted by the police. She later on attended post mortem examination together with the mother of the deceased. In cross examination she stated that the brother of the deceased Oscar used to steal phones and was being looked for by the police which information she got from PW2 and the deceased. **PW16 SGT. BENSON GACHORA** the custodian of arms movement register confirmed having issue the accused with a Ceska pistol No. G8518 which he returned on 21/4/2013 having spent three rounds of ammunition. It was his evidence that the accused informed him that while on duty he came across a person who was robbing members of public within Githurai area and fired the three rounds. PC Bunnet and PC George Amemba whom he had also issued with guns said they were with the accused and spent one round each. He stated further that the same information was confirmed by the OCS Githurai Kimbo.

18. PW17 KIRUI VINCENT KIPNGETICH an investigator with IPOA revisited the scene on 12/2/2014 in the company of PW13 and reconstructed the same and proceeded to draw a sketch map. **PW18 DIANA MUTUNGA WATILA** an investigator with IPOA was instructed on 15/7/2013 to take over the investigations herein following a complaint to IPOA by a consortium of NGO's and the next of kins of the deceased and it was her evidence that according to the ballistic report the bullet head found in the body of the deceased could have been fired by any of the three guns issues to the police officers who were at the scene including the accused.

19. She further stated that a signal had been sent to the authority on 17/4/2013 which indicated that the shooting had occurred at Githurai where there was a robbery where passengers were robbed of mobile phones and personal effects and from the interrogation of witnesses she established that the deceased had been shot at close range by the accused which information was confirmed by the post mortem report. It was her evidence that at the time when the accused shot the deceased he was not in any eminent danger as the deceased was not armed and therefore formed an opinion that the accused unlawfully discharged his firearm unlawfully killing the deceased. This was confirmed by the testimony of officers who were called to the scene who confirmed that the accused had shot the deceased. These included PW6 who was asked to draft a signal, PC Bunnet who stated that he heard gunshots and when he arrived at the scene he found the accused at the scene and that PC Amemba denied having been at the scene. In cross examination she stated that upon review of the report from the scene she formed an opinion that the same was manipulated for cover up purposes and that whereas PC Stephen Bunnet fired his gun in the air as confirmed by PW2, PC Amemba was not at the scene. She stated that the innocence of the deceased was not in issue as the case was on the use of arms by the accused.

DEFENCE CASE

20. When put on his defence the accused gave unsworn testimony and stated that he joined Githurai area at a time when theft and robbery was prevalent in the area and they managed to reduce the same. On the material he was with Toroitich under the command of the OCPD. He was together with PC Boinnet and PC Amemba when he noticed seven youths three of whom he knew as 'Junior' (PW1), PW2 -Skobe' and a third one as 'Katambo' who had been chased from the stage where they were operating as touts since they were robbing people suddenly he heard an alarm raised and when he responded he noticed that one of the youth had grabbed a mobile phone from a passenger and ran away. He followed him while firing in the air. He ran behind a Nissan matatu and when the accused got to where he was he found he had been gunned down with a mobile phone next to him. It was his evidence that he could not identify the person who shot the deceased and stated that he had fired his three shots in the air. He thereafter called the OCS and informed him of the shooting.

21. He confirmed having spoken to PW4 who called the cell phone which had been grabbed from PW8 and directed him to Kasarani police station and that there were many plain clothes police officers at the stage. It was his evidence that on 3/9/2014 he saw the Daily Nation newspaper say that he was at large with a warrant for his arrest and on 3/9/2014 he reported to the OCPD and was taken to CID headquarters before being charged alone while they were three police officers at the scene on duty. He stated further that he did not know the deceased and neither had he seen him before.

SUBMISSIONS

22. On behalf of the accused, Mr. Ombeta submitted that in the course of the accused duties he noticed passengers being robbed and responded to apprehend the boys and zeroed on one by removing his pistol and firing in the air by following the police procedures, the deceased ran towards the back of the matatu where the other officers were and he heard three gunshots and when he got to where the deceased was he had been shot dead. It was submitted that no reason was given by the prosecution why the two other police officers were not called as witnesses.

23. It was submitted further that there was contradiction in the testimony of the prosecution witnesses and that PW10 confirmed that the deceased PW1 and PW2 were thieves at the bus stage and that he saw the deceased running behind the bus. It was submitted that there is a doubt raised as to whether the accused shot the deceased and that the accused was charged without his mental status being established.

24. On behalf of the State Mr. Meroka submitted that the accused who was armed was placed at the scene and that he returned his gun less three firearms having told PW4 that he had killed a robber and that failure to refer the accused for mental assessment is cured by Section 11 of the Penal Code the presumption of soundness of mind until the contrary it proved. The submissions were supported by Ms Gikonyo on behalf of the victim who submitted further that even if the deceased snatched PW8's phone then the force the accused used was excessive and unjustifiable against an unarmed civilian.

