



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: TUNOI, LAKHA & KEIWUA, JJ.A.)

CRIMINAL APPEAL NO. 89 OF 1999

BETWEEN

GUYO FORA DUBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

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

at Eldoret (Lady Justice Nambuye) dated 12th October, 1999

in

H.C.CR.C. NO. 28 OF 1996)

JUDGMENT OF THE COURT

This is an appeal by Guyo Fora Duba, the appellant, against a conviction of murder contrary to section 203 as read with section 204 of the Penal Code entered against him by the High Court of Kenya at Nakuru (Nambuye, J.) on 12th October, 1999 following a trial for the murder of James Mutuku Muuku on 13th December, 1993 at Total Police Patrol Base, Molo in Nakuru District.

The evidence adduced by the prosecution is as follows. Both the appellant and the deceased were police officers attached to Molo Police Station. At the time of this incident both had just been posted to Total Police Patrol Base which is situated at the junction of Nakuru - Kisumu road. The main duty of this Base is to curb thuggery and general banditry along the highway. Before the appellant and the deceased were designated to the Base each of them had been issued with a firearm and ammunition and since there was no armoury at the Base each officer was personally keeping his firearm. All the officers were housed in small separate rooms within a long rectangular building.

The deceased, who held the rank of a Corporal, was in charge of the Base. He stayed with his wife, Pauline Mutuku (PW1). She testified that in the morning of the fateful day the appellant whom she knew well went to their room and called out the deceased. She saw the two walk together towards the local market centre where they stayed for about one hour or so and then came back. Apparently, no one for certain knows, what their mission was nor is it clear what they went to do at the centre. However, back home the deceased expressed a desire to rest and he lay on his bed resting. No sooner had he done so than the appellant came and called him out again.

They left the deceased telling PW1 that he was going to the office to attend to some official matters. He returned at about 1.30 p.m. and had his lunch after which he rested on the bed and asked PW1 to assist him remove his beard using a traditional tool kit. This lasted for about thirty minutes or so. Then PW1 heard a voice calling -

"Corporal, Corporal, Corporal".

The caller was at the window and on looking in that direction she saw a muzzle of a rifle held by a person keenly watching inside the room. She recognized that person to be the appellant. He shouted:

"Leo ni leo Hutanisumbua tena".

PW1 exclaimed that she and the deceased were finished. They jumped into a corner at the head of the bed while pleading with the appellant not to kill them. They pushed shut the window but the appellant forced it open with his gun. Realising that the appellant was out to kill him, the deceased told PW1 to leave the window open. He then, in submission, raised up his hands and begged the appellant for mercy. He implored him to spare his life. However, the appellant pulled the trigger and fired one shot on the deceased hitting him point blank on the chest. He fell down amid a pool of blood.

The appellant threatened to go back and "finish" the deceased as he appeared not to have died. The appellant however retreated and fired one more shot in the air as he ran towards the office. This, we may observe, is a very clear and vivid description of how the deceased was executed in cold blood.

It is the evidence of Emily Ngati (PW2) that she lived next door to the deceased. She heard him plead for his life. She peeped out and saw the appellant standing at the window of the deceased's room. He was holding a gun and was aiming it inside the room, looking for something. She ran towards the office to inform her husband as to what was happening. Before she reached there she heard two successive gun shots.

P.C. Wanjala (PW5) and P.C. Ngati (PW3) were at the Base when this incident occurred. They heard the first gun shot. They saw the appellant shooting in the air the second time. PW5 talked him out of further shooting and when the appellant calmed down, PW5 disarmed him. The rifle that this witness snatched from the appellant is number AD6503044 LIG with its magazine holding about 12 rounds of ammunition. The evidence of these witnesses stood unchallenged.

Apart from the testimony of the witnesses who were at the Base, we think that it is also relevant to consider the evidence of Richard Okango (PW6). We say so because he is not one of the Police Officers. He was a farm manager of ADC Tall Trees. At the material time he had gone to the Base to seek assistance to drive away animals illegally grazing on his farm. On arrival at the Base he saw the appellant who was extremely agitated and when PW6 asked him why he behaved so, the appellant only said:

"I do not want to be arrested".

and he jumped on to the motor vehicle in which the witness had driven into the Base and by which the deceased was rushed to the hospital. PW6 stopped at Molo Police Station where the appellant was formally arrested. The deceased died on his way to the hospital. The post mortem performed on his body by Dr. Kamidigo (PW11) revealed a ruptured liver by a bullet. This was followed by a massive haemorrhage which led to cardio pulmonary arrest causing death.

At the trial, and before this Court, the appellant's defence was an alibi: he had been at Nakuru Provincial Police headquarters and only arrived at the Base after the shooting of the deceased. He maintained that he did not touch any firearm on the fateful day. Mr. Orina, counsel for the appellant, argued before us that the learned judge gravely misdirected herself by failing to consider and address her mind to the fact that the alibi raised by the appellant was not tested and was not ousted by the prosecution. The learned Judge held that the defence of alibi was a frame up and could not be sustained. She concluded that there was sufficient direct and circumstantial evidence to put the appellant at the scene and at the time of the killing

and that he actually shot dead the deceased. The learned Judge concluded that the appellant had consistently lied in maintaining otherwise. After a careful consideration of the evidence, we have come to the same conclusion as the learned judge.

Mr. Orina further complained that the learned judge erred when she held that the prosecution had proved its case beyond all reasonable doubt without addressing herself to the possible alternatives that could have caused the death of the deceased. This alternative possibility is that the deceased shot himself. We have no hesitation in outrightly rejecting this theory for there is no shred of evidence whatsoever to shift the true facts of the killing of the deceased by the appellant. There cannot be any other suggestion that the deceased met his death otherwise.

With respect, we entirely agree with the learned judge's approach in rejecting the suggested theory of suicide. The true position is that, as a general rule, facts which have to be proved to establish the guilt of an accused person in a criminal case must be proved beyond all reasonable doubt by the prosecution, on the evidence considered as a whole. This was done here.

The learned judge was satisfied beyond reasonable doubt that it was the appellant who executed the deceased in cold blood. There is ample evidence on record to sustain the conviction. The witnesses knew the appellant very well. Their evidence stands out unchallenged. We say at the outset that in our consideration of the entire evidence as a first appellate court it was proved beyond all reasonable doubt that the appellant and no one else killed the deceased in such circumstances as to amount to committing murder under the law.

There is no doubt in our minds that the appellant set out with a gun to pursue the specific unlawful purpose which resulted in the death of the deceased.

We are satisfied that the learned judge's unequivocal conclusion that it was the appellant who shot dead the deceased is correct and is beyond reproach. We are further satisfied that the execution of the deceased in cold blood was done with malice aforethought as is required for killing to amount to murder under the law.

We dismiss the appeal.

Dated and delivered at Nakuru this 29th day of September, 2000.

P. K. TUNOI

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

M. KEIWUA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.