



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.5 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. T. Murigi delivered on 14th June 2017 in Embakasi Garisson Court Martial No.5 of 2015)

NELSON OMOLLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Nelson Omollo, was a member of the Kenya Defence Forces. He was charged with three (3) offences before the Court Martial. In the 1st Count, the Appellant was charged with **committing a civil offence** contrary to **Section 133(1)(b)** of the **Kenya Defence Forces Act**, that is to say, **manslaughter** contrary to **Section 202(2)** as read with **Section 205** of the **Penal Code**. The particulars of the offence were that on 12th May 2015 at Moi Air Base, Eastleigh within Nairobi County, the Appellant unlawfully killed No.42313 Constable Peter Ndavi. The Appellant was charged in Count 2 with the offence of **negligently discharging ammunition** contrary to **Section 123(a)** of the **Kenya Defence Forces Act**. The particulars of the offence were that on 12th May 2015 at Moi Air Base, Eastleigh within Nairobi County, the Appellant negligently discharged one round of 9mm ammunition from a self-loading pistol registration No.245NY0363. The Appellant was further charged in Count 3 with the offence of **acting to the prejudice of good order and service discipline** contrary to **Section 121** of the **Kenya Defence Forces Act**. The particulars of the offence were that on 12th May 2015 at Moi Air Base, Eastleigh within Nairobi County, the Appellant caused bodily harm to No.42946 Constable Douglas Micheni on the right upper arm by discharging one round of 9mm ammunition from a self-loading pistol registration No.245NY03633 which hit and injured the said Constable Douglas Micheni.

When the Appellant was arraigned before the Court Martial, he pleaded not guilty to the charges. After full trial, he was found guilty as charged in all counts. He was sentenced to serve two (2) years imprisonment in Count 1, two (2) years imprisonment in Count 2 and one (1) year imprisonment in Count 3. The sentences were to run concurrently. He was further dismissed from the Kenya Defence Forces. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the Court Martial for finding that the prosecution had proved its case beyond any reasonable doubt. He was of the view that the sentence meted by the Court Martial was harsh and excessive in the circumstances. He was aggrieved that the Court Martial failed to give reasons for its judgment and sentence. He was further aggrieved that his conviction was based on an eliminative and discriminative process. He averred that the Court Martial failed to consider the time he spent in close arrest in meting out his sentence. He took issue with the fact that the prosecution concealed material facts from the trial court and therefore acted in bad faith. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submissions from Mr. Were for the Appellant and Ms. Akunja for the State. Mr. Were averred that the Appellant was convicted based on an eliminative and discriminative process. He stated that Osman (PW10) returned the gun to the Appellant before conducting a safety precaution check. He averred that the Appellant only received the gun. When he realized that the pistol hammer was pulled back, he tried to return it to its position, but the bullet was discharged accidentally. He asserted that no charges were preferred against PW10. He submitted that there was no way the Appellant would have known that there was a bullet in the chambers, since the number of bullets issued to PW10 had all been returned and accounted for.

Counsel for the Appellant further submitted that two bullets were fired from the said pistol on that day. The trial court was however not informed where the said bullets came from. He stated that the Appellant was given duties that he was not supposed to be handling. He averred that there was an attempt to cover up evidence of what took place since the scene of crimes officer failed to take photographs of the walls in the armoury. He was of the view that the evidence of the investigating officer exonerated the Appellant. He opined that the sentence meted by the trial court was harsh since the trial court failed to put into consideration the time the Appellant had spent in close custody. He stated that the prosecution failed to disclose to the Court Martial that this case was investigated by police officers from Rongai. He

maintained that the Appellant discharged the bullet accidentally with no malice aforethought. He therefore urged the court to allow the Appellant's appeal.

Ms. Akunja for the State opposed the Appeal. She submitted that the prosecution established that the Appellant was in charge of the armoury. She stated that the Appellant discharged a bullet which hit PW1 on his arm and fatally injured another officer. PW2, who was at the scene, corroborated PW1's testimony. She averred that PW10, Osman, testified that he had been allocated a pistol containing 13 rounds of ammunition. He stated that he conducted a safety check before returning the said pistol with all the bullets intact to the Appellant. Learned State Counsel asserted that the Appellant was a trained officer with three years of experience. She submitted that the accident occurred due to the Appellant's negligence. She stated that the Appellant ought to have checked the pistol outside the cubicle and not inside while serving other officers.

