



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 77 of 2009

REPUBLIC.....PROSECUTION

VERSUS

HAMISI GEOVANNIE NDERI.....ACCUSED

JUDGMENT

The accused person S.SGT HAMISI GEOBANNIE NDERI is charged with murder contrary to section 203 as read with section 204 of the penal Code.

The particulars of the offence are that the 28th day of August 2009 at Maua Township, Igembe district murdered AP CPL FRANCIS MWORIA.

The prosecution called 10 witnesses. The brief facts of the prosecution case are that PW1 Jonah left Meru National Park driving a KWS vehicle at 7 pm on the 28th August 2009. He was in the company of Ranger Wilson Koech, his wife and their child who was sick. He was also in the company of the accused, a Senior Sergeant with the same service, KWS. They proceeded to Maua Hospital where Ranger Wilson alighted with his wife and child. The child was eventually admitted in hospital and therefore Jonah and the accused left them at the hospital. Jonah and the accused eventually landed at Riverside bar where they took three bottles of beer each in the company of a lady one, Kendi PW9. They drove in the car to Silver Inn bar where Jonah sat at one table with Kendi and another lady called Karen.

The deceased is said to have approached Kendi and after exchange of words the deceased produced a pistol with which he treated to kill Kendi. He slapped Kendi and she fell down. Kendi then stood up and ran to the nearest toilet where she locked herself in. Jonah and the accused walked out of the bar. It is the prosecution case that the accused person used a rifle belonging to Jonah PW1, to shoot the deceased from the back. The deceased died on the spot.

The accused person gave a sworn defence. He has admitted that he proceeded to Riverside bar with Jonah and a lady he did not know before where they had a few drinks. He admitted that the three of them drove in the KWS vehicle which Jonah was driving to Silver Inn bar. The accused also admits that a man threatened the lady Kendi with a gun that as a result, people scattered from the bar. The accused said that he decided to hide behind the lodging building and that as he hid there he heard gun shots. That shortly later he heard their vehicle being driven away. The accused said that he went to Co-op Bank and tried to call Jonah but in vain. He then took a taxi and went to Kiengu. He was arrested the next day.

I have carefully considered the evidence adduced both by the prosecution and the defence. The accused was represented by Mr, Ondari advocate while the state was represented by Mr. Moses Mungai, learned State Counsel.

The defence contention was that there was no evidence of who pulled the trigger which fired the bullets that hit and killed the deceased. Counsel urged that even PW2 who was near the scene at the time said he did not see who did it. Counsel urged that PW2 said in cross examination that it was not the accused that shot the deceased and that he was not the one who jumped from the vehicle. With due respect to the counsel those submissions are not accurate. I will deal with the evidence later.

Mr. Mungai for the State urged that the prosecution had proved its case and that the accused should be convicted for the offence. He said that the accused was seen and recognized by PW2 and that PW7 corroborated his evidence.

The accused is charged with murder contrary to section 203 of the Penal Code. That section provides as follows:

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

The burden is on the prosecution to prove its case against the accused person beyond any reasonable doubt. The prosecution must adduce evidence to show that the accused person did an act which caused the deceased the injuries that led to his death. In terms of this case the prosecution must adduce evidence to show that it is the accused person who fired the shots that hit the deceased and caused his death. The prosecution must establish that the act leading to death by the accused was motivated by malice aforethought. Section 206 of the Penal Code gives the circumstances which constitute malice aforethought as follows:

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

- (a) 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;**
- (b) 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;**
- (c) ...**
- (d) ...”**

The issue in this case is who fired the two shots which hit the deceased on the left scapula and the back of the left thigh causing him severe injury which caused death on the spot. There was no direct eye witness evidence of the shooting. The prosecution is relying on circumstantial evidence which was given by three witnesses. These are PW2 Kithure, PW4 Gitonga, and PW9 Kendi. PW1 who was a very important witness turned hostile contradicting all the material aspects of his evidence so that his evidence was absolutely unreliable. In his evidence in court PW1 admitted that he drove himself and the accused to Riverside bar and eventually to Silver Inn bar. He admitted that he had a fire arm that is, an AK 101 rifle prosecution’s exhibit 1. PW1 admitted that his fire arm was the one used to fire the fatal shots. In his evidence before the court he said he does not know who fired the shot but in the statement to the police which was shown to him, Jonah stated clearly that it is the accused person who fired the shots killing the deceased instantly.

PW7 PC Maina said that he was in his house at Maua Police Station Police Lines when he heard the gun shot. He proceeded to the Police Station where he met two reportees, Jonah PW1 and Kithure a watchman,

PW2. He said that Jonah reported to him that his colleague who was with him that evening, shot and killed a man. PW2 the watchman reported to PW7 that a KWS officer had shot and killed AP CPL Mworia.

Regarding PW1 his first report to PW7 and his statement to the Police were similar that it was the accused that shot and killed the deceased. He retracted these earlier reports in his evidence in court. The legal position regarding first and initial reports to people in positions of authority was well put in the case of **Terekali & Another –vs- Republic [1952] E.A** it was held:

“Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of sub-sequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others.....”

Applying the principle in the above quoted case the evidence of PW1 in court was an embellishment and the reason in my view is that since making his report and statement to the police he has had time to consult, as a result of which he has now retracted on his earlier position. Not to mention that the accused is many times his senior and it is not a wonder that he was ready to make a fool of himself by changing his evidence.

The prosecution is relying on circumstantial evidence. In the case of **REP V. KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135**, the Court held:

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

The way to test circumstantial evidence was discussed in the following case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)**, at page 5 where the learned Judges of the Court of Appeal stated:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt 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.”

The prosecution must cogently and firmly establish the circumstances from which they seek to have an inference of guilt drawn, they must unerringly point to the accused guilt and cumulatively the circumstances must form a chain so complete that the only conclusion which can be reached is that with all human probability the offence was committed by the accused.

PW2 was a watchman who was stationed outside Silver Inn bar which he was guarding. His evidence is that some minutes to midnight the deceased found him outside Silver Inn bar and entered the bar through the corridors and through the back door. Shortly later PW2 saw a KWS vehicle driven by Jonah. It was driven in at top speed and was parked three meters from the bar’s corridor. Three people alighted. PW2 described them as a lady whom he knew before called Kendi, PW 9. There were two men from KWS, one was the driver and the other one was an Askari whom he identified as the accused. They entered the bar and the bar maid, Makena sold two beer each to the three of them. Since it was closing time PW2 requested Gitonga to guard the place as he escorted Makena the bar maid. He says that before he escorted Makena, he saw the accused person leave the bar and proceed to the KWS vehicle which he entered through the front passenger door. As he was walking away PW2 stated that he saw Mworia also leaving the bar. PW2 saw him walk over to his vehicle with a lighted torch. PW2 testified that as he started walking away he heard gunshots coming from the KWS vehicle. When he looked back PW2 could not

see Mworia. That he decided to return to the scene and as he approached the shooting scene, he saw the accused come out of the KWS vehicle and run to a nearby river and jumped over it, and disappear. On reaching to where he had seen Mworia standing, he found him lying on the ground with blood on the face and his torch was still on.

PW2 said that there was security light inside and outside Silver Inn bar. He said that the KWS vehicle was 3 meters from the bar corridor, within the security light. He says he went and reported the matter to the police and reported that the accused had shot the deceased.

PW4 Gitonga had been in the bar with Mworia the deceased. PW4 was chewing miraa while Mworia was taking a guinness beer and soda. It was Gitonga's evidence that Kendi PW9 found him and Mworia at the bar and that she was in the company of two askaris from KWS. Gitonga testified that Kendi called Mworia and after they talked for a short time, Mworia slapped Kendi and she fell down. Gitonga said that the two men who were with Kendi then told each other that they should leave. Gitonga then saw one of the two askaris leave the bar first. He was followed by his colleague who walked out with Mworia as they talked. It is after that that Gitonga said he heard three gunshots. PW4 said that he could not identify the two KWS askaris because he did not know them before.

The evidence of Kendi PW9 was a narration of how Jonah called her on the phone and invited her to Riverside bar for a soda. She joined Jonah who asked her to greet his friend who was seated at the next table. Kendi said she saw Mworia who had been her boy friend for period of three years but which relationship had broken. She said that on seeing her, Mworia left the bar and then called her on the phone where he told her:

“You refused to be my friend so that you could be behaving like that. Ni sawa tu”

Kendi said that she, Jonah and the accused decided to go to Silver Inn bar and that Jonah drove them to the place. At Silver Inn Kendi called a friend, Karen who joined her at their table with Jonah. It was at that table that Mworia walked to her and after threatening to kill her that very day he produced a pistol with which he aimed at her. Kendi said Mworia was a man of very bad temper and she did not answer him. Kendi testified that Mworia hit her with the back of his hand and she fell down because she was drunk. She said that the moment she stood up she ran into a toilet and locked herself inside. Five minutes later she heard gunshots.

From the evidence of these three witnesses PW2, 3 and 9 a clear picture is created. It is clear that Jonah and the accused were together with Kendi, a former girlfriend of the deceased. From the evidence of PW9 it is clear that when the deceased saw Kendi in the company of Jonah and the accused, he was infuriated. And from his reaction to Kendi, the accused feelings are clear he felt pained and felt that Kendi was showing off with the two men after dumping him.

