



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL CASE NO. 17 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MICHAEL WACHIRA KINYUA.....ACCUSED**

**JUDGEMENT**

1. There was a hippo invasion on the maize farm of PW2 Pauline Akumu Odera at Lake Area, Mpeketoni within Lamu County on 8th November, 2012. PW2 alerted Kenya Wildlife Service (KWS) and two KWS officers arrived at the farm. One of them was Michael Wachira Kinyua, the accused person. He was with his colleague PW7 Corporal Dihoye Kalume who was also referred to as Corporal Dede by the witnesses. By the end of it all there was a dead hippo and a wounded man allegedly shot by the accused person. The wounded man by the name Moses Kibe Gitau succumbed to the injuries two days later. The accused person now faces the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.

2. The events of that day were relayed by PW1 Daniel Nderitu Gitau, PW2 Pauline Akumu Odera, PW3 Samuel Kinyanjui Kihoto, PW4 Ezekiel Ng'ang'a, Esther Wamucii Gitau (also numbered as PW4 and who shall be referred to as PW4A for the purpose of this judgement), PW5 Tabitha Kirothe Mutegi, PW6 Dihoye Kalume, PW7 Bwanaheri Mohamed Borowa, PW8 John Otieno Goko, PW9 Daniel Mundia and PW10 Michael Munga.

3. On 8<sup>th</sup> November, 2012 PW2 who is a farmer based at Mpeketoni was in her house when she heard animals feasting on her crops. She went to check and found that hippopotamuses had invaded her farm. She alerted PW5 of KWS who in turn informed her boss, PW6, of the invasion. About half an hour later PW6 and the accused person had arrived at the scene and started repelling the animals. One of the hippopotamuses started charging and it was killed.

4. According to PW1 Daniel Nderitu Gitau, the accused then invited the deceased to come over and slaughter the felled hippopotamus. PW1 who had a motorbike went and fetched the deceased together with PW3 Samuel Kinyanjui Kihoto and PW4 Ezekiel Ng'ang'a. When they arrived at the scene the accused directed the deceased to select eight people to slaughter the killed animal. PW1 used the torch to light the place and a crowd formed and started to press in. The accused requested the crowd to take two steps back but they were adamant. PW3 and PW4 confirmed that the crowd declined to move.

5. Subsequently Corporal Dede asked the accused to control the crowd. The accused then cocked his gun, fixed something to the firearm, took the torch, lit the area and ordered the crowd to step back. Meanwhile, the deceased, PW3, PW4 and PW7 Bwanaheri Mohamed Borowa were busy cutting up the meat. PW1 then heard a loud bang and the deceased fell down. He had a bullet wound on his head and a shrapnel grazed PW1. PW1 overheard the accused tell his boss that there was an error.

6. The deceased was rushed to hospital while PW1 remained at the scene. The deceased was then referred to Coast General Hospital where he succumbed to his injuries. In cross-examination he confirmed that the accused was the deceased's friend and they were even together when the accused received a call about the animal invasion. PW1 told the court that the accused removed the magazine and attached an object to the firearm. When he fired sparks and shrapnel flew.

7. PW2 testified that about thirty minutes after the hippo was felled she heard other gunshots and assumed that another animal was being shot at only to hear screams that the deceased had been killed. She ran to the scene which was about 50 metres from her house and saw the deceased lying facing upward and bleeding from the head next to the slaughtered carcass of the hippo. The deceased was then rushed to hospital on a motorcycle.

8. PW2 informed the court that police officers arrived at the scene and took photographs. At cross-examination she confirmed that both KWS officers wore their official attire and that it was Corporal Dede who called people to slaughter the animal. She could not tell if the accused and the deceased had a grudge.

9. PW3's testimony was that as the crowd that had formed pressed towards the animal that was being slaughtered, the accused was urging the

people to step back. It was then that he heard the accused cock his gun. He kept telling the people to move away saying that he would kill somebody. Shortly thereafter PW3 heard a gunshot and noticed that the deceased who was next to him had fallen down. PW7 told him there was blood on the deceased's vest. PW3 called the deceased but he was not responding. It was then that he noticed that the deceased was bleeding from his head. The deceased was taken to hospital immediately after the incident.

10. PW3 told the court that he later led police officers to the scene from where they recovered a spent cartridge. At cross-examination he explained that he was bending down while cutting the carcass and did not see the accused aim the gun at the deceased though he saw him holding the firearm facing up. He explained to the court that the deceased and the accused were friends. In re-examination he explained that it was the accused who cocked his gun and that the spent cartridge was handed over to the OCS.

