



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**CORAM: R. MWONGO, J.**

**CRIMINAL CASE NO. 36 OF 2016**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**EVANS MALIACHI WIYEMA.....ACCUSED**

**JUDGMENT**

1. Evans Maliachi Wiyema, the accused in this case, is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that on 25<sup>th</sup> July, 2014 at Crescent Island in Lake Naivasha, the accused murdered Moses Kinyanjui Wanyoike.

2. It is not disputed that: the deceased's death occurred; that the deceased died from a wound caused by a bullet fired by the accused; and that the persons present at the scene when the incident occurred were Douglas Tutu (PW1), Johnson Ndichu (PW2), Corporal Richard Mapinga (PW13) and the accused. The evidence of the four eyewitnesses concerning the arrest and shots in the shooting is as follows.

3. On 25<sup>th</sup> July, 2014 at about 8.00am PW1 Tutu, PW2 Ndichu, and the deceased Moses Wanyoike, met to go fishing at Crescent Island. Tutu is a fisherman, and Ndichu a former fisherman who was not a builder. They fished until about 3.00pm, and then folded their nets as there were few fish. Whilst they were still in the water, one Mungai (PW3) and some police officers in uniform arrived in a vehicle.

4. As the officers approached the water, the fishermen panicked fearing arrest. They ran into deeper water among the reeds as they were ordered to stop. According to Tutu, a boat was brought and deployed to search for them. According to Ndichu, he heard some shots ring out as they reached some reeds where the fishermen hid. The boat came searching for them.

5. As the boat approached, the fishermen ducked beneath the hyacinth. According to Ndichu the boat had one police officer and two Crescent Island guards in it. Soon the officers spotted Ndichu, and threatened to shoot, then pulled him out of the water. They put Ndichu on the boat, took him to the shore and returned to search for the other fisherman.

6. According to Tutu, at this time he was in the water and his head was beneath the hyacinth, but he could see what was going on. He saw the police officer fire his gun and Wanyoike's body floated up. He was about 3 metres away. It was then that he, Tutu, stood up and surrendered. The officer with the gun was the accused, Maliachi, and he threatened to shoot Tutu if he did not advance quickly. Tutu was taken back to shore but before that he was asked "*where is the goat?*" He replied that he knew nothing about it. Tutu also said he tried to call the deceased, Wanyoike, who had a bleeding wound on his head, but he did not respond. The deceased's body was not taken, but taken in the water.

7. Back on shore the two fishermen were handcuffed together and taken to the police station. Tutu said he wrote a statement. The police officers asked him to show them where Wanyoike's body was, and the next day he took the police to the scene. They did not find the body. Tutu was later charged with theft of sheep in **CMCR No. 1420 of 2014** together with Ndichu but both of them were acquitted.

8. In cross-examination, Tutu said they ran away from police since they had no fishing licences and feared arrest. He said he never saw the deceased armed with a panga nor did they at any time have mutton.

9. Similarly, Ndichu said they had no weapon such as knives or pangas and that he did not participate in any theft. In cross-examination he said that shots were fired towards them; that he heard them whizz past him; that the shots were not into the air; and that he did not know that sheep had been stolen the previous day; that they had five big fish in a gunny bag but no sheep; and that he did not see the deceased being shot.

10. On his part, Corporal Mapinga (PW13) version of the shooting incident was quite different. He testified that he and the accused were on

patrol in uniform having left the police camp at about 4.00p, on 25<sup>th</sup> July, 2016. On reaching Karagita area, a car driven by PW3 stopped next to them. PW3 told them he had been to their camp to report theft of sheep at Crescent Island. Mappinga called the camp, got confirmation of the report, and was advised to assist PW3.

11. Corporal Mappinga and the accused then went to Crescent Island and got there at about 5.00pm. On reaching the farm where the sheep had allegedly been stolen, they saw two people as they approached the lakeside. They followed the two, hastily retreated towards the lake. The officers then split with Mappinga going to the left and the accused to the right. Mappinga then lost sight of the accused, but then heard a gunshot, and shortly thereafter, heard a second gunshot.

