



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 121 OF 2010**

**REPUBLIC .....STATE**

**VERSUS**

**DISHON MUSAU KITHUGA .....ACCUSED**

**JUDGMENT**

The accused **DISHON MUSAU KITHUGA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

***“On the 20<sup>th</sup> day of November, 2010 at Minjore Village, Kirima Location in Laikipia West District within Rift Valley Province murdered JULIUS KIHARA NJERU”***

The accused entered a plea of ‘**Not Guilty**’ to the charge and his trial commenced before **Hon Lady Justice Roseline Wendoh** on 15/7/2014. The Honourable Judge heard two (2) prosecution witnesses. Following her transfer to Meru High Court the case was transferred to me. I recorded the evidence of the remaining eight (8) witnesses. A total of ten (10) prosecution witnesses testified in this case.

**PW1 MOSES KURIA MBITHI** and **PW2 WILSON NJOGU NGATIA** both told the court that on 20/11/2010 they and other youths from Minjore Village accompanied one of their own to his circumcision which was conducted in a hospital in Sipiri. After the boy (whom **PW1** identified as the son of Eunice Wairimu) the group of youths set off to head back to the village for the celebrations. By now it was about 11.30 pm. They were in an entourage of two (2) motor bikes and bicycles. (One of the motor stalled and it was taken to the home of the ‘**Mung’ethe**’ to keep until the next day). **PW1, PW2** the deceased and others continued on their journey. The deceased was riding the bicycle and the other youths were running beside it.

When the group got to a place called ‘**Raha Thumbi**’ they heard some people ordering their group to stop. Before they could respond a shot was fired at them. The youths all scattered and ran away to save their lives. The deceased who was riding the bicycle was hit. He fell of his bicycle and the other youths all ran away to hide. When **PW1** eventually emerged from his hiding place, he found the deceased lying dead next to his bicycle. The chief was called and the matter was also reported to the police.

**PW5** No. 87085421Administration Police Constable **HARRISON MAINA** told the court that on 20/11/2010 at about 10.30 pm he and **Colporal Dishon Musau** (the accused herein) both officers attached to Minjore Chief’s Camp were out on patrol duties. At about midnight they came across a group

of people approaching them. One man was riding a bicycle and 2 others were running beside him. **PW5** stated that the officers took cover in the nearby bushes to observe the group. The accused then ordered the group to stop and at the same time he fired at them. The man who was riding the bicycle was hit and he fell down. The chief was alerted and arrived at the scene within twenty minutes. By then the victim had died.

The matter was reported to police who came and removed the body to the mortuary. Investigations were commenced at the conclusion of which the accused was charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused gave a sworn defence in which he denied the charge of murder. This court must now analyse the evidence on record with a view to determining whether the charge of murder has been proved beyond reasonable doubt as required in law.

Section 203 of the **Penal Code Cap 63, Laws of Kenya** defines the offence of murder as follows

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

From this definition derives the three ingredients of the offence of murder all of which must be proved beyond reasonable doubt

- (1) Proof of the fact as well as the cause of death of the deceased.
- (2) Proof that the deceased met his death due to an unlawful act or omission on the part of the accused. This forms the **‘actus reus’** of the charge.
- (3) Proof that said unlawful act or omission was committed with malice aforethought which forms the **‘mens rea’** of the charge

On the question of the fact of death of the deceased there can be no controversy, **PW1, PW2** and **PW5** all testify that they were present and witnessed the shooting of the deceased.

**PW6 CHIEF INSPECTOR KAZUNGU CHARO** was the officer who went to the scene. He confirms having found the dead body of a young man lying next to a bicycle with a bullet wound to the chest. **PW10 SAMUEL GACHERU WACHIRA** was the paternal uncle of the deceased. He confirms having attended the autopsy where he identified the body of his nephew to the doctor. **PW1, PW2** and **PW8** who were relatives and fellow villagers of the deceased and who all knew him well identify the deceased as **‘Julius Kihara Njeru’**.

**PW7 DR. JOSEPH KARIMI KINYUA** is the doctor in charge of the Medico - legal Unit at Nyahururu Hospital. He produced the post-mortem report in respect of the autopsy conducted on the body of the deceased. **PW7** testified that upon examination a gun-shot wound was noted on the right side of the chest. The cause of death was opined to be **‘haemorrhagic shock due to gun -shot wound to liver and spleen’**. This was expert medical opinion evidence which was neither challenged nor controverted by the defence. I therefore find as a fact that the deceased died as the result of being shot in the chest.

