



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 55 OF 2014

REPUBLIC.....RESPONDENT

VERSUS

FREDRICK NTHIGA MWANIKI....ACCUSED

JUDGEMENT

INTRODUCTION

1. The accused an Insurance Executive was on the night of 27th/28th June 2014 coming from some undisclosed place where driving his motor vehicle Pajero black in colour along Ngong Road-Naivasha Road Nairobi on his way home, while the deceased **FRANCIS AMBUNDO** a mechanic at Donholm having had a long day at work, joined his elder brother **BOAZ AMBUNDO** a business man at Dagoretti corner and cousin **FRANCIS ANDREW NABUCHIRI** an hotelier doing what Kenyan men are known for – drinking alcohol and maybe watching European football, when they decided at midnight that they had had enough and entered into the deceased's motor vehicle a Toyota 110.

2. As fate would have it, the two groups met at some point along Naivasha Road and what followed thereafter is that the accused a licensed gun holder shot both the deceased and **PW1** leading to the death of the deceased and serious injuries to his brother. That is how they found their way un invited before me, to establish the truth of what happened, as the story of the prosecution and defence as to what happened needs judicial pronouncement and that is why **Article 159 (1)** of the **Constitution** states that Judicial Authority is derived from the people and vests in and shall be exercised by the court and tribunals established by or under the **Constitution** and **Article 165 (3) (a)** gives the High Court unlimited original jurisdiction in criminal and civil matters. To the accused he presumed the deceased and his group were thugs while to **PW2** it was a case of road rage. The court now has the burden of establishing the truth.

3. As a result of the meeting between the parties herein, the accused was on 4th July 2014 charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the of 28th day of June 2014 at Dagoretti corner in Dagoretti District of Nairobi County murdered **FRANCIS AMBUNDO**. He pleaded not guilty to the said charges and to prove its case the prosecution called and examined seven (7) witnesses. When put on his defence the accused tendered in his defence sworn statement without calling any witnesses. This court is therefore called upon to determine whether the accused is guilty as charged or not and that is the subject of this Judgment.

PROSECUTION CASE

4. **PW1 BOAZ AMBUNDO** testified on oath that they met at Maxcare Bar in Dagoretti Corner together with one **Vincent Wamwayi** who left them at 9.30 p.m. when the deceased joined them. **PW2** joined them at 11.00 p.m. and they drunk upto 12.00 when they left for their respective houses in the deceased's motor vehicle. It was his evidence that as they joined Naivasha road, the accused came from behind and blocked their way. Thinking that he was drunk they swerved and gave him way. Upon reaching Wanyee Road the accused once more blocked their way. They swerved and moved only for the accused to block them a third time. The deceased then came out to check why they had been blocked, only to be asked by the accused what kind of people they were who were driving carelessly. Without getting out of his motor vehicle the accused shot at them. It was his evidence that the deceased was on the driver's side while he was on the passenger's side of the accused motor vehicle.

5. It was his evidence that the deceased was shot three times on the hand, arm and ribs. He was shot on the left hand too. The accused thereafter called the police. In cross-examination he confirmed that the accused only shot at them when they followed him to his motor vehicle. He stated that after the accused had ordered them to lay down, which order they complied with, he did not shoot at them thereafter.

6. **PW2 FRANCIS ANDREW NABUCHIRI** testified that as they joined Naivasha Road, the accused drove behind them at high speed

before stopping behind them. He then overtook them before stopping in front of their motor vehicle leaving him behind. The deceased and **PW1** got out of the motor vehicle leaving him behind. He then heard the deceased asked the duo whom they thought they were followed by three gunshots. The accused then came out of his motor vehicle to where he was and asked whether there was someone in the said motor vehicle to which he responded by coming out. The accused then called the police and informed them that he had disagreed with people on the road. The police came to the scene and he surrendered his gun to them. He then took the injured to hospital in the deceased's motor vehicle.

7. In cross-examination, he stated that as they were entering the main road, the accused almost hit them with his motor vehicle. **PW3 DR. DOROTHY NJERU** performed post-mortem examination on the body of the deceased who had gunshot wounds and as a result of the said examination, formed an opinion that the cause of death was abdominal injuries due to gunshot. She stated that the wounds showed darkening of the skin confirming that the shots were at close range.

8. **PW4 CORP. MICHAEL KIPNGETICH BETT** visited the scene having been called by the accused and confirmed that the deceased was injured on the abdomen. He instructed the accused in the company of **PC KIRINGA** to take him to the hospital. He further took custody of the accused' gun and certificate thereof. He recovered three spent cartridges at the driver's seat of the accused's motor vehicle. He confirmed that the accused too had injuries as he was bleeding. The accused was later on escorted to Riruta Police Station where he was booked. In cross-examination he confirmed that one of the conditions of the licence is that you can use the firearm if your life was in danger and that the accused was justified using the firearm in the circumstances prevailing at the time.