12. Mappinga further testified that he and the accused were 70 - 100 metres apart when he heard the first gunshot. He asked what was going on and heard the accused say the men they were trailing had pangas. As the two men were surrendering, he heard a third gunshot and saw the accused emerge into view with a machete. Mappinga approached where the accused was and saw a sheep head, skin and legs identified in P. Exhibit 1A - 1X. He suspected the two men, and arrested them. They went back to the camp with the suspects, namely PW1 and PW2 and entered an OB No. 65 report (P. Exhibit 10) on 25<sup>th</sup> July, 2014 at Naivasha Police Station. On returning to their Mirera Anti Stock Theft Unit they recorded the same information in the camp OB No. 4 on 26<sup>th</sup> July, 2014. Although in both reports the officers recorded the alleged stock theft and the use of three bullets they did not report that there was a third person at the scene who attacked the accused and was shot at by accused.

13. The guns which the two officers had used were returned to Mirera Anti Stock Theft Unit for safe custody. Later they were given to firearms expert PW11 for forensic analysis. It is not disputed that the gun used by the accused discharged three rounds of ammunition.

14. The evidence of the finally eyewitness at the scene is that of the Accused Evans Maliachi. In his sworn testimony he confirmed the evidence of Corporal Mappinga that they were on foot patrol at Karagita area on the material day. They met Mungai PW3 who had reported the theft of sheep at Crescent Island. They went to Crescent Island in PW3's vehicle to investigate the theft; when they arrived they were shown where some sheep were grazing.

15. He testified that they saw some men near the lakeside who hastened away into the reeds at the shore when they saw them. They were in uniform. According to him, they were two men. On his suggestion, they agreed to split to catch up with the men, with him going to the left and Corporal Mappinga going to the right to prevent the men from escaping. He said some places were swampy and soggy. He shouted to the men to come out as they were officers.

16. According to the Accused, as he checked about one person came out of hiding and approached the accused with a panga. He fired a bullet into the air. The man told him not fire into the air and instead shoot him. By this time the man was about three metres away. Maliachi fired a second shot. The man was unafraid and came slashing about. As the man was very close he shot a third time as he slipped and fell backwards. He got up quickly but did not see the man again.

17. It was now beginning to get dark. He saw a shiny object and as he went closer he noticed it was a panga. As he went forward to pick it up, another person came out of the reeds with his hands up. He picked the panga and grabbed the man and took him to where Corporal Mappinga was. On getting there, he found Mappinga was holding another young man. The men said they were fishermen. He also saw the head of a sheep four legs and a skin.

18. Shortly after PW3 arrived, the men said they were only two and PW3 confirmed that the feet, head and skin of the sheep were from his flock. They therefore went in PW3's vehicle with the men they had arrested to Mirera Anti Stock Theft Camp. The men were eventually charged for stock theft.

19. The following day he learnt from Naivasha Police Station that one of the persons had remained in the water at the lake. He was aware that in the present case he was accused of killing that man, but states:

***“I am accused of killing the deceased. I did not know I shot him. If I did then he is the person who endangered me with a panga.”***

20. It was in the cross-examination that the facts of the incident are clarified. He admitted in cross-examination by the prosecutor:

***“At Crescent Island I met 2 suspects. I saw 2 suspects. It is true that I was attacked by someone who was not witness 1 or 2 (Tutu or Ndichu). My attacker had a machete ..... I did not hear PW1 or PW2 say they needed to retrieve their colleague on the material date.....”***

21. In further cross-examination he said:

***“During the time of arrest I could not test if there was a third person. It was impossible to trace him. True, the third person went into the water as he ran into the water..... I spotted only two people at the scene.”***

22. In cross-examination by Mr. Mbanya for the Victims, he said:

***“My attacker attacked me with machete. He was about 5 metres. When he came out of the reeds I could only see him from the hips upwards. The water was at his waist. I shot in the air first when he raised the machete. He advanced towards me, I shot again he continued coming. Then I shot facing backwards when he was close. When I looked he was not there and I fell. The ground was slippery - it was at the edge of the water. I shot towards attacker. When I got up I did not see him. I did not see any***

***blood in the water.”***

23. In further cross-exam by Mr. Mbanya, he said:

***“.....I said I fired in self defence. I fired three shots in self defence. There is no mention in the report of the third person. I found the panga at the reeds. This is at the place where he person was in the reeds and where I was. This was not in the water.***

.....

***Mapinga took the panga to the police station. I do not know if it was listed for fingerprints.”***

24. In his re-examination by Mr. Mburu, clarified his evidence as follows:

***“At the time of firing [the] third shot, the distance between me and deceased was 1 metre. No one raised any complaint about a third person.***

.....

