



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 59 OF 2013

Lesit, J.

REPUBLIC.....PROSECUTOR

VERSUS

ERIC MBONDO MULONZI.....ACCUSED

JUDGMENT

1. The accused **ERIC MBONDO MULONZI** is charged with one count of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are:

“On the 13th May, 2013 at South C Estate within Nairobi County jointly with others not before court murdered No. 68689 PC DANIEL MOBISA.”

2. This case was started by Korir, J who heard one witness. The prosecution called in total 10 witnesses.

3. The prosecution case is that the accused hired a vehicle Registration No. KBM 192K from PW2 for 5 days. He took it on the 10th May 2013. On the 13th May, 2013 the vehicle was stopped by the deceased, a Police Officer on patrol duties within South C area. It had five occupants. One of the occupants who sat on the rear right passenger seat shot the deceased before all five abandoned the vehicle, hijacked another vehicle in which they fled.

4. The accused was arrested on the 16th May 2013 and charged with this offence.

5. The defence case is twofold. First that the vehicle the accused hired from PW2 on 10th May 2013 was registration No. KBR 255C a Toyota Fielder which he, accused, hired out to one Wilson. Secondly is an alibi defence that on 13th May 2013 when the deceased was shot dead in South C he, accused, was in Umoja II Nairobi several kilometers away.

6. The case was prosecuted by Mr. Okeyo, Prosecution Counsel except at the defence case when Ms. Onunga Prosecution Counsel took over the case. The accused had two defence counsels. However, Mr. Mokua conducted most of the defence and also gave submissions in the case.

7. Having carefully considered the prosecution and the defence case and all the submissions by Counsels in this case, I find that there are facts which are not in issue and issues which are for determination.

8. The issues which are not in dispute are:

(i) That the accused hired a vehicle from PW2 in the presence of PW7.

(ii) That the deceased was shot while on patrol duties along Muhoho Avenue in South C, and that he succumbed and died while receiving treatment at Forces Memorial Hospital.

(iii) That the deceased was on patrol duties accompanied by his colleague PC Mburu, PW1.

9. The issues which are for determination are:

(i) Whether the circumstantial evidence relied upon by the prosecution met all the requirements.

(ii) Whether the prosecution had proved the elements of murder as against the accused.

(iii) Whether the prosecution suppressed evidence.

(iv) Whether the accused defence and his alibi defence the accused put forward in this case can stand.

10. The accused is facing a charge of murder contrary to **section 203** of the **Penal Code**. The section creating this offence states clearly what the ingredients of the offence are and provides thus:

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

11. The ingredients of murder are therefore:

(i) That death occurred.

(ii) That the death was caused by an unlawful act or omission of the accused person.

(iii) That at the time the accused did the unlawful act or omission he was actuated by malice aforethought.

12. Malice aforethought is an important ingredient to the offence of murder. **Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought in the following terms:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

1. 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,

2. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

3. An intent to commit a felony;

4. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

13. The prosecution has the burden of proof, to prove its case against the accused person beyond any reasonable doubt. That burden rests on the prosecution throughout the case and never shifts to the defence except where provided in the law.

14. On the issue **whether the circumstantial evidence relied upon by the prosecution met all the requirements**. In this case there was no direct evidence against the accused. The prosecution is relying on circumstantial evidence against him. Dealing first with what circumstantial evidence is.

15. There are a myriad of cases setting out the requirements that the prosecution must meet in order to establish circumstantial evidence. I will adopt the case cited by the defence which is **MUSILI TULO VS. REP. [2014] eKLR** where the Court of Appeal held that for an accused to be convicted based on circumstantial evidence, the following requirements must be met:

“(i) The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilty of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

16. Ms. Onunga in her written submissions urged that it is the prosecution position that it has proved the charge against the accused person beyond any reasonable doubt. Counsel urged that the accused conduct was that of a person with a guilty mind. She pointed out that the accused switched off his phone and did not contact PW2 when he failed to return the vehicle as agreed. Secondly that instead of contacting PW2 she went straight to the police. Counsel urged the court to find that the accused acted in concert with the armed man who shot the deceased.

17. The defence on the other hand has urged that the prosecution has failed to prove its case because the circumstances from which the court was asked to draw an inference of guilty were not a definite tendency unerringly pointing towards the guilt of the accused; do not form a complete chain when taken cumulatively as to lead to a finding that there is no escape from the conclusion that the accused and no one else committed the offence.

18. The circumstance the prosecution is relying upon is found in the prosecution evidence. PW2 entered into a contract with PW4 as evidenced in their Agreement P. Exhibit 1. In that agreement PW2 took a vehicle registration No. KBM 192U X-trail red in colour belonging to PW4. That vehicle was still in the name of the previous owner one Lucy as per the Sale Agreement between PW4 and Lucy produced as P.Exh.3 and other documents produced as P. Exhibits 4, 5, 6 and 7.