11. PW4 Ezekiel Nga'ng'a corroborated the evidence of PW3. His testimony was that the accused warned the forming crowd to move aside and cocked his gun. PW4 told the court that at the time he heard the gunshot he was at the head of the carcass and the deceased was towards its legs. The accused checked on the deceased and found him to be alive. PW4 took the deceased to hospital on his motorcycle. The deceased was transferred to Coast General Hospital, Mombasa. Cross-examined, PW4 stated that the accused held his gun facing upwards and assisted in putting the deceased on the motorcycle.

12. In his testimony PW6 confirmed that PW2 had called their office to report an invasion of her farm by hippopotamuses and he went with the accused to arrest the situation. They found a herd of about 20 hippos. He told the accused to chase them off. The accused had a firearm SRN 1700332-FN whereas he carried a firearm SN 7552606577-458 designated for animals. One of the hippos started charging hence they shot at it and killed it. They then informed PW2 about it. Shortly a crowd of about 50 people arrived at PW2's house and he informed them not to quarrel and one person selected 8 people to slaughter the felled animal. He told the rest to stay aside.

13. The chosen 8 had skinned one side of the animal when the crowd started pressing in. PW6 told the accused to organise the crowd and the accused started by talking to them. PW6 asked the accused to leave the crowd alone but the accused instead attached a Blank Firing Attachment (BFA) for blank bullets and removed the magazine with live bullets. PW6's testimony was that the accused cocked his gun which was facing skywards and started walking up and down talking to the people and unfortunately fired. A live bullet hit the BFA splintering it and its particles wounded the deceased but no live bullet left the chamber. The accused then gave him his gun rushed to the deceased and came back saying **"I am finished"**. Shortly two people menacingly advanced towards them with pangas hence their quick flight back to their camp.

14. PW6 explained that blank bullets were used to disperse the public. At cross-examination he explained that it was the norm to carry both live and blank ammunition and that the accused did not have any disciplinary issues. Further, that the BFA was fixed in order to use the blanks and the accused did not aim the gun at the crowd but upwards when the same accidentally went off. PW6 stated further that they ran off as the crowd bayed for the accused's blood.

15. PW5 Esther Wamucii Gitau confirmed that the two later came back running and sweating stating that a hippo had been killed and a person had been hurt. At cross-examination she informed the court that she had worked with the accused for about a year and there were no complaints about his work.

16. Another eyewitness was PW7 Bwanaheri Mohamed Borowa who testified that as he arrived at the scene he heard someone tell the people to step aside. He also heard the accused tell the deceased that he would kill someone. He joined the people cutting the meat as the 8<sup>th</sup> person though the accused just wanted 6 people there. There was light from a torch. Shortly thereafter he heard a gunshot and felt blood on his face. He noticed that the deceased had a cut on his head.

17. When cross-examined, PW7 stated that the KWS officers were in uniform and that there were many people present when the accused declared that he would kill someone that day. His testimony was that no one took off and that the accused did not direct his utterances to anyone in particular.

18. PW8 John Otieno Ouko who was also at the scene heard the accused tell the forming crowd to move behind before stating that as they were ignoring him he would kill someone. The accused cocked his gun and shortly thereafter he heard a gunshot and people scream. The deceased was then taken to hospital where he died. In cross-examination, his account was that the people were pushing towards the animal and the accused who was in uniform was urging them back. The witness explained that when he heard the gun go off he was bending down cutting meat.

19. Daniel Mundia who testified as PW9 went to the scene upon hearing the first gunshots. He found KWS officers who told them to wait. It was then that the deceased arrived on a motorcycle. There was a crowd standing about 20 meters from the killed animal. The witness who knew the accused heard him state that he would kill somebody as he cocked his gun. This was followed by a gunshot and he then heard somebody say **"Wachira umeua"**. The Corporal then told Wachira that **"Umesema utaua, sasa umeua"**. PW9 stated that he did not see how the deceased was shot. He stated that nobody thought the accused could kill someone.

20. In his defence, the accused confirmed that there was a report on the material date about a hippo invasion and together with his colleague they went to attend to it. He was dressed in his uniform and both of them carried rifles. He had 40 rounds of live ammunition and 20 blank ones. They were ferried to the scene by the brother of the deceased who knew the place well. On arrival they found a group of about 10 people inside PW2's compound. He confirmed that the charging hippo was shot and killed. He informed Corporal Dede that it was inadvisable to have the carcass slaughtered at that time as it would be difficult to control the people but he insisted and directed him to get 7 men to do the work which he did.

