



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 26 OF 2018[MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK KIPNGETICH YEGO.....ACCUSED

JUDGMENT

Introduction

1. The accused person herein **PATRICK KIPNGETICH YEGO** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The accused person is alleged to have murdered one Zacchaeus Okoth on the night of 11/8/2017 and 12th August, 2017 within Siaya County. He pleaded not guilty to the charge. The prosecution called nine witnesses in support of their case to establish a prima facie case against the accused person. Placed on his defence, the accused gave unsworn testimony and called no witness. The evidence for the prosecution and defence is summarised below.

The Prosecution's Case

2. The evidence of PW1 Andricus Miyoy from Nyandiwa was that he was the deceased's brother and that on 12/8/2017 at 6 am whilst at his home he was visited by his elder brother John Okumu Oduor who informed him that his brother Zacchaeus had been killed at the roadside. He testified that they proceeded towards Bondo junction and found Zacchaeus dead lying on his back with blood where he lay. It was his testimony that the area chief advised him to report to Siaya police station and a vehicle was sent to the scene to collect the body although the police encountered difficulties as the crowd prevented them from retrieving the body forcing the police to seek reinforcements. He further stated that when he reached the police station he heard people saying that Zacchaeus was killed by the policeman.

3. PW1 further testified that he accompanied the body of the deceased to the morgue where he saw a wound in the deceased's chest through the back. He stated that the police said that it was a bullet that pierced the deceased. He further stated that he did not identify the deceased's body to the doctor who did autopsy but that his father did. In cross-examination, PW1 stated that he did not know who killed his brother as he only saw the body after the fact.

4. PW2 Cornel Paulo Onyango, the deceased's uncle testified that on the night of 11/8/2017 at around 1.00 am, one Okumbe and 2 other people came to his house and told him that they had brought the two people to tell him what they knew that, Ouma had been shot in Siaya. He testified that he took them to Ouma (deceased's) father's home but as the political environment was hostile they did not go that night but left at 6 am and proceeded to Bondo junction in Siaya where they found the body of Ouma lying down near the women representative office.

5. It was his testimony that they went and reported at Siaya Police Station and were accompanied by police officers to the scene but as there was a hostile crowd, the police called for reinforcement. He further stated that they took the body to Siaya Mortuary where they were told to undress the body and saw a wound on the chest piercing through his back which they were informed was a bullet wound. He stated that he recorded his statement at Siaya Police Station.

6. In cross-examination PW2 stated that he did not witness the deceased's death and neither did he know the name of the officer who informed them that the deceased had a gunshot wound.

7. **PW3 No 2001035715 PC Edwin Barack Muniga** an officer at Siaya G.K Prison from October 2004 testified that on 11/8/2017 he was in the station armoury discharging his normal duties. He testified that he attended to the accused when he came to renew a CESKA pistol Reg. No. H1034 which he had previously. It was his testimony that he confirmed that the weapon was in good order gave it to the accused with its full capacity of 16 rounds of ammunition and recorded the same on the register.

8. It was his testimony that on the 3/8/2017, the accused returned the weapon with only 5 rounds of ammunition and upon inquiry as to what had happened to the 11 rounds of ammunition the accused informed him that he had been attacked by youths so he had expended the 11 rounds of ammunition. He testified that the five rounds of ammunition were live and not spent and that they were of the same calibre which

is 3.9mm. PW3 identified the accused before court.

9. In cross-examination PW3 stated that the firearm was originally issued on 7/8/2017 and that the date for renewal was 11/8/2017. He further stated that a minimum period of 6 days for renewal is given and maximum of 14 days and that one could renew the weapon any day after issue. PW3 stated that it was the accused himself who surrendered the weapon 3 days after it was renewed and told him personally how the 11 rounds of ammunition had been expended.

10. PW4 John Okumbe Oduor the deceased's cousin testified that on 11/8/2017 which was a voting day he was with the deceased the whole day. He stated that the deceased was a boda boda rider. It was his testimony that he went to sleep and at night at about 11.00 pm some boda boda riders came asking for the deceased's home to which he responded that the deceased had gone to his duties after they parted at about 6 pm.

11. It was his testimony that the riders identified themselves as the deceased's friends and informed him that they had found him dead on the road and in a pool of blood. He stated that he led the riders to the deceased's uncle's home where they explained to him what they had found and they also proceeded to the deceased's house where they found his wife and handed over the deceased's mobile phone.

12. PW4 testified that the following morning they proceeded to the scene where the deceased had died and saw him in a pool of blood, called Cornel who later came with the police in a vehicle but because of a rowdy crowd the police had to disperse them. He stated that the police then took photographs and removed the body to Siaya Mortuary and on reaching the morgue, the morgue attendant showed them a bullet hole in the chest of the deceased. He stated that he recorded his statement with the police.

