



**Republic v Kortom (Criminal Case 2 of 2020)
[2023] KEHC 23898 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 2 OF 2020
REA OUGO, J
SEPTEMBER 28, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

WILSON KORTOM ACCUSED

JUDGMENT

1. Wilson Kortom the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge are that ; on the 29th day of December 2019 at Transmara West Sub- County within Narok County he murdered Jorim Mokuo Ogeto.
2. The accused person pleaded not guilty and the prosecution called nine (9) witnesses to prove their case. This case was partly heard by Justice Ndungu whilst sitting in Kisii. I took over the matter after his transfer and heard it to the conclusion.

Prosecution Case

3. Samuel Abuga Onsongo, PW1, testified as follows; on the December 29, 2019, he hired a vehicle Toyota Probox, registration number KCP 91N. The deceased Jorim Mokuo Ogeto was the driver. They had gone to pick goats from Lolgorian. They were 3 in the car, the deceased, Innocent Nyangau, and himself. They did not buy the goats. They began their journey back to Kisii at 12.00pm. Whilst between Kosanyi and Esoit they found the road blocked with a log and a motorcycle. The accused was standing on the road. The accused asked them for Kes 3000/-. They told the accused they had no money. He demanded that they pay him. He told them that the vehicle was a charcoal vehicle. The deceased removed the stone and Nyangau removed the log. The accused who had a pistol shot the deceased in the chest. People gathered the accused disappeared. The deceased ran a short distance and then fell down. He called Lewis Matundura who went with his motorbike and they took the deceased to Kilgoris hospital. On arrival at the hospital, they were told that the deceased had died. The OCS



- accompanied them to the scene. The accused returned to the scene in the company of an officer. The accused was arrested. On cross-examination, PW1 testified that the incident happened around 2.00 pm. That he chose the route he knew. That the vehicle they had was not stuck in the mud. That there was no rain. The accused's motorbike was parked on the road and he was alone. That he saw the accused shoot the deceased who was 2 meters away. That they did not fight the deceased. That Innocent ran away.
4. No. 235199 Inspector Bernard Makusha, (Pw2) an officer in charge of forensic examination testified as follows; on 31/12/2019 he was requested by P.C. Abdullahi Hassan of DCI Transmara for forensic scene documentation and certification of photographs. The 1st photo shows a motor vehicle KCP 931N, the 2nd photo is the rear view of the said vehicle and the 3rd photo is for the chassis No. NCP 81-0261678. The 4th photo is inside the back seat of said motor vehicle which had blood stains on the seat. The 5th photo is of a motorcycle reg. KNEP 194C. The chassis number of the motorcycle is NB2815 BNY2 JWDN2118. The next was a photo of a Ceska pistol. Its magazine was serial number J91831. It had a total of 14 ammunition with one cartridge. The photos were produced under his supervision. On cross-examination, he testified that he took the photos at the station and not at the scene. He did not visit the scene.
 5. Lewis Matundura Obonyo, (Pw3) testified that on 29/12/2019 he was called by Pw1 at about 3.00 pm. Pw1 told him that the deceased had been shot. He went to the scene and found the deceased shot on the left side of the chest and was lying down. He put the deceased in the motor vehicle and took him to Kilgoris Hospital. He was pronounced dead on arrival at the hospital. During cross-examination he testified that vehicle registration no. KCF 374J is not his vehicle. That the motor vehicle in the photos is his. That he was paid 3000/-. That he rode a motorcycle to the scene. He denied that they exchanged the vehicle.
 6. Julius Mwangombe, (Pw4) an inspector of police testified that on the 29/12/2019 he was at Esoit police post. At about 1500 hours he received a call from the accused AP Wilson Korum informing him that on the way back to Safari Park hotel he was accosted by 3 men who were doing charcoal business. In the process, the men had beaten him and ran away in 2 Probox motor vehicles. That he has used his firearm and shot once. He wanted to intercept the vehicle. As he left for the scene he met the accused at the gate. The accused handed a Ceska pistol serial number KEAEG1831 to him with 14 rounds of ammunition. He went with the accused to the scene and the accused showed him where the vehicle was with the charcoal. He recovered one cartridge of 9mm caliber. He met with Inspector Jumbe , P.C. Hassan and OCS Kilgoris and they returned to the scene. He handed over the pistol and spent cartridge at Esoit. During cross-examination, Pw4 testified that the accused told him that the vehicle he intercepted had charcoal. At the scene, he saw signs of commotion and blood stains. That it was a rainy season. That the accused was working at the hotel. It is not possible for one to go to Lolgorian and then return through Esoit as you head back to Kisii.
 7. Doctor Obuya Job, (Pw5) testified that on the 30/12/2019 he performed a post-mortem on the deceased. He saw a punctured wound on the left angular approximately 1.5 by 2cm. There was another puncture wound on the back corner thorax area of 2x2cm oozing dark blood. His finding was that; on the upper left back there was a punctured wound and accumulated blood in the chest activity. On the right lung, there was blood though no puncture wound. All other systems were normal. He concluded that the cause of death was hemorrhage secondary to penetrative chest injury. That the probable cause was a gunshot. During cross-examination, he testified that the point of entry was from the front chest and the existing wound would be bigger.
 8. APC George Kimurgut Bomnji ,(Pw6), testified that on the 18/11/2019 he issued a Ceska pistol No. G1831 with 15 rounds of ammunition caliber to the accused. It was for priority security at the Safari



