

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL CASE NO. 9 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS NJERU.....ACCUSED

JUDGMENT

1. FRANCIS NJERU the accused stands charged with the offence of Murder contrary to section 203 as read with section 204 Penal Code. The particulars being that the accused on the 5th day of April 2010 in Rwathia Village in Kirinyaga East District within Central Province murdered Isaac Mwangi.

2. The Prosecution case is premised on the evidence of fifteen (15) witnesses. PW1 - Peterson Muturi Mbutia testified that on 4/4/2010 at around 7.00pm he went to Sape Bar and found the deceased who asked him to buy for him cigarettes in exchange for alcohol. PW1 bought the cigarettes and in return the accused bought him some liquor called Kigwa. They both started drinking. At around 9.00 pm the accused Francis Njeru walked into the bar and sat on another table. PW1 identified the accused in the dock. At around 10.00pm the owner of the bar asked them to leave as he wanted to close the bar. PW1 and the deceased left together. The accused followed them and asked the deceased why he had refused to buy him beer. The deceased replied that the accused had not requested to be bought for beer.

3. The accused reminded the deceased that he had assaulted him when there was an occasion for his child. The argument then developed into a fight but PW1 separated them after which the accused went home while the deceased and PW1 continued walking home. PW1 stated that as they were walking he heard the sound of a gun but did not see the person who had fired the gun. The deceased told him that he felt something penetrate his chest. PW1 told the deceased that they should run. As they were running they collided and fell on the path. It is then that the accused emerged from the coffee plantation and stepped on PW1's back and then shot the deceased twice. PW1 did not see the weapon but he heard the sound of a gun. He then ran and woke up the deceased parents. When they went back to the scene they found the deceased lying on his back but was not dead. They put the deceased on his father's vehicle. They also called the Police who came after 4 hours and they went to the accused's home and arrested him. The Police recovered a gun from the accused's home.

4. During cross-examination, PW1 stated that he knew the accused and the deceased before the incident and that both PW1 and the deceased were drunk when they left the drinking den. However PW1 did not seem sure of the time they left the bar as he didn't have a watch. He said between the time he heard a gunshot and saw the accused emerge was less than a minute. He stated that he did actually see the accused shoot the deceased. The accused even spoke to PW1 and asked whether he should shoot him. On re-examination PW1 stated that he had only taken one bottle of Kigwa.

5. PW2 Peterson Gatete Isaack the uncle to the deceased stated that on the said date he was asleep with his wife at around 1.00 am when he heard PW1 shouting and calling them saying the deceased had been killed by the accused. He went outside but did not see PW1. He saw his brothers Zacharia (PW4) and Njeru who asked him to get into the vehicle. When they arrived at the scene which was about 800 meters from PW2's home they found the deceased lying down. He was not dead but could not talk. He was injured on the chest where he had three holes. They decided to rush the deceased home using Zacharia's car. The deceased however died on the way to hospital. During cross examination, he stated that he knew the wounds were bullet wounds because 4 cartridges were collected from the scene. He also stated that the wounds did not look like knife wounds.

6. PW3 Julius Muchangi who is the deceased's brother stated that he was woken up by his wife's and mother's screams at around midnight. He learnt from his mother that the deceased had been shot. He went

to Karumande where he found the deceased's body in his father's car. The body had three gunshot wounds. The police later recovered a gun from the accused's homestead. He personally saw the police coming from the home of the accused having arrested the accused and carrying the AK 47 rifle (EXB1). He stated that he is the one who identified the body to the doctor who did postmortem.

7. PW4 Zacharia Muchera Isaack the deceased's father stated that he was woken up at about 1.00am by his uncle's son and was told that the deceased had been shot. At the scene, he found the deceased lying down. He was breathing but could not talk. He drove his son towards hospital but the vehicle had a puncture and as they were changing it, the deceased died. He saw three wounds oozing blood on the deceased's chest. He confirmed that he knew the accused as they are neighbours.

8. PW5 Doctor Joseph Thuo a Medical Doctor examined the accused and confirmed that he was fit to stand trial. PW6 Harrison Mburia, the deceased's brother testified and confirmed that he viewed his brother's body at Kibugi Funeral Home on 7/4/2010. He stated that he saw three stab wounds on the chest and one stab wound on the left leg.

9. PW7 Ann Wanjiku stated that she was on duty at Shape bar on the said date. She confirmed that Isaac Mwangi (deceased) and Mutigi were customers at the bar on the said date. When the bar closed at 10.00pm Isaac and Mutigi left together. She stated that she didn't know the accused and that she did not see him at the bar on that day. She also stated that when the deceased and PW1 left the bar at 10pm they were not drunk as they had not taken a lot.