21. In the process a crowd with pangas and knives formed and swelled necessitating its control to avoid injuries. He was instructed by Corporal Dede to fire blanks. He removed the live ammunition magazine, followed procedure, fixed the blank rounds magazine and attached the BFA. He fired the 1<sup>st</sup> blank then the 2<sup>nd</sup> before the BFA exploded. Moses fell down bleeding and he assisted PW3 and PW4 to place him on a motorcycle to be ferried to hospital. The crowd became hostile causing them to retreat to their camp where Corporal Dede made a

report. He was later arrested.

22. The accused testified that he did not intend to injure the deceased whom he had been with for the better part of the day and still communicates with PW1 who is a brother of the deceased. He informed the court that blank bullets can be used to scare animals and control crowds. His evidence was that as he was confident that he had installed blanks he did not shoot in the air but at the crowd that was about 10 meters away fighting to get the meat. He stated that at the time of the explosion of the BFA he did not know where the deceased was.

23. The trial having come to an end the parties filed their written submissions. The Republic represented by the Office of the Director of Public Prosecutions (DPP) in brief submitted that the accused had the firearm that was fired at the crowd and caused the death in question. This, it was asserted, was confirmed by the ballistics report and witnesses present at the scene. It was urged that the ingredient of malice aforethought was established and finally that the accused was well aware of the procedure for handling firearms as stipulated by the Sixth Schedule of the National Police Service Act.

24. On the other hand, counsel for the accused submitted that the evidence of all those who were present when the incident happened did not implicate the accused person. Counsel also submitted that none of the witnesses could confirm that the accused shot the deceased as they were busy cutting up the meat. Counsel further submitted that PW1 witnessed the BFA being attached and PW12 Chief Inspector Francis Mweu confirmed that it fragmented when a live bullet rammed into it and the fragments injured the victim.

25. The defence discredited the process of testing the murder weapon stating that the examination and the preparation of the report had taken less than three days contrary to the evidence of PW16 Johnstone Musyoki Mwangela that the time for preparing a credible ballistics report is at least two weeks. Counsel urged the court to ignore the ballistics report and relied on the treatise by Tristram Hodgkinson and Mark James titled **Expert on Evidence: Law and Practice, 4<sup>th</sup> Edition, Sweet & Maxwell** where it is stated at page 365 that “[f]acts may outweigh opinions, either because an opinion is based on facts which are disapproved, or because facts which are proved show the opinion itself to be erroneous.” The same treatise is also relied on in support of the proposition that experts ought not to take sides.

26. It was further urged that the investigations were not properly done; that the scene was visited by the investigating officer about four months later; that the discovery of live ammunitions was not surprising as the two KWS officers had fired rounds while chasing the hippos; that the fired bullets were not subjected to a higher test such as DNA; that the civilian witness who picked the live ammunition and spent cartridge could not differentiate between a live round and a spent one; and that there was no chain of custody certificate produced in court as to the handling of the exhibits. In addition, it was submitted that there is no information on the custodian of the firearms voluntarily surrendered to the police.

27. In relying on the High Court decision in **Aboud Rogo Mohamed & 3 others v Republic, Nairobi H. C. Criminal Case No. 91 of 2003** it was urged that the prosecution did not prove the occurrence of the event nor the intention. It was submitted that there was no direct evidence connecting the accused to the act as no specific bullet or cartridge collected from the scene was linked to him. Counsel for the accused asserted that PW3 and PW4 claimed to have picked spent cartridges marked A3 at the scene yet it was stated that it was Michael Gitau who picked it. Further, that the exited bullet was not produced in court. It was the accused's case that there was no circumstantial evidence linking him to the offence. The cases of **Joan Chebichii Sawe v Republic, Criminal Appeal No. 2 of 2002; Kipkering Arap Koskei & another v Republic EACA 135; and Republic v Timothy Ngechu Kirengeru, Criminal Case No. 75 of 2007** were cited as providing the law as to when circumstantial evidence can be used to convict.

