REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 76 OF 2017.

BETWEEN

ZACHARY NGARI…….APPELLANT.

AND

REPUBLIC ……..…….RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Nairobi Cr. Case No. 1222 of 2013 delivered by *Hon. C. C. Oluoch, SPM 10th April, 2017).*

JUDGMENT.

Background.

1. Zachary Ngari, hereafter the Appellant was charged with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The particulars of the offence were that on 20th February, 2013 along Likoni Road, Industrial Area within Nairobi County, unlawfully killed number 51782 Senior Sergeant Timothy Kaingu. He pleaded not guilty to the offence. He was found guilty and sentenced to five years imprisonment. He was dissatisfied with both the conviction and sentence against which he proffered the present appeal.

2. His grounds of appeal were set out in a Petition of Appeal filed on 14th July, 2017. I duplicate them as under;

a. The leaned Senior Principal Magistrate, Mrs. C. C. Oluoch erred gravely in analysis of the evidence which was circumstantial.

b. The learned Magistrate erred gravely in failing to appreciate the significance of the failure by prosecution to call a fellow police officer who was present in the police car at the material time in view of the discrepancies in the evidence of PW1, another officer in the vehicle, and the report by that other police officer who was not called to testify but which was produced in court.

c. The learned magistrate erred gravely in failing to appreciate the fatal bullet could have come from the robbers who were shooting at the police vehicle the deceased and Appellant were in.

d. The learned magistrate failed to address the issue of missing three (3) cartridges from the Appellant's gun, and therefore if the chain of evidence was established by the prosecution.

e. The learned magistrate failed to appreciate that the ballistics and post mortem evidence did not conclusively point to the Appellant.

f. The learned magistrate therefore wrongly concluded the killing was unlawful while in fact it might very well have been an accidental death.

g. The totality of the evidence including the sworn testimony of the Appellant indicated an exchange of gunfire between the Appellant's party and robbers who were in a stolen vehicle whose particulars had been flashed to police officers minutes before the fatal shooting of the deceased.

h. The learned magistrate did not satisfactorily consider the contradictions in the evidence, or apply the principals governing

circumstantial evidence to the known and proven facts of the case.

i. The sentence of five years imposed on the Appellant was manifestly excessive in the circumstances of the case and was based on the observations made by the trial court that the Appellant was a trigger happy reckless person who shot indiscriminately without care for the lives of those in the vehicle.

Evidence

3. The summary of the prosecution's case was that on 2/2/2013 a police motor vehicle registration No. GKA 795F Peugeot SD4 station wagon from Embakasi Police Division was assigned to go to Industrial Area, Nairobi to collect some motor vehicle spare parts. The vehicle was being driven by PC Kaingu, the deceased. In the vehicle were other police officers namely; PC Kubai, PC Kungu, PC Ngari(Appellant) and PW1, CPL Stephen Kariuki Ndegwa. The money to buy the spare parts was given to PW1 who went ahead of the rest of the officers. The driver and the other two officers joined him later so as to collect the purchased goods.

4. On their way back to the Police Station, a police radio communication announced that a Range Rover Motor Vehicle Registration No. KBL 539D Maroon in colour had been car jacked and inside it were two innocent persons. The police officers spotted the vehicle along Dunga Road and started pursuing it. A confrontation ensued at Migwani Road after the Ranger made a U- turn and faced the police car. A fierce gun battle commenced between the robbers in the Range Rover and the police. It is in the incident that the deceased, Sgt. Timothy Kaingu was shot on the chest. Traffic police officers who were nearby responded to the scene. They drove the deceased to Coptic Hospital where first aid was administered. He was transferred to Kenyatta National Hospital where he died while undergoing treatment.

5. A post mortem revealed that the deceased died of chest injuries due to a single gunshot by a high velocity firearm. Investigations revealed that the fatal bullet was fired by firearm serial number 18018079 issued to the Appellant, then working as a Police Constable (PC) at Embakasi Police Station. A firearm register was produced to that effect. The Appellant was accordingly charged.

6. In his sworn defence, the Appellant stated that it was the robbers who shot the deceased during the exchange of fire between the police and the robbers. He stated that he sat in the extreme right behind the driver in the Peugeot car and that when the robbers opened fire at them, he saw the deceased leaning on his right hand. He stated that it was the robbers who opened fire first before the police started shooting at them.

Determination

7. This is the first appellate court whose duty is to reevaluate the evidence on record and come up with an independent finding. The court must however bear in mind that it has neither seen nor heard the witnesses and give due regard for that. **See OKENO V REPUBLIC (1972) EA, 32.**

8. Before I delve into the re-evaluation of the evidence, it is important to point out that the Respondent conceded to the appeal. The concession was based on the assertion that the prosecution failed to call a very crucial witness namely CPL Kubai who was in-charge of the rest of the police officers in the police vehicle. According to learned State Counsel, Ms. Aluda, CPL Kubai was seated on the front passenger seat and so he was best placed to tell how the deceased was shot. She also placed her argument on the fact that only six spent cartridges were collected from the scene yet nine had been spent from the Appellant's rifle. Furthermore, there was no dispute, as also evidenced by the Occurrence Book (OB) extract produced in court by the defence that there was a shoot-out.

9. It was also not disputed that three police officers who were in the police vehicle were armed. According to the counsel, the ballistic evidence was intended at finding the Appellant guilty even before the evidence was analyzed. It was her assertion that the Appellant's defence was not considered which she thought was plausible and that had it been considered, a guilty verdict would not have been arrived at.

10. Counsel also poked holes in the evidence of the investigating officer who testified that the Appellant was prompted to shoot after hearing the sound of a tyre burst. According to her, at least the traffic police officers who came to the rescue of their colleagues could have been called as witnesses to confirm the evidence of a tyre burst. She was of the candid view that the deceased was shot by the robbers as initially reported to the police. She urged that the appeal be allowed.

11. The Appellant was charged with manslaughter contrary to Section 202 as read with 205 of the Penal Code. Section 205 is the penalty provision. The offence is defined under Section 202 (1) and (2) as follows:

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

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

12. In re-evaluating the evidence, I have arrived at the conclusion that the Appellant was convicted purely based on circumstantial evidence. I attach this finding to the fact that none of the prosecution witnesses including PW1 who was in the police vehicle saw the Appellant shooting the deceased. The Appellant was linked to the death of the deceased by a ballistic examination conducted by PW2, Immanuel Lagat of Independent Police Oversight Authority (IPOA).

13. The law on the principles that guide the court when considering circumstantial evidence was spelt out in the case of **R vs Kipkering Arap Koskei** and **Another [1949] 16 EACA, 135** in which it was observed that:

"That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt, and the burden of proving facts which justify the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

This principle was late in the case of Simon Musoke vs R. Criminal Appeal No. 188 of 1956 given more explanation when the court added that at the same time there must not be any co-existing facts in or circumstances which may weaken or destroy that inference of the guilt of the accused person".

14. In **Peter Mote Obero & Another V Republic [2011] eKLR** Court of Appeal at Kisumu, in Criminal Appeal No. 177 of 2008, the learned Judges Omolo, Waki & Nyamu, JJA reiterated as follows;

"It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – TEPER V R [1952] AC 480. With those safeguards in place, circumstantial evidence is as good as any direct evidence which is tendered and accepted to prove a fact. In R V TAYKLOR, WEAVER AND DONOVAN [1928] 21 Cr. App. 20 CA, the court stated:

"Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial."

In the case of **Alex Miseki Wambua vs. Repuiblic [2008] eKLR**, the Court of Appeal observed as follows:

"The same court expanded the principle in Simon Musoke V.R [1958] EA 715, which cited with approval the following passage from the Privy Council in Teper V. R. [1952] AC 480 at P. 489,:

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

15. In the present case, the court is enjoined to critically re-examine not only the ballistic expert evident but also the circumstances under which the deceased died so that before drawing the inference of the Appellant's guilt, it is established that there are no other co-existing circumstances which would weaken or destroy the inference.

16. There is entirely no doubt that the Appellant was issued with firearm serial number 18081079, as confirmed by PW3, a police officer from Embakasi Police Station who produced a firearm movement register and PW2, the ballistic expert. The latter adduced the Ballistic Expert Report dated 18th March, 2013 as P. Exhibit 10 which confirmed that six spent cartridges were fired from firearm (AR47 riffle) issued to the Appellant. It was also the evidence of the investigating officer, IP John Shegu who testified as PW7 that the Appellant's firearm fired nine (9) bullets. According to the witness, the riffle had 30 rounds of ammunitions at the time of issuance but was returned less nine rounds.