Learned State Counsel further submitted that the element of malice aforethought was not present in this case. However, the Appellant was charged because of a breach of procedure. She averred that the Appellant failed to properly conduct safety procedure when he was handed the pistol as required. She pointed out that the involvement of civilian police officers only served to compliment the investigation by the military police. She dismissed the assertion by the Appellant that there was an attempt to cover up the events of that day. She stated that the scene of crime was documented by the Scenes of Crime Officer. She asserted that the prosecution established that the Appellant mishandled a pistol which led to the death of a serviceman. She was of the view that the period the Appellant spent in close arrest was considered by the Court Martial in sentencing. In the premises, she urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Douglas Michemi, was a member of the Kenya Defence Forces. It was his testimony that he was on duty at Kahawa West on 12th May 2015, together with three other military officers. They were led by a sergeant. They later returned to the Moi Airbase. They went to the armoury to return their firearms for safe keeping. The sergeant (PW10) gave his pistol to the Appellant who was in-charge of the armoury. PW1 stated that he saw the Appellant take the pistol and walk to the safe. He held the pistol looking downwards for about 20 minutes. He then stood up and held the pistol upwards with his finger on the magazine. PW1 then heard a loud bang and fell down to the ground. His colleague also fell down. He realized that he had been shot on his arm. The Appellant came rushing to where they were. He was calling out for help. They were rushed to the hospital. His colleague however succumbed to his injuries before they got to hospital. PW1 stated that the bullet went through his arm and hit the deceased on his head. The deceased was standing behind him.

PW2, Geoffrey Mukala Mbuvi, is a member of the Kenya Defence Forces. He stated that he went to the armoury on 12th May 2015 at about 1830 hours. He found Sergeant Osman and two other constables who were returning their firearms. He stated that when he got there, he saw Sergeant Osman bending facing a table. After sometime, the said Osman returned his weapon and left. The other two constables were behind him awaiting for their turn. He suddenly heard gun shots. The two constables who were standing in front of him fell down. One of them stood up. He had been shot on his upper right arm. The other constable was shot on his head. He called for help and the two officers were taken to the hospital.

PW3, Corporal Evans Omondi, was an arms mechanic at Moi Air Base. He stated that on 11th May 2015, at about 2.30 p.m., he was ordered by his superior (PW4) to go and relieve the Appellant who was on duty at the main gate armoury. The Appellant was deployed temporarily to do guard duties. He stated that he filled in for the Appellant who later came back to his duty at the main gate of the armoury on 12th May 2015 at about 3.00 p.m. He told the court that while on duty on 12th May 2015, he issued a firearm to Senior Sgt. Osman. The firearm was a self-loading pistol with one magazine containing 13 rounds of ammunition. He produced into evidence an extract from the armoury daily issue book showing that he had issued the said firearm to Sgt. Osman on 12th May 2015 and that the Appellant received the said firearm and 13 rounds of ammunition when Sgt. Osman returned them that evening.

PW4, WOII Nicholas Roy Okoth, was the warrant officer in-charge of the base armoury at Moi Airbase. He stated that on 11th May 2015, he instructed the Appellant to report for duty at the main gate armoury. The Appellant had however been allocated guard duties on the same day. He therefore instructed PW3 to relieve the Appellant who proceeded on guard duty. The following day, on 12th May 2015, at about 3.00 p.m., the Appellant reported back for duty at the main gate armoury. At about 8.00 p.m., he received a call from Warrant Officer I, Chebus, who was in-charge of the main gate squadron. Officer Chebus informed him that there had been an accidental discharge of a firearm by the Appellant at the armoury which had resulted in the injury of two service members. He told the court that the Appellant was a class one arms mechanic and that the base armoury was usually operated by class one arms mechanics. On cross-examination, PW4 stated that the Appellant was stationed at the base armoury and was conversant with all safety procedures with regard to handling of firearms.

PW5, Paul Mwele Kavita, stated that on 12th May 2015, he was deployed at the main gate at Moi Air Base as a gate commander. He heard a loud bang. He saw soldiers running from the armoury calling out for help. Two service members had been shot. One was shot on his arm while the other had a bullet lodged in his head. He called Sergeant Wanjohi who assisted him to take the injured officers to hospital.

PW6, Corporal Fredrick Sandaki, stated that he was based at the Technical Maintenance Unit at Moi Air Base. He told the court that he was deployed at the main gate armoury from 8th May 2015 to 11th May 2015, when he handed over duties to the Appellant. He stated that the duties of a storeman at the armoury were to implement safety procedures while handling firearms, account for all firearms and ammunition and ensure that the records tallied with physical stock at the armoury.