13. In cross-examination, PW4 stated that he never witnessed the incident and further that the boda boda riders never told him how the deceased met his death. He further stated that he did not know how a bullet looked like.

14. PW5 Paul Miyoyo Onyango, the deceased's father testified that he hailed from Bar Agulu Sub location and that on 12/8/2017 at about 2 am he was at Mombasa when he received a telephone call that Zacchaeus his son had been killed. He stated that he arranged to return home and arrived after 3 days. PW5 further testified that on 24/8/2017 he identified the deceased's body at Siaya Mortuary to the doctor who carried out the autopsy. In cross-examination he admitted to seeing the accused person for the first time in court.

15. PW6 Philip Atonya Kahi a prisons officer currently working with Prisons Kakamega testified that on 13th August 2017 he was stationed at Siaya as Officer in Charge (OIC). He testified that he was in the office when at about 9 am the Officer In-Charge of the Armoury (Barrack) came and reported that the accused had returned a firearm with less ammunition (bullets). It was his testimony that he told the officer to call the accused Mr. Yego to come and explain as he had been issued with a Ceska pistol. PW6 testified that they had an Ammunition Control Register which showed the allocation, the name, Rifle number and date of 11/8/2017. He stated that the S/No for the rifle was H1034.

16. PW6 further testified that when the accused arrived at his office he told him he had used the bullets but never disclosed how he used them. He testified that he questioned the accused further and instructed him to report the matter to the police who came to his office and recorded his statement on 14/8/2017. It was his testimony that he later learnt from the police officer who recorded his statement that they had found a dead body at Bondo junction and they suspected the person had been killed by CID Siaya. He further testified that the Arms Movement Register and Duty Register showed that the accused was on duty when he was issued with the Ceska pistol. PW6 identified that accused in court as Yego.

17. In cross-examination PW6 stated that the accused could not explain how the bullets were lost but later informed him that he had gone to withdraw money from Equity Bank and was accosted by some boys. It was his testimony that the accused looked perturbed and that he went to his quarters and subsequently proceeded on leave. He further stated that he did not assign the accused any other officer because he was a Senior Officer so he expected him to go and report to the police but that he could not ascertain whether to date the accused had reported the incident to police.

18. PW6 further stated that he was informed by the Investigating Officer that a person had been found lying dead at Bondo junction. He further stated that he was aware that the firearm was issued to the accused earlier than 11th August 2017 and that the latter date was a renewal. He stated that anything done outside prison did not fall under his authority.

19. PW7 No 48210 Sgt Maurice Mangoli who is currently attached to DCI Kapsabet and previously worked with DCI Siaya stated that he was the investigating officer in the case. He testified that on 12/8/2017 a report was made to his station at about 8.30 am by one Andrew Miyoyo Wasuni that while at his home early morning of 12/8/2017 he had received information from boda boda riders that the body of the deceased was lying along Siaya - Kisumu road in Siaya town. He testified that the reportee after receiving the report came and confirmed the deceased as his nephew. He further testified that the scene was visited by the OCS Siaya Police Station with his team who removed the body to Siaya Mortuary.

20. PW7 testified that on 24/8/2017 a post mortem was conducted on the body of the deceased which confirmed that the deceased died due to gunshot wound which had an entry and an exit. It was his testimony that on the 30/10/2017, in the company of DCIO Mr. Kasyoki and PC Driver they proceeded to Siaya G.K Prisons after hearing rumours that the deceased was shot by a prisons officer and a spent cartridge had been collected. He stated that at the G.K Prison, they found that the pistol which was used to shoot the deceased was from G.K Prisons Siaya and upon examination of the Arms Movement Register, they found that the accused had been issued with Ceska pistol on the material day as it was a Presidential Election announcement and in Siaya the situation was chaotic.

21. He further testified that they found that the accused had been issued with a Ceska pistol with 16 rounds of ammunition but when he returned it had 5 rounds of live ammunition. It was his testimony that they repossessed the pistol plus the 5 rounds and recorded statement of the Armourer Mr. Barrack and O/IC G.K Prison PW6. PW7 testified that on 6/11/2017 in company of DCI Mr. Kasyoka and driver, they

escorted the said pistol to CID Nairobi for ballistic examination and a report was prepared for them. He testified that on the 10/12/2018 the accused was arrested from Kisumu where he was working and brought to Siaya Police Station as the investigations had led them to establish that the accused person was involved in the shooting of the deceased. PW7 identified the accused person in the dock.

