



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**HIGH COURT CRIMINAL CASE NO. 73 OF 2011**

REPUBLIC .....PROSECUTOR

VERSUS

JOHN KARARU WANGUI.....ACCUSED

**JUDGMENT**

**INTRODUCTION**

1. The accused **JOHN KARARU WANGUI** was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were as follows:-

COUNT 1 On 18<sup>th</sup> September, 2011 at Mukaru Pub in Kawangware Riruta within Nairobi County murdered **ESTHER NJERI GIATHI**.

COUNT 2 On 18<sup>th</sup> September, 2011 at Mukuru Pub in Kawangware Riruta within Nairobi County murdered **ALI MWAMBURI ABDALLAH**.

2. On 28/9/2011 he pleaded not guilty to both counts before Justice Ombija as he then was and on 15/2/2012 his trial commenced before the said Judge who heard the evidence of nine (9) prosecution witnesses before retiring from the Judiciary. On 16/6/2016 direction were issued herein by Justice Lesiit under **Sections 201 (1) and 200** of CPC with direction that the cause proceed from where it had reached before me.

3. On 28/2/2017 the last prosecution witness **PW10 CPL JAIRUS NAMITI** testified before me and thereafter when put on his defence the accused gave unsworn statements of defence.

4. I must stated for record purposes that I did not have the advantage of hearing and seeing nine (9) prosecution witnesses but have read and analyzed their recorded testimony for the purposes of this judgment.

**PROSECUTION CASE**

5. **PW1 ERICK BABAYARO ONSRE** testified that he was a manager at Mukaru Gardens a day and night club when on 18/9/2011 at 1.00 a.m. there were revelers in the club among them three (3) men and three (3) ladies whom he had been told were police officers taking beer at a table who started quarreling amongst themselves and were advised by the other customers to go outside the pub to resolve their

differences. It was his evidence that once outside a physical fight broke out between two of the policemen of which one left promising to come back to show them whom he was.

**6.** Shortly after 10-15 minutes he returned with a G3 rifle and ordered everybody out before opening fire. PW1 then called an Administration police officer named James Kihara whom he informed of the shoot out. In cross examination he testified that he did not see the accused shoot anybody but only saw him with a gun and fixing the magazine.

**7. PW2 ALI MWAMBURI DALI** testified that he was in the company of **ALI ABDALLA** who had told him that he was going to get his girlfriend from Mukaru Garden bar, he escorted him to the gate before returning to his house and at about 3.00 a.m. heard gun shots coming from nearby at about 5.00 a.m. in the morning one Omondi told him that he had found the deceased dead at the gate of Mukaru Gardens and the body taken to City mortuary where he identified it.

**8. PW3 JOHN BARASA BAKARI** testified that he was working as a bouncer at Mukaru Garden and was on duty on 17/7/2011 when there were about two hundred (200) revelers including the accused whom he knew as an Administration policeman who was in the company of three police officers and three ladies between 9.00 p.m. to 1.00 a.m. when they started quarreling amongst themselves before the Assistant Manager ordered him to take out the accused and his companions who were breaching the peace. With the assistance of other bouncers they did remove the accused from the pub only for the him to come back with a promise that the people who were fighting him were going to know whom he was. He ran towards the AP Camp and returned with a G3 gun and called him "mrefu" as he went inside the bar and ordered everybody to get out of the bar. He then fired one shot into the air and another on the ground before he started shooting at anything and anybody in sight. The accused thereafter hi-jacked a customer motor vehicle but was unable to drive the same. He then took his rifle and went back to the AP Camp.

**9. PW4 LUCY WANJIKU UNGAI** identified the body of the one of the deceased **ESTHER NJERI GIATHI** at the city mortuary with a big hole at the back. **PW5 S. SGT. NGUMGU** stated that on 18/9/2011 at 0.300 hours he was alerted by a security officer that John Kararu who was manning AP Camp at Kawangware had left the armoury and took with him G3 Serial No. 53395 with twenty rounds of ammunition and on reaching Kawangware Co-operative Bank they heard gun shots from Mukaru Bar, after thirty minutes he saw the accused coming along armed. He was disarmed and at the scene they found two dead people a lady and a man. In cross-examination he confirmed that the accused had an injury on his head and one police officer collected cartridges at the scene.

**10. PW6 DR. PETER NDEGWA** performed post mortem examination on the bodies of the deceased and as regards **ESTHER NJERI GIATHI** who had a gaping exit gunshot wound on the right collar bone, ruptured right lung, he formed an opinion that the cause of death was due to a single gunshot. On **Mwamburi Abdallah** there was an entry gunshot wound on the right posterior chest wall which had exited at the left upper arm and formed opinion that the cause of death was exsanguinations on hemorrhage due to severe chest and vascular injury due to a single gunshot.

