



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE 32 OF 1996

REPUBLIC PROSECUTOR

VERSUS

FRANKTON NABWERA ACCUSED

JUDGEMENT

The accused person Frankton Nabwera chesoli is charged with two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence in count one are that on the night of 10th and 16th October, 1996 at Kiamumbi Farmers co-operative Society Estate in Kiambu District of the Central Province, the accused murdered Boniface Ngigi. The particulars in the second count are the same as in the first count save that the deceased was peter Mbega. The accused denied both counts. Prosecution called fourteen (14) witnesses to testify. The summary of prosecution case is as follows:

On 15th October, 1996, PC Albanus Kingoo (PW1) was on duty as a driver at Kiambu Police Station when at about 8.0 p.m he drove the accused who was the duty officer on patrol until midnight. From Kiambu Police Station PC Kingoo (PW1) drove the accused a dog handler and dog escort to an area near Kamiti Prison. PW1 drove behind Inspector Gichia (PWb). According to PW1 Inspector Gichia stopped and said that they had reached the place. So the accused and his team alighted and followed Inspector Gichia. After a short while PW1 who had been left in his vehicle heard gun shots. Then

-1-the accused called him to drive nearer. PW1 put the two injured Police Officers and a woman into the vehicle and took them to Forces Memorial Hospital where the doctor pronounced the two Police Officers dead.

Rachel Njeri Mungai (PW2) testified to the effect that on 15th October, 1996 at about 2.30 a.m. She had footsteps outside. When she peeped she saw many people whom she could not recognize coming towards her house. She heard them talk in English. They started knocking doors saying that they were policemen. She opened the door and they said that they wanted Mungai's house. Mungai was her son and she called him and the door was opened by Mungai's wife. Then these people started shooting. They shot the woman and her husband. The policemen pushed the woman into the house and there were more gun shots. According to PW2 four people were shot and these were the two policemen, a man and his wife. PW2 said that she could not identify the policemen who were shooting.

SSP Joram Songok (PW3) testified that he was the D.C.I.O Kiambu at the material time when he was called on 10th October, 1996 and proceeded to Kiamumbi Estate. He was with the OCPD Mr. Manyara and found that the Police Officers who had been injured had been rushed to hospital. As a Police dog had

disappeared and a G3 rifle also missing PW3 dispatched officers in several directions to try and retrieve the dog and the G3 rifle. When PW3 came back to the scene he found the accused and Inspector Gichia who explained to him what had happened. PW3 recovered spent and two cartridges and live bullet at the scene together with a revolver and a G3 rifle. PW3

disbelieved the story of the accused as regards the shooting incident and so directed that the accused be placed in custody. PW3 took the firearms to the ballistic expert.

Jemimah Wambui Nganga (PW4) testified to the effect that on 15th October, 1996 at about midnight she was asleep at her house. She was with her husband and the children. PW4 heard people speak to her mother. They asked for Mungai's house. These people came to PW4's door and said that they were policemen. PW4 opened for them. Then somebody entered with a torch holding a gun. PW4's husband went to the children's room under the bed. As PW4 came out of her room she heard "ndio huyu" and then a tall man said "maliza yeye". PW4 then screamed and she was pushed out only to meet a policeman with a big dog. When she saw the dog she went back. Then she suddenly fell. She found that she was full of blood. She did not know that she had been shot. The person who was shooting was at the door. She heard more gun shots. She saw a policeman shooting upwards. She went round the kitchen and saw a one big policeman fall near the toilet. PW4 did not know where her husband was. She told the policemen that she had been shot. From the scene PW4 and the injured policemen were taken to Memorial Hospital where she was treated. She was admitted for two weeks. Her husband came back later after PW4 had been discharged and returned home.