PW7, Lieutenant Erick Oduor, was at the time based at the Technical Maintenance Unit at Moi Airbase as the Acting Adjutant. He stated that the Appellant was a trained class one arms mechanic. On 12th May 2015, the Appellant had been deployed to the main gate armoury where he accidentally discharged a firearm resulting in the injury of two service members. One of the injured officers succumbed to his injuries and died. He stated that prior to that incident, the Appellant was of good discipline and no disciplinary cases had been brought against him. He produced in evidence the Appellant's QR card which contained the Appellant's particulars and qualifications. He stated that the QR card also indicated that the Appellant was an arms mechanic stationed at the armoury.

PW8, Warrant Officer II James Kilonzi, was in-charge of personnel management at Moi Air base. He stated that the Appellant was deployed

at the main gate armoury on the material day of 12th May 2015. At about 10.00 p.m., PW4 informed him that the Appellant had accidentally discharge a firearm while he was attempting to safely empty it. Two service members were injured in the process. One of them succumbed to his injuries and died.

PW9, Senior Sgt. Boniface Wachira, was at the time in-charge of security standby at Moi Airbase. On 12th May 2015, he was on duty at the main gate. At about 6.30 p.m., he heard the sound of a gunshot emanating from the armoury. He went to the armoury where he met PW1 who was bleeding from his arm. PW1 informed him that he and another service member had been shot. He took the two injured officers to Base Medical Centre in his personal car.

PW10, Sgt. Osman Ibrahim, stated that on the material day of 12th May 2015, he signed for a self-loading pistol at the main gate armoury at Moi Airbase. He went to pick up his boss at Kahawa Sukari and took him to the National Defence College. In the evening, he took his boss back home and went back to the camp and returned the pistol back at the main gate armoury. He stated that he conducted a safety precaution check outside the armoury before returning the pistol. He explained that he removed the magazine, cocked the gun and released. He entered the armoury and handed the pistol to the Appellant who was on duty. The Appellant gave him a container to put his ammunition. He had 13 rounds of ammunition.

PW10 stated that the Appellant instructed him to put 12 rounds in the container and give him the remaining one round. He signed the register and left the armoury. He stated that the Appellant took the container containing the 12 rounds, the loose round, an empty magazine and the pistol. He maintained that there were no bullets in the chamber since he had conducted a safety precautionary check before returning the pistol. Later that night he was called by a military police who informed him that his pistol had been discharged and had fatally injured a service member.

PW11, Superintendent of Police, Kiberenge Seroney, was stationed at the DCIO Starehe based at Pangani. On 13th May 2015, he received a call from Major Oyamo of Moi Airbase Eastleigh who informed him that a serviceman had been shot at the armoury. He sent a team of investigators. They took photographs of the scene and lifted blood samples from the armoury. They also took the firearm that was involved in the incident and sent it for ballistic examination together with the spent cartridges. He then forwarded the ballistic report to the investigating officer.

PW12, IP Anguka Owande, was stationed at the DCI Headquarters. He was the Scenes of crimes officer in the present case. He proceeded to Moi Airbase Eastleigh on 13th May 2015. He was received by Major Oyamo. He took photographs of the armoury where the incident occurred. He also took photographs of the deceased person during the post mortem examination. The said photographs were produced into evidence. PW13, Dr. Sila, stated that he was a pathologist based at the Defence Forces Memorial Hospital. He testified that he conducted a post mortem on the body of the deceased, Peter Ndavi, on 21st May 2015. He stated that the deceased had a bullet lodged in his head. He established that his death was caused by an extensive brain damage due to a gunshot injury to his head. He produced the post mortem report into evidence.

PW14, Chief Inspector Alex Chirchir, was a firearm examiner based at the DCI Headquarters. He told the court that on 2nd June 2015, he received a pistol Serial No.245NY03633, an expended cartridge and a fired bullet from the DCIO Starehe. He was instructed to establish whether the firearm was capable of firing and whether the expended cartridge and the fired bullet were fired from the said pistol. Upon examination, he found that the pistol was capable of firing and that the expended cartridge and fired bullet were fired from the said pistol. He told the court that the said pistol cannot fire without its magazine as that was the mechanical safety of the said firearm. He produced a report of his findings into evidence.

PW15, Major Andrew Onyamo, investigated this case. It was his testimony that on 12th May 2015, he was at the Military Police Headquarters when he was informed that an accidental discharge had occurred at Moi Airbase armoury. The incident resulted in the injury of two service men. He went to the scene and discovered that the officer who accidentally discharged the firearm was the Appellant. He recovered the firearm which was a self-loading pistol. He also recovered a spent cartridge at the scene. There was also blood at the scene. He was informed that the injured service men had been rushed to hospital. He did an accountability check for the ammunition at the armoury and discovered that one round of ammunition was missing. He also checked the register and discovered that the firearm involved in the incident was returned by PW10 and received by the Appellant who was on duty.