22. In cross-examination PW7 stated that they opened an Inquest File because at the time they could not determine who could have caused the death of the deceased. He further stated that they did not get any eye witness and that the incident happened during elections when there was chaos. He further stated that only the accused person's firearm was found to have discharged the firearm regarding this incident. PW7 admitted that he did not personally recover any spent cartridge. He stated that when he revisited the scene where the body of the deceased was found he only saw blood.

23. He further stated that when he went to ballistics he found that IPOA had send the spent cartridge. He stated that he also visited the Office of OIC GK Prison Siaya and recorded his statement which was to the effect that he had told the accused to record a statement after finding that the accused had surrendered less ammunitions. PW7 stated that the Arms Movement Register showed the accused had more ammunition than what he had returned and as such it was for the accused to state where he took the rest of the ammunition.

24. PW8 Dr. Mevis Mbeki sought and was granted permission to testify on a post-mortem Report for Zachaeus Okoth done on 24/8/2017 by Dr. Belinda Omondi who was currently studying in Cuba. She stated that she worked with Dr. Belinda during this period and could interpret her handwriting and findings.

25. Dr. Mbeki testified that the body was identified by Paul Miyoyo and James Opiyo on 24/8/2017 with the general observation that there was no clothing. She testified that the body was a male, black African, aged about 29 years with good nutrition, well-built physique and height of 6' 2" ft.

26. She testified that externally there was a Gunshot wound on the right side of the second intercostal space on the lateral side of the sternum and that within the respiratory system there was a haemothorax of more than 200 mls in the pleural cavity. It was her testimony that there was a continuous bullet wound through the right lung medially from the high lung to the base of the lung but that all other body systems appeared normal.

27. Dr. Mbeki testified that as a result of her examination, Dr. Omondi found the cause of death to be laceration of the right lung due to the gunshot to the right chest leading to severe chest injury and she issued death certificate No. 0757049. She also produced the postmortem as PEx 7.

28. In cross-examination Dr. Mbeki stated that it was the best practice to measure wounds though there was no indication that the entry and the exit points were measured. She further declined to comment on whether such an injury could be caused by anything other than bullet wound.

29. PW9 No. 235220 CIP James Onyango testified that he worked with the DCI as a Firearms Examiner and had been based in Nairobi Forensic Office for 7 years. He stated that he was a trained police officer and a trained firearms examiner by Forensic Technology College in SA, Madison Police Academy in the USA and Ballistic School in Moscow, Russia. It was his testimony that he had a Ballistic Examiner's Report done by one Mr. Johnstone Mwangela whom he worked with for the last 7 years and was thus able to interpret his writings and who was attending a seminar at Defence College in Loresho and could not be available.

30. PW9 testified that the report was done on 7/11/2017 by Mr. Johnstone Mwangela on a firearm based on the exhibits availed by CPL Maurice Mangoli on 6/11/2017 which were;

- a) Ceska Pistol Serial Number H1034 marked as EXA1
- b) 1 Magazine EXA2
- c) Rounds of ammunition EX B1-B5

31. He testified that the exhibits were accompanied by an Exhibit Memo form requiring the following to be ascertained:

- a) Whether ExA1 is capable of firing.
- b) Whether Ex B1-B5 can be fired from Ex A1

32. PW9 further testified that on 7/11/2017, an additional exhibit was received in the laboratory from No. 00138 Monicah Obegi of IPOA Ref. IPOA/CNV/0001052/2017 which was marked as IPOA 'A' accompanied by an Exhibit Memo form requiring Examiner to ascertain:

- 1) the type of calibre if IPOA 'A'
- 2) the type of firearm that can fire IPOA 'B'
- 3) if the Exhibit IPOA 'A' was fired by the firearm that was submitted by the DCI Siaya

33. PW9 testified that examination was done and the Results were:

a) Exh A1 is a 9mm caliber Ceska Pistol of model C285B bears Serial No. H1034 stamped as SNo. KEKPS H1034. It is designed to chamber and fire rounds of ammunition in caliber 9 x 19mm such as exhibits B1-B5. It is in good general and mechanical condition and complete in all its component parts and capable of firing ammunition.

b) Exhibit A2 is detachable pistol box magazine, a storage and a feeding device of ammunition in the pistol with a carrying capacity of 16 rounds in calibre 9 x 19mm when fully loaded. It is a component part and works well with the pistol exhibit marked A1.

c) Exhibits B1-B5 are 5 rounds of ammunition each by calibre 9 x 19mm. They are used in pistols such as Ex A1.

d) 3 of the 5 rounds were picked at random and successfully testified in Ex A1 test cartridges were obtained and marked as TCI, TC2 & TC3.

34. PW9 further testified that based on the aforementioned tests, they formed the opinion that;

a) Exhibit A1 and Exhibits B1-B5 were a firearm and rounds of ammunition respectively as defined under Cap 114 of the Laws of Kenya.

b) Exhibit IPOA 'A' is a fired cartridge case in calibre 9 x 19 mm. the cartridge case was microscopically examined in conjunction to each of the 3 test cartridge cases fired from exhibit A1.

35. It was his testimony that from these comparison, there was sufficient matching firing pin markings breech face markings and ejector markings and thus based on their analysis they formed the opinion that the cartridge case IPOA 'A' was fired from ICZ85B Ceska Pistol SNo. H1034 marked as Ex A1. PW9 proceeded to produce the report drawn and signed by Mr. Johnstone Mwangela as exhibit No. 8.

36. In cross-examination PW9 stated that they received 2 exhibit Memo forms, one form from Sgt Mangoli and another from IPOA. He stated that there were no exhibits marked A3, A4, A5 submitted and that they carry out analysis on requests from investigating officers in exhibit Memo forms. It was his testimony that in the Exhibit Memo forms, the request was whether Ex A1-A5 can fire from A1. He further stated that as an examiner, they did not respond to questions, on the Exhibit Memo but that as experts they examine all exhibits submitted to their satisfaction.

37. In re-examination stated that he had testified on what the Investigating officer submitted as exhibits for examination and analysis and that it was not possible to make any examination on an exhibit that was not submitted for examination.

38. PW10 Steven Oduor Otieno testified that on the night of 11th & 12th August 2017 at about 10 pm towards 11 pm, they had been in elections and he had gone to pray at Ganga, a mountain, for Raila to be elected as President when he heard screams from people saying 'Uhuru mwizi'. It was his testimony that he ran down the mountain through Siaya town when he found police in running battles with people. He stated that he went through Bondo junction and past the Petrol station near Women Rep's Office where youths had lit a fire and he started talking to them.

39. PW10 testified that he found Zachaeus Okoth, the deceased, whom he knew well among the youth and as he was telling the youth to go home he saw someone approaching as there were street lights. He testified that as they passed the deceased called the person by name stating, **"We know you Yego. You are Askari Jela and we have no issues with you. Just go your way and sleep".**

40. He further testified that when Yego heard this, he questioned the deceased why he was calling him Askari Jela and told him, **"Unajua kuwa naweza kukuua sahiu", "You know I can kill you now"**, after which the accused cocked the pistol that he was holding, aimed at the deceased and shot him once forcing the crowd to get scared and run away from the scene. It was his testimony that he used to see Yego and knew him before as a Prison's Officer. He further stated that Zachaeus Okoth fell down so he and the rest of the crowd ran away and he stopped when he reached the garage near Women Rep's office.

41. It was his testimony that he then returned to the scene and found Zachaeus bleeding from the chest and his clothes were bloodied on the chest after which he told some youths to go and tell Zachaeus' parents that Zachaeus had been killed with a gun. He stated that he stayed there until morning when the deceased's parents came and the Police took the body to the mortuary.

42. PW10 testified that he saw spent cartridges at the scene which he picked and placed in his pocket and surrendered to IPOA whom he called. It was his testimony that they then went to the mortuary with the Human Rights people to witness the postmortem. He identified the accused in court as Yego.

43. In cross-examination PW10 stated that he and the deceased were among those who were rioting. He stated that they were all standing beside the road and that there was a big street light lighting the place. He stated that he stood about 4 metres from the deceased. He further stated that he gave the cartridge to the IPOA Officer on the date he recorded his statement on 22nd October 2017 and that he avoided giving it to the police as they would have hidden it as the culprit was an officer.

44. PW11 Monicah Obegi, a Senior Investigations Officer working with IPOA in Kisumu testified that she was assigned a case on the death of Zachaeus Okoth and attended the postmortem. She stated that she recorded statements of 4 witnesses and received a cartridge from one of the eye witness. It was her testimony that she took it to the DCI Nairobi for examination. She stated that from the evidence they gathered, they made recommendations that the file be shared with the police to continue with investigations and referred the file to ODPP after which they closed their file and prepared their report. She produced the cartridge as PExhibit 9(a) and the Exhibit memo as PExhibit 9(b).

45. In cross-examination she stated that from her investigations she established that there were chaos in Siaya Town and that the deceased

and PW10 were part of the rioters whereas the accused was a prison's officer. She further stated that she established that all police and even prison's service were called upon to restore law and order in Siaya town. It was her statement that there was no possibility that any other police officer fired at the deceased because the ballistic analysis showed that the gun which the accused had is the one which fired the cartridge. She stated that she received the cartridge from PW10 Steven Oduor on 24/8/2017.

46. In re-examination PW11 stated that from their investigations, on the material night, the accused was not part of the officers assigned to control the riots in town.

Defence Case

47. Placed on his defence, the accused testified that he was a Chief Inspector of Prisons Service and had been in service since 2002. It was his testimony that on 6/8/2017 he was in Siaya G.K. Prisons and that they were deployed as Special Police Officers to assist police officers to supervise the 8th August 2017 General Elections. He stated that he was issued with a Ceska Pistol though he could not recall its serial number. The accused denied knowing the deceased.

48. The accused further testified that on 11/8/2017 he was in Siaya Prison and he went to renew his pistol in the morning because he was on standby. He stated that he was in Prisons Quarters watching elections news when at around 9.35 Uhuru was declared the President and chaos erupted outside by people who started rioting. He stated that he mobilized his officers and got Anti-riot squad to surround the prisons.

49. The accused testified that there were some riots outside the Prison but they were chased by 4 prisons officers who manned the Prisons gate and this restored calmness so he decided to go home outside the prisons quarters. He stated that he did not know what happened to the deceased.

Accused person's Submissions

50. It was submitted that the accused in compliance with the provisions of Section 28 of the Police Act which provides for the circumstances in which a police officer may use his firearm as well as Chapter 11 of the Police Manual 1990 that provide justifiable instances when a police officer may use his gun that the accused lawfully stated upon returning the weapon that he had been attacked by youths being a voting day as the presidential elections had been announced and that he thus expend the 11 rounds of ammunition to protect himself from the chaotic crowd.

51. It was further submitted that there was no direct evidence linking the accused to the deceased's murder and that the prosecution relied on suspicion which however strong, cannot provide a basis for inferring guilt, which must be proved beyond reasonable doubt as was held in **Republic v Geoffrey Cheruiyot alias Erik Kiprotich Kirui [2015] eKLR** and **Sawe vs. Republic [2003] KLR 364**.

52. It was further submitted that the charge was defective. It was submitted that the information alleged that the offence was committed on the night of 11th and 12th August 2017, and therefore to that extent it was defective, for the deceased could not have been killed twice, on 11th and then again on the 12th.

53. It was submitted that the state had founded its case largely on circumstantial evidence as none of the witnesses presented could positively testify to having seen the accused killing the deceased and further that in the instant case, as no one witnessed the killing, there was no evidence of the actual killing from which one could draw an inference of an intention to kill from the conduct of the accused person.

Analysis of the Law and Determination

54. I have considered the evidence presented before the court both by the prosecution and the defence and in my humble view, the main issue for determination is whether the prosecution proved the case against the accused person to the required standard and which standard has been held to be that of beyond any reasonable doubt.

55. Section 203 of the Penal Code provides that:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

56. In **Anthony Ndegwa Ngari v Republic [2014] eKLR** the Court of Appeal sitting in Nyeri held:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”

57. As a preliminary issue, I will address the issue of an alleged defective charge sheet as was raised by the accused person's advocate vide his submissions. It was submitted that the charge brought against the accused was defective because the information alleged that the offence was committed on the night of 11th and 12th August 2017, and therefore to that extent it was defective, for the deceased could not have been killed twice, on 11th and then again on the 12th.

58. The Court of Appeal in **Peter Ngure Mwangi v Republic [2014] eKLR**, citing **Isaac Omambia v Republic, [1995] eKLR** with approval stated:

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO v R, [198] eKLR that:

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,

(ii) when for such reason it does not accord with the evidence given at the trial.”

59. The Court of Appeal in the *Peter Ngure (supra)* case was further guided by the case of *Peter Sabem Leitu v R, Cr. App No. 482 of 2007 (UR)* where the Court held:

“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.”

60. In the present case, the charge was clearly read out to the accused and he was fully aware that he faced the charge of murder. The particulars in the charge sheet were also read out. Further, the accused was at all times represented by Counsel, in fact plea had to be postponed for the accused to appoint his own counsel. The evidence adduced by the prosecution was consistent and to the effect that the events leading up to the deceased’s passing occurred on the night of 11th with the body of the deceased being taken from the scene on the morning of 12th August 2017.

61. Taking all the above into consideration, It is my humble view that the charge sheet brought against the accused was in no way defective. The accused did not demonstrate any prejudice that was occasioned to him by the alleged defective charge/Information. The claim that the charge sheet was defective is an afterthought. It is dismissed.