Having proved the fact and cause of death the prosecution must go further and adduce evidence to prove that it was the accused who so shot and killed the deceased.

**PW1 ‘Moses Kuria Mbuthu’** and **PW2 ‘Wilson Njogu Ngatia’** were with the deceased on the material night and witnessed the incident. Both told the court that they heard the sound of a gunshot after which the deceased fell off the bicycle he was riding. Both testify that the deceased was shot by an administration police officer who was later identified as the accused.

**PW5 ‘Constable Maina’** was an Administration Police Officer attached to the Nyahururu Chief’s Camp.

He testified that on the night in question he was out on patrol duties in Minjore Village, accompanied by the accused. **PW5** stated that they came across a group of youths and took cover in order to observe them. **PW5** heard the accused shout and order to the youths to stop and simultaneously heard a gunshot. One youth (the deceased) fell to the ground. **PW5** stated that he asked accused whether it was he who had fired the shot and the accused replied in the affirmative.

**PW4 CHIEF INSPECTOR CHARLES KOILEGE** a firearms examiner told the court that he received for analysis two G3 Rifles.

- Serial No. 388687

- Serial No. 6674798

He found that both Rifles were in good mechanical condition and were capable of being fired. The witness filled and signed his report which he produced as an exhibit before the court **P. Exb 3**.

**PW6 CHIEF INSPECTOR KAZUNGU** told the court that upon receiving news of the shooting incident he immediately rushed to the scene. He disarmed the accused who had on him a G3 Rifle Serial No. 388687 which at the time had 16 rounds of ammunition. **PW6** also took possession of the accused's police uniform to be taken for swabbing and testing.

**PW7 CHIEF INSPECTOR BERNARD KWARAT** was the investigating officer. He too rushed to the scene immediately after the incident. He confiscated the G3 rifles which were in the possession of both accused and **PW5**. Whilst the rifle of **PW5** contained the full count of 20 rounds of ammunition the rifle held by the accused only contained 16 rounds. **PW7** also forwarded the police uniform which accused was wearing at the time to the Government Chemist for analysis **PW7** also obtained the Firearms Register from Ol Moran DO's Office **P. Exb 4** which register indicated that the G3 Rifle Serial No. 388687 had been issued to the accused on 12<sup>th</sup> October, 2010.

**PW8 SIMON NANDI SUNGUTI** was the Government analyst. He told the court that he received for purposes of examination and analysis one set of Administration Police Officer's uniform as well as cotton swabs obtained from two G3 Rifles. **PW8** told the court his analysis revealed the cotton swabs taken from both Rifles contained traces of gun-powder. He filled and signed his report dated 24/4/2011 which he produced as an exhibit **P. Exb 5**.

From the evidence above it is clear that both **PW5** and the accused being police officers on duty had been issued with G3 Rifles for their use whilst out on patrol. There was nothing irregular or unlawful in the possession of the Rifles by the two officers. Although upon examination by the Government Analyst cotton swabs taken from both Rifles contained traces of gun-powder, it is pertinent to note that whilst the firearm issued to **PW5** had its full load of 20 rounds of ammunition, the Rifle issued to the accused had only 16 rounds meaning that at least 4 rounds had been used. In the circumstances it would be safe to assume that the shot which hit the deceased was fired from the rifle issued to and used by the accused.

The accused gave a sworn defence in which he readily conceded that he did fire four (4) shots from his rifle and one of the shots which he fired hit the deceased. The accused claimed to have fired that shot in self defence. (more on this later) However by his own admission in open court, the accused is the person who fired the shot which hit and killed the deceased.

The final ingredient of the offence murder, requiring proof is '**malice aforethought**' which forms the '**mens rea**' for the offence of murder.

In his sworn defence the accused whilst admitting that he shot at the deceased claims that he acted in self-defence. The accused explained that the area in which they were patrolling was a forested area with trees and shrubs. The security in that general area was poor and cattle rustling was rife. The accused further explained that the three youths failed to heed his order to stop and instead ran towards him. This caused him to fear for his life and he therefore fired four (4) shots from his rifle.