The following day, PW10 reported the matter to the DCIO at Starehe. Police officers from Starehe visited the scene and took photographs. They also took the firearm for ballistics examination. PW15 stated that he interviewed witnesses and took down their statements. He discovered that the two injured servicemen had gone to the armoury to return their weapons. They were in line awaiting to be served when the incident occurred. PW10, after undertaking the necessary precautions, handed over his pistol to the Appellant. He also handed 13 rounds of ammunition which he had removed from the magazine. As the Appellant was conducting a safety check, a round of ammunition was accidentally discharged from the firearm. It hit PW1 on his arm, exited and hit the deceased on his head. The ballistics report confirmed that the bullet that hit the deceased was fired from the said firearm. He also confirmed that the Appellant was on duty at the armoury that night and was the one who accidentally discharged the firearm. PW15 stated that the Appellant was conversant with safety procedures involving handling of firearms. The accident occurred due to his negligence. After his investigations, he preferred the present charges against the Appellant.

The Appellant was put on his defence. He admitted that he was on duty at the main gate armoury on the material day of 12th May 2015. He stated that he was trained in handling store matters, but that he could not decline the directive to work at the armoury since they were trained to follow instructions at the military. He testified that PW10 came to the armoury to return his firearm and ammunition. He returned 13 rounds of ammunition which the Appellant placed in the safe. He however noticed that the hammer on the pistol was pulled back. He knelt down facing the safe and inserted his middle finger in the housing to trip the arm lever spring so as to disengage the hammer. He stated that he was not aware that the firearm had an extra bullet in its barrel. He then heard a loud bang. The firearm had accidentally discharged a bullet. The bullet from the pistol hit the wall and then it ricocheted and hit the two service men. He told the court that the armoury cubicle was small. He stated that he did not aim the firearm at the injured servicemen.

The Appellant further testified that according to the register, PW10 had signed for 13 rounds of ammunition which he had returned. He stated that PW10 must have had an extra bullet in the pistol, since the pistol could accommodate an extra bullet. He testified that according to the report made to the DCIO Starehe, the investigating officer falsely indicated that two rounds of ammunition had been discharged. He stated that the wall where the bullet hit before ricocheting had a hole. He further testified that the person returning the firearm is required to conduct a safety check outside before handing over a firearm at the armoury. He pointed out that none of the prosecution witnesses indicated that they saw PW10 conducting a safety check outside the armoury. He said that he was not present when the investigating officer conducted an inventory at the armoury. He denied the assertion that accident occurred due to his negligence. He stated that he did not have any intention to harm or kill anyone, and that the incident still traumatized him.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the Court Martial to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32**). In the present appeal, the issue for determination by this Court is whether the prosecution established the Appellant's guilt on the charges preferred against him to the required standard of proof beyond any reasonable doubt.

With regard to Count 1, **Section 202** of the **Penal Code** provides as follows;

(1) "Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm."

In the present appeal, it was the prosecution's case that the Appellant, who was a soldier trained as an arms mechanic Class 1 was negligent in the manner that he handled the pistol that discharged one round of ammunition that caused the death of Peter Ndavi and injured PW1. From the evidence on record, PW10 came back to the camp at Moi Air Base Eastleigh from Kahawa West where he was on duty. He went to the armoury to return his firearm as he was required to. The Appellant was on duty that night at the main gate armoury. PW10 stated that he conducted a safety precautionary check outside the armoury before returning the pistol. He explained that he removed the magazine, cocked the pistol and the release. He entered the armoury and handed the pistol to the Appellant.

PW10 further stated that the Appellant gave him a container to put his ammunition. He had 13 rounds of ammunition. PW10 stated that the Appellant instructed him to put 12 rounds in the container and give him one round. He signed the register and left the armoury. He stated that the Appellant took the container containing the 12 rounds, the loose round, an empty magazine and the pistol. He maintained that there were no bullets in the chamber since he had conducted a safety precautionary check before returning the pistol. PW1 and the deceased were also at the armoury that night. They were standing in line behind PW10 waiting to be served by the Appellant.

PW1 stated that he saw the Appellant take PW10's pistol. He walked to the safe. He held the pistol looking downwards for about 20 minutes. He then stood up and held the pistol upwards with his finger on the magazine. PW1 then heard a loud bang and fell down to the ground. He was shot on his upper arm. The bullet went through his arm and hit the deceased on the head. The post mortem report adduced into evidence as well as the evidence of PW13 established that the deceased's cause of death was extensive brain damage due to a gunshot injury to his head. The ballistics report also established that the bullet lodged in the deceased's head was fired from the pistol subject matter in the present appeal.