62. Having found that the Information for murder against the accused was not defective, the next question is whether the prosecution proved:

a) That there was the death of the deceased and the cause of the said death

b) That the death was caused by unlawful acts or omission

c) That the accused committed the unlawful act which caused the death of the deceased

d) That the accused had malice afore thought

63. The fact of the deceased’s death is not in doubt as PW’s 1, 2,4,5 & 10 all saw the deceased’s body at the morgue. All the aforementioned prosecution witnesses apart from PW5, the deceased’s father also saw the deceased’s lifeless body on the ground at the scene of crime on the morning of 12th August 2017.

64. The cause of death was verified by Dr. Mbeki who produced a post-mortem report that stated that the deceased’s cause of death was laceration of the right lung due to the gunshot to the right chest leading to severe chest injury.

65. Having proved the fact as well as the cause of the death of the deceased, the prosecution is under a duty to prove whether the death of the deceased was caused by an unlawful act or omission and whose unlawful act or omission it was.

66. The injuries sustained by the deceased were in the form of a gunshot wound to the chest which ended up piercing the deceased’s lung. The accused in his defence testified that he was deployed as Special Police Officer to assist regular police officers to supervise the 8th August 2017 General Elections. He testified that on the material day, after the announcement of the election results chaos broke out and there were riots. He stated that 4 officers were assigned to guard the surroundings of the prison and when rioters approached the prison, the 4 managed to disperse the crowd and calm was restored to the point he managed to go to his home which was outside the prison premises.

67. PW10 on his part testified that he and the deceased were part of a riotous crowd that formed after the announcement of the results and that the accused shot the deceased after the deceased identified him as a prison officer and told him to stay away from the riot. In a twist of events, it was submitted on behalf of the accused and contrary to his sworn testimony that the accused lawfully discharged his weapon while confronted by a riotous crowd.

68. The National Police Service Act in Section 61 provides:

“Power to use firearms

(1) Subject to subsection (2), a police officer shall perform the functions and exercise the powers conferred by the Constitution and this Act by use of non-violent means.

(2) Despite subsection (1), a police officer may use force and firearms in accordance with the rules on the use of force and firearms contained in the Sixth Schedule.”

69. The 6th Schedule on the conditions as to the use of force provides as follows;

“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.”

70. Further to this, the Conditions as to the Use of Firearms in the same Schedule provide 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;

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

(c) protection of life and property through justifiable use of force;

(d) preventing a person charged with a felony from escaping lawful custody; and

(e) preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.

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.”

71. In *Republic v Wesley Cheruiyot Mutai* [2017] e KLR, M. Odero J held:

“As stated earlier the accused was not just an ordinary member of public. He was a trained police officer who had been lawfully provided with a firearm for use in the course of his duties. Can a police officer resort to the use of his firearm willy nilly. Certainly not. Section 28 of the Police Act Cap 84 Laws of Kenya (of which I have no doubt accused was well aware), sets out the circumstances in which a police officer may resort to the use of his firearm.

Chapter 11 of the Kenya Police Manual 1990 at Section 3 provides as follows:

“What is the effect of a police officer’s decision to use a firearm? The decision to use a firearm against any person places a serious legal as well as moral responsibility on a police officer. Therefore there should be no doubt in his mind of the circumstances in which he is justified in using a firearm.”

There are only certain justifiable instances in which a police officer may lawfully resort to the use of this firearm. These justifiable circumstances which are set out in section 4 of Chapter 11 of the Kenya Police Manual include

· To protect himself or members of public

· To suppress or disperse a riotous mob

· To prevent the escape of a person in lawful custody on account of a felony

· “To effect, a lawful arrest if the police officer is in danger because the person to be arrested is in possession of and is intending to use a dangerous weapon against him.”

· Section 49(5) and (6) of the National Police Service Act sets out the circumstances under which a police officer may resort to the use of force and firearms. Part A of the 6th schedule provides for the use of force (firearms) by the police as follows:

“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.”

72. In the instant case and from the evidence adduced, it is my humble view that the testimony of PW10 is more believable compared to that of the accused. This is because the reason for discharging the bullets as advanced by the accused is contradictory. The testimony of PW3 who was in charge of the armoury at Siaya GK Prisons was that the accused explained the missing bullets by stating that he discharged them whilst under attack by some youths. The accused subsequently informed his superior PW6 who was then in charge of Siaya GK Prison that he discharged the bullets when he was accosted by some boys after withdrawing money from Equity Bank.

73. In his defence, the accused denied knowledge of the alleged murder of the deceased. The accused was of course not obliged to say anything in defence but he gave to different people different versions of what exactly happened to the lost bullets. He has not accounted for where those 11 bullets went and the evidence by IPOA and the Ballistics Expert is clear that the bullet which was recovered at the scene where the deceased was found lying dead was fired from the pistol which was issued to the accused person.