28. It was further submitted that malice aforethought was not proved; that the accused person visited the farm solely on an official mission; that the circumstances were that it was a dark night lit by a few torches and the accused could not have singled out the deceased; that the two were good friends and the accused even called and selected the deceased to slaughter the hippo; that the accused attached a BFA which was an indication that he intended to use blank ammunition; that the evidence indicates that the shot was to scare and control the crowd; that the accused voluntarily handed over his firearm; that the accused's colleagues testified that he had no disciplinary issues; and that the investigating officer confirmed that he had no criminal record hence speaking of his good character. Relying on Section 55 of the Evidence Act and the treatise titled **Evidence** by Fraser P. Davidson published by Thomson under the auspices of Scottish Universities Law Institute Ltd, counsel for the accused submitted that an accused is entitled to lead evidence on his good character.

29. The accused also relied on the defence of mistake as availed by Section 10 of the Penal Code. He finally submitted that any reasonable doubt found in the case must always benefit the accused as was held in **Ouma v Republic [1986] KLR 617**.

30. Section 203 of the Penal Code under which the accused is charged provides that:

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

31. The prosecution was therefore required to prove that the accused had malice aforethought and carried out an unlawful act that occasioned death. In other words the *mens rea* and the *actus reus* had to be proved.

32. That the deceased died from the injuries inflicted on him on the material day was confirmed by PW1, the brother of the deceased and PW4A, the mother of the deceased. PW15 Dr. Ngali Buko stated that he was present when his colleague Dr. Munyula performed post-mortem on the body of the deceased. The witness stated that the cause of death was as a result of a head injury. He produced a post-mortem report, which confirmed the said findings, as an exhibit in this case. All the witnesses who were at the scene confirmed that the deceased started bleeding from the head immediately the firearm was fired. The evidence therefore corroborates the autopsy findings. That the deceased died as a result of injuries received on the material day is therefore not disputed. Indeed the accused did not deny this obvious fact.

33. The accused appears to suggest that it could have been somebody else who fired the bullet that killed the deceased. This suggestion is without merit. All the witnesses present at the time of the incident indicated that the projectile that hit the deceased was discharged from the firearm of the accused. The evidence was corroborated by that of the firearms examiner who told the court that the spent cartridge submitted

to him was fired from rifle serial number 170032. A report was produced to back up this evidence. This is the firearm that was issued to the accused.

34. The accused's argument that the ballistics report should be disregarded as it was prepared at a supersonic speed has no legal basis. Although the ballistics expert stated that it normally took two weeks to examine a firearm and prepare a report, he did not say that it was impossible to carry out the task within a day. There is no other ground upon which the report can be challenged. In any case there is sufficient evidence from the eyewitnesses to show that it was the accused who released the projectile which killed the deceased. The act has been proved.

35. As already stated, the prosecution had a duty to prove the act and the intention in order to succeed in securing a conviction for the offence of murder. The question that follows then is whether the accused's actions disclose malice aforethought.

36. Section 206 of the Penal Code defines malice aforethought as follows:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-**

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

37. According to the evidence of some of the witnesses the accused's utterances prior to the incident indicates that there was malice aforethought. For instance PW3 Samwuel Kinyanjui Kihoto testified that the accused said he would kill somebody before he heard the gunshot. However, the circumstances under which those words were uttered and the actions of the accused do not establish malice aforethought.

38. PW4 and PW6 indicated that the accused held the gun up in the air. PW6 stated that before the incident the accused walked up and down talking with the people in a bid to control them. Perhaps it was to calm them down too. Further, PW1 indicated that he saw the accused attach an object to the gun which object PW6 confirmed was a Blank Firing Attachment (BFA). PW12 Chief Inspector Francis Mweu explained that a BFA is engaged in order to shoot blank ammunition automatically and that the accused's gun could handle blank ammunition.

39. The testimony of PW12 is crucial. He told the Court that:

**“When you use the blanks, the muzzle is blocked and one can fire automatically. All the gas comes through the side. Wachira covered the muzzle. He forgot there was a live bullet in the chamber. He removed the magazines of live bullets and replaced it with the blank magazine. He did not lock to remove the live round in the chamber. He applied pressure on the trigger. The live round in the chamber exploded and damaged the muzzle and the blank attachment on the muzzle. The destroyed fragments of the muzzle and the blank attachment together with the destroyed live bullet hit the victims. After changing every magazine, one should lock. Wachira should have known that there was a live bullet in the chamber.”**

40. During cross-examination the witness stressed that:

**“He blocked the muzzle, replaced the live magazine with blank magazine but left the live bullet in the chamber. What caused injuries is whatever came out of the muzzle. I believe they were fragments. If it was a bullet the victim could have died instantly.”**

41. PW16 Johnstone Musyoki Mwangela the ballistics expert in response to a question put to him by the defence counsel stated that:

**“If one shoots a person at close range using the rifle, the head will be blown away.”**

42. From the evidence that was adduced it becomes clear that the accused did not intend to use a live bullet to scare away the crowd that was pressing towards those who were skinning the hippopotamus. His actions though criminally negligent cannot be elevated to malice aforethought.

