



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS**

**Criminal Case 28 of 1996**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**ALEX KIOKO KINYINGI..... ACCUSED**

**Coram: J.W. Mwera J.**

**Mr. Matemu Advocate for Accused Mrs. Murungi - Learned State Counsel for Republic**

**Court Clerk Muli**

**Interpretation: English/Kiswahili/Kikamba Accused in court**

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**JUDGEMENT**

On 18th November 1996 the accused Alex Kioko Kinyingi was charged with the murder of one Peter Mwangi Ndetha on the night of 23-24th December 1995 at Tulia Market Mutonguni Kitui. He pleaded not guilty and his trial got under way on 21st July 1997 in the presence of assessors. Mr. Matemu represented the accused while the State's case was argued by the Learned State Counsel. The prosecution called thirteen (13) witnesses while the accused himself was heard as well as his one witness AP.C. Julius Thuvi.2

The overview of the case was that on the fateful night there was a discotheque at a certain bar at Tulia Market. It was full of people including the deceased and some of the witnesses as well as the accused. That at some stage the accused disagreed with Festus Mutua Kasumbi (PW1) and a local chief Julius Kimwele (PW2) intervened. That the accused went to his quarters at the camp where he lived with other administration policemen, took a gun returned to the crowded bar and opened fire, killing some patrons and injuring others. The charges were then preferred against him. The State then opted to prosecute for Count 1 regarding the murder of Peter Ndetha

Going over the evidence gives the following picture.

Festus Kasumbi (PW1) apparently knew the accused before. On the night in question the two met when PW1 left a bar to go out and relieve himself outside. According to him the accused followed and held him. He asked PW1 whether he knew a woman called Mwikali which PW1 admitted. It became a point of disagreement between the two. The two pushed each other. The chief (PW2) came out and saw this. He

took a whip and caned both men once each. As PW1 ran home, the accused ran to Muthale Camp where he lived. But PW1 came back to the bar at about 9.00 -10.00 P.M. While there gun-shots rang out. Then the accused came into the building, saw PW1 and told him that he had come back. He was armed. He aimed at PW1 who fell down to take cover as the bullets hit the wall close to him. Everybody ran via the back door. PW1 who was injured fell by a tree and kept quiet as the accused called him out thrice. Another man called Mutua who had taken cover where PW1 was answered and the accused shot him. He then passed on going his way. Kasumbi had seen the accused armed with the gun which was later produced in court as Exh.P6. He was later taken to hospital for treatment.

In cross examination Kasumbi (PW1) answered that he chewed "miraa" as he drunk that evening and that Chief Kimwele (PW2) who whipped them had also been drinking. He said that Muthale Camp was 6-7 kilometres away from the scene. PW1 said that the accused shot at many people but that he was not acting as if he was temporarily mad. To Kasumbi, the accused looked sober and normal. He had not seen him drinking and the two had no grudges between them.

The court then heard Chief Kimwele (PW2). He had attended a meeting at Mutonguni Secondary School. He passed via Tulia Market when he knew there was a discotheque. All was peaceful. He met some administration policemen from his camp and instructed them to ensure that all was safe at the disco. He moved to a nearby bar for drinks. A certain bar maid reported to him that 2 men were quarrelling and fighting outside. They were Kasumbi (PW1) and the accused. PW1 challenged the other to a fight. PW2 felt the accused's life was in danger; he took a whip from his motor vehicle and lashed both of them. They fled. The accused left behind open shoes. PW2 took them away when he was leaving.

Later at night the discotheque bar owner one Daniel Kalulu woke up PW2 to report that patrons had been shot at and they had run away. Only four victims had been identified. But he gave the name of the accused as the gunman. Police came the following morning from Kitui and warned PW2 to remain indoors on allegation that the accused had vowed to kill him. When the police came to his home they told PW2 that they had arrested the accused and recovered a gun, catridges and a magazine. When PW2 went to the scene he saw much blood and bullet holes in the front door of the bar. The chief who knew the accused, for one and half years, had no grudges with him.

