



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO 17 OF 2014

LESIIT, J

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN BUNNET SIMION.....ACCUSED

JUDGEMENT

1. The accused is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**.

“The particulars of the charge are that on the 26th day of January 2014, at Roysambu stage Kasarani within Nairobi County he murdered Julius Njuguna Irungu alias Dadi.”

2. The brief facts of the prosecution case are that the accused person who was a police officer attached at Kasarani Police Station was on Spiv duties with PW10, within Kasarani Police Station area. The prosecution case is that while at Roysambu roundabout the accused shot dead the deceased person.

3. The summary of the prosecution case was as follows:PW1 was the driver of the matatu registration number KBH 445 Y. His testimony was that the deceased was his conductor. That while picking passengers at Roysambu roundabout, the accused and PW10, whom PW1 knew as police officers entered his matatu. PW1 stated that he alerted the deceased because the practice was that whenever the two officers were sighted conductors knew that they were expected to give them between 50/- or 100/- to avoid arrest.

4. PW1 stated that when he told the deceased to be alert, the deceased alighted from the matatu and ‘sorted’ the two officers. By then the matatu had 8 passengers. PW1 testified that the deceased continued calling out for passengers when he saw the accused load three arrested conductors whom he knew, two sharing a pair of hand cuffs and one handcuffed alone, into his matatu.

5. PW1 stated that while PW10 entered the driver’s cabin, the accused sat at the seat behind the driver’s cabin, at the far left edge next to the exit where the deceased usually sat. The arrested persons sat next to the accused to his left while the deceased hang on the door frame. PW1 said that the accused asked him to drive to Kasarani Police Station. PW1 said that as he drove to the Police Station, just before he took the roundabout at Roysambu he heard the sound of a gunshot. He however continued driving. He said he drove on until just before the flyover where the accused told him to stop. He said that when he stopped all the passengers and the arrested conductors were ordered to disembark by the accused.

6. PW1 testified that as he drove on with only PW10 and the accused inside the vehicle, he heard the accused inform PW10 that ***“Imetoka na imegonga”***, which means ***“It has released or discharged and it has hit”***. That when PW10 asked him what he meant, the accused said that he had shot someone.

7. PW2 was a tout who loaded passengers at Roysambu. He testified that on 28th January 2014 he was at the Roysambu roundabout as he awaited a matatu registration number KBH whose driver was PW1 for him to load passengers into it. The matatu arrived and as PW2 called out for the passengers, he noticed that the conductor of the matatu in front of KBH, which was a KBJ had been arrested together with others by police officers he knew physically. The arrested persons were made to sit on a rock. The accused and his colleague later came with the arrested persons into the Matatu KBH. He said that one of the officers sat next to the driver in front while the accused sat behind the driver’s seat, with the arrested persons seated to his right away from the door.

8. PW2 stated that the accused removed a gun, pointed it at him and ordered him to alight the matatu which he did immediately. He left the deceased hanging on the sliding door of the matatu as it drove off. PW2 stated that he crossed the road but that soon thereafter, he heard the sound of a gunshot. He crossed back and found the deceased fallen on the ground with bullet wounds. The matatu did not stop. PW2 said that he saw the vehicle stop 15 meters from where the deceased had fallen and all the passengers disembarked from PW1’s vehicle.

9. PW3 was the driver of the matatu vehicle registration number KBJ 677Q. He stated that at around 9.30 pm, he was at Roysambu stage waiting for passengers to board his matatu. He testified that the passenger seated at the co-driver’s seat informed him that his conductor had been arrested. He said that he disembarked from his vehicle and was able to see his conductor being pushed into a matatu registration number KBH 447Y. PW3 testified that shortly thereafter he heard a gunshot which appeared to come from the vehicle KBH. PW3 heard the man seated behind the driver’s cabin state that they are police men and not robbers and soon thereafter the said motor vehicle KBH started moving.

10. PW3 said that he saw the matatu slow down after 30 meters and then after another 15 meters the matatu stopped and people inside the matatu disembarked. PW3 said that he saw those people walk towards where he had initially seen the car slow down and as soon as they got there, they started screaming. PW3 testified that he walked to where the people were screaming and he saw a man lying on his back bleeding around the chest area.

11. PW4 was the Armourer at Kasarani Police Station. He stated that on the 29th day of January 2014, he was called by the OCS, one CIP Dominic Munyao who informed him that he had disarmed the accused and had handed over the firearm and rounds of ammunition to the DCIO Kasarani. PW4 produced the Arms Movement Register as P.Exhibit 4. He identified the firearm he had issued to the accused and which the accused had surrendered back as P. Exhibit 1.

12. PW5 conducted two ID Parades where the accused consented to take part in and opted not to have a friend or an advocate present. In the 1st ID parade, the accused was identified by PW2. In the 2nd parade the accused was identified by PW1. PW5 produced the parade forms as P. Exhibit 3.

13. PW6 who recovered P. Exhibit 4 stated that she was the Crimes Branch Duty officer at Kasarani Police Station on 28th January, 2014. She received a call from CPL Ndemo the In-charge Mobile Patrol who informed her of an incident at a roundabout. PW6 said that she proceeded to Roysambu roundabout where she met a crowd of members of the public surrounding a man lying on his stomach in a pool of blood. While at the scene, PW6 was handed over a cartridge of 9mm caliber P. Exhibit 4, by P.C Wambua who claimed to have received it from a member of the public. PW6 identified P. Exhibit4. PW6 further stated that the members of public who handed over P. Exhibit 4 declined to be involved with the case.

14. PW7 Dr. Peter Muriuki Ndegwa conducted the post mortem on the body of the deceased on 31st January, 2014 at City Mortuary. Externally PW7 found an entry gunshot wound on the right shoulder

which was 1cm in diameter and an exit wound on the left anterior axillary line 5 cm below left nipple which was 1 cm in diameter.

15. Internally, there was a penetration wound between the 2nd and 3rd ribs on the right of the chest cavity through the back with perforation of the right and the left lung. The heart was also perforated on the right atrium. The doctor also found an exit bullet wound on the left side between the 5th and 6th ribs. After the examination PW7 was of the opinion that the cause of death was exsanguination due to several chest injuries due to a single gunshot. He produced his report as P. Exhibit 5.

16. In cross examination, PW7 gave his opinion as to how the injury might have been caused. He stated that the deceased might have been seated and if not, the person who shot him was on a higher ground as the trajectory of the bullet was from up going downwards.

17. PW8 a ballistic expert attached to DCI headquarters in Nairobi produced a report dated 6th February 2015 as P. Exhibit 10, on behalf of CPL Chirchir who was the author, and the one who had examined the firearms and ammunition submitted to them for examination as per the exhibit memo P. Exhibit 11.

18. According to PW8, CPL Chirchir findings were that the two Ceska pistols, P. Exhibits 1 and 9 were two C285B Ceska Pistols manufactured in the Czech Republic. They were of caliber 9mm by 19mm and were in good general and mechanical working conditions and were capable of being fired. He found that the 24 rounds of ammunition submitted for examination, P. Exhibit 7, were all capable of being fired and were ammunition in terms of the Firearm Act.

19. PW6 testified that CPL Chirchir also found that two Ceska magazines, P. Exhibit 8 (a) and (b) were complete in all their component parts and each having a capacity to carry 16 round of ammunition of caliber 9mm by 19mm. He said that CPL Chirchir found P. Exhibit 4 was an expended cartridge case of caliber 9mm by 19m. He carried out a comparative microscopic examination of P. Exhibit 4 using ammunition in P. Exhibit 7, which he test fired using the two Ceska pistols, P. Exhibits 9 and 1.

20. PW8 testified that according to his report, CPL Chirchir after conducting the microscopic examination found that there were margins on the bridge face, ejector and firing pin, which enabled him to form the opinion that P. Exhibit 4 was fired from the pistol, P. Exhibit 1.