- Club Hotel based in Mara. He received a report from the sub-county commander on 29/12/2019 that the gun had been used. The gun was taken to him. It had 14 rounds of ammunition calibre and one round was used. During cross-examination, he testified that the period one stays with the gun depends on the nature of duty. Officers are usually given guns and they return them when going on off-duty.
9. Alfred Kahi No 25124, (Pw7) an inspector of police testified as follows; he is a ballistic expert. His main function is to examine firearms. On 6/1/2020 he received the following exhibits from P.C. George Ayieta, one Ceska pistol serial number G1831 ('A'), a magazine (B), a spent cartridge of 9mm ('Q'), and 14 rounds of ammunition ('C-P'). The investigating officer desired that he ascertains if Exhibit marked 'A' was a firearm under the Firearm Act, whether Exhibit 'B' was compatible with Exhibit 'A', whether Exhibit 'C- P' could be fired from Exhibit 'A' and lastly whether exhibit 'Q' was fired in the exhibit 'A'. He did his examination and his findings were as follows; Exhibit 'A' is a Ceska pistol model CZ 85B which is designed to chamber rounds of ammunition calibre 9x19m. It was in good and mechanical condition and it was complete with all its parts including its detachable box magazine marked 'B'. The pistol was capable of being fired as he was able to test it and fire by means of 3 rounds from exhibit 'C- P' picked at random. Exhibit 'C- P' were 14 rounds of ammunition in calibre 9x19mm and each was found to be in line as 3 rounds were picked at random and tested in the exhibit 'A'. He also recovered the test cartridge cases and test bullets which he marked as 'TC1- TC3', the bullets were 'TB1-TB5'. He retained them for comparison purposes. He formed the opinion that exhibits 'A', and 'C-P' are capable of being fired and they are firearm and ammunition as the Firearm Act Cap 114 of the Laws of Kenya. Exhibit 'Q' is a fired cartridge case, it is a component part of formerly fired rounds of ammunition in calibre 9x19mm and that comparative microscopic examination of exhibit 'Q' in conjunction of the test cartridge cases 'TC1-TC3' that were fired in exhibit 'A'. It revealed marching ejector markings, matching breech face markings, and matching firing pin markings which enabled him to form the opinion that exhibit 'Q' was fired from the Ceska pistol serial no. G1831 exhibit 'A'. He produced the report and certificates as exhibits in court. During cross examination he reiterated his evidence adding that each firearm has its unique features.
10. No 93282 PC Abdullali Hassan (Pw8) the investigating officer recalled that on 29/12/2019 whilst at the station he got a call from Inspector Jumbe to accompany him to a scene of the murder at Esoit area. They proceeded to the scene and established that Jorim Mokuha had been shot by the accused. The deceased was driving vehicle registration number KCP 931M a white Probox along Lolgoarin Esoit Mara Road when he was stopped by a person who had barricaded the road with stones and logs. They were told that the person had asked for Kes 3000/- from the occupants of the vehicle. The deceased answered they did not have the money. They alighted from the vehicle to remove the barricade. A disagreement ensued between them and the accused and this promoted the accused to shoot one firearm from his Ceska pistol and the bullet entered the deceased's chest and exited from his back. The deceased ran and fell on the ground. The accused fled from the scene. The deceased was taken to hospital but was pronounced dead. At the scene, they recovered a cartridge and drew a rough sketch plan of the scene. The accused surrendered himself at Esoit and handed in his firearm. They arrested the accused and took him to Kilgoris police station. They found the Probox at the police station. A post mortem was done and the firearm bullets and cartridge were taken for examination. The accused was an administration police officer attached to guard Mbata Safari Club at the time of the incident. His sketch showed where the body was, the vehicle, and the cartridge. He produced the recovered exhibits as part of his evidence. During cross-examination Pw8 testified he was told by the witnesses what happened. They have no photos of the scene, nor did he find a vehicle at the scene. The bullet head was not recovered he recovered the cartridge. That the motorcycle was released to the accused. They did not search its particulars to prove it belonged to the accused. that he found stones and logs