**11. PW7 APC JAMES KAHARA** stated that on 18/9/2011 he was in his house within the AP Camp when he heard loud gun shots. He called **SS JIMNAH NGUMGU (PW5)** with whom they proceeded to the scene. They subsequently disarmed the accused who ran away from Dans Bar **PW8 AP SSG SAMWEL KIPLAGAT** confirmed having issued the accused with a G3 rifle serial number J53395 with twenty rounds of ammunition which he recorded in the Arms Movement Register.

**12. PW9 CI ALEX CHIRCHIR** a firearm examiner testified that on 21/9/2011 he received from PC Leonard Kiptoo a G3 rifle No. KE- AP-J53359 with five rounds of ammunition and successfully test fired the rifle using three rounds of ammunition and formed an opinion that the firearm was capable of being fired and were firearms within the meaning of Firearms Act (Cap 114.)

**13. PW10 CPL JAIRUS NAMITI** stated that the accused an AP officer had been deployed to guard the DC's office and armoury when he left his place of work and changed into civilian clothes and joined people at Mukaru pub when a quarrel broke out at their table. He was subsequently thrown out by the

bouncers and he went to the camp for a gun which he returned with and started shooting at randomly ordering people inside the pub to leave and close the bar and as the deceased persons sensing danger were leaving the bar he shot both death at the gate of the bar. The accused was eventually arrested and charged upon confirmation by Dr. Kamau that he was fit to stand trial.

## **DEFENCE CASE**

14. When put on his defence the accused stated that on 17<sup>th</sup> in the morning he reported on duty at Kenya power from 6.00 a.m. to 12.00 and thereafter joined his friends for drink at a club called Uchumi from 6.00 p.m. He was supposed to be on guard at an AP camp but does not remember what happened thereafter only to wake up at Langata Police station on 18<sup>th</sup>. It was his evidence that he does not remember what occurred on the fateful night.

## **SUBMISSIONS**

15. On behalf of the prosecution it was submitted that by going to get a firearm and loading the same and proceeding to fire the same ought to have known the result of his action. It was submitted that the deceased persons died as a result of gunshot wounds which came from a gun which was legally issued to the accused. It was submitted that the accused ought to have known that the firearms could cause death and that his defence was a mere denial.

16. On behalf of the defence it was submitted that none of the prosecution ten witnesses saw the accused fire any shot. It was submitted that there was no direct evidence that link the accused to the fatal shooting and that possessing a gun was not evidence of murder. It was submitted that the case was purely on circumstantial evidence which did not point exclusively to the guilt of the accused. It was submitted that the prosecution had failed to prove malice aforethought and that since there was no evidence that the accused knew the deceased persons to transfer malice it must be demonstrated that the accused had intention.

17. It was submitted that the evidence tendered shows that the accused was heavily intoxicated which diminished his criminal liability. It was further submitted that there was a doubt on the murder weapon which was referred to as J53395, 53395 and AP J53395 and therefore there was a dispute as to whether it was the same weapon issued to the accused raising doubt into the prosecution cases.

## **ANALYSIS AND DETERMINATION**

18. For the prosecution to sustain a conviction on a charge of murder under Section 203 of the Penal Code the following ingredients of the offence must be proved beyond any reasonable doubt:

- a) The fact and the cause of the death of the deceased.*
- b) The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person.*
- c) The fact that the said unlawful act or omission was caused by malice aforethought.*

19. The fact and the cause of death of the deceased persons was proved by the evidence of the following witnesses:-

**PW2 ALI MWAMBURI DALI** a cousin to one of the deceased persons identified the body of **ALI ABDALLAH** and his girlfriend at the city mortuary, **PW4 JOHN BARASA BAKARI** confirmed that when they came out of the club in the morning after the shoot out they found two people lying on the ground dead with gunshot wounds while **PW5 LUCY WANJIKU UNGAI** confirmed the death of **Esther Njeri Giathi**. **PW5 S. SGT NGUMGU** also confirmed the said death. The cause of death was positively confirmed by **PW6 DR PETER NDEGWA** who performed post mortem examination on their bodies and formed an opinion that the cause of death was due to a single gunshot which ruptured the right

lung of **ESTHER NJERI GIATHI** exiting from the collar bone while for **ALI MWAMBURI ABDALLAH** the cause of death was exsanguinations or hemorrhage due to severe chest and vascular injury due to a single gunshot with exit at the upper arm.

20. On whether the said death was caused by unlawful act on the part of the accused person in **PW1 ERICK BABAYARO ONSRE** a manager at Mukaru Gardens placed the accused person at the said bar on the material day. It was his evidence that the accused and his group started to quarrel and they were thrown out of the bar by **PW4 JOHN BARASA BAKARI** who was a bouncer at the bar. He knew the accused very well by name and as an administration police officer. It was PW4's evidence which was corroborated by PW1 that the accused promised to return back to the bar and those at the bar were going to know whom he was only to return armed with a G3 rifle after about ten minutes. It was his evidence that the accused went into the bar and ordered everybody to get out of the bar before he opened fire and started to shoot at anybody and anything on sight and threatening to kill anybody who attempted to disarm him.

21. **PW5 S. SGT NGUMGU** stated that he was alerted that the accused had left the AP Camp at Kawangware armoury armed with G3 rifle with twenty (20) rounds of ammunition. They followed him and shortly thereafter at Mukaru bar, they then saw the accused armed towards Dans Bar from where they disarmed him. It was his evidence that at that time the accused had discharged sixteen bullets. This evidence was corroborated by **PW7 APC JAMES KAHARA** who disarmed the accused and handed over his gun to Chief Inspector Nzuki of AP Camp Dagoretti.

22. **PW8 AP Senior Sergeant SAMUEL KIPLAGAT** confirmed having issued the accused with a G3 rifle Serial No. J53395 with twenty rounds of ammunition of 7.62mm which he confirmed through arms movement register which the accused signed for. **PW9 Chief Inspector Alex Chirchir** a firearm examiner confirmed that the cartridges collected from the scene were fired from the G3 rifle which was issued to the accused person.

23. From the evidence tendered the accused was positively placed and the scene armed with a G3 rifle which he had signed for. The deceased persons died as a result of gunshot wounds fired from the gun which was issued to the accused person. The accused had no lawful excuse to use the said gun. It is therefore the finding of the court that the death of the deceased was caused by unlawful act on the part of the accused person and therefore find that the second ingredient of the offence of murder has been proved beyond reasonable doubt.

24. The final issue for determination is whether the same was caused by malice aforethought:- It was submitted by the defence that the prosecution failed to disclose the intention on the part of the accused to commit murder and further that the accused was in such a state of intoxication that diminished his criminal liability. However the evidence tendered by the prosecution witnesses and in particular PW4 shows that the accused was in total and full control of his mental abilities. He was able to positively identify and recognize PW4 whom he called "Mrefu" whom he promised not to kill. The accused left the said scene and promised to come back for those who were fighting him at that time he knew his mission and what he was doing. This evidence was corroborated by PW1 who confirmed that the accused came back to the pub with a gun and ordered everybody out.

25. Malice aforethought is established under **Section 206** of the Penal Code in one or more of the following circumstances:-

*a) An intention to cause 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 intention to commit a felony.**

26. From the evidence tendered before the court it is clear that the accused had intention to kill or cause grievous bodily harm to those who had allegedly fought with him and that by going for a loaded gun he knew that there was a serious risk that death or grievous body harm would ensue from his acts and he committed those acts deliberately and without lawful excuse with the intent to expose potential victim to that risk as a result of those acts – see **NZUKI v REPUBLIC [1993] KLR 171**.

27. Whereas the accused intention has to harm those who had fought him and whereas there is evidence that the two deceased persons were not part of that group Section 206 is very clear that it is immaterial whether the person he intended to kill or harm is the actual person killed or not. He brought about the elements which constituted the crime charged and since his intention and the action coincided his action fell into the scope of transferred malice within the meaning of **REPUBLIC v LATIMER [1986] 17 QBD 359** as submitted by the prosecution. I therefore find and hold that the prosecution proved beyond any reasonable doubt that the unlawful action herein was committed with malice aforethought on the part of the accused person.

28. As stated herein the accused was not in such a state of intoxication within the meaning of **Section 13(2)** of the Penal Code that is to say that at the time of the act or omission he did not know that such act or omission was wrong or did not know what he was doing and **(a)** the state of intoxication was caused without his consent by the malicious or negligent act of another person or **(b)** he was by reason of intoxication insane, temporarily or otherwise at the time of such act or omission. The accused was in full control of his mental faculties. He went for the firearm which he signed for, attempted to break into the cash counter and to hi-jack a car. He had promised to come back for those who had fought with him which he did. He was aware of his environment as confirmed by the evidence of PW1 and PW2.

29. It has been held that voluntary drunkenness is never an excuse for criminal misconduct. See **DPP v BEARD [1920] AG 494**. In this case the motive for the commission of the offence was established in that the accused went out of his way to kill or have those who had fought with him at the bar thereby leading to his being thrown out. I am therefore satisfied beyond any reasonable doubt that the defence of intoxication is not available to the accused person having taken into account his conduct before and after the commission of the offence.

30. Further whereas it was submitted by the defence that there was a doubt as to the firearm which was issued to the accused. It was clear from the evidence of PW5 that the accused took G3 rifle Serial No. J53395 as confirmed by **PW8 S. SGT. SAMUEL KIPLAGAT** and **PW6 CHIEF INSPECTOR ALEX CHIRCHIR** as **KE-AP-J53395** which was one and the same rifle.

31. In the final analysis, I find and hold that the prosecution has proved beyond any reasonable doubt all the elements of the offence of murder and hereby find the accused guilty and convict the same accordingly of murder as charged.

**DATED, SIGNED and DELIVERED at Nairobi this 8<sup>th</sup> day of March, 2018**

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Meroka for the State*

*Mr. Muchina for Wandugu for the accused*

*Accused present*

*Court clerk Tabitha*