***At the time, the arrested persons did not raise the issue of a third person. I came to learn of the third person the following day.***

25. It is clear from the overall evidence of the accused, that he shot the deceased from a distance of about 1 metre; that he knew of the fact that this person was the one who attacked him; that his attacker was not witness 1 or 2 and that the third person went or ran into the water. It is therefore baffling that at the same time, the accused also asserts that he only saw two people at the scene.

26. The defence case is that the evidence of PW1 and PW2 ought to be treated with caution because some facts are disputed by other prosecution witnesses. In particular defence counsel agreed that the issue of a boat and circumstances surrounding the shooting suggest that the evidence of PW1 and PW2 is fabricated, untruth and suspicious. Counsel urges that:

***“The explanation of the accused herein is truthful in that the deceased was armed with a machete and was determined to cause him harm. The accused acted in self-defence in the circumstances prevailing.”*** (See page 5 Defence Submissions.)

27. The defence also submitted at page 2 of submissions:

***“The accused testimony was that the deceased armed with a machete failed to comply with warnings and two shots. He menacingly confronted the accused armed and at close range. The third shot was fired by the accused as he fell. When he rose the aggressor was nowhere to be seen.”***

28. In summary as I understand it, the material evidence of the Accused juxtaposed with that of the other eyewitnesses, is that: a report of theft of sheep at Crescent Island had been made to the police. PW13 and the accused being on patrol in Karagita area, went on the report of PW3 Mungai to Crescent Island; in the meantime, Tutu, Ndichu and the deceased were at the lake, most likely fishing; when the three saw the police officers they panicked and ran for cover towards the reeds; The Sketch Plan of the scene produced by PW16 AS p. Exhibit 15 shows that the reeds were off the beach and in the lake; The officers approached the area in a two pronged dragnet from the left and the right; One of the accused, Ndichu PW2 was arrested by Corporal Mapinga; Tutu surrendered to the Accused; but prior to that surrender the accused had had a confrontation with a third person who he alleges attacked him with a panga; that person turned out to be the deceased; the accused admits having shot the deceased as he (accused) was falling backwards and the accused was merely a metre away.

29. There is no doubt in my mind that this interaction between the accused and deceased lingered in his mind; that he could not just brush it aside willy-nilly: after all he had fired three bullets at-or in relation to the deceased for his attack on him. This is not a matter that could have been easily forgotten. As such my view is that the accused had to put a spin on the situation so as not to fall into any complicated consequences. He therefore decided not to report the incident to his supervisors or in his formal reports. Instead the police decide to bring charges for theft of the sheep against the accused.

30. There is no dispute with regard to other aspects of the evidence. The deceased body was found on 27<sup>th</sup> July, 2014. The body was duly identified by the deceased's father (PW4), with the help from PW7 and PW8 and some divers; a post mortem was carried out by Dr. Ngulungu PW9 who formed the opinion that *“the cause of death was severe head injury attended by skull fractures and extensive brain lacerations due to a single gunshot to the head”*.

31. According to Dr. Ngulungu the injuries were as follows:

***“On head there was entry gunshot wound located on front of right ear. When probed, the direction was to left and backwards. It was a near contact would 10mm in diameter – exit. Exit was on left parietal region above ear.***

***On right wrist there was a large laceration measuring 50mm diameter and exposing crushed boned.***

***There were two bruises seen at from of neck measuring 20 x 10mm and 20 x 5 mm respectively.***

***Internal examination of body on head. It showed extensive comminuted scar bone fractures and brain showed extensive lacerations as a result of gunshot. All other systems were normal.***

32. As noted the criminal charges against PW1 and PW2 for stealing livestock in the lower court were in CMCRC No. 1420 of 2014 Naivasha (Republic v Johnson Ndichu and Douglas Tutu). In those proceedings at the Accused herein gave evidence on 28<sup>th</sup> October, 2014. The proceedings produced as P. Exhibit 14 by PW5 Emmanuel Langat. The accused described the shooting incident as follows at page 11 of those proceedings:

***“After a while my colleagues spotted two people near the sheep but outside the stream. They entered the Lake and took cover behind the reeds which were inside the water. We kept watch.***