at the scene but he did not take them as exhibits. The rest of Pw8's evidence during cross-examination reiterated his evidence in chief.

11. Silas Ogeto Maguza, (Pw9) testified that the deceased was his son. He was 21 years old. On 29/12/2019 he got a call from his cousin that his son had been shot. He proceeded to Kilgoris Hospital and found his son had died. He later attended the post-mortem and identified his son. He was shot in the area of his heart. The bullet entered and went out through his back.

Defence Case

12. The accused person gave a sworn statement. He called 3 witnesses. APC Wilson Kortum No. 99024300 (Dw1), the accused testified that he is a police officer with CPUU Transmara West. He was deployed at Mpata Club, a tourist hotel in Masai. He was to guard the whites and the residents. He was on patrol. He was in civilian. He would use a motorbike registration no. KMEP 194C. It belongs to him. He had a gun Ceska serial no. 1831. On 29/12/2019 he left Mpata and went to Esoit area about 20 kms away. He did his shopping and left at about 2.30 pm to 3.30 pm. whilst on the way he found a lot of water on the way. It had rained. He found a vehicle stuck on the road. It had 3 people inside it. 2 were pushing the vehicle. He put his bike aside. The driver was checking on how they could get out of the place where they were stuck. They asked for his assistance. He told them he could not help them. They asked him who he was and he told them he is a police officer. One of them came out and the vehicle came out of the mud. On seeing that the vehicle move he asked them what they were carrying. He asked them if it was charcoal. One of them on heard him mention makaa, one of them pretended like he was checking inside the vehicle, and then suddenly he felt a push at his chest. For him to go ahead the vehicle had to move first. He fell down beside the road. He was hit at the back with a stone. He wanted to get away but they held his clothes. They tried to hit him with stones. The one in the vehicle came out and shouted 'You have not killed up to now'. By then he was held at the back and the 2 surrounded him. One of them went to get stones from a distance. He removed the gun he wanted to shoot in the air. 2 of them held onto his clothes. The one behind held him from the back as he wanted to shoot in the air. The other one at the front wanted to get the gun from him. The driver went to get a stone. The one at the front who held the gun was hit by the bullet. He attempted to get his gun from the front. He shouted and ran and the one at the back followed him. He locked the gun. The person fell 50 meters away. The others followed him. He saw it could be a mob justice case. He took a photo of the vehicle and he ran to Esoit Police station. He rang the OCS Esoit police station and told him what happened. The OCS asked him if he could reach Esoit. He went to Esoit and reported. Police from Kilgoris went back with him to the scene. They did not find the vehicle there. The vehicle was registration no. KCF 374J. They did not go to Esoit. He was told they had gone to hospital and that the person had died. They went back to Esoit police station. They went back with the DCIO to the scene. The vehicle was not there. He was told that since the person had died he was under arrest. He had been injured. He was taken to the hospital and treated and given a P3 form. He produced the jacket (Dext. 2) he had on the material day. During cross-examination, he testified that there was no roadblock. That he did not stop the 3 people and accused them of carrying charcoal. He denied asking them for Kes 3000/-. He admitted that the deceased was shot from the front in the chest. He stated that they were fighting.
13. Samwel Olemokom (Dw2) testified as follows; his home is in Trans mara. He knows the accused person. He usual sees him around with a motorbike. On 29/12/2019 he was grazing cows at Esoit. A Probox came along. The said vehicle used to pass there daily. He knew the driver. It used to carry makaa . They would help in pushing the vehicle daily when it got stuck in the mud. The place is uphill. They would be given tea for pushing the vehicle. That on the material day they were not called. The driver came along and only waived them. The vehicle had 3 people. As they were going up the boda person came along and he wanted to pass. The vehicle skidded. 2 came out and they went to fight