Inspector Stephen Kimani Gichia (PW5) testified that on 16th October, 1996 he was in the house at about 6.30 p.m. When he was informed that some suspicious characters had been seen within the

area PW5 said that security was bad in the area as there had been cases of people being attacked. As a result of this report Inspector Gichia decided to go to Kiambu Police Station where he armed himself with a revolver with six rounds of ammunition and went back to Kiamumbi Estate. PW5 flashed his powerful torch and saw six people. He came to learn that one of them was a known criminal known as David Mungai alias Tyson. PW5 questioned Mungai and as a result the other men ran away as PW5 fired in the air. PW5 decided that the matter should be reported to Kiambu Police Station. As a result Inspector Nabwera (the accused) who was the Duty Officer proceeded to Kiamumbi Estate. On arrival at the scene PW5 knew that the suspect was David Mungai. PW5 led the accused and other officers to the homestead of the suspect Mungai. the accused knocked the door of the suspect mother and asked to be shown the house of the suspect. A house was pointed out and the accused proceeded to inquire from a lady the whereabouts of the suspect and she said that the suspect was not in. She said that she was the wife of the suspect. The accused ordered the dog handler and the escort to enter the room while he

remained at the door. PW5 went on to testify that he could hear the Police Officers telling the suspect to surrender and then there was a gun shot inside the house. There was a commotion in the house and then the accused retreated saying "Ni wengi ni wengi wanatupiga". The accused was then shooting in the air. The two Police Officers who had entered the room came out. The dog handler fell some metres away while the escort went behind the wall and fell down. PW5 then blew his whistle as they put the injured

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Police Officers into the vehicle. The two officers and a lady were taken to hospital but the two Police Officers were pronounced dead. The bodies of the two Police Officers were taken to City Mortuary for

postmortem. Hezron Masambaga Asiligwa (PW6) testified to the effect that while on duty on 16th October, 1996 he heard gun shots and when he went to the scene he found Police vehicles. The following morning he recovered a gun and went to call the police.

John Chiira Gichohi (PW7) said that he was with Inspector Gichia when they confronted a group of people they suspected. During the incident at the suspect's house PW7 was asked to keep away.

John Kamande mwihia (PW8) and Zaverro Mbundi (PW9) did not witness the incident.

Mbogo Donald Mugo (PW10) the ballistic expert gave evidence in respect of firearms and ammunition presented to him. The most important aspect of PW10's evidence was that the gun that the accused had on the material day was not among those that PW10 examined.

Rev. Morris Mwarandu (PW11) was an identifying witness who identified the body of one of the dead police officers. Ngige Njuguna (PW12) identified the body of the other officer for postmortem examination.

Dr. Kamau (PW13) examined the accused and found him depressed. Dr. Kamau also produced the postmortem reports in respect of the two dead Police Officers.

Inspector Boniface Mwaura (PW14) was the investigating officer

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who collected all the exhibits and the evidence in this case.

The accused in his unsworn statement explained how he was the Duty Officer on the material day when he was accompanied by other Police officers to Kiamumbi to apprehend suspected thugs. They knocked at the door and a woman came out. The accused inquired whether that was the house of the suspect and the woman responded positively. The woman said that the suspect (Mungai) had escorted visitors at 9.00 p.m. and that he had not returned. The accused went on to explain that since the police team believed that the suspect was inside they decided to take the police dog inside the house. The dog handler and escort entered the house. PC Mbega (deceased) shouted in Kiswahili, "Afande kuna watu wengi hapa". Then all over sudden the commotion started inside the house. There were gun shots in the house. The two Police Officers who had entered the house came out shouting that they had been shot. At that time the accused cocked his gun and shot in the air to scare those people inside the house. The accused then instructed the driver to bring the vehicle and the injured officers were taken to hospital together with a lady who had been injured. On arrival at Forces Memorial Hospital the two Police Officers were pronounced dead. Their bodies were then taken to City Mortuary. The accused went back to Kiambu Police Station where he surrendered his gun. The accused went back to the scene where he was interrogated by the D.C.I.O Mr. Songok and other Senior officers but he was set free. In the evening of the same evening of the same day the accused was arrested from his residence by members of Flying Squad from Makuyu.

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The accused concluded his evidence by stating that he did not believe that his gun was the one which killed his two officers.

