



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: TUNOI, O'KUBASU & GITHINJI, J.J.A
Criminal Appeal 131 of 2005**

BETWEEN

WYCLIFFE OTIENO KAHUMBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at

Nairobi (Osiemo, J) dated 9th June, 2004

in

H.C.CR.C. NO. 37 OF 2002)

JUDGMENT OF THE COURT

This is indeed a very sad case whereby a noble attempt by the Administration Police officers and the Assistant Chief of Ting'ang'a to apprehend robbers who were freely waylaying and viciously attacking villagers along Ndumberi – Githunguri road junction during the night of 21st February, 2002, resulted in the tragic death of a young girl of about 15 years.

The appellant **WYCLIFFE OTIENO KAHUMBA**, an Administration Police officer attached to Ting'ang'a Chief's Office was after trial convicted of manslaughter and sentenced to 3 years imprisonment. He had initially been charged with murder whose particulars according to the information was that on the 21st day of February, 2002 at Ting'ang'a village in Kiambu District within Central Province murdered M N, hereinafter referred to as the deceased.

Briefly, the prosecution case is that on 21st February, 2002 at about 10 p.m. **Stanley Mathu (PW4)** was on his way to Ting'ang'a Shopping Centre when he was attacked at the Ndumberi-Githunguri junction and robbed of cash Shs.200/= and an ID Card. He went and made a report of the incident at the nearby Chief's Camp. At that time the appellant and another Administration Police Officer **Frederick Kalivola** were on duty. The appellant and his colleague AP Kalivola and Assistant Chief of the area decided to rush to the scene and see if they could apprehend the attackers. The APs were armed with two guns – G3 and Mark II rifles - and twenty rounds of ammunition. As they had no motor vehicle they approached **David Njuguna (PW2)** who had a pick up to drive them to the scene. When they reached the junction of Ndumberi-Githunguri road, they saw some two people jump into the bush. Gun shots were heard within

the vicinity and it is the prosecution's case that two or three shots were fired by the appellant towards that direction. The appellant and his colleagues did not stay long at the scene as they were soon thereafter driven away. It is apparent that one of those shots hit the deceased causing her death and it is the case for the prosecution that the killer shot was fired by the appellant from his gun. Later, the police from Kiambu Police Station visited the scene and collected the body of the deceased. Subsequently, the appellant was arrested and charged with the offence of murder.

The appellant in his defence stated that he and **AP Kalivola** booked their guns in the firearms movement register. They were G3 A3/SN 39 3429 and Mark II 303 S/N 14463 rifles. They loaded each gun with 10 rounds of ammunition. The APs were then driven by PW2 to the scene. At the scene two people advanced towards them and the appellant and AP Kalivola cocked their guns. The appellant denied that any gun shots were fired by them.

He further testified:-

“I did not kill the deceased. The police ought to have brought to court the firearms register which contained all the details of the gun and the number of the rounds of ammunition issued and the person to whom the gun was issued and the time the same was issued. According to the list of exhibits as contained in the committal bundles shows that no rounds of ammunition fired from both of the guns.

I now produce the list of exhibit as DEX111. B-3. The guns we had in our amourey we did not have G 3 FMB but we had G3 A3 SN 393429. The gun we had did not shoot any of the rounds. According to the list of exhibits no recovery of the spent cartridge. No recovery of the spent cartridges. No recovery of the spent bullet head and the distance we were at the junction was 200 m and entered into the bush 100 m. No bullet can go that distance and then deviate 100 m inside the bush and hit somebody behind a cliff.”

The synopsis of the appellant's testimony is as follows. The guns they had did not fire any rounds of ammunition. He could not be held responsible for the firing of the gunshot, as it has not been shown to have been fired from the gun he was assigned.

These valid denials cannot be proved in the absence of the firearms movement register and the report on spent cartridges.

However, the learned trial judge convicted the appellant of manslaughter holding that he was satisfied that the bullet fired by the appellant killed the deceased.

Mr. Ocharo, for the appellant, in a vigorous and persuasive submissions, argued that the gunshot that killed the deceased cannot be traced to the appellant. It could have come also from **AP Kalivola's** gun or even from any of those that the robbers might have possessed. He faulted the prosecution for failing to produce the firearms movement register to show who of the two APs was assigned the gun, the killer weapon. *Mr. Ocharo* further averred that the omission was fatal and the conviction cannot stand. The learned State Counsel **Mrs. Murungi** conceded the appeal and stated that the prosecution could not prove its case beyond reasonable doubt in the absence of the firearms movement register and the spent cartridges. With respect we agree with her.

The prosecution did not prove with any degree of certainty the gun that the appellant possessed during the material night. Was he in possession of a G3 or Mark 4 rifle? Moreover, the ballistic memo exhibit form listed a gun that was never possessed by any of the two APs. It must follow therefore that the prosecution did not adduce evidence sufficient enough to connect the appellant with the killer weapon.

Had the prosecution case rested on circumstantial evidence we would not have nevertheless found that the inculpatory facts were incompatible with the appellant's innocence and incapable of explanation upon any hypothesis other than his guilt as there were other co-existing circumstances, for example, the robbers and AP Kalivola having fired other gunshots, which would have weakened or destroyed the inference.

In the result, the appeal is allowed, the conviction for manslaughter is quashed and the sentence of imprisonment is set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED and DELIVERED at NAIROBI this 18th day of November, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR