



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 74 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

WESLEY CHERUIYOT MUTAI alias JOHN KIPRONO KIRUI....ACCUSED

JUDGMENT

The accused **WESLEY CHERUIYOT MUTAI** alias **JOHN KIPRONO KIRUI** 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 24th day of August 2008, at Karangi village in Laikipia West District within Rift Valley Province murdered JIMMY GATHECHA MAINA”

The accused pleaded ‘**Not Guilty**’ to the charges. His trial commenced before **Hon. Justice William Ouko** (as he then was) on 13/12/2012. The prosecution led by the learned State Counsel called a total of eleven (11) witnesses in support of their case. **MR. MARAGIA** Advocate acted for the accused.

On 17/9/2014 the accused was placed onto his defence in a ruling delivered by **Hon. Lady Justice Helen Omondi**. Following her transfer to the Bungoma High Court, I took over the matter and heard the defence of the accused.

The brief facts of the case were as follows. **PW5 DAVID NDIMU NDERITU** told the court that he runs a shop/bar at Nyahururu Town. On 24/8/2008 the accused came in with some friends to drink. As they were leaving a fight erupted between accused and three youths outside the bar. Accused left but returned shortly thereafter armed with a gun.

As the accused resumed his struggle with the three youths **PW4** suddenly heard a gun-shot and the deceased came running to his shop holding his bleeding chest. Members of public mobilized to rush the victim to hospital but he died on the way.

It is important to note that from the evidence of all the witnesses the deceased was **not** one of the three youths with whom the accused had been engaged in an altercation. The deceased was just a passer-by who was unfortunately hit by a stray bullet.

After being placed on his defence the accused opted to give a sworn defence. The accused conceded that he was at the scene on the material night and states that as he and his friends left the bar at 3.00pm he met three drunken youths outside and they began abuse him. The accused claims that the youths chased him

and he went to collect his firearm in order to arrest them.

When he returned to the scene, this time armed with his pistol the accused caught hold of one of the youths with whom he had earlier been fighting in order to arrest him. As they struggled his firearm went off and the bullet hit the deceased who was standing nearby. The accused told the court that he did not know the deceased and he had no quarrel with him and he certainly had no intention to shoot or kill the deceased.

This court must now analyze the evidence on record with a view to determining whether the charge of murder has been proved beyond reasonable doubt as is required in law.

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”.

Therefore in order to prove the charge of murder the prosecution must tender sufficient evidence to prove the following crucial ingredients of the offence.

- i. Proof of the fact as well as the cause of the death of the deceased
- ii. Proof that the deceased met his death due to an unlawful act or omission on the part of the accused
- iii. Proof that said unlawful act or omission was committed with malice aforethought

In this case the fact of death of the deceased cannot be in any doubt. **PW5** and **PW6 JOSEPH NDERITU** who was the employer of the deceased told the court that they heard a gun-shot and suddenly the deceased began to scream saying that he had been shot. **PW2 DAVID KINYANJUI** an uncle to the deceased and **PW4 NANCY WAMBUI MAINA**, the deceased’s mother both testify that they went to the mortuary and identified the body of the deceased to the doctor for purposes of the post-mortem examination. The witnesses who all knew the deceased well gave his name as ‘**Jimmy Gathecha Maina**’.

Evidence regarding the cause of the death was tendered by **PW10 DR. BEATRICE CHESIRE** doctor at the Nyahururu District Hospital. I have noted that **PW10** was not the doctor who performed the autopsy on the body of the deceased. This was done by a ‘**Dr. Kuria Wanderi**’ whom **PW10** said she did not know. However, **PW10** confirmed that the autopsy was conducted at their medical facility and the post-mortem report bore the stamp of the Medical Superintendent at Nyahururu District Hospital. **PW10** further explained that the said **Dr. Wanderi** left that facility and his whereabouts were not known.

Section 77(1) of the Evidence Act provides as follows

“77(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics experts, document examiner or geologist upon any person matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it”.

On the basis of Section 77 the post-mortem report was admissible in evidence notwithstanding the unavailability of the maker to formally produce it. Moreover the accused in his defence conceded that the deceased was shot that evening.

The post-mortem report indicated that upon examination the body of the deceased had a gun-shot wound below the back and penetration into the chest. The exit wound was on the right exterior upper chest wall. The cause of death was opined to be '**cardiopulmonary arrest secondary to severe chest injury due to gunshot wound**'.

As I have stated earlier the post-mortem report duly signed and stamped was produced in court as an exhibit. This was expert medical opinion evidence which was neither challenged nor controverted by the defence. I therefore find as a fact that the deceased met his untimely death due to having been shot in the back.

The next question requiring an answer is whether it was the accused who fired the fatal shot. Both **PW5** and **PW6** were at the scene and witnessed the shooting **PW5** told the court that after engaging in an altercation with some youths outside his shop the accused left briefly and returned with his firearm. **PW5** said that the accused engaged in a fight with one of the men and that the deceased was standing some distance away watching the events. **PW5** suddenly heard the sound of a gunshot and then saw the deceased run into his shop clutching his chest which was bleeding.

On his part **PW6** told the court that he was called by his son and informed that the accused had gone to the centre armed with a gun. **PW6** rushed to the scene. While there he too heard a gunshot and heard the deceased cry out that he had been shot.

Although neither witness saw the accused actually point the gun, take aim and fire a shot in the direction of the deceased, they both state that it was only the accused who was armed with a gun at the scene. The fatal shot could only have come from the gun which the accused had.

PW11 SENIOR SERGEANT ROTICH told the court that at the material time he was the officer in charge of the armoury at Nyahururu police station. He testified that on 16/8/2007 he issued a G3 Rifle Serial No. F 95261 together with sixty rounds of ammunition to **No. 81007 PC Wilson Mutai** who is the accused before court. **PW11** produced as an exhibit the Arms Movement Register **P. exb 1** which the accused signed to confirm receiving the firearm and ammunition.

In his defence the accused readily conceded that he had been issued with the rifle and ammunition in question. He stated that the same was for his use whilst on patrol duties.

PW7 CORPORAL PAUL LIMO told the court that he went to the scene the day after the incident. Whilst there he recovered a bullet head and a cartridge case. Later **PW11** collected the Rifle Serial No. F 95261 with 39 rounds of ammunition from Losohura police station. The witness produced the Rifle **P. exb 3**. 39 rounds of ammunition **P. exb 4**. Gullet head **P. exb 5** and spent cartridge **P. exb 5** as exhibits.

PW11 further stated that upon conducting a search of the accused's house 20 rounds of ammunition were recovered **P. exb 6**. The exhibits were all sent to the Government Ballistics Analysts for examination.

PW3 CHIEF INSPECTOR EMMANUEL LANGAT is the Firearms Examiner who produced the report in respect of the examination and analysis conducted on the exhibits **P. exb 2**. In the report dated 13/11/2008 the findings were as follows

- The rifle Serial No. F 95261 was a firearm in good condition and the ammunition were found to be live and capable of being fired.
- Testing of the recovered fired cartridge revealed that it had been fired from the rifle Serial No. F 95261 in court
- The recovered fired bullet was examined and found to have been fired from the same rifle Serial No. F 95261

The evidence of the Ballistics Examiner provides conclusive proof that the firearm which had been issued to the accused was fired at the scene in question where the spent cartridge and bullet were recovered. The evidence is that only one gunshot was fired. Thus it is clear that the rifle which accused had is the one

from which that fatal shot was fired.

As stated earlier the accused in his defence readily concedes that he was issued with the rifle Serial No. F 95261 and he further concedes that he was at the scene with his loaded rifle. The accused also concedes that the shot which killed the deceased was fired from his said firearm.

Therefore I am satisfied that the *actus reus* of the offence of murder has been proved beyond reasonable doubt. Accordingly I do find that it was the accused who shot and killed the deceased.

The final element of a charge of murder which requires proof is the *mens rea* or the mental aspect of the offence. In law *mens reas* is defined as ‘**malice aforethought**’. It must be shown that the accused acted deliberately with intention to kill or to grievously harm the deceased.

In his defence though admitting that it was a shot fired from his rifle that killed the deceased, the accused pleaded that he had no intention to harm or kill the deceased. He stated that this was a pure accident in which his gun misfired and the bullet hit the deceased who was a mere bystander.