21. PW9 was the investigating officer in this case. He stated that on 29th January, 2014 he was instructed by the DCIO Mr. Obore to accompany him to a scene where a police officer had allegedly shot a conductor. They proceeded to the scene which was at Roysambu roundabout. He testified that they met touts and drivers of route 44 having blocked the route, near the scene of the incident. PW9 stated that he was able to get two drivers and a tout connected to this case, and that he proceeded to record their statements and those of the other witnesses. He also requested CIP Manyasi, PW11 to record the Statement under Inquiry from the accused person.

22. PW9 produced a cartridge which had been handed over to him by SGT Muthoni, PW6 as P. Exhibit 4. PW9 stated that he checked and confirmed that there was no record of the incident entered in the Occurrence Book by the either the accused or PW10.

23. PW10 stated that on 28th January 2016 he was on Spiv duty with the accused at around 10.00 pm within Roysambu stage area. He said that they arrested 2 conductors who were not in uniform and that they ordered them into a matatu registration number KBH 445Y, the one driven by PW1. He said that he sat next to the driver, and the accused sat behind with the arrested persons. Before they started moving, PW10 heard a sound that he likened to that of a tyre burst. He said that soon thereafter the accused alighted from the car and told him **“imetoka na imegonga”** meaning **“it has discharged, and it has hit someone”**.

24. PW10 said that he instructed the accused to close the rear door next to where he was and he instructed PW1 to drive towards Neema Hospital as they had a casualty. PW10 stated that upon reaching the under

pass at Roysambu round about, the accused hit the cabin window and said that the passengers wanted to alight. The passengers alighted and since they had a casualty PW10 instructed PW1 to drive to Neema Hospital. PW10 said that when the accused suggested that they alight and abandon the vehicle, he directed PW1 to drive towards the police station. PW10 said that both of them alighted before the vehicle reached the station and walked to the station for the rest of the distance.

25. PW10 testified that at the Report office he advised the accused to enter the report in the O. B. to which the accused said he wanted to talk to the Duty Officer first. In cross examination, PW10 stated that the accused appeared drunk. He also said that he did not follow keenly what happened at the back of the vehicle as he sat in front.

26. PW11 was the officer who took the accused Statement under Inquiry. PW11 proceeded to inform the accused of his rights under **section 25** of the **Evidence Act**. PW11 testified that the accused opted to speak in English language and declined to have an advocate or relative present as the statement was being taken.

27. PW11 produced the statement as P. Exhibit 13 by consent of all parties. In brief the accused had stated that he had a pistol which he held in his hand because he was surrounded by touts and bodaboda people. He said that he supported handcuffed prisoners to enter a matatu so that he could sit next to the exit. He said that as he pushed the prisoners inside, his gun accidentally discharged one round of ammunition which hit the conductor. He informed PW10 to tell the driver to drive off to the station. That after a few meters he ordered the driver to stop after which he released the passengers. He stated that they drove on to the roundabout where they released the three prisoners, the driver and the vehicle. He stated that he and PW10 walked to the station. He also stated that he told PW10 that his gun had discharged a bullet which hit someone at the stage but that he did not know the extent of injury inflicted. He stated that as he entered his house which is next to the road he heard people saying that the person who had been shot had died. He said that he was arrested the next day.

28. The accused in his sworn defence admitted being at the scene on the day in question. He admitted that he was armed with a gun on the night in question. He further admitted that he made a statement to police which was produced in court as P. Exhibit 13. The accused in his defence in court denied having shot the deceased. The accused stated that his in-charge CPL Toroitich called him the next day and ordered him to return his pistol which he did as directed. He stated that when he went to the OCS on 29th, January, 2014 is when he was informed that he was a suspect in a murder incident that had taken place on the 28th January, 2014 while he was on duty. The accused stated that upon arrest, the ammunition he had in his pistol was counted and it was confirmed that all his ammunition was accounted for.

29. The Prosecution and the defence counsels made submissions in this case. Learned counsel for the accused Mr. Ochako submitted that the prosecution had not established the accused shot and killed the deceased as there was no eye witness who witnessed the incident. Counsel urged that the prosecution had failed to establish that the accused had formed the intention to kill the deceased. Counsel urged that PW1, the driver of the vehicle where the scene of the gun shot is alleged to have been never heard the gunshot neither did he witness any disagreement between the deceased and the accused.