43. The absence of malice aforethought was also confirmed by the evidence of PW4 and PW6 who indicated that the accused cocked and held the gun up in the air and not that he aimed at anyone. Further, PW1 and PW6 stated that a BFA was attached to the rifle and the ballistics expert confirmed that there was a BFA that splintered. In fact the expert stated that had live bullets been fired at close range the head of the deceased would have been blown off. There was also no evidence of an entry and exit wound on the head indicating that a bullet had penetrated through. The injuries sustained by the only other casualty, PW7, were multiple lacerations on the left cheek and a wound on the right side of the face with no indication they were bullet wounds. There was therefore no proof to the required standard that malice

aforethought preceded or accompanied the actions of the accused when he fired at the crowd.

44. Despite submissions by the defence counsel to the contrary, the accused does not deny that the deceased died as a result of his actions. The question that remains to be answered is whether the accused is guilty of manslaughter or whether he acted in self-defence or mistake of facts as he claims.

45. The defences put forward by the accused are found in the Penal Code. Section 10 prescribes the defence of mistake of fact thus:

**“10. Mistake of fact**

**(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.**

**(2) The operation of this section may be excluded by the express or implied provisions of the law relating to the subject.”**

46. The defence of mistaken belief was explained by Lord Cross of Chelsea in the case of **DPP v Morgan [1975] All ER 347** at page 352 as follows:

**“If the words defining an offence provide either expressly or impliedly that a man is not to be guilty of it if he believes something to be true, then he cannot be found guilty if the jury think that he may have believed it to be true, however inadequate were his reasons for doing so. But, if the definition of the offence is on the face of it " absolute " and the defendant is seeking to escape his prima facie liability by a defence of mistaken belief, I can see no hardship to him in requiring the mistake—if it is to afford him a defence—to be based on reasonable grounds. As Lord Diplock said in *Sweet v. Parsley*, there is nothing unreasonable in the law requiring a citizen to take reasonable care to ascertain the facts relevant to his avoiding doing a prohibited act.”**

47. The accused claims he acted on the mistaken belief that he had removed all the live rounds of ammunition from the rifle. Indeed he appears to suggest that the injuries to the deceased were caused by the explosion of the BFA. He is thus not saying that there was a live bullet lodged in the chambers of the rifle at the time he attached the BFA. His assertion that the BFA simply exploded cannot be believed. PW12 who was among the first police officers to arrive at the scene stated that **“I placed myself where the accused was standing. I collected spent cartridge of 7.62mm”**. This evidence confirms that the cause of the explosion was the live bullet. The accused having been trained on use of firearms failed, as per the evidence of PW12, to lock in order to remove the live bullet in the chamber. He could not therefore have held an honest and reasonable belief that he had removed all the live bullets. This particular defence is thus not available to him.

48. The other defence taken up by the accused is that of self defence as provided by Section 17 of the Penal Code. The provision states:

**“17. Defence of person or property**

**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.”**

49. The Court of Appeal in **Ahmed Mohammed Omar & 5 others v Republic [2014] eKLR; Criminal Appeal No. 414 of 2012 (Nairobi)** discussed at length the common law principles relating to the defence termed self defence. The Court stated that:

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

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

50. The Court also cited the English case of **R v Williams [1987] 3 All ER 411** where Lord Lane, C.J. held that:

**“In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant’s alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”**

51. From the principles enunciated in the English cases cited by the Court of Appeal in **Ahmed Mohammed Omar** (supra), the question as to whether an accused person acted in self-defence can only be decided based on the facts of each case.