Both **PW5** and **PW6** confirm that the deceased was **not** one of the men with whom the accused was arguing/fighting. Both state that the deceased had nothing at all to do with the accused; he was merely standing by observing the altercation. There is no evidence that the accused person aimed his rifle at the deceased or that he targeted him in any way. The deceased was not the object of the accused’s ire and the accused had no reason or motive to shoot at him.

I do accept that the deceased was but a bystander who unfortunately got hit by the bullet fired from the accuseds rifle. For the above reasons I find that there was no malice aforethought and thus the *mens rea* for the charge of murder has not been proved.

However the fact that the accused did not **intend** to shoot the deceased does not absolve him from blame entirely. The accused was a police officer and had been trained in the use of firearms. The police in Kenya are issued with firearms not for the use in settling petty squabbles or personal scores, but for use in prevention of crime and the protection of the public.

As stated earlier the accused was not just an ordinary member of public. He was a trained police officer who had been lawfully provided with a firearm for use in the course of his duties. Can a police officer resort to the use of his firearm willy nilly. Certainly not. **Section 28 of the Police Act Cap 84 Laws of Kenya** (of which I have no doubt accused was well aware), sets out the circumstances in which a police officer may resort to the use of his firearm.

Chapter 11 of the **Kenya Police Manual 1990** at Section 3 provides as follows

“What is the effect of a police officer’s decision to use a firearm? The decision to use a firearm against any person places a serious legal as well as moral responsibility on a police officer. Therefore there should be no doubt in his mind of the circumstances in which he is justified in using a firearm”.

There are only certain justifiable instances in which a police officer may lawfully resort to the use of this firearm. These justifiable circumstances which are set out in section 4 of Chapter 11 of the Kenya Police Manual include

- To protect himself or members of public
- To suppress or disperse a riotous mob
- To prevent the escape of a person in lawful custody on account of a felony
- **“To effect, a lawful arrest if the police officer is in danger because the person to be arrested is in possession of and is intending to use a dangerous weapon against him”**

Section 49(5) and (6) of the National Police Service Act sets out the circumstances under which a police

officer may resort to the use of force and firearms. Part A of the 6th schedule provides for the use of force (firearms) by the police as follows

“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”.

In this case when the altercation between the accused and the three youths erupted the accused did not have his firearm. He actually left the scene went and collected his firearm and returned to continue the fight. This was reckless in the extreme. The persons with whom he was arguing were unarmed. The only possible reason why accused would fetch his firearm was to intimidate and/or unlawfully harm the men.

The accused in his defence claims that he went to get his gun in order to arrest the men. Why does an officer require a gun to effect an arrest? The men were unarmed. They had not committed any felony. Their only offence would have been abusing or provoking the accused. This is not a felony requiring massive fire force to effect an arrest. They posed no threat to the life of the accused. He faced no danger at all. The accused could and ought to have sought reinforcement from the public from other police men. In collecting and bringing to the scene a loaded rifle, in a place where other members of public were present for no justifiable reason whatsoever, the accused acted in a careless, negligent and a reckless manner. He did not require the use of his firearm merely to arrest a couple of drunken louts.

Whilst I am satisfied that there was no premeditation on the part of the accused, in that he had not aimed at or targeted the deceased in any manner however I do find that the manner in which accused used his firearm was reckless, careless and negligent in the extreme. It is this recklessness that led to the unfortunate and untimely death of the deceased.

I find that the accused acted unreasonably and in direct contradiction to his training as a police officer on the use of arms. His reckless action led to the loss of a young innocent life.

Section 202 of the Penal Code Cap 63 Laws of Kenya provides as follows

“202(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 act or 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”.

As a police officer the accused had a duty to act in a manner as to preserve and protect life certainly he had a duty not to use his firearm unless such use was justifiable. In the circumstances of this case there was no justifiable cause for accused to use his firearm.

The facts of this case satisfy proof of the offence of manslaughter. Therefore I acquit the accused of the charge of murder and instead substitute a conviction for the offence of Manslaughter contrary to Section 202(1) of the Penal Code.

Dated in Nakuru this 24th day of July, 2017

Maureen A. Odero

Judge