30. Counsel urged that there was no evidence showing that the accused had any missing bullet when he returned his gun as he returned all the ammunition that had been allocated to him. Counsel urged that the evidence of PW10 amounted to the evidence of a suspect and as such, it should be treated with caution as it was self-serving. Finally counsel urged that PW8 evidence was not able to determine when a gun was last fired and as such it was not proved that the bullet came from the accused's gun when the deceased was shot.

31. Learned Prosecution Counsel Ms. Onunga submitted that the prosecution had proved their case beyond any reasonable doubt as the statement in which the accused admitted to killing the deceased was produced in court. Counsel urged that PW10's evidence to the effect that accused told him "**imetoka na imegonga**" corroborated the accused statement under inquiry. Counsel urged that it was not in dispute that the accused was armed with a gun at the material time and that the accused defence was an after-

thought that ought not to be believed.

32. Counsel urged that since the firearm was a heavy weapon and the fact that the accused was a trained officer, he must have known so well when he was justified to use a weapon. Counsel urged that under the Sixth Schedule of the National Police Act, the life of the accused was not in danger, neither was the life of any member of the public in danger and therefore the accused use of his firearm was unjustified and unlawful. Counsel urged that no bullet can be discharged without the trigger being pulled and the fact accused pulled the trigger shows that he had formed the intention to kill. Counsel urged that the fact that the accused being a police officer and having known his obligations in the event of such an incident happening, failed to report the incident to his seniors as was required of him was an indication of his lack of remorse.

33. The accused person faces a charge of murder contrary to **Section 203** of the **Penal Code**. This section creates the offence of murder and provides as follows:

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

34. Malice aforethought is an essential ingredient in the offence of murder. The circumstances that constitute malice aforethought are set out under **section 206** of the **penal code** as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

1. 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,

2. 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;

3. ...

4. ...”

35. The onus and evidential burden lies with the prosecution to prove its case against the accused person beyond any reasonable doubt. The prosecution must prove that it was the accused who shot dead the deceased. The prosecution must equally prove that at the time the accused shot dead the deceased, he had formed an intention to either cause death or grievous bodily harm.

36. Having considered the evidence before me, I find the following issues are not in dispute. It is not in dispute that on the night in question the accused was a police officer on Spiv Duty, which is, operating in civilian clothing within Kasarani area in the company of PW10. It is not in dispute that the accused was armed with a Ceska pistol, P. Exhibit 1 at the material time. It is not in dispute that the accused arrested some 3 people and placed them in the motor vehicle reg. no. KBH 445Y, driven by PW1, intending to take them to Kasarani Police station. It is not in dispute that the deceased was the conductor of the matatu driven by PW1 which PW10 and the accused boarded together with the three people they had arrested. There is no dispute that the deceased was hit by a bullet as he rode in PW1’ vehicle while on duty, next to the accused. There is no dispute that the deceased died at the scene from multiple chest injuries caused by a single gunshot. There is no dispute that the cartridge, P. Exhibit 4 recovered at the scene after this incident was fired from the accused pistol, P. Exhibit 1.

37. The issues in dispute and which are therefore for determination in this case are the following:

a) Whether the prosecution has established the charge against the accused, including the issue

whether it was the accused gun which was used to shoot the deceased.

b) Whether PW1 heard any gunshot as he carried the accused and PW10 in his matatu.

c) Whether PW10 was an accomplice.

d) Whether the prosecution has established that P. Exhibit 13 was a confession and further what probative value can be ascribed to it.

e) Whether the prosecution have proved malice aforethought.

f) Whether the prosecution has established motive for this crime.

g) Whether the accused has a plausible defence.

38. **As to whether the prosecution has established the charge against the accused, including the issue whether it was the accused gun which was used to shoot the deceased and whether PW1 heard any gunshot as he carried the accused and PW10 in his matatu.** PW4 No. 53111 CPL Benson Basora stated that on 23rd January, 2014 he issued a Ceska firearm registration no. G5838 P. EXHIBIT 9 together with 15 rounds of ammunition to one P.C Abdi Ahmed, who was PW10 in the case. On the 28th of January 2014, PW4 said he issued No.73821 P.C Stephen Bunnet, the accused herein a Ceska Firearm Registration number F5611 P. Exhibit 1 with 15 rounds of ammunition. PW4 stated that the accused was supposed to renew the same firearm after a week because of the nature of duties that he undertook. From the evidence of PW4, he issued the accused with P.Exhibits 1 together with 15 rounds of ammunition on the 28th day of January 2015. The accused never returned the firearm neither did he go back to PW4 to renew the same after a week as expected of him.

