



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 105 OF 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GEOFFREY WAFULA MAKOE.....ACCUSED**

**J U D G M E N T**

1. **Geoffrey Wafula Makoe**, hereinafter “the Accused” is charged with two (2) counts:

- i. **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence being that on the **18<sup>th</sup>** day of **November, 2008** at **Mtito Andei Township**, in **Kibwezi District**, within the **Eastern Province** murdered **Issack Ndunda Muli** (deceased).
- ii. **Attempted Murder** contrary to **Section 220** of the **Penal Code**. Particulars of the offence being that on the **18<sup>th</sup>** day of **November, 2008** at **Mtito Andei Township**, in **Kibwezi District**, within the **Eastern Province** attempted unlawfully to murder **Munyao Ikulumi**

2. Facts of the case are that the accused herein is an Administration Police Constable. On the **17<sup>th</sup>** day of **November, 2008** he was assigned duties of escorting a motor-vehicle that was transporting **BAT (K) Cigarettes** from Nairobi to Malindi. The accused and his two (2) colleagues were issued with firearms. They embarked on the journey. On arrival at **Mtito Andei** they decided to spend a night there and proceed to Malindi the following day. They booked rooms at **Sunrise Lodge**. As two (2) of his colleagues retired to bed he opted to socialize within the lodging by drinking. At about **1.00 a.m.** he followed a lady who went to the cloakroom. There was a confrontation between them and some other patrons intervened. As a result of the melee that ensued the accused lost some money. Subsequently he went to his room and returned with a rifle. He shot the deceased and **Munyao Ikulumi** hence this case.

3. To prove the case the Prosecution called nine (9) witnesses. PW1, **Rachael Peninah Mwanzia** the barmaid stated that there were many patrons and it was raining. She heard gunshots as she attended to customers. She took cover under the counter.

4. PW2 **Benson Munyao Kimanthi** a patron at the bar stated that he saw the accused on the material night drinking alcohol. He had removed his vest, socks and shoes. The watchman ordered him to leave. He complied. Fifteen (15) minutes later he heard a gunshot. He peeped through the window only to see the accused armed with a rifle which was directed towards the bar. Patrons scampered. He attempted to jump over the gate but could not, he turned round and encountered the accused who shot him twice in the left thigh. Electric lights were on at the bar emanating from Electric Power that enabled him to identify the accused. He was taken to **Makindu Hospital** where he was admitted for four (4) months.

5. PW3 **Richard Mutie Mbaluka**, the proprietor of the bar heard gunshots. He rushed to the scene to

find a person lying on the floor bleeding. He went and reported the matter to the police. They went back to the scene to find two (2) people having been shot. One of them was already dead.

6. PW4 **Isaac Muli**, the brother of the deceased identified his body to the Doctor who performed the post mortem.

7. PW5 No. **46335 Sergeant Richard Karanja** visited the scene of the incident. He arrested the accused and recovered a pair of jungle socks, spent cartridges, and a Rifle **Serial No. FMP 388308** and rounds of ammunition. They took PW2 to hospital and the deceased to the mortuary.

8. PW6 No. **222524 Sergeant Hassan Musa Wazir** who was assigned escort duties with the accused stated that prior to leaving each one of them was issued with a rifle (G3) and rounds of ammunition. They decided to sleep in **Mtito Andei** because the driver of the motor-vehicle was tired. They discharged their duties of guarding in turns. The accused took over guarding duties at **1.30 a.m.** He returned to the room at about **2.15 a.m.** threw the firearm on the bed and stated:

*“Two down, wawili chini”*

This prompted him and their colleague **Felix** to go and check on the motor-vehicles. They did not find anything unusual. They returned to their room. After a short while police officers under the command of the **OCS, Mtito Andei** notified them that the accused had shot two (2) people. He was arrested. On cross examination he stated that while at the police station he heard that the accused had been robbed after he snatched from some people a woman.