The Appellant in his defence admitted that he was on duty on the material night at the main gate armoury. He stated that PW10 came to the armoury and returned his firearm and ammunition. He returned 13 rounds of ammunition which the Appellant placed in the safe. He however noticed that the hammer on the pistol was pulled back. He knelt down facing the safe and inserted his middle finger in the housing to trip the arm lever spring so as to disengage the hammer. He stated that he was not aware that the firearm had an extra bullet inside. He then heard a loud bang. The firearm had accidentally discharged a bullet. The bullet from the pistol hit the wall and then it ricocheted and hit the two service men.

It is therefore not disputed that the Appellant was on duty that night at the armoury, and that he accidentally discharged a firearm at the armoury resulting in the injury of PW1 and death of Peter Ndavi. What is in dispute is whether the Appellant was negligent in the discharge of his duties which resulted in the death of the deceased. Black's Law Dictionary Ninth Edition at page 113 defines negligence as "**failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation: Any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly or willfully disregarding of other rights. The term denotes culpable carelessness**".

The prosecution adduced sufficient evidence to the effect that the Appellant was a trained arms mechanic class one, which was the highest category of training in that field. PW7 produced in evidence the Appellant's QR card which contained the Appellant's particulars and qualifications. The same indicated that the Appellant was an arms mechanic stationed at the armoury. PW3 also told the court that he trained together with the Appellant as an arms mechanic Class 1 and that he had worked with him at the armoury for about three years. The Appellant in his defence admitted that he was a trained arms mechanic Class 1 and that he knew how to use and handle firearms. He also admitted that he was trained on how to perform safety precautions while handling a firearm.

It was the prosecution's case that the Appellant ought to have performed the safety precaution measures outside and not inside the armoury, as was the case on the material night. The Appellant on the other hand stated that the person returning the firearm was the one who was supposed to conduct the safety precautionary check before returning his firearm, and that he was therefore not responsible for the accident that occurred. After evaluation of the evidence on record, this court is of the view that the Appellant was negligent in the way that he handled the firearm which led to the accidental discharge that caused the death of the deceased person, and injured PW1.

The Appellant admitted that he conducted a safety check inside the armoury. He also admitted that safety precautions were supposed to be undertaken outside the armoury. PW10 testified that he conducted a safety check outside the armoury before handing over the pistol to the Appellant. The Appellant, during cross-examination, admitted that the rounds of ammunition returned by PW10 tallied with the rounds of ammunition that had been issued to him according to the register at the armoury. He however noted that the hammer of the pistol was pulled back. The Appellant stated that he conducted a safety precaution check to bring back the hammer back to its position. The mistake he did was that he conducted the said check inside the armoury which was contrary to the set procedures. He admitted that he was aware that if one releases the pistol hammer and there is a bullet inside the chamber, the bullet will be fired.

The Appellant's excuse that he was not aware that there was a bullet inside the chamber does not hold water. He was aware that any safety precautionary procedures were required to be conducted outside the armoury to avoid such accidents. He told the Court Martial that he conducted the safety precautionary check inside the armoury since he was the only person working at the armoury that day and that there were other people who were waiting in line to be served by him. That is the reason why he did not go outside to conduct the safety check to return the pistol's hammer to its position. As the person who discovered that the pistol hammer was pulled back, he ought to have acted more carefully and conducted the safety check outside the armoury. Had the Appellant been more prudent and careful in the discharge of his duties at the armoury, the death of the deceased could have been avoided. Even though the discharge was accidental and the Appellant had no intention of killing the deceased person, the Appellant ought to have exercised a reasonable standard of care while handling the firearm.

From the foregoing, this court is of the opinion that the Appellant's guilt in the three counts was established to the required standard of proof beyond any reasonable doubt. This court, having re-evaluated the evidence adduced before the trial court and the submission made on this appeal, cannot see any reason to disagree with the finding reached by the trial court. His appeal against conviction in all counts is hereby dismissed.

On sentence, this court notes that the Appellant was a first offender. He was remorseful that the accident happened. He was also in pre-trial detention for about two years before he was convicted and sentenced by the Court Martial. This court has taken into account the circumstances under which the offence was committed. In the premises therefore, this court commutes the Appellant's sentence to the period that he served. Since he is out on bail pending appeal, he is ordered set at liberty forthwith unless otherwise lawfully held. The other order issued by the Court Martial dismissing him from the Kenya Defence Forces shall stand. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF MAY 2020

L. KIMARU

JUDGE