Self defence is a well recognized and acceptable defence to a charge of murder. Section 17 of the Penal code, Cap 63, Laws of Kenya provides

***“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 a person or property shall be determined according to the principles of English Common Law”***

What then is the position in English Common Law regarding Self Defence. The classic pronouncement is to be found in the case of **PALMER Vs REPUBLIC [1971] AC 814** which decision was approved and followed by the Court of Appeal in **REPUBLIC Vs McINNES 55Cr. App R. 551** where it was held

***“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 a 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 .....*”**

In **ARCHBOLD – Criminal Pleading, Evidence and Practice, 2002** paras 19-42 it is stated that the test of whether the force used in self defence was reasonable is not purely objective.

***“There is no rule of law that a man must wait until he is struck before striking in self defence”***

This then is part of the body of English Common Law on Self-Defence and this is the approach also taken by the commonwealth courts, including Kenyan Courts.

It is important to note that in order for one to rely on self defence, it is not necessary that the belief of the accused that he (or his property) was under imminent attack be based on reasonable grounds. In **DPP Vs MORGAN [1975] All ER** it was held

***“..... If the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants belief was material to the question whether the belief was held, its unreasonableness so far as guilt or innocence was concerned, was irrelevant”***

Therefore even if the accused mistakenly perceived himself to be under attack then the plea of self-defence would still be available to him on the basis of that mistaken belief.

In this case the facts are not in dispute at all. On the night in question the deceased was riding a bicycle with **PW1** and **PW2** running beside him. The accused and **PW5** were both police officers out on patrol. On seeing the three they took cover in the nearby bushes to observe the three youths. The accused in his defence claims that when the three men were about five feet away he shone his torch at them and shouted ‘**simama**’ ordering them to stop. The accused claims that the three declined today his order and instead ran towards him. The accused fearing for his life and safety in view of the prevailing insecurity in that area fired three shots into the air. The men still did not stop so accused lowered his gun and aimed towards their feet and fired. One of the shots hit the deceased in the chest killing him instantly.

However, this narration by the accused is not supported by the evidence on record.

Both **PW1** and **PW2** state that they saw the flash of a torch and heard a voice ordering them to stop. They

did not stop but all turned and ran back towards the direction they had come from. They then heard the gunshots being fired.

It is not surprising that **PW1** and **PW2** did not stop when ordered to do so. It is not surprising in view of the very factors explained by the accused in his defence. It was dark, this was a forested area and insecurity was rife in the region. Upon hearing an unknown voice ordering them to stop it is not surprising that the youths took to their heels. They had no way of knowing that it was the police who were ordering them to stop – the accused did not identify himself as a police officer he did not say ‘**simama – polisi**’ of words to that effect and he was by his own admission hiding in the bushes. **PW1** and **PW2** undoubtedly thought they were under attack by thugs and took to their heels. They had no way of knowing that it was security officers who were ordering them to stop. In the circumstances the reaction of the youths in failing to stop was reasonable and indeed understandable. **PW1** and **PW2** later realised that their friend who had been riding the bicycle had been shot and killed.

**PW5 Constable Maina** was a fellow officer out on patrol with the accused. He confirms that when they saw the youths approaching both officers took cover in the nearby bushes in order to observe the three men. **PW5** states that accused then ordered the youths to stop and fired his gun at them. In his evidence **PW5** states

***“We hid in the bushes to watch the 3 men. I heard a shot. Accused shouted stop and simultaneously, he fired a shot. The three men were not armed”*** [own emphasis]

On his part **PW5** insists that when the accused shouted the order to stop the deceased who was on the bicycle stopped immediately. **PW5** stated

***“When the accused shouted stop the deceased stopped his bicycle immediately. As soon as he alighted from his bicycle the accused shot him. The deceased did not do anything. He just stopped.***

Under cross – examination this witness remained unshaken in his testimony. He insisted that there was bright moon light on the night in question and visibility was good. He also maintained that the accused fired his gun at the same time as he shouted to the men to ‘**stop**’. **PW5** was a colleague of the accused. They were out on duty together. There is no evidence or suggestion of a pre-existing grudge or any bad blood between the two officers. **PW5** had no reason or motive to lie against the accused. In my view he gave a truthful account of events as they occurred on the night in question.

There is no doubt in my mind that the three men were all unarmed. The accused does not mention having seen any of the three wielding any type of weapon. The deceased obeyed the order to stop and immediately stopped his bicycle. His two companions turned back and ran. In the circumstances what possible threat could the accused an armed officer have perceived to his person? None of the men made any move towards him and none made any move to attack him. In his defence the accused stated that the area was notorious for stock theft. The three men were not leading any cattle. They had no livestock with them. The accused simply fired 4 shots at the unarmed youths. There was nothing to suggest that the deceased and companions were engaged in any unlawful or illicit activity. There is no curfew in that area and it was not illegal for them to have been moving about at night.

The accused in his defence suggests that the three men ran towards him implying that they were approaching with a view to attacking him. Firstly none of the men was armed so even if they were running towards accused they would not have posed a threat to his person secondly accused was a police officer trained in the art of combat and further he was not alone, he had a fellow officer **PW5** with him.

Thirdly this defence is negated by the autopsy findings which show that the deceased was shot in the back. **PW9** the doctor testified that the bullet entered the body of deceased through the side and exited through the left side of the chest. **PW6** the first officer who visited the scene also stated that he noted that the entry wound was in the back and the exit wound was in the chest. If as accused claims the deceased was advancing menacingly towards him then the entry wound would clearly have been to the front *ie* the

chest. The position of the entry and exit wounds makes it clear that the deceased was **not** advancing towards accused as claimed. Rather the deceased was in retreat *ie* was running away from accused. A person who is fleeing cannot be deemed a threat. The accused claimed that he fired three times into the air with a view to scaring away the three men. When they failed to retreat he lowered his gun and fired a fourth time aiming at their feet. The accused being a trained police officer would not fail to hit the men's feet and instead hit him in the chest. The accused who in the first place had no reason or justification to fire his gun could not in my view have hit the deceased in the side when aiming at his feet. I reject this defence as untrue.

I find no merit in the accused's claim that he was acting in self defence. The three men were all unarmed and posed no threat whatsoever to the two policemen.

It is important to note that the accused was not just any ordinary citizen. He was an administration officer trained and adept in the use of firearms. The deceased who had stopped could easily have been overpowered and apprehended by the accused alone or by the two officers who I have no doubt are both well trained. The officers in my view could easily have chased down and caught **PW1** and **PW2**. There was absolutely no reason or justification for the accused to have fired 4 shots in the circumstances. From the evidence available I am satisfied that the accused did not believe himself to be under any threat at all. He simply fired his gun at three unarmed Kenyan citizens who were going about their own business.

As stated earlier the accused was not your ordinary citizen. He was a trained security officer and as such is expected to be guided by the Constitution and the **National Police Service Act**. Policemen are given arms to use in the protection of citizens. Even in situations where a police officer is faced with threat to his own life he should not use his weapon as the first resort. Section 49(5) and 61 of the **National Police Service Act** as read together with the sixth schedule sets out the circumstances under which a police officer may resort to the use of force and the use his firearms. Part A of the Sixth Schedule provides

***"1. A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result.***

***2. The force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the standing orders"***

Based on these provisions of the law it becomes absolutely clear, that the accused acted both recklessly and negligently by firing at an unarmed civilian who posed no threat and offered no resistance at all to him. The accused failed to adhere to the requirements of the police standing orders which require that firearms be deployed as a last resort.

For the reasons given above I reject the accused's claim that he acted in self-defence I find that the accused wilfully fired four (4) shots directly at the three unarmed men none of whom posed any threat to himself or to his fellow officer.

Section 206 of the Penal Code defines '**malice aforethought**' in the following 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) .....

(d) .....

I find that the accused recklessly fired four shots directly toward the three men, knowing and having reason to believe that such an act would cause death or grievous harm to one of the men. The mens rea for the offence of murder in my view clearly existed. I find that this charge of murder has been proved beyond reasonable doubt and I accordingly convict the accused of that offence.

Mr. Gai holding Mr. Ombui

Mr. Motende for State

**Dated and Delivered in Nakuru this 31<sup>st</sup> day of March, 2017.**

**Maureen A. Odero**

**Judge**