17. A further undisputed fact was that the deceased died of a gunshot wound by a high velocity firearm. **PW5, Dr. Johasen Oduor** confirmed the same in a Post Mortem Report adduced as P. Exhibit 19. But what the evidence adduced did not establish is whether the fatal bullet was discharged by the deceased's firearm. This is deduced against the background that it is two police officers in the police car who were issued with each an AK 47 riffle. It also was not established the type of firearms that the robbers were armed with. In my view, this is the only key link that would erase any shred of doubt that the Appellant killed the deceased. PW1 who was in the police vehicle the deceased was driving did not aid the court in finding an answer. His testimony was merely that he heard gunshots and then ducked down in the vehicle. He testified as follows:

"I felt as if the car has stopped suddenly. Then heard gun shots and I ducked down in the vehicle. There was a lot of dust and the smell of gun powder"

PW1 was the only witness present at the time of the incident. His further evidence was:

"I saw senior Sergeant was lying on the steering wheel with his head on his arms and he was stationery (written as shading). I asked if they had shot but he didn't reply."

18. Clearly, the witness did not give a lead to a very crucial question, namely: who first opened fire, he robbers or the police? I have candidly stated this question because from the testimony of PW7, the incident was reported as a shooting incident. This clearly pointed to a shoot-out between the robbers and the police. It then begs more questions than answers as to why the investigations zeroed in on analyzing only six (6) spent cartridges as opposed to the nine (9) that were collected from the scene. A question arises; from which and whose firearm did the three other spent cartridges come from? In addition, no bullet was retrieved from the deceased's body. And so, it again begs the question how it was concluded that merely because the cartridges that were examined came from the Appellant's firearm, he is the one who killed the deceased. Had a bullet been retrieved from the deceased's body, it would have been examined with a view to matching it with the spent cartridges. It was then absurd that a conclusion was reached that it is the Appellant who killed the deceased.

19. Moreover, it suffices as submitted by the learned State Counsel, that the investigations appeared geared towards deliberately incriminating the Appellant. This is buttressed by the fact that only one eye witness, PW1 was called, whose evidence did not rescue the

prosecution's case. In my view, the passenger who was on front passenger seat, Sgt PC Kubai would have been a crucial witness. He sat in front and so had the advantage of a clear view of what exactly transpired at the point of confrontation between the robbers and the police.

20. All the evidence crystalized together demonstrate that the Appellant was charged on the basis of mere suspicion which is not evidence. He just but was a victim of the circumstances. He found himself shouldering the blame because it had to be attached to a person, anyhow. The gaps in the prosecution's evidence that I have pointed out attest that the facts of the case are not incompatible with the Appellant's innocence. They are not incapable of an explanation upon other reasonable hypothesis that the Appellant was guilty. The co-existing circumstances of the case truly weaken the inference that the Appellant killed the deceased.

21. It is gainsaid that the prosecution's duty is to prove a case beyond all reasonable doubts. If the any doubt is entertained in the mind of the court, it should be accorded to the accused. **Lord Denning in Miller vs Minister of Pensions [1947] 2 All ER 3372** defined what reasonable doubt is as follows:

> **"Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt but nothing short of that will suffice."**

22. The prosecution failed in establishing that the Appellant committed any unlawful act or omission amounting to culpable negligence while discharging his duty. Yes, he opened fire. Yes, he shot at the robbers. Yes, the robbers also shot at the police as was testified by PW4, PC Daniel Kienyo, a scene of crime officer. But the latter's evidence and photographs of the police vehicle adduced showed the body of the vehicle was riddled with bullet holes. Not only were the glasses shuttered but the siren was also damaged. Surely, the police could not have been shooting at themselves. I am at a loss why the Appellant was singled out as the culprit. His arraignment was the result of orchestrated mission to fault an innocent man.

23. It is my humble finding, upon re-evaluating the entire evidence that the case does not meet the test defined under Section 202 of the Penal Code. The evidence adduced was insufficient to found a conviction against the Appellant. His conviction was unsafe in the circumstances.

24. In the end, I allow the appeal, quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held.

DATED and **DELIVERED** 27th day of September, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. M/s Masaki h/b for Mr. Mugu for the Appellant

2. Miss Artina for the Respondent.