39. The Firearm Expert CPL Chirchir in his report found that the cartridge P. Exhibit 4, was fired from accused pistol. That cartridge was handed over to PW6 at the scene where the deceased body was found, on the same day of incident by a police officer not called as a witness. The Firearm Expert's Report indicates that the accused firearm P. Exhibit 1 was the one from which the cartridge recovered at the scene, P. Exhibit 4 was fired.

40. This finding places the accused at the scene of the incident. There was corroboration from PW1 and 10 that indeed the accused was at that scene at the time the gunshot was heard. PW2 in addition testified that the accused was at the scene while armed with a pistol, and that he ordered him to leave at gunpoint. There is ample evidence which establishes that the accused was at the scene of incident while armed with a pistol at the time the gunshot was fired.

41. PW10 in his evidence testified that the accused made a confession that his gun had discharged a shot and that the shot hit someone and that he did not know the fate of the person who was hit. He ascribed to the accused the words '**imetoka na imagonga**'. PW1 corroborated PW10's evidence that the accused uttered those words immediately after the shot was fired.

42. PW2 also heard the gunshot as he crossed the road after the accused ordered him to leave. He identified the sound of the gunshot as coming from the vehicle which PW1 was driving. PW3, the driver of the vehicle ahead of PW1 also heard the gunshot coming from PW1's vehicle.

43. The doctor's finding at post mortem establishes beyond any reasonable doubt that the deceased cause of death was injuries caused by a single gunshot. All these evidence are in tandem with the deceased having been shot at the scene of incident.

44. Apart from all these evidence was the accused own admission in the statement under inquiry taken from him by PW11. In that statement the accused makes a clear confession that his gun fired a shot and hit a person who died at the scene.

45. I find that the prosecution has established beyond any reasonable doubt that it was the accused gun which was fired at the scene, and which hit the accused causing him his death. I find that PW1 heard the shot. Mr. Ochako the defence counsel's submission that PW1 never heard the shot was not correct.

46. As for PW10 being an accomplice as Mr. Ochako submitted. I do not understand in what respect Mr. Ochako argues that PW10 was an accomplice. If he meant to the murder, I see no evidence to show that PW10 went out on duty with PW1 with a common purpose to shoot anyone or to cause death to anyone. There is no evidence whatsoever that PW10 and the accused had any such a purpose on the material day.

47. I must however mention that I noted from the evidence of PW1 that the accused and PW10 were known to visit the matatu stage purposely to collect between 50/- and 100/- from the matatus; and that on the material day the deceased did 'sort' the two according to PW1. If PW10 was an accomplice, it was to receiving bribes from matatu operators at that stage, and doing everything possible to extort the money. I doubt that as Spiv Duty Officers they should have engaged in traffic duties of enforcing the Traffic Act. I do believe that the two officers arrested the three conductors in order to extort money from them. That explains why the two officers did not take the conductors to the station in order to have them formerly charged.

48. As for the shooting of the deceased, I do not find that action was a furtherance of the common purpose to collect bribes from the matatu operators. I say so because there was no reason to shoot the deceased to enforce their illegal business since at the time the incident occurred, the deceased had already parted with his bribe. In the circumstances therefore I find that PW10 was not an accomplice in this case.

49. **Whether the prosecution has established that P. Exhibit 13 was a confession and further what probative value can be ascribed to it.** P. Exhibit 13 was admitted without challenge by the defence. In that statement the accused gives details of the events of the material day. However in his defence the accused retracted the statement denying any discharge from his gun and denying that he admitted the discharge to PW10. Accused defence was that he never discharged any shot and that he never admitted so to PW10. As stated the accused has retracted his statement initially admitted without opposition

50. That retraction of the statement has the effect of withdrawing what he admitted in it. The prosecution has the burden to adduce evidence to support its case by other evidence. In addition the court has a duty to look at the entire evidence adduced in the case and make a determination of the case.