9. **PW5 DR. JOSEPH MAUNDU** examined the accused who had bruises on the right lower lips and soft tissue injuries over the neck. He confirmed that the accused was mentally fit to stand trial. **PW6 CORP. HENRY NJUGUNA** stated that he heard from the police communication of a shoot out along Naivasha Road and responded to the same by going to the scene. The following day he followed the accused to the police station where he interrogated him. He collected his firearm which he forwarded to the Ballistic Department for examination. He conducted a search on the accused's motor vehicle and recovered a fourth spent cartridge. In cross-examination he stated that the deceased was on the driver's side of the accused motor vehicle while **PW1** was on the left side thereby surrounding the motor vehicle. He stated that the shooting occurred around the accused's motor vehicle. It was his evidence that the deceased and **PW1** went to the accused's motor vehicle.

10. **PW7 MR. ALEX MWANDAWIRO** a firearm expert examined the firearm and the ammunition recovered from the accused and the scene and confirmed that it was a firearm and the spent cartridges were fired from it.

DEFENCE CASE

11. When put on his defence the accused stated that while driving at night, the deceased attempted to block him and he avoided it by swerving. He then parked his motor vehicle on the opposite side when two gentlemen approached him and one hit him on the left cheek and he realized that he was under attack and to deter them, he opened firearm with one of the attackers running away while the second one attempted to take his gun even after he had shot at him, causing him to fire again hitting the deceased on his arm. He then ordered them to lay down as he thought there were more in the motor vehicle.

12. It was his evidence that his intention was not to kill but to immobilize them, he did not know how the bullet entered the deceased abdomen. It was not possible for him to run away or fight back so he used the firearm in self defence. He did not fire again at them once they complied with his order. In cross-examination he confirmed having shot the deceased and that he was under attack by the deceased that it is why he shot at him again. It was his evidence that **PW1** ran away from the scene saying that "*kumbe ni police*", meaning that he was a policeman.

SUBMISSION

13. At the close of the defence case, the accused filed written submissions which were highlighted by Mr. Mwaniki while the State through Mr. Okeyo adopted their submissions at no case to answer. On behalf of the defence it was submitted that the State failed to prove that the shooting was unlawful. It was submitted that under **Article 26 (3)** of the **Constitution** one can be deprived of life intentionally provided that it is authorized by the Constitution and/or any other written law from which reference was made to **Section 14 (2)** of **Cap 56 Public Order Act** which allows killing in defence of person or property where a person is allowed to use reasonable force. It was submitted that the above is permitted also under **Section 17** of the **Penal Code** as set out in the case of **PALMER v REGINA [1971] 1 ALL ER 1077**. It was submitted that the prosecution failed to prove that the accused acted with malice aforethought as defined in Section 206 of the Penal code and as elaborated in the case of **REPUBLIC v TUBERE S/O OCHEN [1945] 12 EACA 63**.

14. It was submitted that the accused was justified to use force as he believed that his life was in danger and that there was no evidence that the accused knew the deceased. It was contended that the court ought to look at the conduct of the accused who calmly sat in his motor vehicle and did not shoot until he was attacked, when he first issued a warning shot but the deceased and **PW1** proceeded to attack him, the waving shots notwithstanding.

15. On behalf of the state Mr. Okeyo submitted that the only issue for determination was whether the accused had malice aforethought. It was submitted that the deceased and **PW1** were not armed while the accused on the other hand had a gun and that there was no element of any provocation on the part of **PW1** and the deceased. It was submitted that it was the accused who provoked the deceased and **PW1** by trying to block the road. It was submitted that there was no reason which prevented the accused from driving off if he believed that the place was unsafe. It was submitted that the force used by the accused was not justifiable.

ANALYSIS AND DETERMINATION

16. To prove its case on a charge of murder, the prosecution is required to prove beyond any reasonable doubt the following elements of the offence:-

a. The fact and the cause of death.

b. That the said death was caused by unlawful act of omission or commission on the part of the accused person.

c. That accused acted with malice aforethought.

17. The fact and cause of death of the deceased is not in dispute in this cause. Both evidence tendered by the prosecution and defence shows that the deceased died as a result of gunshot wound inflicted upon him by the accused the night/morning of 28th June 2014 almost five years ago as at the time of this Judgement. **PW1** who was with the deceased together with **PW2** both confirmed that he was shot by the accused while they were driving along Naivasha Road in Nairobi at Wanyee Area. The accused in his testimony confirmed shooting the deceased whom he later took to the hospital at the instruction of the police who came to the scene led by **PW4 CORP BETT** and **PW6 CORP. HENRY NJUGUNA**. The cause of death was proved through the evidence of **PW3 DR. DOROTHY NJERU** to be abdominal injuries due to gun shot. I am therefore satisfied and hold that the fact and cause of death was proved beyond any reasonable doubt.

