



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL CASE NO. 1 OF 2016

REPUBLIC.....PROSECUTOR

versus

NICHOLAS WANJOHI GAKUYA.....ACCUSED

JUDGMENT

1. **Nicholas Mwangi Karuri (deceased)** died on 5th April 2009. As I write this judgment there is no doubt in my mind that all players of the justice system failed in ensuring that the person/s responsible for the death of that deceased were brought to book. The reason for so stating is because the police did an extremely shoddy investigation and consequently failed to avail witnesses who could possibly have assisted the court reach a just determination. In addition the murder trial has inordinately delay in its conclusion before the courts. **Nicholas Wanjohi Gakuya (Wanjohi)** the accused herein was arraigned before the Nyeri High Court on 12th May 2009 where he was **charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He was charged with the murder of Nicholas Mwangi Karuri, deceased.**

2. Following Wanjohi's plea of not guilty his trial began at Nyeri High Court before Justice Makhandia as he then was, now a judge of the Court of Appeal. The said judge received the testimony of 1st and 2nd prosecution's witnesses before he was transferred from Nyeri High Court. The case continued from where it had stopped before Justice Sergon who received evidence from prosecution witnesses number 3 to 6. After receiving the evidence of prosecution witness number 6 Justice Sergon was transferred from Nyeri High Court. The murder file was then transferred to Nanyuki High court and was received in this court on 25th January 2016. On receipt of the murder file, Nanyuki High Court ordered the trial to continue from where it had stopped. Before Nanyuki High Court the prosecution only called one witness being PW 7 then closed its case.

3. In my view the combination of shoddy investigation by the police of this case and the prolonged trial before court and before different judges had a negative effect on the outcome of the case.

4. It is under those circumstance that I find myself in the unenviable position of having to determine the guilt or otherwise of Wanjohi, the accused. As stated before and it is worth repeating, the case was very poorly investigated. Indeed I would even go further to state the case was not investigated at all. The prosecution simply presented evidence relating to ownership of G3 rifle and the number of ammunitions fired on the fateful night.

5. **Article 50(2)(a)** of the Kenyan Constitution provides that an accused person has the right to be presumed innocent until the contrary is proved. The legal burden of proof placed upon the prosecution in criminal trial is in effect a statement of that fundamental presumption in our constitution that a person is

presumed to be innocent until proved guilty. In the case of **MCingosh v Lord advocate (2001) 3 WLR 107** the court considered that presumption and stated:-

“ The more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing inquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system.”

6. It is also important to remember that it is a well-established principle in law that an accused does not have any obligation to prove his innocence.

BACKGROUND

7. Wanjohi and the deceased were administration police officers (AP). They had been deployed at Endana AP Camp. The deceased and Wanjohi, while at that camp shared the living quarters. The deceased was shot dead at that camp on 5th April 2009. While at that camp the deceased had been issued with G3 Rifle serial No. 388274 with 40 rounds of ammunition. The accused had been issued with G3 Rifle serial no. 403024 with 40 rounds of ammunition.

PROSECUTION'S EVIDENCE

8. The assistant chief **P W 5 Peter Mwangi Wangana** who resides in Endana village stated that on 5th April 2009 at 9.00 p.m., as he watched news on his television he heard a knock at the gate. It was Wanjohi the accused. The accused told him that they had been attacked by bandits at Endana A.P. camp. Before accompanying the accused the chief received a phone call from a police informer who informed him that the accused had killed the deceased. That police informer by the name of Wilson Kiragu was not called by the prosecution to testify before court. The assistant chief's evidence on what the informer told him was therefore hearsay. The assistant chief's evidence because it offends the hearsay rule is inadmissible. The inadmissibility of hearsay evidence was discussed in the case **KINYATI V REPUBLIC [1984] eKLR** where the Court of Appeal held as follows:-

“4. Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence.

5. The rule against hearsay is that statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact.

6. Hearsay evidence may be admitted if the statement containing it is made in conditions of involvement or pressure and within proximity but not exact contemporaneity as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.

7. The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is a hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is not inadmissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made.

8. Some seemingly hearsay evidence may be proved to be original evidence when the fact that it was made, as distinct from its truth by taking the following into account:-

(a) was the statement made or not

(b) it is relevant to an issue, regardless of whether it is true or false.

(c) if it affects the credit of a witness by either being consistent or inconsistent.”

9. The assistant chief drove back to the AP camp in the company of the accused. He saw the deceased's body which was at the Endana trading centre. At that scene he collected three spent cartridges. The accused was arrested that night on suspicion of having caused the deceased's death.

10. Those three spent cartridges were examined by firearm examiner **Johnstone Musyoka Mwongela (PW 2)**. The firearm examiner examined also G3 Rifles Serial No. 403024, issued to accused and No. 388274, issued to the deceased. The firearm examiner was requested to determine between those two rifles which one had fired the three spent cartridges. On examination the firearms examiner determined that the 3 spent cartridges were fired by the G3 Rifle Serial No. 403024 issued to the accused.