***When I went near I could not see them. I called one of them and challenged them to get out of the water but they did not come out nor respond. I went nearer to get a clear view and I saw one of them. He was holding a machete as though he was ready to kill something. The person is not before court. This is the machete. PMFI 1 P. Exhibit 1.***

***He was coming towards me and so I shot in the air. He told me not to fire in the air but to shoot him. He was by then so close and was about to cut me with the machete.***

***I moved backwards and fired the 2<sup>nd</sup> fire in the air. The third time when he struck at me I moved backwards but fell and so while shooting the bullet did not go upwards. On waking up I did not see anyone.”***

33. The accused clearly testified that the suspects entered the lake and took cover between the reeds which were inside the water; that he challenged them to get of the water; that the one with the machete was not one of the persons before the court so was not PW1 or PW2. When he shot and fell backwards the man with the machete was close enough to cut the accused. The accused says he did not see anyone after he fired the third shot. That is obviously because the machete man must have fallen into the water after being shot.

34. Thus, the only question before me is whether the accused shot the deceased with malice aforethought or whether the defence of self defence holds as against the charge of murder.

35. The prosecution submitted that they had proved all the elements of the offence of murder. They cited the case of the Court of Appeal **CA No. 352 of 2012 Anthony Ndegwa Ngari v Republic [2014] eKLR** which asserts that the ingredients to be proved are:

***“i) The death of accused.***

***ii) That the accused committed an unlawful act which caused the death of the deceased.***

***iii) That the accused had malice aforethought.”***

36. The victim’s counsel submitted that in terms of **Republic v. Mohammed Dadi Kokane & 7 Others [2014] eKLR** the prosecution had proved:

***“1) the fact of death of the deceased;***

***2) the cause of such death;***

***3) proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, and lastly;***

***4) Proof that the said unlawful act or omission was committed with malice aforethought.”***

37. With regard to the malice aforethought, the *mens rea*, it was submitted by the victims counsel that following **Republic v Benjamin Wanyiri Maina v Republic [2014] eKLR**, the court differentiated motive and *mens rea* and held that there is no requirement to prove motive in law. On his part the defendant submitted that had the accused harboured malice aforethought, he had the time, chance and ability to cause death to both PW1 and the deceased. But as PW1 had not threatened him with a machete or any other weapon, he only used force on the deceased.

38. The accused asserts that the shooting was not preplanned; that without the untruthful evidence of PW1 and PW2 the prosecution case fails; and that under Section 61 of the National Police Service Act Schedule 6 Part B, the accused acted to deter an attack on him.

39. The victims counsel on his part asserts that the accused’s *mens rea* is evidenced by the serious violations of the Police Standing Orders in that he failed to accurately make a report of the shooting of the deceased and use of excessive force in using his firearm. The victims cited **Republic v Titus Ngamau Musila Katitu [2018] eKLR** where the court observed (Wakiaga J):

***“Section 16 of the National Police Force Act stipulate that a police officer shall undertake their responsibilities in a non-violent way and if they must use force must be guided according to the Act as was confirmed by the Court of Appeal in IP VERONICA GITAHU & ANOTHER v REPUBLIC [2017] eKLR thus:-***

*“One of the objective of the National Police Service Act is to give effect to among others, Article 238 of the Constitution and Article 244, which sets out the objects and functions of the National Police Service, and demands compliance by the police with constitutional standards of human rights and fundamental freedoms. In addition the Act makes express provisions regarding self defence by police officers and the use of force, in particular the use of firearms. Section 49(5) and 61 of the Act as read with the Sixth Schedule set out the circumstances under which a police officer may resort to the use of force and firearms.”..... The provision of the Act are a complete and exhaustive code and demand that a police officer must resort to non-violent means as the first option and to use force only when non-violent means are ineffective. In addition even where the use of force is justified, the officer does not have a carte blanche in the use of force. The Act demands that the force used must be proportional to the objective to be achieved, the seriousness of the offence and the level of resistance and still only to the extent necessary. When it comes to use of firearms, the Act makes that a last resort option.” (Emphasis added)*

And that although the work of the Police is to control crime, there can be no doubt that there must be respect of life:

*“.....the right to life is sacrosanct under Article 26(1) of the Constitution and the limitation under Subsection (3) does not include the fact of being an alleged criminal as one of them. The deceased was entitled to a right of fair trial as stated in Article 50(1) and 50(2) (a) just as the accused has had his day in court.”*

40. The prosecution, too, cited the case of **I.P. Veronicah Gitahi and Another v Republic [2017] eKLR** where the Court of Appeal confirmed a conviction against police officers for recklessly firing their guns and using excessive force. In that case it was:

*“One of the objectives of the National Police Service Act is to give effect to, among others, Article 238 of the Constitution and Article 244, which sets out the objects and functions of the National Police Service, and demands compliance by the police with constitutional standards of human rights and fundamental freedoms. In addition the Act makes express provisions regarding self defence by police officers and the use of force, in particular the use of firearms. Sections 49(5) and 61 of the Act as read with the Sixth Schedule sets out the circumstances under which a police officer may resort to the use of force and firearms. Part A of the Sixth Schedule provides for use of force by the police in the following terms:*

*“1. A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result.*

*2. The force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders.*

*3. When the use of force results in injuries—*

*(a) the police officers present shall provide medical assistance immediately and unless there are good reasons, failing to do so shall be a criminal offence; and*

*(b) shall notify relatives or close friends of the injured or affected persons. (Emphasis added).*

*Part B of the same schedule makes provisions on the use of firearms by the police as follows:*

*1. Firearms may only be used when less extreme means are inadequate and for the following purposes-*

*(a) saving or protecting the life of the officer or other person; and*

*(b) in self-defence or in defence of other person against imminent threat of life or serious injury.*

*2. An officer intending to use firearms shall identify themselves and give clear warning of their intention to use firearms, with sufficient time for the warning to be observed, except-*

*(a) where doing so would place the officer or other person at risk of death or serious harm; or*

*(b) if it would be clearly inappropriate or pointless in the circumstances.*

*3. A police officer shall make every effort to avoid the use of firearms, especially against children.”*

*In our view in light of the above express provisions of the National Police Service Act regarding use of force and firearms by the police in self defence, there is no room for invoking section 17 of the Penal Code and applying the principles of the Common Law on self defence. The provisions of the Act are a complete and exhaustive code and demand that a police officer must resort to non-violent means as the first option and to use force only when non-violent means are ineffective. In addition even where the use of force is justified, the officer does not have a carte blanche in the use of force. The Act demands that the force used must be proportional to the objective to be achieved, the seriousness of the offence and the level of resistance, and still, only to the extent necessary. When it comes to use of firearms, the Act makes that a last resort option.*

***To determine whether a police officer has used force or a firearm as required by the Act therefore cannot be a subjective issue. The court must evaluate all the circumstances surrounding the use of force or firearm so as to determine, for example, whether force was used as a last option; whether it was proportionate to the threat that confronted the police officer; or in a case involving a child, whether the officer had made all effort to avoid the use of firearms.”***

41. Evaluating the evidence on record concerning the accused’s firing of three rounds of ammunition, my view is as follows. The accused herein said he saw the suspect ran to hide in the reeds in the water by the lakeside. It was daytime and there was plenty of light. He shouted to them to come out. He issued a power threat by firing a round of ammunition. Then he says the deceased told him not to shoot in the air, but to shoot him. He shot a second round in the air. What does not add up is how the deceased who the accused said was in the water, yet managed to approach the accused allegedly wielding a panga. I find that highly unlikely or credible. All in all, the accused asserted that the suspects were in the water upto their waists. So how did the deceased run to the accused through the water with a panga and in such a way as to threaten the accused. I find the accused’s explanation rather incredible.

42. In addition, how would a police officer, trained and armed to use a gun, fire at a person who was between one and five metres away and not know whether the bullet had hit the target; then, not seeing the threaten person, assume nothing had happened. Such is the height of recklessness or negligence. So much so that the accused did not even bother to report the incident to his superiors and instead pretend that nothing really happened.

43. Given all the foregoing circumstances and my finding, I determine and hold that the accused acted with *mens rea*, recklessly and in violation of the law. His actions were made all the more unacceptable by the fact that he did not report the incident but instead chose to assist in prosecuting the fishermen. His actions do not add up and do not support the defence of self-defence. Ultimately, I find the accused guilty of murder and convict him for the same.

44. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 22ND DAY OF FEBRUARY, 2021.**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Maingi for the DPP
2. Mr. Wairegi holding brief for Mr. Mburu F. I. for the Accused
3. Evans Maliachi Wiyema - Accused present in open Court
4. Court Assistant - Quinter Ogutu