In cross examination PW2 said that when he lashed PW1 and the accused it was neither hard nor vicious. He denied ever arresting PW1 for an assault on a certain female called Mrs. Syuki. He too said it was 6 kilometres by a foot route from Tulia Market to Muthale Camp. That there was even a longer route. In re-examination PW2 told the court that he had intervned when PW1 and the accused were quarreling because the former had threatened the other with a knife.

William Lubanga (PW3) a ballistic expert from C.I.D. Headquarters Nairobi told the court that he got a G3 rifle, 18 rounds of ammunition, 13 fired rifle bullets, one fired bullet and he went over to examine all of them in the manner of their trade. He found that the G3 rifle successfully fired the bullets he had and it was in good serviceable order. Even the 13 spent catridges had been fired by the G3. That being the relevant evidence, PW3 tendered his report (Exh.P1) and left the witness stand. Harrison Mutua Kimele (PW4) climbed in it.

He gave evidence of the quarrel between the accused and PW1 whereby PW2 Chief Kimwele took a cane and whipped them. They fled their ways while one left a shoe behind which was given to PW2. PW4 then went to the disco bar and at about 12.30 p.m. he heard gun shots outside the bar. Shots came via the front door. Patrons lay down and PW4 fell in a corner.

When the shooting ceased momentarily he fled by the rear door but he was shot in the arm. He ran home to give himself first aid. He came back to the scene and the victims were taken to Kitui District Hospital. He had not been able to see who the gunman was. But he knew that in all eight people were shot. Mutua who was generally new in the area did not know many people there by name.

Silas Kavisu (PW5) had gone to park his matatu near Mutonguni Bar at Tulia Market, the scene of the shooting in question. He entered the disco bar and bought cigarettes. But as he was about to leave, a

stranger's voice ordered him to return inside the bar. Then gunshots rang out. As he ran he was shot in the shoulder. Eight people were injured. He was taken to hospital with the survivors. PW5 could not identify the gunman although he saw him.

Another victim of the shooting Joshua Nzelu (PW6) had been at the discotheque that night. He heard gunshots from the front door. He was shot in the leg; he fell down. It was dark and he did not see his assailant. He was later taken to hospital.

On his part Cosmas Mutisya (PW7) was at the bar herein near the door. Somewhere near midnight he heard cocking of a gun from outside. Shooting began and his friend at the door a policeman was shot. PW7 dived under a table but as he ran off he was shot in the leg. He fell and lay under tables until he was later collected and removed from there. He did not see his assailant, but the shooting took about 10 minutes. Other people injured were taken to hospital like PW7.

Eunice Mwangi (PW8) the deceased Peter Ndathi's sister, on 29th December 1995 identified Peter to the doctor who performed a post mortem examination.

Mzee Kivaa (PW9) who was on the night watchman's duties at Kiatine Bar, Tulia on the night in issue testified next. He heard gun shots at night. He did not go out until the following morning when he went to the scene of the shooting and collected a magazine. He handed it to a headman (Exh.P8).

APC. Musa Chebii (PW10) was at the disco from 8.30 p.m. on 23rd December 1995 ensuring security at the function.

At about 3.15 A.M. he heard gun shots and he took cover. The light was blown out. He tried to run out but he was shot in the leg. He fell down. He managed to find his way to the chief's camp at Tulia and he was taken to hospital. He had not identified the gunman or the firearm. He had seen and drank with the accused at about 9.00 P.M. that evening. They were friends. On the following morning of the shooting, 24th December 1995 Chief Kimwele (PW2) called LP. Musili (PW11) at Kilui Police Station and reported the shooting saying that an AP. at Muthale was responsible - one AP.C. Kioko.

As PW11 proceeded with officers to the scene A matatu brought 8 victims of the shooting to the local hospital. PW11 went to the scene and found not so organised a situation. One victim had been left behind and a local man had picked up a magazine. The bar doors were broken and there was blood. IP. Musili then with his men went to Muthale Camp where the suspect was - 6 km. away. They found the accused's mate asking him to open for him. This mate had not known of the shooting. It took the accused 10 minutes to open the door. O.C.P.D. Saina and LP. Kimeu joined LP. Musili at Muthale Camp. They were prepared to force the accused out of the house but he opened it and he was arrested. The gun was recovered from the house. It had 18 live rounds of ammunition some of which were test-fired by the ballistic expert at C.I.D. Headquarters. The accused had not refused to come out of his house and he did not threaten the arresting officers. LP. Onyango (PW12) was also present. IP. Musili handed everything to him to conduct the investigations.