11. **Sgt. John K. Mwangi (PW 4)** the immediate supervisor of the accused and deceased was informed on 5th April 2009 that one AP officer had shot his colleague. On reaching Endana trading centre he found the deceased body. He also found the accused already arrested. The assistant chief surrendered to him the three spent cartridges. The evidence of that witness in relation to the ammunition issued to both the accused and the deceased is very confusing. The sense however one gets from his evidence was that he recovered from the gun safe two G3 Rifles issued to the accused and the deceased and 4 magazines, which each ought to have had 20 rounds of ammunition. He said that however one of those magazines only had 17 rounds of ammunition and not 20 rounds like the other 3 magazines.

12. **IP Benjamin Wambua** the officer in charge of police station (OCS) at Ngareng'iro Police Station also went on the scene on 5th April 2009. He confirmed that the assistant chief gave him G3 Rifle issued to the accused and the three spent cartridges. He was the one who forwarded the two Rifles and the ammunitions to the firearm examiner.

13. **C.I.P. Shadrack Marwa** was attached to Ngareng'iro Police Station. He too confirmed that there were 3 spent cartridges at the scene on 5th April 2009. He further testified that there were witnesses who heard a quarrel between the accused and the deceased before the shooting. It is important to state that those witnesses were not called by the prosecution to testify and the evidence relating to the alleged quarrel between accused and the deceased is inadmissible because it is hearsay evidence. What is however worrisome is that this officer admitted that having received three spent cartridges from the assistant chief he, and his colleagues, did not bother to check at the scene to see if there were any other spent cartridges. That is what I earlier referred to as shoddy investigation of this case.

14. The postmortem report was produced by its maker Doctor Kurgat. The doctor testified that the deceased had multiple gun wounds; two to the chest, two to the abdomen, two to the upper region of the thigh, and two to the right buttock. The cause of death was found to be hemorrhage secondary to penetrating injuries secondary to bullet wounds.

DEFENCE EVIDENCE

15. The accused on being found to have a case to answer stated in his defence that he was at Endana AP camp together with the deceased. He testified that in the evening the deceased decided to go to the Endana trading center to buy some cigarettes and maize meal flour for their dinner. Ten minutes after the deceased left the AP camp the accused heard gun shots and screams from the direction the deceased had gone. The accused said he ran to that direction saw some people running low in some thicket. He could not see the deceased. Accused said he realized something was wrong and fired three shots into the air. On returning to the camp he saw the deceased lying down with his Rifle. Deceased was bleeding and was not speaking. He place both Rifles into the armoury then went and report the incident to the assistant chief.

16. The accused said that the area where Endana AP camp was, was notorious for cattle rusting. That it was an insecure place.

ANALYSIS AND DETERMINATION

17. Viscount Sankey L.C. in the case **WOOLMINGTON V DPP [1935]** in discussing the duty of the prosecution stated:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to the defence of insanity.....”

18. The prosecution as it is seen from the above utterly failed in that duty. It failed to prove the accused guilty. The prosecution simply presented evidence of the issuance of Rifles and ammunitions to the accused and the deceased. They also presented evidence which showed that three bullets were fired using the accused assigned Riffle. The doctor who did the postmortem, however, found that the deceased died of 8 gunshot wounds. The prosecution’s witnesses, and in particular the immediate supervisor of the accused and the deceased confirmed only three bullets were missing from the magazines issued by him.

19. With that evidence in mind it becomes clear that the gun shots from the accused’s Riffle were not the ones that killed the deceased. Indeed the doctor’s finding that the deceased died of 8 gunshot wound gives credence to the defence of the accused that he heard gunshots in the direction that the deceased had gone. It ought to be borne in mind that the accused when he immediately reported to the assistant chief, about the incident, he told the assistant chief that the AP camp had come under an attack from bandits. Further C.I.P Shadrack Marwa without elaborating confirmed that there was, then, enmity between the regular police officer and administration police officers. The question that remains unanswered is, was the deceased killed by the bandits or the regular police who had enmity with AP police officers. The doubt all that creates must be to the benefit of the accused.

20. From the evidence adduced by the prosecution it is clear that there was no direct independent witness of the murder of the deceased. The prosecution presented circumstantial evidence. The courts have set the stand of examining circumstantial evidence. In the case **REPUBLIC V KIPKERING ARAP KOSKE & ANOTHER 16EACA 135** it was held:-

“In order to justify the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of his guilt.”

21. The prosecution’s evidence does not satisfy the legal requirement of circumstantial evidence to justify the conviction of the accused. There is nothing that connects the accused to the murder of the deceased. The prosecution only presented evidence leading to suspicion. Suspicion no matter how strong does not obliterate the duty of the prosecution to prove the case beyond reasonable doubt against the accused. The prosecution failed in that duty. The prosecution did not prove the case against the accused.

22. It is because of the above finding that the accused Nicholas Wanjohi Gakuya is acquitted of the charge of murder of Nicholas Mwangi Karuri deceased.

DATED AND DELIVERED AT NANYUKI THIS 14TH DAY OF JUNE 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Accused: Nicholas Wanjohi Gakuya

For Accused:.....

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE