



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL CASE NO. 11 OF 2019

BETWEEN

REPUBLICPROSECUTOR

AND

JOSEPH MAUTIACCUSED

JUDGMENT

1. The accused, **JOSEPH MAUTI**, is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the information are that on 11th April 2019 at Nyakegogi Sub-location in Sameta Sub-County within Kisii County, he murdered **DOMINIC OYUNGE ONTUMI** (“the deceased”). The prosecution case was that the accused, a police officer, walked into Maximum Bar at Itumbe and shot the deceased. The prosecution marshalled 10 witnesses while the accused made an unsworn statement in his defence.

2. The offence of murder is defined by **section 203** of the **Penal Code** as follows; “*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*” The ingredients to be proved by the prosecution are threefold; first, the death of the deceased and the cause of that death; second, that the accused committed the unlawful act that led to the death; and third, that the accused committed the unlawful act with malice aforethought. The standard of proof to be achieved by the prosecution is beyond any reasonable doubt.

3. The fact and cause of death of the deceased was not in dispute. The postmortem on the deceased’s body was done by Dr Brian Ayara (PW 1) on 12th April 2019 at the Kisii Teaching and Referral Hospital (“KTRH”) Mortuary. He noted that the deceased’s body was pale as a result of loss of blood. He observed that on the right side of the abdomen there was an entry wound measuring 10 X 10 mm above the iliac spine and on the left side there was an exit wound which was ragged and which was about 70mm long. Internal examination revealed that there were corresponding injuries in the abdomen, internal bleeding and a fracture of the iliac bones on the left hip. The deceased also had a fracture of the bone on the left hand. PW 1 concluded that the deceased died as a result of excessive bleeding due to a single penetrating gunshot wound injury.

4. The incident took place on 11th April 2019 at about 10.30 pm at Maximum Bar (“the Bar”) at Itumbe market. Eric Mosiria Ochieng (PW 2), Emily Sarange Ongeru (PW 3), Lilian Mokeira (PW 4) and Vincent Mogire Nyabuto (PW 5) were all at the Bar. PW 2 testified that he knew the accused as he was a policeman in Itumbe. On that night he was seated near the counter when the accused, who was dressed in police uniform while armed with gun, entered the Bar. He came close to where he was sitting in Ekegusii, “*I will kill someone ... I will kill someone....*”. After a short while, he heard a gun shot and fell down immediately. He was about 4 metres away from the deceased. He recalled that as the accused walked out of the bar, he kept saying that he would kill someone.

5. PW 3 told the court that the accused entered the Bar armed with a gun. She recalled that he went where PW 4 was at the first counter and demanded beer. She also heard him saying that he would kill someone. Thereafter he went to the second counter where she heard him saying in Ekegusii, “*I will kill someone with a gun*”. She saw the accused pointing his gun at the deceased who was seated next to her. While the accused was talking, she heard a gunshot. She became confused and ran out. When she returned, she found many people had gathered around the deceased who had collapsed in a pool of blood.

6. PW 4, an employee of the Bar, testified that she was working at the first counter when the accused came to where she was and demanded to be served beer. She told him to pay but he told her he would not pay. He put the gun on the counter and told her that he would shoot her. When he left her to go to the other bar, she heard a gunshot. She immediately ran out of the bar. When she returned, she found the deceased had collapsed in a pool of blood.

7. PW 5 also testified that he knew the accused since he was a police officer in Itumbe. He recalled that the accused came into the Bar threatening to kill someone. As he was seated at the counter, he could see what was happening. The deceased was seated about 5 metres away from him when the accused shot him. The accused ran away thereafter.

8. The gun shot was heard by members of the public who came to the Bar to see what was happening. Chief Inspector, George Wang'ombe (PW 7) was at home when he was called by a member of the public and informed that a shooting had taken place. He went to the police station and found the accused handing over his rifle to the officer in charge of the armory, Corporal Ezekiel Kiomi (PW 6). PW 6 recalled that he was called by the officer at the report office, PC Abdi Omar, and informed that the accused had fired his gun at Itumbe market. When he went to the report office, he found the accused who told him that he had killed one person. He took the rifle, disabled the magazine and counted 29 bullets. He testified that he had issued the accused with 30 rounds of ammunition when he reported on duty earlier that evening.

9. As agitated member of the public came to the station, PW 6 and PW 7 arrested the accused and placed him in the cells. They proceeded to the Bar where they found the deceased's body in a pool of blood. The investigating officer, Chief Inspector Paul Langa (PW 8), also testified that he was at home when he was informed of the shooting at the Bar. He went to the scene accompanied by Corporal Charles Kitur (PW 10), a Scene of Crime officer, who took photographs of the scene which he produced in evidence. PW 10 also testified that he collected a spent cartridge at the scene next to the deceased's body. PW 8 arranged for the deceased's body to be taken to KTRH Mortuary where the post mortem was conducted. In the meantime, the accused was taken Kisii Police Station to protect him from the agitated members of the public who posed a threat to his safety.

10. In order to ascertain whether the accused was armed, PW 10 called for the Arms Movement Register which was produced by PW 6. It showed that the accused was issued with and signed for an AK 47 Rifle Serial No. 60033624 with 30 rounds of ammunition of 7.62mm caliber on 11th April 2019. In order to establish whether the firearm issued to the accused was capable of firing and whether it fired the spent cartridge that was found at the scene, he forwarded the rifle, the spent cartridge allegedly fired and the 29 rounds of ammunition by an Exhibit Memo dated 16th April 2019 to the Ballistics Department.