19. According to PW2 the accused met her along Kimathi Lane on 10th May 2013 at 6.30 p.m. The accused required of her the X-trail red in colour for five days. PW2 said she charged him 4000/= per day bringing the total to 22,500/= which he paid vide M-Pesa. PW2 testified that since the accused was a broker, and as was her practice, she did not prepare any Agreement for that transaction between the accused and her company, Trends Events. She said that she released the vehicle to the accused on 10th at 7 p.m. and that he was to return it on 15th at 7 p.m.

20. PW2 stated that when the accused did not return the vehicle she started calling him on the evening of the 15th. When she could not get through to him, she decided to use the vehicle's tracking system with which she tracked the vehicle at Langata Police Station.

21. The other witness called to support PW2's evidence was PW7. It was the evidence of PW7 that he had known the accused for long time and that he had hired out vehicles to him before he left that business. PW7 later changed his evidence and said that he knew the accused before but that he only came to know him by name on the day he took a vehicle from PW2.

22. PW7 had started by testifying that on 10th May 2012 he was at his clothes shop at Imenti House when one Patrick Oreri approached him asking for a vehicle to hire. He said that he took Patrick to PW2 who hired out a Fielder vehicle Registration No. KBR to him.

23. PW7 testified that Patrick returned after 4 days with the accused and that he required an X-trail. PW7 said that the accused negotiated for the X-trail and took it from PW2 on the same day. That on 16th May, 2013 PW7 informed him that the accused had failed to return the vehicle as agreed.

24. The evidence of PW2 and 7 was inconsistent and contradictory. First and foremost PW2 does not mention PW7 in her evidence. Secondly PW2's evidence was that the accused took the vehicle the Red X-trail on 10th May 2013 while PW7 testified that on 10th it is one Patrick who took a Toyota Fielder and that 4 days later is when the accused took the X-trail. The date the accused took the X-trail is contradicted in the evidence of the two witnesses.

25. PW7 contradicted his own evidence as well. He started by saying he knew the accused before 10th May 2013, and that they had done business together before. He then changed and said he did not know him before. He changed his evidence further by saying that it was the accused name he did not know until the day he took away the vehicle. The other inconsistency between the evidence of PW2 and 7 is that PW2 does not mention giving out any vehicle to one Patrick on the 10th May. Neither does PW2 mention being with PW7 on the 10th or on any other day when the accused leased the vehicle from her.

26. Apart from the inconsistency in PW7's own evidence, he admitted that even though he testified that the accused paid money by M-pesa and then took away the vehicle, he did not witness any payment nor did he see the accused driving away the vehicle.

27. PW2 and 7 are the ones who provide the nexus between the accused and the X-trail vehicle. As key witnesses whose evidence was material to the case, it was important for the court not to have any cause to doubt their credibility. This is how the court put it in the case of **NDUNGU KIMANI VS. REP [1979] KLR 283:**

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

28. I find that PW7 is not a credible witness given the inconsistencies in his own testimony created by the fact he did not stick to one version of his story but kept shifting positions. He did not impress the court, was of poor demeanour and his integrity was doubtful.

29. As for PW2 I did not find her a credible witness either. She said that she was dealing with the accused for the second time when she leased the vehicle to him. I was not convinced that she could give out a vehicle to the accused, a total stranger, without drawing any agreement or issuing any receipt for payment made. Further she claims that the accused took the vehicle for 5 days and that she charged him 4000/= per day. Yet the amount paid according to her testimony was 22,500/=. In addition, the M-pesa account shows that the accused paid an additional 4000/= which PW2 does not explain. The accused said that he was paying for cologne on the 13th May, which he bought from PW2. What PW2 said does not add up and the difference is not explained.

30. In *Uganda Court of Appeal in TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA, 6* it is not very contradiction that warrants rejection of evidence. As the court put it:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

31. I find that the evidence by these two key witnesses was not believable as it was full of material contradictions. I find that the evidence does not meet the requirements of establishing circumstantial evidence for the prosecution as the inconsistencies could not be resolved within

the case. The contradictions and inconsistencies go to the root of the prosecution case, the evidence was not cogent and the credibility of the two key witnesses was doubtful.

32. The second issue has to do with **whether the prosecution was able to prove the elements of murder as against the accused**. As stated earlier there was no eye witness account connecting the accused to the shooting following which the deceased died.

33. There are two witnesses who were present at the scene when the shooting took place. These were PW1, the Police Officer who was on patrol duties with the deceased at the time of incident. The other one was PW9 who was selling sand along Muhoho Avenue within meters of where the incident took place.

34. PW1 was clear that he saw the one who shot his colleague and could identify him if he saw him. He said that the man was not before the court. PW9 on his part said that he was lying down after a meal on the left side off the road. He said that the vehicle in question was stopped by the deceased because of overlapping. It stopped on the left side of the road, which is the side on which he was. He said that the deceased, whom he had seen before, had a 15 minutes discussion with the driver of the vehicle who had alighted to talk to him in front of the vehicle. He said that the deceased was shot on the right side of the vehicle, which was the side away from his view. PW9's view was therefore obstructed. He said that the vehicle's rear windows were dented and he could therefore not see the vehicle occupants until they alighted in a huff after the shooting. PW9 testified that the man who shot the deceased alighted from the rear right side of the vehicle which was the far end from him.

35. Neither PW1 nor PW9 identified the accused in connection with the shooting or the red X-trail vehicle in which the gunman alighted from. Mr. Mokuia for the accused urged the court to note that in any event no identification parades were conducted to find out whether PW1 and 9 could identify the accused in connection with this case. I will get back to this later.

36. I find that from the evidence adduced by the prosecution, they have failed to establish that either the accused shot the deceased on the material day. Alternatively they should have shown that he was in the company of those who shot the deceased and that he fled the scene with them after the shooting. That could have sufficiently established that he was acting in concert with others, as framed in the information before the court.

37. With such evidence the court could have had a basis to rule that the accused was a principle offender under **section 20** of the **Penal Code**, or a joint offender under **section 21** of the **Penal Code** and that therefore the action of any one of those in his company was the action of all.

38. I find that the prosecution did not prove the elements of the charge in that the prosecution did not prove that the accused and others not in court unlawfully shot the deceased; that as a result the shooting the deceased died; and finally that the action was actuated by malice.

39. The other issue is **whether the prosecution suppressed evidence**. Mr. Mokuia for the accused urged that the prosecution suppressed evidence because the investigating officer failed to conduct identification parades in the case. He urged that lack of fingerprints report means that no finger prints dusting was even conducted. He also urged that the accused call data record was never obtained and finally a trace metal detection test was not conducted.

40. There is no doubt that no identification parades were conducted in this case. It was an important step in the prosecution case especially because two witnesses were present at the scene of shooting. A prudent investigating officer should have had parades conducted for PW1 and 9 to identify the accused, even if for purposes of elimination. Failure to carry out the identification parade speaks of sloppiness in investigations rather than suppression of evidence.

41. The submission on the accused mobile data is not correct as it was before court as P.Exh.13. In fact, the accused phone data has been relied upon by the defence to support the alibi defence.

42. As for the trace metal detection test and the finger print dusting the defence questioned PW5 regarding the test and the dusting in connection to the rifle recovered from the vehicle in question. I do not see any value of the test and the dusting even if they were carried out. The rifle was taken from PW1 at the Station armoury. It had been recovered in the boot of the car and had passed through many hands. In the circumstances it would have added no value to carry out the test or the dusting of the rifle done.

43. There is another aspect which was not mentioned by the defence, and which is relevant here. PW2 in her evidence testified that on the 16th May 2013 after tracing the X-trail vehicle at Langata Police Station she called the accused on phone and asked him to proceed to Langata Police Station. PW2 testified that she was already there and had been arrested by PW5. She then called the accused who proceeded to the Langata Police Station at 6 p.m. same day where they both met PW5, the investigating officer in this case.

44. PW5 the investigating officer in this case explained to the court how he traced PW2. It was his evidence that he got the particulars of the registered owner of the vehicle from KRA. He then traced her, one LUCY WAHOME, who led him to RACHAEL, PW4. It is PW4 who gave him the contacts of PW2 and when she said she could not go to Langata police station, he went to Nairobi CBD where he said *'he caught up with her'*.

45. The evidence of PW5 contradicts the testimony of PW2. It is clear from the evidence of PW5 that PW2 did not take herself to Langata Police Station but was caught up with in the City Centre, many kilometers away.

46. That is not all. It was the evidence of PW5 that he found the accused at Industrial Area Police Station where he had gone to make a report. It was the DCIO who informed him of the accused presence there. PW5 said that he escorted him to Langata Police Station where he held him. I noted that PW5 did not divulge what report the accused was making at Industrial Area Police Station when he arrested him, until at the Re-Examination stage. In Re-exam by the prosecution PW5 said that the accused was reporting the missing motor vehicle KBM 192K Nissan X-trail Red in colour.

47. That evidence was clearly an afterthought and was brought in cleverly to ambush the defence. It is however a mere allegation. There was an easy way to establish the report the accused made, which is through production of the OB where it was recorded. I find failure to produce the OB abstract of accused report at Industrial Area Police Station fits well with what Mr. Mokua for the defence termed as suppression of evidence.

48. I must add here that the accused in his defence clearly stated that he went to Industrial Area Police Station to report the missing vehicle Registration No. KBR 255C. He had given it to one Wilson who did not return it on time as agreed. At the stage where the accused made that assertion, it was open for the prosecution to apply to adduce evidence to rebut accused defence. This is because it is the prosecution which has the burden of proof in this case. It is quite instructive that no such application was made.

49. Regarding the duty to call sufficient evidence in **BUKENYA & OTHERS 1972 EA 549** LUTTA Ag. VICE PRESIDENT held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

50. I find the prosecution failed to avail material evidence in this case, as demonstrated herein above. I find that certain aspects of the case required further investigations, but which investigations were not conducted, as shown herein above. I agree with the defence that there was a degree of sloppiness on the part of the investigations. In the circumstances an adverse inference that the prosecution failed to avail some evidence because it was not in its favour would not be farfetched.

51. The final issue for determination is **whether the accused defence and alibi defence should stand**. As I stated at the introductory stage of this judgment, the accused defence was two-fold. One, that the vehicle he hired from PW2 was a Toyota Fielder and two, that at the time of alleged shooting he was at Umoja II.

52. Regarding the vehicle he hired or leased from PW2, the accused produced an Agreement cum Receipt in the letterheads of Trends Events. It was D. exh. I. It is shown that it was taken on the 10th May 2013 at 7 p.m. to be returned on 15th May 2013 at 7 p.m. It further shows that the charges for the vehicle and number of days it was leased was 3500/= x 6 days and the total cost as KShs.21,000/=. It has the registration No. of the vehicle as KBR 255C. It is signed by both parties.

53. As noted earlier, the prosecution did not apply to call evidence to rebut the defence case. Neither did they apply to have the document D. Exh. I examined by a Handwriting Expert.

54. I have taken the liberty of comparing the logo of the Trends Events in both D. exh. I and P. exh. I. The latter was the Agreement between PW2 and 4 for the vehicle in question. They are exactly the same. I also compared the signatures of PW2 in both documents and to the naked eye they look similar.

The accused had no burden to prove his innocence in this case. All he required to do is to create doubt in the veracity of the prosecution case. For that proposition I quote the case of

55. I find that accused defence that he hired the vehicle KBR 255C and not the vehicle in P.exh.2(a)(b) and (c) has cogent evidence in support through the document D.exh.I.

56. The prosecution through the investigating officer tried to adduce documentary evidence of a receipt but same was objected to by the defence. The objection was upheld. The reason is very simple. First PW2 was clear in her evidence that she did not issue any receipt to the accused for payment made in respect of the car hire. Secondly, PW2 was clear that she did not prepare any Agreement in respect of the said transaction.

57. Having said so, it was very clear that if any document purporting to be a receipt or agreement in support of the car hire by accused from PW2 must have been created after PW2 testified in court. It was only going to contradict evidence of PW2 and was an afterthought. For such a document to surface during the testimony of PW5, without it having been acknowledged by PW2 the alleged maker, made it a useless piece of paper lacking critical veracity from the evidence of PW2. It could therefore not be admitted in evidence as that would have been irregular.

58. The other defence was the alibi defence the accused put forward. It was supported by the M-pesa transactions of accused phone produced as P.exh.13. It was the accused defence that on 13th May 2013 at 1443 hours the accused withdrew KShs.4000/= from an M-pesa Agent, Lexcon, at Umoja 2 near matatu terminus. It was accused defence that he carried out that transaction in person at Umoja II which is several kilometers from South C.

59. The document P.Exh.13 was a prosecution exhibit and is therefore authentic, it cannot be said to have been manufactured by the accused. It shows clearly that accused cell phone line was used to withdraw the amount at about the same time that the shooting in question took place.

60. As to what alibi defence is, in **KIARIE V. REPUBLIC (1984)KLR 739** where it was held:

6.“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a

doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi."

61. In the case of **UGANDA v. SEBYALA & OTHERS [1969] EA 204**, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."

62. I find that the alibi defence is cogently established. It creates doubt in the veracity of the prosecution case. It also exonerates the accused from the shooting incident, and from the case as a whole.

63. Having considered, analyzed and evaluated all the evidence adduced by both the prosecution and the defence in this case, I find that the prosecution has failed to prove the case against the accused beyond a reasonable doubt. In the result, I give the accused the benefit of doubt and acquit him for this offence under **section 322** of the **Criminal Procedure Code**.

SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF NOVEMBER 2018.

LESIT J

JUDGE