ANALYSIS AND DETERMINATION

25. To sustain A conviction on a charge of murder under Section 203 of the Penal Code the prosecution is required to prove beyond any reasonable doubt the following elements of the offence:-

a) Proof of the fact and the cause of death of the deceased.

b) Proof that the death was caused by an unlawful act of commission or omission on the part of the accused person.

c) Proof that the said unlawful act or omission was committed with malice aforethought.

26. The fact and cause of the death of the deceased has not been disputed throughout this trial there was on the material day a shoot out at Githurai bus stage wherein the deceased was shot dead. This fact was confirmed by the evidence of **PW10 JAMES MAINA** who was at the stage, **PW8** whose phone was allegedly stolen by the deceased who was later called by the accused to Kasarani police station in the company of **PW3** where they identified the body of the deceased and the stolen mobile phone. **PW1** was at the scene and confirmed having witnessed the killing of the deceased with both **PW6 CI TAJIRI LENGULEE** and **PW13 INS. NICHOLAS WAMBUGO** a scene of crime officer attended to the scene and took photographs which were produced in court confirming the death of the deceased. The deceased is not Jesus Christ neither is he Jairus daughter among those known to have risen from the dead.

27. The cause of the death of the deceased was proved beyond any reasonable doubt through the evidence of Dr. J. Oduor the Chief Government Pathologist who performed post mortem examination on the body of the deceased in the presence of **PW15 PETRONILA KAVETSA ADAZO** and **PW14 PC JOHN BIKO** who confirmed that the cause of death was head injury due to gunshot fired at close range and at the time of the said examination recovered a deformed bullet head from the head of the deceased.

28. On whether the said death was caused by an act of commission or omission on the part of the accused person, the evidence tendered before the court positively placed the accused who was a police officer at the scene. In his defence the accused admitted that he was at the scene and that he was issued with a firearm which was confirmed by the evidence of **PW4, CI SAMUEL ODONGO MOSI, PW5 JOSEPH KOSKEI** and **PW10 SGT. BENSON GACHUKA** who had issued him with a firearm which he later returned having spent three (3) rounds of ammunition of which he accounted for by stating that while he was on duty he came across a person who was robbing members of the public within Githurai and fired the three rounds.

29. **PW2 SHILTON GALDWIN** in his testimony put the accused and the deceased together at the scene and stated that he saw the accused arguing with the deceased and that the accused whom he knew as a police officer pushed the deceased down before removing his gun and shooting the same as they were behind a motor vehicle. This evidence is corroborated by that of **PW10** whose evidence was that both the deceased and **PW2** were together at the stage who in cross examination stated that he saw them running and then he heard gun shots behind the bus and he later on confirmed that it was the deceased whom he knew as "mondo" who had been shot, though he did not see the person who had shot him. He confirmed having seen the accused who he knew as a good police officer protecting the stage from criminals at the stage.

30. The fact of the accused having shot the deceased is further confirmed by the evidence of **PW4 CI SAMUEL ODONGO MOSI** whose evidence was that he was on patrol within Githurai Kimbo on 14/4/2013 when he was called on phone by the accused who informed him that there were robbers who had been robbing passengers at the stage and that he gunned down one of them and recovered a mobile phone and that out of this information a signal was sent to the headquarters, this same information was given to **PW5 PC JOSEPH KOSGEI** while **PW7 CI ALEX DINDI MWANDAWIRO** a firearm examiner confirmed that the gun which had been issued to the accused was in good general and mechanical conditions capable of being fired. He further confirmed that the bullet head recovered from the body of the deceased would have been fired from either a pistol or a submachine gun.

31. When put on his defence the accused denied having shot the deceased but stated that he was at the stage when he noticed seven (7) young men on the wall of Thika Superhighway including **PW1, PW2** and the deceased who started to rob passengers and that he followed the deceased while firing in the air and that as he ran after him he could hear gun shots from behind the bus and when he got there he found the deceased had already been gunned down. This evidence by the accused however contradicts the evidence of the prosecution witnesses and the report which was made by the accused to his superiors and is therefore an afterthought. The accused in his defence contradicted himself having confirmed knowing the deceased very well stated further that he had never seen him before.

32. I have taken into account the evidence of **PW18 DIANA MUTUNGA WATIKA** the final investigator in this matter having taken over the investigation from the initial investigation by the police officers and would agree with her that there was an initial attempt by the police to cover up the matter which explains the custody and handling of the exhibits include the bullet head recovered from the body of the deceased, the guns issued to the accused and his two colleagues which they confirmed using even after the report of the shooting had been made and leading to the finding by **PW7** that the said bullet head recovered was not fired from the accused pistol when looking against the evidence of **PW2**. Whereas the ballistic result was inconclusive, the same did not exclude the gun issued to the accused having fired the fatal shots.

33. Whereas there are minor contradictions in the evidence of **PW1, PW2** and **PW15** these can be explained by the fact that both **PW1** and **PW2** were under the radar of the accused and his colleagues and were placed at the scene by prosecution witnesses. I am satisfied and find that the prosecution has proved beyond any reasonable doubt that the accused shot the deceased who died as a result of the injuries sustained therefrom and that the omission on the part of the prosecution to call **PC Amemba** and **PC Bunnet** who were working with the accused on the material date as prosecution witnesses was not fatal to the prosecution case the evidence on record being that they fired in the air as part of crowd control after the accused had shot the deceased and that they were part of those who attempted to cover up the investigation herein as per the evidence of **PW18**.

34. On whether the said death was caused by malice aforethought whereas there is evidence that the deceased had snatched a mobile phone from **PW8 MARY MUENI MWEKI** and was known in the area as being part of the youth terrorizing the residence of the area and passengers at the state. There is no evidence tendered before the court that the deceased was armed and that the life of the accused and or

PW8 was in danger. It was PW3's evidence that the deceased took the mobile phone and ran behind the matatu which drove away from the stage. There is the evidence of PW1 a protected witness who testified that the accused had warned the deceased to request his brother Oscar to return a mobile phone he had stolen or he could be shot dead and PW2's evidence that at the time of shooting, the deceased was already lying down on the ground and had raised his hands up in submission to the authority and power to the accused.

35. According to the evidence of PW12 Dr. Oduor the deceased had three gunshot wounds on his head thereby corroborating the prosecution evidence that the accused fired three times at close range and therefore agree with the submissions by the prosecution that the defence attempt to justify the shooting of the deceased because he was a robber is rebutted as Section 16 of the National Police Force Act stipulate that a police officer shall undertake their responsibilities in a non-violent way and if they must use force must be guided according to the Act as was confirmed by the Court of Appeal in **IP VERONICA GITAHU & ANOTHER v REPUBLIC** [2017] eKLR thus:-

***“One of the objective of the National Police Service Act is to give effect to among others, Article 238 of the Constitution and Article 244, which sets out the objects and functions of the National Police Service, and demands compliance by the police with constitutional standards of human rights and fundamental freedoms. In addition the Act makes express provisions regarding self defence by police officers and the use of force, in particular the use of firearms. Section 49(5) and 61 of the Act as read with the Sixth Schedule set out the circumstances under which a police officer may resort to the use of force and firearms.”..... The provision of the Act are a complete and exhaustive code and demand that a police officer must resort to non-violent means as the first option and to use force only when non-violent means are ineffective. In addition even where the use of force is justified, the officer does not have a carte blanche in the use of force. The Act demands that the force used must be proportional to the objective to be achieved, the seriousness of the offence and the level of resistance and still only to the extent necessary. When it comes to use of firearms, the Act makes that a last resort option.*”**

36. The fact that the deceased was shot three times in the head and while lying down clearly shows that the accused had the intention to kill and succeeded to kill the deceased the fact that he was fighting crime in the area for which he became popular and considered a hero notwithstanding. The accused knew the area very well he knew the deceased and his group and even if they were criminals there was no justification to kill the same but to have him prosecuted in a Court of Law as I stated in the case of **REPUBLIC v WILFRED MWITI HIGH COURT AT NAIROBI CRIMINAL CASE NO.61 OF 2011**

“69. The accused was under a duty to preserve the life of the deceased and having established that they had seen the group running away, the use of excessive force in shooting at the deceased herein was unlawful and reckless and in total disregard of forces standing orders. Based upon the accused defence and the evidence of his witnesses I find that the circumstances prevailing as stated by those witnesses did not justify the shooting of the deceased dead and the force used therein as stated by Dr. Johansen Oduor.”

37. Having taken the account them evidence of the prosecution witnesses and the accused defence herein I am satisfied that find and hold that the prosecution has proved beyond any reasonable doubt all the ingredients of the offence of murder and hereby find the accused guilty and accordingly convict the same of the murder of **KENNETH KIMANI MWANGI on 14/3/2013 and quote Sandra Ochola (supra)** as regards this case:-

“Regardless, unjustifiable murder cannot be overlooked especially if we intend to achieve the reforms (police reforms) we idealize. Unfortunately for Katitu, our criminal justice system does not recognize popularity and public outcry as credible grounds for bail or acquittal. Furthermore the court may not take kindly to actions that attempt to belittle the constitution; Katitu therefore chose the wrong time to be a hero.”

38. Whereas this court appreciates the difficult condition, the police works in trying to control crimes and the dangers associated therewith, the right to life is sacrosanct under **Article 26(1)** of the Constitution and the limitation under **Subsection (3)** does not include the fact of being an alleged criminal as one of them. The deceased was entitled to a right of fair trial as stated in **Article 50(1)** and **50(2) (a)** just as the accused has had his day in court.

DATED, SIGNED and DELIVERED at Nairobi this 7th day of February, 2018

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Meroka for the State

Ms Kali for Ombeta for the accused

Ms Gikonyo for the family

Accused present

Court clerk Tabitha