the boda person. They were about 50 meters away. As the boda person tried to get away the 2 tried to surround him. His friend whom he was with said that the language being used was not good. He suggested that they go and help. Then suddenly he heard a sound that was not normal. They heard screams. He went to attend to a cow which was about to deliver. As he went he saw someone being put in the vehicle. They left. The boda person had left. Then he saw a Landcruiser. The people who came with it told them that the boda person was police. He boda person fell twice he had the yellow jacket on. During cross-examination, he testified that he did not see a roadblock and that he got to know the accused was a police officer on the material day.

14. Samwel Kinyamel Olemorambi (Dw3) testified as follows; he looks after cows around Kimetet Farm. He used to see the accused riding a motorbike wearing a yellow jacket. On 29/12/2019 he had taken cows to graze. There was a Probox that usually comes along. It had rained the whole night. The said vehicle got stuck. They would seek their assistance when they got stuck. The vehicle would have 2 occupants. On the material day it had 3 occupants. The driver did not call them. The vehicle kept skidding. The boda person came and stopped. He wanted the others to pass. They saw 2 people throw stones at the boda person. They were struggling. They decided to continue grazing. They checked the place again. They saw 3 people surround the boda person. Then they heard a sound and they got away. One person sat down. The driver got into the vehicle put the person inside the vehicle and drove away. They could see clearly from where they were. The accused had his jacket on. During cross examination he testified that the accused is usual in civilian clothes and that on the material day he was in uniform and that he did not know the accused was attached to the hotel.
15. No. 5363 (DW4) a clinical officer at Transmara west sub-county hospital testified that he had a P3 form of Wilson Kortum which he filled on 20/1/2020. He used medical notes of a colleague called Doris. The accused alleged to have offended and assaulted by a person unknown to him. On examination, he had a mild tenderness on the back of the neck with no bruises noted. The tenderness was on the right shoulder blade and on the mid-right thigh with no swelling. The injuries were about a month old and the object used was blunt. He was treated with painkillers

Submissions

16. After the close of the defense case, the prosecution did not file any written submissions. The defense filed written submissions on 27 June 2023. I have carefully read and considered the said submissions. A summary of the defense submissions is as follows; the submissions reiterate the evidence with comments on the prosecution evidence. It was submitted that Pw1's evidence was contradictory. The prosecution failed to prove that the accused was provoked. That the accused's defense is that there was a struggle and that he was brought down severally before he drew his pistol to scare the assailants. On the issue of inconsistency of evidence, the accused relied on 2 cases namely *Richard Munene v Republic* [2018] eKLR and *Dickson Elia Nsamba Shapwata & another v the Republic* (Criminal Appeal No 92 of 2007). It was submitted that the prosecution had not proved that the accused caused the death of the deceased as the evidence of Pw1 was not corroborated by any other apart from himself, despite the fact that he was accompanied by 2 other people. There was no explanation of what happened to Nyangau who accompanied Pw1. The law requires the trial court to carefully scrutinize the evidence of a single witness and only convict if satisfied that it was free from the possibility of error or mistake (see *Wamunga v Republic*). Reliance was also made in the case of *Ogeto v Republic* [2004] KLR 19 and *Roria v Republic* [1967]EA 5 83.