74. On the other hand, counsel for the accused, Mr. Ochanyo filed written submissions wherein he tended to adduce evidence to the effect that the accused acted in self defence when he discharged the bullets in self defence from youths who had attacked him on the material night. Parties to a criminal trial have a right to make submissions reserved by sections 310 and 311 of the Criminal Procedure Code which stipulates as follows:

“310. Prosecutor’s reply

If the accused person, or any one of several accused persons, adduces any evidence, the advocate for the prosecution shall, subject to the provisions of section 161, be entitled to reply.

311. Where accused adduces no evidence

that there is evidence that he committed the offence, the advocate for the prosecution shall then sum up the case against the accused person, and the court shall then call on the accused person personally or by his advocate to address the court on his own behalf.”

75. The Kenya Judiciary Criminal Procedure Bench Book, 2018 posts the practice for final submissions at para. 176 p.106 as follows:

“XVI. FINAL SUBMISSIONS

At the close of the case, both the prosecutor and the accused are entitled to present submissions to the court on both the evidence and the law (ss. 213, 310 & 311 CPC). The Prosecution has a right of reply where the defence calls evidence by a witness other than the accused, and where the DPP personally appears as advocate for the Prosecution (s.161 CPC).”

76. It is settled law that submissions, however well-choreographed they may be, cannot be a substitute to evidence. **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007** stated and rightly so:

“Submissions simply concretize and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

77. Similarly in **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** the learned Judge-Mwera J expressed himself as follows and I concur:

“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

78. I am further in agreement with sister **Ngenye-Macharia J** when she made the following observations in **Joseph Mwangi Njoroge v Republic [2017] eKLR**:

“Submissions by themselves are neither law nor evidence. They are only intended to sum up a case for a party. They do not constitute a new avenue to adduce evidence in a case but are rather meant as a guide to the trial court when evaluating the evidence before it. They do not form an integral part of the hearing and therefore they cannot be said, as the Appellant contends, to be part and parcel of the trial.”

79. Even if I was to believe the version of events as advanced in his counsel’s written submissions, the reasons advanced by the accused and

his defence team do not satisfy the provisions set forth in the National Police Act as quoted herein above. In my view, there was no justification for the said act of shooting the deceased as there was no evidence that the deceased was armed or that he posed any threat to the public or to the accused herein.

80. Article 26 (1) of the Constitution of Kenya 2010 guarantees every person the right to life. Under Sub-article 3, a person shall not be deprived of life intentionally except to the extent authorized by the Constitution or other written law.

81. In **Republic v Wilfred Mwit** High court at Nairobi Criminal Case No. 61 of 2011 Wakiaga J stated as follows in his sentencing remarks of a crime buster police officer convicted of murdering an allegedly well-known criminal:

“69. The accused was under a duty to preserve the life of the deceased and having established that they had seen the group running away, the use of excessive force in shooting at the deceased herein was unlawful and reckless and in total disregard of forces standing orders. Based upon the accused defence and the evidence of his witnesses I find that the circumstances prevailing as stated by those witnesses did not justify the shooting of the deceased dead and the force used therein as stated by Dr Johansen Oduor.”

Having taken the account them evidence of the prosecution witnesses and the accused defence herein I am satisfied that find and hold that the prosecution has proved beyond any reasonable doubt all the ingredients of the offence of murder and hereby find the accused guilty and accordingly convict the same of the murder of KENNETH KIMANI MWANGI on 14/3/2013 and quote Sandra Ochola (supra) as regards this case:-

“Regardless, unjustifiable murder cannot be overlooked especially if we intend to achieve the reforms (police reforms) we idealize. Unfortunately for Katitu, our criminal justice system does not recognize popularity and public outcry as credible grounds for bail or acquittal. Furthermore the court may not take kindly to actions that attempt to belittle the constitution; Katitu therefore chose the wrong time to be a hero.”

Whereas this court appreciates the difficult conditions the police works in trying to control crimes and the dangers associated therewith, 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.”

82. The aspect of when an act causing death can be said to be lawful has been recognized from the time immemorial. This court in the case of **Republic v WOO [2020] eKLR** quoted the case of **Gusambizi Wesanga v Republic [1948] 15 EACA 65** where the Court stated:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defense or in defence of property.”

83. The evidence before court irresistibly points to an unlawful act that led to the death of the deceased.

84. On whether the prosecution have proved beyond reasonable doubt that it was the accused person herein who committed the unlawful act, the evidence of the ballistic expert as given by PW9 was that the bullet cartridge recovered from the scene of the crime by PW10 was fired from the Ceska Pistol serial number H1034 issued to the accused by PW3 and which pistol was returned without 11 bullets which the accused failed to account for. I am therefore convinced that it was the accused who committed the unlawful act leading to the deceased's death.