11. Inspector Kenneth Chomba (PW 9), a ballistic expert with the Directorate of Criminal Investigations, examined the AK 47 Rifle Serial No. 6003624 and its components parts and found them to be in good working order and capable of firing. He concluded that it was it was a firearm within the meaning of the *Firearms Act (Chapter 114 of the Laws of Kenya)*. He also examined the ammunition handed over to him and concluded that the ammunition was capable of being fired. PW 9 also conducted a microscopic examination of the fired cartridge and compared it to the test ammunition fired and confirmed that they were all fired from the AK Rifle Serial No. 6003624 issued to the accused.

12. At the close of the prosecution case, I put the accused on his defence. He elected to make an unsworn statement. He told the court on the material day, he reported to the Police Station at 6.00pm. While working, he ordered supper at the Bar. While still in uniform, he left work carrying his rifle at about 10.00pm to go and eat at the Bar. He explained that it was unfortunate that when he was at the Bar, he stood up and heard the blast of one round of ammunition. He immediately ran outside the Bar and while outside, people started chasing him so he ran to the Police Station for safety. He met PC Omar at the report office and explained to him that he had discharged one bullet. The accused stated that he did not know how the bullet was discharged. He handed over the gun and magazine in the presence of PW 6 whereupon he was arrested.

13. The accused also stated that the court that he had enlisted in the General Service Unit of the Police Service in 2002 and had served without any blemish on his record. He explained that he did not have any quarrel with anyone or any problem with members of the public at Itumbe. He also stated that he was God fearing and happily married with 3 children and that incident came as a shock to him.

14. There is no doubt that it is the accused who shot the deceased. He was the only person who had a firearm at the Bar on that night, a fact confirmed by PW 2, PW 3, PW 4 and PW 5 who saw him walk into the bar on the material night with a gun. Although PW 2, PW 3 and PW 4 heard the gun shot, it is only PW 5 who testified that he saw the accused shoot the deceased. The prosecution also proved that the gun used to fire the deceased was the one issued to the accused. PW 6 confirmed that he issued the accused with the AK 47 Rifle which PW 9 confirmed was used to fire the bullet that killed the deceased. Further, the spent cartridge found next to the deceased's body was proved to have been discharged by the firearm issued to the accused.

15. In his unsworn statement, the accused confirmed that his gun discharged a round of ammunition but the tenor of his defence was that the discharge of the firearm was accidental. The question then is whether the shooting was accidental or whether it was done with malice aforethought. I now turn to consider this issue.

16. In dealing with this question I must point out that use of firearms by police officers is regulated under **section 61** of the *National Police Service Act, Act No. 11A of 2011* which states as follows:

62(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.

17. The rules on the use of force and firearms are to be found in **Part B** of the *Sixth Schedule* titled, "*Conditions as to use of Firearms*" which provide, in part, 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.
3. A police officer shall make every effort to avoid the use of firearms, especially against children. [Emphasis mine]

18. In *IP Veronica Gitahi and Another v Republic MSA CA Criminal Appeal No. 23 of 2016 [2017] eKLR*, the Court of Appeal dealt with the scope of application on the use of force with the firearm under the *National Police Service Act* vis-a- vis the common law and in particular the defence of self defence. It observed as follows:

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

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

19. The evidence is clear and the accused admits that he went in the Bar in uniform and carrying his firearm. This is not a case where the accused was justified in using his firearm or a case where he complied with the regulations for the use of firearms under the National Police Service. The testimony of PW 2, PW 3, PW 4 and PW 5 did not allude to any fact from which this court could conclude that the accused was under any threat from the deceased or anyone at the Bar. The accused, in his own defence, did not assert such a right to defend himself or act to protect life or property of any other person. At this stage, I wish to point out that it is the duty of the prosecution to disprove that the discharge of the firearm was not accidental but was done with malice aforethought.

20. Apart from the fact that the accused came in the Bar in uniform and armed, the testimony of PW 2, PW 3, PW 4 is that the accused was uttering threats and saying in Ekegusii that he wanted to kill someone. He first approached PW 4 whom he threatened to shoot while pointing the gun at her and a few minutes later he went where the deceased was and shot him. The accused's statement that he had ordered food and went to eat the Bar is not supported by the witnesses who were at the Bar. They are all clear that he demanded to be served alcohol and nothing was suggested to any of them that he had ordered food earlier and had come to eat. This evidence dispels any notion that the shooting was accidental hence I reject his defence on that account.

21. Malice aforethought constitutes the mental element of the offence of murder, that is, *mens rea* or the *intention* to kill another person. **Section 206** of the *Penal Code* defines it as follows;

206. 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.

22. In determining whether there was malice aforethought, the court must look at the entirety of circumstances and in particular the nature of weapon used and the manner in which the deceased was injured and 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 stated as follows:

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...

23. As I stated elsewhere in this judgment, the use of a firearm by a police officer is circumscribed by the *National Police Service Act*. The accused did not have any justification for discharging the firearm. He expressed threats when he entered the Bar and threatened to shoot someone. Moreover, the accused being a police officer ought to have known that shooting the deceased or indeed any other person with a firearm would cause grievous harm or indeed death. Nothing emerged from the evidence suggesting the accused's motives and I can only speculate what caused him to 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. I therefore find that the prosecution proved malice aforethought in line with **section 206(a)** of the *Penal Code*.

24. I find the accused, **JOSEPH MAUTI**, guilty of the murder of **DOMINIC OYUNGE ONTUMI** contrary to **section 203** of the *Penal Code* and I convict him accordingly.

SIGNED AT NAIROBI BY

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISII this 25th day of JULY 2019.

R. E. OUGO

JUDGE

Mr Nyagwencha, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.