Analysis And Determination

17. Section 203 of the *Penal Code* defines the offence of murder. The following elements are required to prove the offence of murder; proof of death, the cause of that death, proof that the death was due to



an unlawful act or omission, that the unlawful act or omission was on the part of the accused and that the unlawful killing was with malice aforethought.

18. There is proof of death. Pw1, Pw3 and Pw9 saw the body of the deceased. Pw5 testified that the cause of death was hemorrhage secondary to penetrative chest injury. That the probable cause was a gunshot.
19. The next issue for determination is whether the accused caused the unlawful death of the deceased. Pw1 is the only eyewitness. He testified that they met with a roadblock, a log, and, a motorbike was placed along the road. The accused asked them for 3000/- and accused them of carrying charcoal. They told him they did not have the money. They got out of the vehicle; the deceased removed the stone and Nyangau the motorbike. Then the accused shot the deceased. The accused does not deny that the gun which he had shot the deceased. The accused's version of what happened is as follows; he found the vehicle with the 3 occupants. They were stuck in the mud. They asked for his assistance. He declined. They managed to move the vehicle and when he asked them if they were carrying charcoal the 3 persons turned on him he was held and they used stones to beat him. He removed his gun to defend himself and the person who was at the front held the gun and was shot. There is no dispute that the deceased died as a result of a gunshot. The gun was in the possession of the accused. The accused appears to be raising a defense of self-defense, that he pulled out the gun at a time the 3 men were attacking him. Pw1 denied attacking the accused. I do agree that one Innocent who was with Pw1 was a vital witness but he was not called to testify. I warned myself of the danger of convicting on the evidence of a single witness and also that I did not hear Pw1 testimony. His evidence was clearly recorded on what he witnessed on the material day at 2:00 p.m. during the day when in the company of the deceased. I find no inconsistency in the evidence of Pw1 who was the only eyewitness. The defense witnesses said they witnessed a struggle between the boda man the accused and the three men. Their evidence supports the accused's case. So, did the accused cause the unlawful death of the deceased? It is apparent there was a commotion as a result of some disagreement between the accused and the occupants of the vehicle.. In view it is not clear from either side how the disagreement started; however, the accused caused the death as he drew out his gun which was in his possession, and the deceased was shot during the commotion. He therefore caused the unlawful death of the death.
20. The final issue for determination of whether there was malice aforethought on the part of the accused persons. Section 206 of the [Penal Code](#) defines malice aforethought as follows:
 - “206. 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) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”
21. My view is that there was a commotion between the accused and the other occupants of the vehicle Pw1 was in. The accused stated that the gun which was in his possession shot the deceased during the



said commotion. I find that in the circumstances there was no malice aforethought proved on the part of the accused. The evidence as adduced by the prosecution has established beyond reasonable doubt the act of unlawful killing of the deceased by the accused person herein without malice aforethought. Sections 179 of the *Criminal Procedure Code* provides as follows;

- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

22. From the foregoing analysis, I find the accused Wilson Kortom guilty of a lesser charge of manslaughter contrary to section 202 (1) of the *Penal Code* as read with section 205 of the *Penal Code* and he is convicted accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS THIS 28TH DAY OF SEPTEMBER 2023.

R. E.OUGO

JUDGE

In the presence of:

Wilson Kortom/ Accused- Present

Mr. Kerosi - For the Accused person

Mr. Ayodo State Counsel

Orwasa/Wilkister - C/A