85. **On whether the accused had malice aforethought when he unlawfully killed the deceased**, Malice aforethought is defined under section 206 of the Penal Code. Under section 206 it 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

(c) an intention 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.”

86. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 (a-e) malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case at the trial. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

87. In determining whether there was malice aforethought, the court must examine the entire circumstances and in particular, the type of the weapon used and the manner in which the deceased was injured, which are a manifestation of the malice aforethought. This principle was elucidated by the Court of Appeal in **Bonaya Tutu Ipu & Another v Republic MLD CA Criminal Appeal No. 43 & 50 of 2014 [2015] eKLR** where it was stated:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT -Vs- UGANDA, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in REX - Vs- TUBERE S/O OCHEN (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...”

88. As stated elsewhere in this judgment, the use of a firearm by a police officer is circumscribed by the National Police Service Act. The accused has not explained or given any justification for discharging the firearm. He has not expressed any threats to him that necessitated his use of the firearm in such lethal manner. If there were threats to his life or life of others, which have not been demonstrated to this court, why did he not fire in the air to scare the riotous group? There was no evidence that the deceased and others were armed and therefore posed any threat or risk to the life of the accused person.

89. Moreover, the accused being a senior prisons officer ought to have known that shooting the deceased or indeed any other person with a firearm and through the chest area would cause grievous harm or indeed death. The shooting was in the chest meaning the accused had every reason to know that the deceased would not survive the bullet. The chest is host to many organs of the body including the heart and lungs.

90. Nothing emerged from the evidence suggesting the accused’s motives since there was nothing to show that he was under attack from the deceased and his teammates who were not happy with the presidential elections outcome but who were demonstrating without causing any havoc, and this court can only speculate what caused the accused person to react and act the way he did. However, and according to section 9(3) of the Penal Code, motive is irrelevant in proving the commission of murder particularly where the evidence is clear and direct as is in this case. The section provides:

“9(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.”[emphasis added].

91. It is worth noting that PW10 testified that during the riots, when he and the deceased passed the accused, the deceased called the accused person by name stating, ***“We know you Yego. You are Askari Jela and we have no issues with you. Just go your way and sleep”***, and that when the accused heard this, he questioned the deceased telling him, ***“Unajua kuwa naweza kukuua sahi”***, which when translated means ***“You know I can kill you now”***. PW10 testified that the accused then cocked the pistol that he was holding, aimed at the deceased and shot him.

92. Even if this court was to go by the submissions of Mr Ochanyo that the accused was acting in self-defence which defence was never proffered, I am not persuaded that the evidence on record satisfies the defence of self-defence as defined in section 17 of the Penal Code. The section provides:

“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.”

93. The common law principles of self defence as stated in the privy council decision in **PALMER v REPUBLIC [1971] 1ALL ER 1077** was cited with approval by the Court of Appeal in **AHMED MOHAMMED OMAR & 5 OTHERS v REPUBLIC [2014] eKLR** as follows:

“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.”

94. In **Republic v Gedion Wambua Koko & 2 others [2019] eKLR** citing the East Africa Court of Appeal in the *Tumbere case (supra)* in determining whether malice aforethought had been established beyond reasonable doubt, the court considered the following elements:

- a) *The nature of the weapon used;*
- b) *The manner in which it was used;*
- c) *The part of the body targeted;*
- d) *The nature of the injuries inflicted either a single stab/wound or multiple injuries; and*
- e) *The conduct of the accused before, during and after the incident.*

95. From the evidence adduced, the accused herein was a Chief Inspector of Prisons and was authorised to hold the Ceska Pistol which he used that material night to shoot the deceased. He targeted the deceased’s chest area where a single bullet was sufficient to kill the deceased. After shooting the deceased, the accused returned the Ceska pistol to the armoury and could not account for the 11 rounds of ammunitions which were missing.

96. From the evidence adduced for the prosecution and the defence, and the submissions and authorities cited herein, this court is persuaded beyond any reasonable doubt that the prosecution adduced sufficient evidence to prove malice aforethought on the part of the accused which evidence excluded self-defence. In the circumstances, I find and hold that the accused person **PATRICK KIPNGETICH YEGO** is **GUILTY** of the offence of murder as charged contrary to section 203 of the Penal Code. I hereby convict him accordingly.

97. Sentence will be after records and mitigation.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 29TH DAY OF MARCH, 2021

R.E. ABURILI

JUDGE