IP. Onyango (PW12) investigated this case and also took some statements from the accused. Production of a statement under inquiry was objected to by the defence but after a trial-within-a trial it was admitted. What it all means is that since it was repudiated, other independent material evidence will be looked at, if it has to form a basis of not acquitting the accused. However PW12 evidence approximates that of PW11 regarding visiting the scene and arresting the accused to receiving the items PW11 recovered to be used in evidence: the rifle, spent cartridges, a live bullet head, magazine etc. P.C. Kipsang delivered these items to PW3, the ballistic expert whose evidence has already been recounted. After a Trial-within-a trial the statement LP. Onyango took under inquiry was put in evidence when he completed his testimony. But before he did so, the court heard LP. Muhcso (PI3). He recorded a charge and caution statement from the accused. Therein the accused said (translation) that he did not kill Peter Ndathe intentionally. He had fired and Peter was hit. (Exh.P2). IP. Onyango produced his statement under inquiry (Exh.P3) plus all other articles/exhibits even the post mortem report. In fact the death of Peter Ndathi was not in question.

In the fairly long cross examination that followed LP. Onyango told the court inter alia that the accused told him that he had found himself shooting aimlessly into the disco hall. He did not know whom he shot and that he said that he was out of his mind. That closed the State's case and the defence one opened with the accused himself on oath.

Alex Kioko the accused (DW1) told the court that on 23rd December 1993 he had started drinking at 10.00 A.M. He moved to several bars. He then saw Chief Kimwele (PW2) drinking. When night fell the accused went home to Muthale Camp. He referred to a row with Kasumbi (PW1) in October 1995 before the shooting. So on the fateful night when the 2 met again at a bar, PW1 held a knife and threatened to stab the accused. They scuffled and Chief Kimwele came. He whipped the accused and spared Kasumbi. The accused fled to his quarters and in the meantime his shoes flew off. He did not know the time because he was drunk.

From his house the accused took his loaded gun and returned to Tulia Market. At the scene he began looking for his shoes. People were laughing in the disco bar and the accused just found himself shooting there without aiming at any particular person. He did not know why. He emptied a magazine of 20 rounds, then he went back home to sleep. When police came the following day, they arrested him. He was later charged. The accused said that he did not threaten to kill the chief and he did not intend to kill Kasumbi either. They knew each other though. That Kasumbi once called him "the Chiefs dog" and he had assaulted him before. The accused brought out an issue that Kasumbi (PW1) once assaulted one woman Veronica Syuki. He was arrested by police, when Chief Kimwele declined to do so and he was charged (Exh.DI) in KITUI CR.C.NO. 596/94. In cross examination the accused told the court that LP. Onyango did not allow him to make his statement in Kiswahili as LP. Muheso did. He did not know any of the victims of his shooting - except Kasumbi (PW1) and Chebii (PW10). To the accused the distance between the disco hall and Muthale Camp was one and a half kilometres - by a short cut which he took. Although drunk, the accused walked this distance. He remembered he had left his shoes back at Tulia Market. He returned with a gun to ensure his safety as he went to recover his shoes. He insisted that otherwise he was drunk. He just shot into the bar when patrons there, not necessarily Kasumbi, were laughing.. He fired without knowing why after the Chief beat him.

A.P.C. Julius Thuvi (DW2) then testified. He knew the accused who was working at Muthale Camp in 1995. DW2 went over the duties of the administration police vis avis the local chief concluding that chiefs did not have mandate to whip the policemen. That in October 1995, Kasumbi beat the accused and the complaint was investigated but he was never arrested. DW2 gave the various routes from Tulia to Muthale measuring three kilometers and two and a half kilometers. He did not witness the shooting though.

Both the defence and the prosecution counsel submitted. Mr. Mutemu dismissed presence of malice aforethought in the whole case. That the accused shot but he did not know what he was doing or how many people he shot. That they were all strangers to him. The victims of the shooting including those who testified had their evidence analysed and according to Mr. Matemu, none established malice aforethought.

