



**Republic v Agwingi (Criminal Case E007 of 2022)
[2022] KEHC 16678 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E007 OF 2022
KW KIARIE, J
DECEMBER 20, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

WILSON SIARA AGWINGI ACCUSED

JUDGMENT

1. Wilson Siara Agwingi is charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offence are that on the September 19, 2017, at Riat Market, in Ndhiwa sub county of Homa Bay county, murdered Philip Kiloba Tissa.
3. When police officers who were on guard duties at Sukari Industries responded to a commotion that involved the deceased and some two other people, the deceased was shot at by the accused after he had surrendered.
4. In his defence the accused contended that he acted in self defence. He said that the deceased approached him while armed with a machete and attempted to cut him. This is when he was shot after he pulled the trigger accidentally.
5. The issues for determination are:
 - a) How was the deceased shot;
 - b) Whether the accused acted in self defence or not;
 - c) Whether the accused caused the death of the deceased or not; and
 - d) Whether the offence of murder was proved.



6. All the prosecution witnesses as well as the defence were in agreement as to what led to the incident where the deceased lost his life. On the material morning, it would appear, there was a disagreement between the deceased, Tyson and another unidentified person. The disagreement degenerated and the deceased and Tyson (according to one version) entered into a maize plantation and attracted a crowd of onlookers. The other version was that they were three. Except for this minor discrepancy, the evidence up to that point agreed. What followed thereafter is where there are not only disagreement in the evidence of the prosecution and the defence, but also contradictions in the evidence of the prosecution witnesses.
7. Edward Mulobi Litoyi (PW1) testified that Tyson and the deceased were chasing each other and that it was Tyson who was armed with a machete. When the duo were ordered by the police officers to surrender, both complied and knelt down while lifting their hands. He then suddenly heard a gunshot. This was how the deceased was shot. During cross examination, he said the deceased appeared mentally disturbed for he was throwing stones at his fellow workers.
8. His colleague, Daniel Indai Keyari (PW2) testified that Tyson and the deceased were chasing each other while Tyson was armed with a machete. When Tyson grabbed the deceased by the collar, the latter pleaded not to be cut. Two police officers went to where the two were struggling and ordered them to kneel down. The two complied. One police officer announced that he could shoot them. That is when he heard gunshots. During cross examination, he conceded that in his statement to the police, he did not mention that Tyson had a machete as it appears in his later statement with IPOA. He also acknowledged that in his statement with IPOA, Tyson indicated that it was the deceased who had a machete.
9. Godfrey Analo Makotsi (PW3) testified that he went to the scene after the fact and that he found one police officer holding a machete.
10. The second version by the prosecution was that the deceased was shot when he refused to comply with an order to surrender. This was testified to by APC Benard Otieno Opiyo (PW4). His evidence was that the deceased was armed with a machete. His statement to the police indicated that the deceased pursued and aimed his machete at APC Siara, the accused herein. He conceded that in his statement with IPOA he did not indicate that the deceased pursued the accused.
11. PC Peter Mbugua (PW5) testified that the deceased threatened the accused with a machete before he was fatally shot. He testified that it was Tyson who had a machete but during cross examination he conceded that he did not indicate this in his statement. He further said that Tyson indicated that it was the deceased who had the machete.
12. The evidence of Godfrey Chelasia (PW6) the investigating officer with IPOA was that the deceased was shot by the accused while kneeling down.
13. Wilson Siara Agwingi, the accused testified that when he and his colleague went to intervene where some three people were fighting, one of them ran away. The remaining two were ordered to surrender, one of them complied but the deceased defied. The deceased approached him while armed with a machete and held his gun's barrel. He cocked his gun to scare off the deceased. Since his hand was on the trigger, the deceased was shot.
14. Some prosecution witnesses supported the contention of the accused that the deceased threatened him while armed with a machete. The prosecution failed to call Tyson as a witness yet he was very key. Another witness whom PW6 conceded had said that the deceased had a machete, was not called. The Court of Appeal in the case of *Bukenya v Uganda* [1972] EA 549, (Lutta Ag Vice President) held:



The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

15. The failure to call these two material witnesses is fatal to the prosecution case.

16. Section 17 of the [Penal Code](#) addresses the issue of self-defence as follows:

Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.

17. The Court of Appeal in the case of [Abmed Mohammed Omar & 5 others v Republic](#) [2014] eKLR stated as follows:

What are the common law principles relating to self defence" The classic pronouncement on this issue and which has been severally cited by this court is that of the [Privy Council in Palmer v R](#) [1971] AC 814. The decision was approved and followed by the Court of Appeal in [R v McINNES](#), 55 Cr App R 551. Lord Morris, delivering the judgment of the Board, said:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary.

But everything will depend upon the particular facts and circumstances.Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

18. Probably this is the time to pause as a country and think as to whom the responsibility of investigation should be bestowed from the onset, when there is an allegation that a police officer has misused the gun either to kill or maim. This is to avoid the kind of accusations of interference and deliberately changing of statements and deliberate omission to call material witnesses.

19. The plea of self-defence by the accused, in view of the material contradictions and omissions of material evidence, is persuasive. I therefore find that the prosecution has not proved its case against the accused. I accordingly acquit the accused of the offence of murder and set him free unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER, 2022

KIARIE WAWERU KIARIE



JUDGE