51. I have looked at the prosecution case and find sufficient evidence to establish beyond any doubt that the accused confession of the offence, and the facts as stated therein are in tandem with the prosecution case. The statement is a confession. I find that it is of probative value and can be used in the case.

52. As to whether the prosecution have proved malice aforethought. The prosecution urged that the accused had cocked his gun and that it could not have fired without the trigger being pulled. Ms. Onunga learned Prosecution Counsel urged that the accused handled the gun contrary to the Sixth Schedule under the National Police Act. Counsel urged that the accused deliberately pulled the trigger discharging the shot which should be interpreted to mean that he had formed the intention to kill.

53. The prosecution case shows clearly that the deceased had bribed the accused and that the deceased was in the good books of PW10 and accused. The two officers arrested others who were not towing the line and placed them in PW1's vehicle in order to take them to the Police Station. I do not see any reason the accused could have had of having an intention to shoot the deceased. Further the accused own first words after the shot was fired were to PW10. PW10 was more senior to the accused. When he uttered the words "**imetoka na imegonga**", the accused was reporting to his boss and therefore accounting to him about what had just happened.

54. **Those words "imetoka na imegonga"** speak of an unintentional discharge of ammunition. It negates a calculated deliberate action on accused part. The prosecution has in the circumstances failed to prove beyond any reasonable doubt that the accused had malice aforethought when the shot was fired. The evidence supports the finding, which I hereby do, that the discharge of the ammunition on the material

day was accidental and devoid of malice.

55. **As to whether the prosecution has established motive for this crime.** I find no evidence to establish that the action actions that day were premeditated. Thus the issue of motive does not arise.

56. **As to whether the accused defence was plausible and believable.** The accused in defence denied his gun fired any shot at the scene. That defence is not reasonable or plausible. The prosecution has shown that the accused had a loaded pistol in hand, and that a shot was fired from it at the scene. That shot hit the deceased causing him injuries which caused his death. The accused admitted hitting the deceased to his boss (PW10) at the scene of incident. The accused defence is in the circumstances not reasonable plausible or believable.

57. I have considered that the prosecution did not call some witnesses who could have been of help to the case. These include the conductor of PW3 and the other two who had been arrested by the accused and PW10. It is clear that from what happened that day, PW10 and the accused interfered with the case. First they released potential witnesses. They did not remain at the scene upon realizing that they had shot someone. Thirdly they made no report of the incident, neither did they enter the incident in their OB, which was mandatory, not optional. These are but a few of the actions done which shows clear interference with the case. That does not explain why the investigating officer did not make effort to get those other witnesses who witnessed the incident. That notwithstanding I find that there is sufficient evidence to determine this case.

58. Having considered this case I find that the prosecution has proved beyond any doubt that the accused gun fired a shot which hit the deceased causing his death. I found that the prosecution has not proved any malice aforethought on accused part. The evidence was suggestive of an accidental discharge. That shows that the accused did not handle his official gun as be fitting of a well-trained, experienced, sober and responsible officer. He had many years of experience; he was well trained; there is no issue about that.

59. There could have been no discharge, accidental or otherwise if the gun was not cocked. By cocking his gun, at a public place where there was no danger to life or property, and therefore no reason to fire was evidence of negligent conduct. The gun going off in such circumstances and hitting the deceased causing his death amounts to unlawful killing.

60. Having come to the conclusion I have of this case, I find that the accused caused the deceased death out of unlawful act or conduct. The prosecution has proved the offence of manslaughter. In the circumstances, I substitute the offence of murder contrary to section 203 of the Penal Code to Manslaughter contrary to section 202 of the Penal Code. I find the accused guilty of manslaughter contrary to section 202 of the Penal Code. I convict him of manslaughter under section 322 of the Criminal Procedure Code.

DATED AT NAIROBI THIS 27TH DAY OF APRIL, 2017.

LESIIT, J

JUDGE