After the final submissions by Mr. Namisi for the accused and Mr. Matongo for the State, I summed up the evidence and the law to the assessors. Each of the three assessors returned a verdict of not guilty.

In this case we heard the evidence of prosecution witnesses and the unsworn statement of the accused

person. From the evidence on record it is clear that this was an incident in which Police officers under the command of the accused were involved in a shoot out while pursuing suspected thugs. We heard the evidence of the police driver PC Albanus Kingoo (PW1 who drove the accused and his team to Kiamumbi Estate. The team was led by Inspector Gichia (PWb) who knew where one suspect Mungai alias Tyson lived. PC Kingoo was left in the vehicle while the accused and his security team went to where the suspect was to be found. PW1 did not witness the shooting incident since he was at a distance and took cover on hearing the gun shots. Hence, the evidence that has to be carefully considered is that of Rachel Njeri Mungai (PW2) Jemimah Wambui Nganga (PW4) Inspector Gichia (PW5) and the accused. Those are the people who were at the scene of shooting incident. There was slight variation in what the witnesses stated in their evidence but the totality of their evidence was that the accused was the leader of the police party that was pursuing suspected thugs. Inspector Gichia had useful information since he knew the suspect Mungai very well. This was one of those to be arrested. As it

turned out Mungai was not arrested and instead it was the police team which suffered loss by the death of the two police officers. The suspect managed to escape. It was not clear whether Mungai was alone or at the scene but it was in his house that the commotion started. According to the accused the two police officers and the police dog were confronted by many people inside Mungai's house. The shooting started inside the house. That is what even PW1's evidence supports. Inspector Gichia also said that there was shooting inside the house. The accused maintained that he remained outside the house and this statement remained unchallenged. The accused said that he shot in the air after the two police officers had come out of the house crying that they had been shot. It was the accused's contention that since he shot in the air there was no way he could have shot any of the police officers. This statement of the accused was supported by Inspector Gichia. The witnesses who were at the scene all testified that it was dark. We have no single witness who testified to the effect that he/she saw the accused shoot any of the police officers. But prosecution wanted to rely on both direct and circumstantial evidence. Circumstantial evidence relied on was that the accused as the leader of the team remained outside and hence he must have shot the police officers thinking that they were thugs. But the accused indicated that he could not have made such mistake since nobody else came out of the house apart from his officers who had been already injured during the shooting inside the house. There was then the evidence of the gun that the accused had. The accused admitted firing five bullets

in the air. Unfortunately, the accused's gun was not among those examined by the ballistic expert. How can one conclude that this was the gun used in fatal shooting.

Having analysed the evidence on record I find that there was no witness who saw the accused shoot in the direction of the house. Available evidence shows that the accused shot in the air. This evidence has not been contradicted. The evidence of ballistic expert does not incriminate the accused, what evidence implicates the accused in this incident? In my view there is none. Why is the accused in the dock? What about Inspector Gichia? Having considered the fact of this case, I feel very sorry for the accused. I fail to understand why the accused was arrested let alone being charged on two counts of murder. Here is a case in

which the accused who had a group of police officers to pursue suspected thugs and in the ensuing exchange of gun shots he is made answerable for the deaths of his juniors. The question of accused having shot his juniors by mistake does not arise as there is no evidence in that direction. It was improper to charge the accused.

The upshot of the foregoing is that I am in entire agreement with the three assessors who returned a unanimous verdict of not guilty. The accused is therefore, acquitted on both counts. He is to be set free forthwith unless otherwise lawfully held Order accordingly.

Delivered at Nairobi this 13th day of march, 1998.

E. O'KUBASU

JUDGE 13.3.98

Coram: E. O'Kubasu, J Mr. Matongo tor state Mr. Namisi tor accused c/clerk - Kamau Assessors: 1. Morris MuKuo 2. D. Nderitu Order: Judgment read.

E. O'KUBASU

JUDGE

Mr. Namisi: I apply tor certified copy of proceeding and judgment. Order; Certified copy of proceedings at judgment to be given to Mr. Namisi.

E. O'KUBASU

JUDGE

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