18. That the said death was caused by the accused is further not in dispute. The accused was placed at the scene, his gun according to evidence of **PW7 MR. ALEX MUDINDI MWANDAWIRO** was used to inflict the fatal injuries on the deceased and to cause serious injuries to **PW1** who was with the deceased on the material day. The accused in his defence confirmed having discharged his firearm. **DR. NJERU (PW3)** stated that the deceased was shot at close range which the accused corroborated in his evidence in defence. It is therefore clear as a cloudless sky that the death of the deceased was caused by unlawful act on the part of the accused the said death being unnatural.

19. The only issue in dispute which this court is called upon to exercise its judicial mind on whether the said death was caused with malice aforethought, that is, the mental element to enable the court find the accused culpable. Put differently is whether the accused had any justifiable reason to cause the death of the deceased as stated in his defence before court.

20. Section 206 of the Penal Code defines malice aforethought in the following clear terms:-

“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.”

21. In the case of **REPUBLIC v STEPHEN SILA WAMBUA MATHEKA [2017] eKLR** Nyakundi J. had this to say on malice aforethought:-

“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. In the OGELO v REPUBLIC [2004] 2KLR 14 the Appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter-alia that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution.”

22. The question for the court to answer is whether the prosecution proved beyond any reasonable doubt any of the elements that constitute malice aforethought as defined herein above, put differently is whether the accused established the defence of self defence as provide d for under Section 17 of the Penal Code which provides that:-

“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.”

23. 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 submitted by the defence in the following terms:-

“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.”

24. The following facts are undisputed. The incident took place at about midnight. The accused being a licensed gun holder was alone in his motor vehicle while the deceased and his group were three as submitted by the defence and supported by the evidence on record, the deceased and **PW1** assaulted the accused from either side of the motor vehicle. It is the deceased and **PW1** who left their motor vehicle and went to the accused motor vehicle where he had stopped by the side of the road. **PW5 DR. MAUNDU** confirmed that the accused had sustained injuries on his face and neck thereby corroborating the accused’s account of attack. **PW1** admitted that they indeed went to the accused’s motor vehicle with the intention of finding out why he had blocked them.

25. It was the duty of the prosecution to dislodge the defence raised by the accused which based on the evidence on record it failed to do. The question which the court has to answer is what would have a reasonable man in the situation the accused found himself would have been expected to do. It was his evidence that he used his firearm as in the circumstance as he was allowed to do under the Firearm Licence he was holding. **PW4 CORP. BETT** confirmed the accused was justified in using his firearm in the situation prevailing.

26. The Court of Appeal in the case of **AHMED MOHAMMED OMAR & 5 OTHERS** *supra* had this to say:-

“They had been issued with guns and live bullets. ... It was about 12.30 a.m. They fired twice into the air. Undeterred by the warning shots, the deceased, who were armed with pangas, swords and what looked like a gun, confronted the Appellants. We think, in the circumstances, the Appellants reasonably believed that their lives were in danger or were in danger of serious bodily injury.”

27. Did the accused use reasonable force? Based on the circumstances of this case and evidence before me, there is no evidence that the accused used excessive force, he believed he was in danger, having shot **PW1** the same left his side of the motor vehicle while the deceased continued with the attack. His action thereafter shows that he did not have any malice aforethought as he did not shoot at **PW2** who did not follow the duo to the accused’s motor vehicle. He thought that the duo were thugs who were out to attack him and reasonably took action to protect himself.

28. Having therefore succeeded in establishing the defence of self defence it follows that the offence of murder has not been established and proved beyond reasonable doubt for which the accused is entitled to an acquittal. The prosecution failed to prove that the force used by the accused was excessive so to found him culpable of the lesser offence of manslaughter. There is evidence that the accused acted as a result of road rage. Having stopped by the road side, the deceased and his group had the option of driving away but they thought they were men enough to attack the accused who had allegedly blocked them.

29. I accordingly find the accused not guilty of murder contrary to **Section 203** of the **Penal Code** and sad as it is that the deceased lost his life, he is the one according to the evidence before the court who invited the action leading to his death as confirmed by **PW2** in his interview to the press in particular Citizen TV as played before court. The accused is to be set free forthwith unless otherwise lawfully held and it is so ordered.

Dated, signed and delivered at Nairobi this 27th day of June, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Mwaniki for the Accused

Accused present

Court assistant- Karwitha