Then the statement under inquiry by LP. Onyango came in for the firing. It was said not to be worth much - especially after it was repudiated. It required corroboration. So the court was exhorted either to acquit the accused of murder or least of all find that only manslaughter was proved.

The Learned State Counsel focusing on the issue of malice aforethought only, stressed that the accused ran 4-6 kilometres to his house to fetch a loaded gun. When he returned to the disco bar, he opened fire killing and injuring patrons. That he was sober and alert all the time he did this. She concluded that the accused was engaged in a criminal act when he shot killed/injured people.

After due summary to the 2 assessors that remained at the end of the trial they brought back opinions of the accused being guilty as charged. Now the decision of this trial follows.

After reviewing all the evidence and considering such aspects of this case as touch on the law and the

circumstances, it is not in dispute that the accused while armed with a loaded gun herein shot in the disco hall at Mutonguni Bar on the night in question and by that some people were killed while others were injured. Eye witnesses or those present at the time and at the scene say so and the accused said as much when he told this court that he came back to the scene and shot in the disco hall where people were drinking, laughing and listening to music.

All said and done, was there intention to shoot and kill? It need not be argued more that aiming a loaded gun into an occupied room and then opening fire does not mean to injure, So that act by itself is criminal. Therefore if one is shown to have done such an act then one intended its natural consequences.

The accused after being whipped by the Chief because he was feuding with Kasumbi (PW1) left the scene and walked whether it was one and a half kilometres, two kilometres or three kilometres or even six kilometres to Muthale to collect his gun and come back to the scene. He claimed that he was drunk. But in order for drink to act as a defence, the accused must show the court that it disabled him from telling right from wrong or from knowing that what he was doing was wrong. This court was not shown such proof. The impression left after all the evidence is that the accused went home to pick his loaded gun. He did not lose his way there. Thinking and reasoning he came back to the bar. He realised his shoes had fallen there and he knew a gun is good for safety. But one wonders what safety the accused required this time round with a loaded gun when he had been at the market nearly half the day without it. The Chief who had whipped him had gone. Even the pains on his body were gone. He did not go to the place he was beaten. He came to the bar door and opened fire inside. Kasumbi (PW1), his combatant earlier in the night, was there. He too was hit like the others. When they ran out in the dark, the accused called out Kasumbi's name thrice. He lay quiet. When one Mutua answered, he was shot by the accused. The accused was acting with a sober mind. After going to Muthale and back, he has not shown this court what then came into his mind so that he was unable to reason. Motives are not central in murder trials but this court takes the liberty to assume that for the quarrel between the accused and Kasumbi about a certain Mwikali and that by that the Chief lashed him, the accused took his loaded gun and came back to sort things out with Kasumbi. But even if that be not sound, the mere act that the accused shot into a crowded hall with no reason, excuse or cause was a criminal act. It is no matter that he did not know his victims or that he did not target anybody in particular. Whatever happened in the course of the accused's criminal act, rests with him alone and for this matter it is the death of Peter Ndetha.

Looking at the charge and caution statement first, it was not repudiated, the accused told LP. Muheso that he did not kill Peter with malice. That the accused fired bullets that hit him and (because) the chief had whipped him. That is all that the court has said above. For whatever reason that the accused fired, he did so soberly and Peter was killed in the process.

The statement under inquiry (Exh.P3) does not deviate much from the evidence of Chief Kimwele (PW2) as seen side by side with that of Kasumbi. It begins with the drinking, the quarrel, the whipping and the loss of accused's shoes as he fled. He told LP. Muheso (in Exh.P2) that he shot about because the Chief had whipped him. He said in (Exh.P3) statement under inquiry that when he came back from Muthale now armed, he looked for the Chief. He did not find him. The accused would have killed him.

All evidence seen together makes the statement under inquiry admissible. This court is not relying on it to convict though. It is satisfied from all evidence tendered that the accused murdered the deceased herein as charged and he is accordingly convicted. The sentence for murder is one and mandatory - death, and this court pronounces it over the accused Alex Kioko Kimingi.

Right of appeal explained.

Judgement accordingly.

Delivered on 10th November 1998.

J.W. MWERA

JUDGE