52. Before proceeding to restate the relevant facts, I will at this stage refer to Section 112(1), (3) & (4) of the Wildlife Conservation and Management Act, 2013. These are the provisions that govern the use of firearms by wildlife rangers like the accused person. They state:

**“112. Use of firearms**

**(1) The President may, through the Inspector-General of the National Police Service, make available to the uniformed and disciplined officers of the Service such firearms as may be necessary for the Service to carry out its functions under this Act.**

**(2) ....**

**(3) A member of the uniformed and disciplined cadre, after acquiring the requisite training, and when authorized by the Director-General, may use firearms for the following purposes, in the course of and for his lawful duty—**

**(a) in the course of law enforcement against—**

**(i) any person charged with an offence punishable under this Act, when that person is escaping or attempting to escape lawful custody;**

**(ii) any person who, by force, removes or attempts to remove any other person from lawful custody;**

**(iii) any person who, by force, attempts to prevent the lawful arrest of himself or any other person; or**

**(iv) any person unlawfully hunting any wildlife using a firearm;**

**(v) any person unlawfully hunting any wildlife using a firearm;**

**(b) in self-defense or in defense of another officer or other person;**

**(c) for the protection of people and property against any animal causing destruction to human life or crops or livestock or property;**

**(d) for the protection and safety of visitors against banditry or animals;**

**(e) in the course of problem animal control; and**

**(f) wildlife veterinary activities**

**(4) Notwithstanding the foregoing, a uniformed and disciplined officer of the Service shall not resort to the use of firearms—**

**(a) under paragraph (a)(i) of subsection (3), unless the officer concerned has reasonable grounds to believe that he cannot otherwise prevent the escape, and unless he has given ample warning to such person that he is about to use a firearm against him, and the warning is unheeded; or**

**(b) under paragraph (a)(ii), (a)(iii) or (a)(v) of subsection (3), unless the officer concerned believes on reasonable grounds that he or any other person is in danger of grievous bodily harm, or that he cannot otherwise prevent the removal, effect the arrest or, as the case may be, defend himself or the other officer or person.”**

53. The law under which the accused operated specifies circumstances in which he can use a firearm. He was allowed to use the firearm to kill the hippopotamus as that was **“in the course of problem animal control”**. The law also allowed him to use the firearm **“in self-defense or in defense of another officer or other person”**. The Act therefore reinforces the Penal Code in so far as the use of the firearm in self-defence is concerned.

54. The question is whether the use of the firearm by the accused was in defence of self, another officer or any other person. The accused’s testimony was that as the crowd swelled they had to control it as they feared that the people who were armed with pangas and knives would injure each other as they fought over the carcass. Answering questions put to him during cross-examination, the accused stated that:

**“The deceased arrived during the slaughtering of the hippo. We had to control the crowd. I had handled such a scene before. There was no danger to me. You shoot in the air when trying to control a crowd. I did not shoot in the air as I was confident I had blank bullets.... I was trained on how to use a firearm. I was trained to fire in the air to control the crowd. I was stationary when I fired at the crowd.”**

55. The accused therefore admitted that there was no danger posed to him by the crowd. His boss and colleague Corporal Dede stated during cross-examination that the accused pulled the trigger by accident. Although this assertion contradicts the accused’s case that he directly shot at the crowd, it only shows that there was no danger to both the accused and his boss. In fact Corporal Dede testified that the danger only arose after the deceased was injured. Two people who were armed with pangas advanced towards them menacingly and they fled to their camp. This is the only time they may have been justified to use their firearms but they wisely did not do so.

56. PW1, the brother of the deceased talked of the crowd pressing towards the carcass. It was then that he heard Corporal Dede direct the accused to shoot in the air. PW3 confirmed this evidence and so did the other witnesses. There is no indication from any of the prosecution witnesses and even the accused that the people advancing towards the carcass had threatened to cut each other. Their sole aim was to get a piece of the carcass. There was therefore no threat to the accused, his colleague or any of the members of the public present. Indeed when PW12 arrived at the scene after the deceased had been taken to hospital, he found people peacefully sharing the meat. The danger of the people cutting each other when sharing the meat was therefore non-existent. The use of the firearm by the accused was not justified in the circumstances.

57. Section 202 of the Penal Code defines manslaughter as follows:

**“202. Manslaughter**

**(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.”**

58. The accused person failed to ensure that he had emptied his rifle of live bullets before affixing the BFA. He also directly fired at the crowd instead of firing in the air to scare them. In any case, the circumstances that prevailed did not justify the use of a firearm at all. His actions amounted to unlawful actions or omissions which eventually resulted in the death of the deceased. Although the accused is charged with murder, the actual offence established is that of manslaughter. The reasons as to why the actions of the accused did not amount to murder have already been stated in the body of this judgement. I therefore find the accused guilty of the lesser charge of manslaughter contrary to Section 205 of the Penal Code and I convict him accordingly.

**Dated, signed and delivered at Malindi this 21<sup>st</sup> day of February, 2019.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**