It is clear from the prosecution evidence that the first meeting place between Jonah, Kendi, the accused and the deceased was at Riverside bar. It is also clear that the accused was the first to leave Riverside bar and that he went to Silver Inn bar. It is not clear whether when the accused, Jonah and Kendi decided to go to Silver Inn bar, whether they were following the deceased. That one does not come out clearly from the evidence adduced by the prosecution. It is however clear that the deceased menacingly approached Kendi at Silver Inn bar and threatened to kill her that same day with a gun which he aimed at her. In the public bar in the view of all the deceased hit Kendi across the eyes with the backside of his hand. That hit was so strong that it sent Kendi flat on the ground. Kendi then ran away from the scene leaving the accused, the deceased and Jonah at the bar. According to PW4 the three of them walked out of the bar following each other.

PW2 was outside Silver Inn bar. He said that the first person to walk out of Silver Inn bar was the accused who went and sat in the KWS vehicle. After a short while Mworia also left the bar. PW2 did not speak about Jonah neither did he refer to him at the time that he heard the gun shots from the KWS vehicle. PW2 was emphatic that the accused was seated inside the KWS vehicle alone. PW2 was also emphatic that the gun shots he heard came from the KWS vehicle where the accused was seated alone.

The prosecution has cogently and firmly established the circumstances from which an inference of guilt was sought to be drawn. The prosecution has shown that the accused, Jonah, Kendi and the deceased kept meeting that evening and that the deceased was very unhappy with Kendi's association with Jonah and the accused, and he openly demonstrated it. The accused left the bar and went to sit in the KWS vehicle where PW1 had left his rifle and he, accused knew that the gun was there. The accused waited until the deceased went out of the bar and he shot him twice from behind as he tried to open his car. He then ran into the night through a river. That clearly shows a guilty mind and also an attempt to escape responsibility for what he had done.

The prosecution has demonstrated that there was no one else in the KWS vehicle and indeed the vicinity except the accused and the deceased. The prosecution has shown beyond any reasonable doubt that it was only the accused that had the opportunity and the time to commit this offence. The prosecution has shown that the gun shots sounded from within the KWS vehicle where the accused was alone. I find that these circumstances unerringly point to the accused guilt and that cumulatively the circumstances form a chain so complete that the only conclusion which can be reached is that with all human probability the offence was committed by the accused.

The accused denied the offence and said he was not even at the scene where the shots were fired. The prosecution proved he was at the scene. His defence has been shaken and displaced by the prosecution evidence. The evidence adduced by the prosecution establishes beyond any reasonable doubt that it was the accused and no one else who shot the deceased. PW2 who gave the most incriminating evidence against the accused was a watchman and was on duty when he witnessed the events he narrated to court. He had no grudge against the accused and no such suggestions were put to him. He was a credible witness and one who impressed me as one whose interest was to tell the truth. I was satisfied he was worthy of belief.

The prosecution has proved that the cause of death was injuries that were inflicted by gunshots. There were two entry bullet wounds, one on the left scapular which exited on the right chin causing massive bleeding and fragmentation or shattering of the lower and upper jaw and fracture of the cervical spine and spinal cord at the 2nd and 3rd level. There was the entry wound on the back of the left hip with the exit on the left front thigh causing fracture of the left femur into complex fragments. The cause of death was cardio-pulmonary arrest secondary to hemorrhage arising from gun shots.

The prosecution has proved that the bullets which caused the death of the deceased were fired from the same gun which was in the vehicle driven by PW1 and in which the accused was seated in before the gunshots were heard coming from the same vehicle. There was a clear nexus between the gun P. Exhibit 1, and the bullets that caused the deceased death.

There were some questions which remained unanswered. PW4 saw the accused PW1 and the deceased leaving the bar few minutes before the shots were fired. However PW2 who was outside the bar only saw the accused and the deceased leave. It is not clear where PW1 went. However it is clear that after the gunshots, PW1 appeared as he was the one who drove the same motor vehicle to the police station to report the matter. The unclear issues do not affect the finding that it was the accused that fired the fatal shots using PW1's gun.

The motive for the attack is not clear. However motive need not be proved for the offence to be proved. Malice aforethought was however established. The accused chose to use a gun against the deceased. He shot him twice on the scapular area and the hip area. Those are sensitive areas to shoot at. In addition he shot him twice. The accused action was both calculated and deliberate. It is clear that the accused had formed an intention to cause the deceased grievous harm or death. The ingredients for the offence of murder and in particular the circumstances that constitute malice aforethought as provided under section 206 (a) of the Penal Code were fully and firmly established.

Having carefully examined the entire evidence in this case, I have come to the conclusion that the prosecution proved its case against the accused beyond any reasonable doubt. I accordingly reject the accused defence, find him guilty as charged and convict him accordingly.

DATED SIGNED AND DELIVERED THIS 11TH DAY OF OCTOBER, 2012

**LESITT, J.
JUDGE.**