10. PW8 C.I.P (A.P) Joel Kiptum stated that on 5/4/2010 at 2.00 am he was called by his colleague and informed that there was a shooting at Karumandi. He accompanied other officers to Karumandi where they found a motor vehicle with the deceased's body inside. They went to the scene and found two spent cartridges and blood. PW1 informed them that the deceased had been shot by the accused. PW1 led them to the accused's homestead. The accused was not in his house but they found him in his brother's house within the homestead. He was lying under the bed. When they searched the homestead they found a rifle and a magazine hidden under a chicken cage. Upon cross examination, he confirmed that the recovered rifle was not dusted. He stated that the scene of crime was ½ a kilometer from the bar. He denied that PW1 was a prime suspect.

11. PW9 – Johnston Musyoki Mwangela a Firearms examiner of twelve (12) years' experience stated that on 6th April 2010 he received the following exhibits from C.I. Patrick Mwita for examination. They were;

- | | | | | | | |
|------|-------|-----------|-------|--------|------------|---------|
| i) | A.K. | 47 | Rifle | Serial | No.2106576 | (EXB1). |
| ii) | Fired | cartridge | | cases | EXB 3 | (i) |
| iii) | | Magazine | | EXB | 3 | (ii). |

Upon examining them he found the A.K. 47 Rifle to be complete in all its areas of operation and the magazine was capable of firing ammunition. He concluded that EXB1 was a firearm as defined under the Firearms Act, while EXB 3(i) were two fired cartridges of caliber 7.62 by 39mm which had been fired from EXB1.

12. PW10 No 78668 P.C Cleophas Musinga testified that he was working at the scene of crime Embu when the incident occurred. He visited the scene of crime on 9/4/2010 at Rwathia village and took photos thereof which he produced in Court as EXB 4(i) – (viii) by PW15 Cpl Reuben Imanyara who had supervised the printing. He produced a certificate to that effect – EXB 17.

13. PW11 No 218018 Titus Mutiso testified that on 5/4/2010 in the wee hours of the morning he was called by the OCS Kirinyaga and informed of the shooting at Karumandi. At the police station he found motor vehicle KRN494 with the body of the deceased inside. They later visited the scene where they found blood stains and recovered two spent cartridges. They were later led to the homestead of the accused. They found the accused in his brother's house after they broke into it. The accused was very drunk with muddy shoes. They also recovered an AK 47 rifle serial number 06576 and a magazine.

During cross examination he stated that he witnessed the gun being recovered from the accused's homestead and agreed that the gun ought to have been dusted.

14. PW12 No 46539 Boru Dida also testified and confirmed that the accused was arrested from his brother's house and that a gun was recovered from the homestead. He also stated that the deceased's body had three gunshot wounds. PW13 NO.88729 PC Hillary Chebuot Tanui of Kirinyaga police Station testified that he witnessed the accused being arrested and a rifle being recovered from the homestead of the accused. He was also present when the postmortem was done.

15. PW14 Dr. Andrew Kanyoni from Kerugoya District Hospital stated that he examined the body of the deceased. He confirmed that the deceased's body had bullet wounds on the right chest, left eye and left Lumbar region. He did not recover any bullets from the body. His findings were that the cause of death was severe blood loss and damaged organs caused by bullet trauma.

16. In his defence the accused gave unsworn evidence and did not call any witness. He stated that on 5/4/2010 he woke up and went to church at Kamweti. He later went home and slept. The next day the Police went to his home and found him looking after his animals. He opened his house for them to conduct search but they did not recover anything. They also didn't recover anything from his mother's and brother's houses. He stated that he doesn't take alcohol. He testified that PW1 framed him because in 2007 PW1 was being arrested for being in possession of timber from the forest. He swore to finish him because he was the one who betrayed him. That is why PW1 framed him. He admits having been arrested.

17. In his submissions, counsel for the accused stated that he wished to adopt the submissions filed on 25/7/2014. He emphasized that the prosecution did not prove the case according to the required standards. He submitted that no motive was established and no intention was shown by the prosecution. PW1 the eye witness said he did not see the person who fired the gun. He was drunk and his judgment was impaired.

18. The fact of death is not disputed. PW2, PW3, PW4, PW6, PW8, PW10 and PW14 confirmed this. PW6 identified the deceased's body at Kibugi Funeral Home. PW4 Zakariah Muchera Isack confirmed the cause of death as severe blood loss and damaged organs by bullet trauma.

19. Section 203 Penal Code provides;

"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder". It therefore follows that the two main ingredients to be proved in a charge of murder are;

- i) The act of killing (Actus reus)
- ii) The malice aforethought (intention) which is the mens rea

Out of the fifteen prosecution witnesses who testified it is only PW1 who claimed to have been present when the deceased was killed. He stated that him and the deceased had been at Sape bar drinking upto 10pm when they left. The accused who had also been in the same bar followed them and confronted the deceased for not buying him beer. A quarrel ensued and the two fought. PW1 separated them and accused went to his home.

20. It was while they were walking home that PW1 heard the sound of a gun. He did not see the gun or the holder of the gun. However the deceased told him that something had penetrated his chest. As they ran PW1 and deceased collided on a narrow path and they fell down. It was then that the accused allegedly emerged from the coffee plantation and stepped on his back and shot the deceased twice.

21. The first issue is whether the accused is the person who fired this gun and fatally shot the deceased. It is not in dispute that this incident took place at night. The question the prosecution ought to have answered is how PW1 was able to identify the accused in such circumstances. Were the

circumstances favourable for a positive identification? PW1 clearly stated that the accused emerged from a coffee plantation and stepped on his back and then shot the deceased. If the accused stepped on PW1's back before he shot the deceased, it clearly means that PW1 was lying facing down prior to the arrival of the person with the gun.

22. It was also PW1's evidence that they had fallen down after knocking each other. Its therefore not clear at what point PW1 saw and identified the accused, as the person who had attacked them.

23. In the case of WAMUNGA –VS- REPUBLIC [1989]KLR 424 which was followed in SHADRACK MBAABU KINYUA – REPUBLIC NYERI COURT OF APPEAL CRIMINAL APPEAL NO.163/11, the Court of Appeal held thus;

“Where the only evidence against a Defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction”.

24. In WAITHAKA –V- REPUBLIC [1979] KLR 271 the Court of Appeal held that greater care should be exercised where the conditions for a favourable identification are poor and where the identification is by a single witness.

25. In MAITANYI –V- REPUBLIC [1986] KLR 198 the Court of Appeal held thus;

i) Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

ii) When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

iii) The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

iv) Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

26. The evidence of PW1 in cross-examination shows that he was drunk. He also admitted that his Judgment was impaired by alcohol. It was at night and there is no evidence on the source of light available that could have enabled him to see and recognize the accused. I find that circumstances were not favourable for a positive identification.

27. PW1 testified that the accused talked to him and asked him if he too should be shot. He said he knew the accused before the incident and that he had known him for a long time as they are from the same village. Was this sufficient for PW1 to recognize the voice of the accused? In the case of CHOGE –V- REPUBLIC [1985] KLR at page 4 the Court of appeal stated thus on voice identification;

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.

28. In PETER MUSAU MWANZIA –V- REPUBLIC [2008] eKLR the Court of Appeal held that a witness in a case of voice identification must show for example that the suspect has been close to him for some time or is a relative to prove that he was able to identify the suspect by voice. In the present case the evidence on voice identification cannot stand that test because though PW1 and accused come from

the same village, PW1 did not show that he was that close to the accused to be able to identify his voice.

29. A lot of questions were raised as to why the accused took so long to inform the deceased's parents about the shooting yet the deceased's home was ¼ km from the scene. The incident occurred between 10pm – 11pm. PW2 heard PW1 shouting that the deceased had been killed by the accused. This was at around 1.00am. The prosecution did not explain this delay yet it was very well raised in the cross-examination of PW1 by the defence Counsel.

30. Did the prosecution link the AK47 Rifle (EXB1) to the accused person? PW8, PW11, PW12 and PW13 witnessed the recovery of the AK47 Rifle (EXB1). They all confirmed that EXB1 was not recovered from the accused's house. They said it was found under a chicken cage. The homestead had three (3) houses belonging to the accused, accused's brother and their mother. EXB1 was found under the chicken cage next to the house of the accused's brother. It's not clear if this brother of the accused was present and if he was interrogated. This was a serious omission.

31. It is also admitted that the AK47 rifle was not dusted for finger prints. Did it therefore belong to the accused and was it him who had used it on 4th April 2010 to shoot the deceased? Again the prosecution did not avail sufficient evidence to link the accused to this AK 47 Rifle (EXB1).

32. The accused in his unsworn defence told the Court what he did on 5th April 2010 hence raising an alibi. He explained how he was arrested the next day after Police Officers conducted a search at their home. He also mentioned that PW1 had a grudge against him since he believed that the accused was responsible for his arrest for being in possession of timber from the forest.

33. The issue of a grudge was not raised in cross examination of PW1. The accused talked of 5th April 2010 but I want to think that he meant 4th April 2010. He raised an alibi. It was therefore the duty of the prosecution to squarely place him at the scene of crime. From my analysis of the evidence above it has clearly come out that the evidence of the visual and voice identification plus the recovery of the rifle have failed to link the accused to the shooting incident. The actus reus has not been proved.

34. After making the above analysis, I come to the final conclusion that the prosecution has failed to link the accused to the shooting that led to the deceased's death. The charge of murder has not been proved. For my part I find the accused not guilty and acquit him under section 322(1) Criminal Procedure Code.

He shall be released forthwith unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED AT EMBU IN OPEN COURT THIS 9TH DAY OF SEPTEMBER 2014.

**H.I.
J U D G E**

ONG'UDI

In	the	presence	of;
M/s	Ing'ahizu	for	State
Mr.	Momanyi	for	Accused
Mutero/Kirong	–		C/c