



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NUMBER 17 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RAJAB KIPKOGEI KORIR.....ACCUSED**

**JUDGMENT**

Bernard Ogutu Odunga, hereinafter called “the deceased”, was shot dead at Caramel Guest House in Mbotela Estate Nairobi at about 6.00pm on 25<sup>th</sup> September 2013. Rajab Kipkosgei Korir, hereinafter called “the accused”, a police officer attached to Makongeni Police Station at the time, shot him dead. According to Dr. Oduor Johansen (PW12) who examined the body of the deceased and recorded his findings in the post mortem report produced in court as Ex.8, the cause of death of the deceased was multiple gunshot wounds. The doctor noted ten (1) gunshot wounds both entry and exit. His evidence is that he found the following gunshot wounds on the body of the deceased:

*(a) Entry gunshot wound on the right side of the chest located at the 3<sup>rd</sup> intercostal space, anterior axillary line measuring 1x½ cm and an exit wound located also on the right side of the chest at the 3<sup>rd</sup> intercostal space measuring 1x ½ cm and located at 5cm from the midline;*

*(b) Entry gunshot wound at the right side of the abdomen located 14cm from the midline and 18cm from the iliac crest with an exit wound on the left side of the umbilicus, 6cm from the midline;*

*(c) Entry gunshot wound on the right upper arm, medial aspect, with the exit wound on the right upper arm lateral aspect with associated fracture of the humerus bone;*

*(d) Entry gunshot wound on the left arm, lateral aspect and located 6cm from the left wrist with an exit wound on the same arm, medial aspect and also 6cm from the wrist joint; and,*

*(e) Entry gunshot wound at the neck on the left side with the exit on the right side.*

The deceased was at the time of his death dressed only in a towel that was tied around his waist. According to Catherine Nyambura (PW1) one of the workers at Caramel Guest House, the deceased was at the time preparing to go to the bathroom to take a bath. Evidence shows that the deceased was a regular customer at the Caramel Guest House and that he used to stay at Caramel Guest House five days in a week. He would always arrive at the Guest House at 5.00am and leave at 7.00pm. According to the staff of Caramel Guest House who testified in court, Catherine Nyambura (PW1) and Julius Muchanga Mwangi (PW2), the deceased used to work as a bouncer. He had been a customer at Caramel Guest House since 2010. The Investigating Officer (I.O) Jaffers Mworira (PW11) told the court that the deceased used to work as a bouncer at a club known as Phoenix located in Nairobi Central Business District (CBD). He said he visited Phoenix Club but found out that it had changed management. He said he did not pursue the matter further.

Evidence shows that the accused and PC Mwenda (DW3) were both in civilian clothes when they visited Caramel Guest House on 25<sup>th</sup> September 2013. Evidence shows that the two officers talked to Esther (not a witness) who worked at the Guest House and asked for a room. Both Catherine and Julius Mwangi (PW2) were at the Guest House in the course of that morning on 25<sup>th</sup> September 2013 at 9.00am when the two officers arrived at the Guest House. Julius told the court that he arrived at the Guest House at 7.00am that day and left at 5.30pm. He testified to seeing the two officers at 5.30pm that day. Catherine said the two officers arrived at the Guest House at 9.00am, left after talking to Esther and booking a room and returned at 5.00pm the same day.

After the investigations were completed, the accused was charged with murder under Section 203 as read with Section 204 of the Penal Code, the particulars of which state that on the 25<sup>th</sup> September 2013 at Caramel Guest House in Mbotela Estate within Nairobi County

murdered Bernard Ogutu Odunga. The accused denied committing this offence. He is represented by Mr. Nyakundi, advocate.

In his defense the accused told the court that he in company of PC Mwenda were on undercover patrol duties within Mbotela Estate and other areas under Makongeni Police Station when one Njambi, a staff member of Caramel Guest House called him at about 6.00pm and reported that there was an armed man at the Guest House. The two officers, who were about 200-400 metres from Caramel Guest House, rushed to the scene. Inside the compound of the Guest House they saw a man standing a few metres to the bathroom. The man was holding a black polythene bag containing a pistol. The man grabbed PC Mwenda while still holding the plastic bag. The accused challenged him to surrender but the man defied the order while still holding the other officer. The accused then shot the man until he fell down. The accused testified that the man, who is the deceased, had a pistol and handcuffs. The accused reported the shooting to his superiors. Scenes of the crime personnel were sent to process the scene and collect the body of the deceased. The accused adopted his statement dated 10<sup>th</sup> July 2014 in evidence and produced it as Defense Ex. 1.

PC George Mwenda who was in company of the accused on duty on 25<sup>th</sup> September 2013 told the court that the accused received a call from an informer that the suspect the two officers were looking for was at a certain area; that the two officers rushed to the place and found the man; that PC Mwenda asked him to introduce himself but the man jumped at him while holding a black polythene bag; that he struggled with the man; that the paper bag dropped and the man was left holding a gun in his hand; that the accused shot the man while the man and PC Mwenda were still struggling; that the man tore off PC Mwenda's clothes and that he could not reach for his gun due to the struggle. PC Mwenda adopted his three statements he made to the police and produced them as Defense Ex. 2(a) (b) and (c).

Ag. SPP Nathan Sanya (DW2) told the court that he was the OCS Makongeni Police Station at the time of the incident giving rise to this case. He stated that on 25<sup>th</sup> September 2013 he was away from the station on duty when he heard the accused over the police radio communication asking for scenes of crime personnel over a shooting incident at Makongeni of an armed suspect who had defied orders to surrender. DW2 testified that before this date he had received reports from Mbotela of a suspicious man who used to go to sleep the whole day in a guest house in Mbotela and leave in the evening and that he had been armed. He told the court that one Thiong'o was the person who reported to the police. It was not clarified whether the Thiong'o is the same as the Thiong'o PW2 mentioned who used to work at the Caramel Guest House either as a watchman or caretaker.

At the close of the case it was submitted on behalf of the accused that the prosecution has failed to prove this case to the standard required. It was submitted that there is no eye witness to the events and that key witnesses were left out. It was submitted that the credibility of PW1 Catherine is questionable; that the deceased was a wanted criminal and that his occupation was not ascertained; that the GK vehicle alleged to have brought in certain items to the scene and the items alleged to have been brought were not identified and that there is no clear evidence as to what really happened. This court was urged to find that the accused is not guilty and acquit him. On the other hand the prosecution submitted that the case against the accused has been proved beyond reasonable doubt and that all the ingredients of murder have been established. The prosecution urged the court to find the accused guilty and convict him accordingly.

The burden to prove a criminal case lies with the prosecution and does not shift. In a murder trial the prosecution must prove that the accused with malice aforethought caused the death of the deceased by an unlawful act or omission. My reading of the evidence and the consideration of the same shows clearly that the deceased Bernard Ogutu Odunga was shot dead on 25<sup>th</sup> September 2013. This fact is not disputed. It is admitted by the accused. He had been issued with a Ceska pistol on 23<sup>rd</sup> September 2013 with 8 rounds of ammunition by SGT Ronald Mukangai (PW9). He was assigned undercover duties with PC Mwenda (DW3). It is not in dispute that they went to Caramel Guest House in Mbotela. I do not doubt the evidence of Catherine and Julius Mwangi (PW2) that on that day they saw the accused and DW3. Catherine said she saw them twice, at 9.00am when they came in and talked to Esther about renting a room and again at 5.00pm when they returned to the Guest House. PW2 said he saw them outside the gate of the Guest House at about 5.00pm when he was leaving duty. He left to go home immediately but was called before he reached home and told that the deceased had been shot dead. He returned to the Guest House and saw the body of the deceased.

It is not in dispute that the deceased was at the time of being shot dressed in a towel that was wrapped round his waist. The only witness who told the court that she saw the deceased minutes before he was shot dead is Catherine. She said she had gone outside the Guest House to buy a matchbox at a shop near the gate. She said she was about 10 metres from the scene when the shooting took place but from her evidence in cross examination it seems that she did not witness the shooting but heard the sound of it. I have examined Catherine's evidence and that of Julius and note that there is no contradiction in regard to who the accused person and his colleague talked. Julius was referring to 5.30pm when he saw the accused and his colleague talk to Catherine while Catherine was referring to 9.0am when the accused and his colleague are said to have talked to Esther.

As stated above there is no doubt that the deceased was shot to death by the accused. The circumstances surrounding that shooting are not clear. Esther who may have seen what had happened did not testify. The Investigating Officer Jaffers Mworira (PW11) told the court that Esther was not traced and that her phone was unreachable. The watchman referred to as Ndung'u by Catherine was not a witness. This omission to call the two witnesses leaves the evidence of Catherine as the closest evidence in respect of the circumstances under which the deceased was shot. In her evidence is chief, Catherine told the court that she saw the deceased in a towel and slippers enter into a room near the gate where he stored his clothes and saw him come out; that as he was going to fetch water to take to the bathroom for a bath two men told him to lift his hands; that the deceased told the two men that he was not a thief but a bouncer but they shot him. Catherine said she was 10 meters away. In cross examination Catherine repeated the same evidence but in re-examination she told the court that she did not see the deceased being shot nor did she witness him being told to lift his hands. Most of the evidence by Catherine is attributed to what she claimed was the information given to her by Esther. It cannot be ascertained because Esther did not testify. However her evidence that she saw the deceased lying on the ground with blood at the scene cannot be doubted because it has been ascertained by that of the other witnesses including police officers.

This case is disturbing. PW11, the I.O is on record telling the court that he met resistance from the police in the course of his investigations. Indeed PW11, an officer from the Independent Policing Oversight Authority (IPOA) was assigned to investigate this case on 10<sup>th</sup> February 2014, about four months after the shooting. He met resistance and had to compel Makandara Police Division to assist him in order to start the investigations. PW11 did not explain what he meant by compel but he did mention writing several letters seeking assistance. He took the

statements of the staff at Caramel Guest House but only Catherine and Julius Mwangi testified.

The defense of the accused is to the effect that the deceased was a wanted criminal. He told the court that he and his colleague were responding to a call from one Njambi a staff member of Caramel about an armed man at the Guest House. The identity of Njambi is not given nor was she a witness. DW3 told the court that the accused received a report from an informer without disclosing the identity of that informer. In his statement to PW11 the accused does not name the woman who called him and reported about an armed guest at the Guest House. He stated further that the man was wearing a towel and was carrying a black polythene bag which he dropped when he started struggling with DW3 revealing a pistol. The statement of DW3 recorded on 27<sup>th</sup> June 2014 is even more unbelievable. He states that when he asked the man in a towel to identify himself, the man did not say anything but withdrew a pistol from his bag and that DW3 started struggling with the man necessitating the shooting by the accused. This version in the statement of DW3 is contradicted in his further statement recorded on 2<sup>nd</sup> December 2014. In the latter statement, DW3 stated that when he asked the man to identify himself, the man, who was at the time holding a black polythene bag, jumped at him and they struggled and in that struggle the man tore at DW3's sweater. He stated that in the course of that struggle the deceased let go of the bag revealing a gun in deceased's left hand. This version of evidence is similar to what DW3 told the court.

It is strange that neither the accused nor DW3 mentioned that they had been detailed by the OCS Ag. SPP Nathan Sanya (DW2) to follow up on a report allegedly made by one Thiong'o at Makongeni Police that a suspicious guest who sleeps during the day and leaves in the evening. This was the evidence of DW2. He told the court that the report was made four days earlier and that the accused and his colleague were not successful until 25<sup>th</sup> September 2013 when they found the deceased.

Another aspect that is disturbing about this case is the evidence that despite the deceased being armed as alleged by the accused and DW3, DW3 started struggling with him and the accused shot the deceased while still struggling with DW3. That in itself is incredible. I want to believe that the safety of DW3 was paramount if indeed it is true that he was struggling with an armed person, the deceased. Under those circumstances, it would be incredible that the accused would choose to shoot at the deceased without due consideration that he was endangering the life of his colleague. Further evidence shows that the pistol found at the scene had not ammunition. It was described as an old, rusty pistol. Catherine told the court that when she saw the deceased after the shooting, he had a pistol placed on his chest. This may be the case because Catherine was near when the shooting took place. The other witnesses, Julius (PW2) and PC David Kipchumba (PW6) described the pistol, the magazine and other personal items including clothes as being near the body of the deceased.

There is the evidence of Joshua Munyalo (PW3) who testified to seeing a GK double cabin vehicle arrive at the scene and a police officer in that vehicle carrying a small item and enter into the Caramel Guest House compound with it. This witness seemed to suggest that this is the pistol found at the scene. PW3 did not see what that item was and no other evidence exists as to its identity. This court cannot therefore speculate.

The information that was given to the superiors of the accused is that the accused and his colleague confronted an armed suspect and shot him after he defied the order to surrender. It is clear to me that this case rests on the word of the accused and his colleague DW3 against that of Catherine whose evidence is not that of an eye witness *per se*. The photographs of the scene of this crime bear witness to the interference with the evidence and the scene this case suffered. It is obvious that the scene was tampered with. The accused and DW3 did not even mention the items found strewn all over the body of the deceased. They only mentioned a black polythene paper bag and not clothes and other items seen in the photographs. Even if this court were to believe the accused and DW3 it is obvious that the scene as described by them is not the same as seen in the photographs.

After careful reading and consideration of all the evidence by the prosecution and the defense, it is clear to me that police did not assist the investigating officer in unraveling the circumstances surrounding the death of the deceased. Even if it were true that the deceased was a wanted criminal due process demands that he be arrested and prosecuted for the crimes he was alleged to have committed. It is not lost to this court that the accused and his colleague had all the time and opportunity to arrest the deceased who was sleeping in his room unaware that he was being sought by the police. Why didn't the accused and DW3 call for reinforcement to arrest the deceased from his room during the day if they believed he was a wanted criminal who was armed? Why did they wait for him to come out and gun him down in the manner they did? I ask these questions because I do not believe the defense of the accused person. I do not believe the contradictory evidence the accused and DW3 gave or that of DW2 and the report the accused and DW3 gave to their superiors in Makongeni Police Station. I also believe that the scene of the shooting was interfered with in a way that concealed what took place.

Despite my posing the above questions, it is not lost to me that the law does not place the onus of proving a case on the accused person nor does it place a responsibility on him to prove his innocence. It is the duty of the prosecution to prove that the accused is guilty beyond reasonable doubt. It is my considered view that the investigations in this case leave a lot to be desired. While I understand the challenges facing PW11 who investigated this case, I find that the police working with the accused and those in the Division failed the accused and failed the course of justice. I wonder why any senior police officer in the relevant police division did not ensure that this matter was properly investigated even before the IPOA was called in.

The conclusion I arrive at after careful analysis of all the evidence is that the prosecution has not discharged its heavy duty of proving the case against the accused beyond reasonable doubt. It is obvious to me and it must have been obvious to the officers who visited the scene that it had been tampered with. It should have been obvious to the I.O and the prosecution that failure to call Esther and the watchman who were present at the Guest House would turn fatal to this case given that the account given by Catherine is based on what Esther told her and that she did not witness the shooting as she testified. Why did the investigator pursue having the alleged recovered pistol examined by the firearms examiner? Why was the pistol used by the accused not examined? Why did the accused need all the bullets to kill the deceased? Why did the accused have to shoot the deceased five times and how could this have been possible given that the deceased was said to have been struggling with DW3?

All the questions posed above lead me to conclude that there is a lot that has not been disclosed in this case. It is disturbing as I stated above that the deceased will not get justice. His family will not get justice. This court has not been able to determine why the deceased was killed in the manner that he was. It has been stated that suspicion however strong cannot provide the basis of inferring guilt which must be proved beyond reasonable doubt (see ***Joan Chebichii Sawe v. Republic (2003) KLR 364***).

My conclusion of this matter is that the case for the prosecution fails due to the reasons I have given in this judgment. The evidence is weak, key witnesses have been left out, police did not help in the matter and did not accord the investigator all the assistance he needed to find evidence; the police believed what the accused and DW3 told them or perhaps they are complicit in concealing what happened in this matter. The evidence on record cannot sustain a conviction and this court must obey the law and lay down its tools at this stage. This court has failed to render justice due to the poor and insufficient evidence. I think it is right to state at this stage, having failed to find sufficient evidence to connect the accused with this offence, that if indeed the accused committed this offence then this court leaves vengeance to the Lord. I find the accused not guilty of murder as charged and I hereby acquit him and order that he shall be at liberty forthwith. It is so ordered.

**Delivered, signed and dated this 20<sup>th</sup> day of September 2018.**

**S. N. Mutuku**

**Judge**