9. PW7 No. **2002049678 APC Daniel Mshale Kinyale**, the In charge Armory issued the accused with a **G3 rifle Serial No. 388308** with 20 rounds of ammunition calibre **7.26 x 51mm.**

10. The **G3 Rifle Serial No. 388308**, an empty magazine, ammunition and empty cartridges were submitted to PW8, **Johnston Musyoki Mwongela**, a **Firearms Examiner** for examination. On examination the G3 rifle was found to be in a good general and mechanical condition and indeed a firearm. The magazine was a detachable one of a G3 rifle with a capacity of twenty rounds of ammunition in caliber **7.62 x 51mm.** It was in a good working condition and suitable for use in a G3 rifle. Some of the rounds of ammunition picked out of the 15 rounds were successfully testified. The three (3) cartridges recovered were fired in the **G3 rifle Serial No. 388308.**

11. PW9 No. **219000 Assistant Superintendant of Police Charles Kipchumba** investigated the case and caused the accused to be charged with the offences. PW10 **Dr. Hannington Mibei** produced the post mortem report on behalf of **Doctor Katoka** who performed the autopsy on the body of the deceased. On examination, externally, the body had a skull fracture with exposed brain matter internally. There was a skull fracture on the left parietal temporal area. There was brain trauma on the nervous system. Consequently he formed an opinion that the cause of death was fatal head injury secondary to a gunshot.

12. When put on his defence the accused stated that he was issued with a firearm which had twenty (20) rounds of ammunition. He booked a room which he shared with the driver of the G4S motor-vehicle they were using. The driver offered to buy him a drink. They went to the club. He bought him a bottle of Guinness. He drunk a bit of it knowing that he was on duty. He moved to relieve himself within the premises. Prior to reaching the cloakroom he was attacked by about five (5) people who beat him up thoroughly. They took away his wallet which contained **Kshs. 3,700/=** and a cellphone. He remained with only a pair of trousers. He reported to the watchman who slapped him thrice instead of assisting him. He went to seek assistance from his colleagues who did not wake up as it was raining heavily. He took his firearm and went back to the club with the intention of recovering his property. He encountered a violent man who wanted to snatch his gun. He acted in self defence by firing the bullet upward. He saw the person bend but did not realize he had hit him. The person fell down and he entered the club where many people were lying down. He did not find his property therefore went back to his room and found his colleagues awake. He denied having intended to kill the deceased.

13. Submissions at the close of the defence case were filed which I have duly taken into consideration.

14. It is provided in **Section 203** of the **Penal Code** that:

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

Therefore issues for determination are:

- Whether death occurred
- Whether the accused caused the death
- Whether the act or omission that resulted into death was unlawful
- Whether the act/omission was accompanied by malice aforethought.

15. The fact of death was proved by evidence adduced by eyewitnesses who saw the deceased prior to his demise and after he was injured fatally. An autopsy was conducted on the body that established the cause of death which was a fatal head injury secondary to a gunshot. In his defence the accused admitted having shot the deceased. It is therefore not in dispute that he caused his death.

16. The issue to be determined is whether he did it by malice aforethought?

17. Malice aforethought is defined by **Section 206** of the **Penal Code** as:

***“(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) an intent to commit a felony;***

***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

18. It is argued by the accused that he had no intention of causing the death of the deceased, but acted with the intention of defending his weapon. However looking at evidence adduced, the accused was seen by PW2 being ordered by the watchman at the club to leave the premises. He complied but returned with a firearm which he used to shoot at patrons. The accused explained that he was robbed of his property by five people, instead of the watchman listening to his complaint, he also assaulted him. The fact that the accused left the club after having been wronged and returned to revenge is evidence that he was provoked.

19. Provocation is indeed a statutory defence and is well captured in the **Penal Code**. **Section 208** of the **Penal Code** provides thus:

***“(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of selfcontrol and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.***

*(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.*

*(3) A lawful act is not provocation to any person for an assault.*

*(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.*

*(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.”*

If it is proved that the accused acted in the heat of passion having been caused by provocation then the offence would be reduced to manslaughter (**see Section 207 of the Penal Code**).

20. From the foregoing it is apparent that the accused should have acted at the time when he temporarily lost his mind. The accused, according to PW2 had not been provoked by anyone as he was ordered out. It was his conduct of removing socks, vest and shoes as he drunk alcohol that made the watchman ask him to leave. The accused however, explained that some people took away his properties as he went towards the cloakroom. He did not complain to the management but decided to collect his firearm that was in the room. He returned and fired shots randomly at patrons. He stated that his intention was to recover his property. When he returned to the room he did remember that he had killed one person. This was not a person who was temporarily deprived of his reasoning capacity. He was fully aware of what he was doing. And even if he had been provoked, he did not act in the heat of passion.

21. Further, he states that he acted in defence of his property. He alleges that he fetched the firearm to go and recover his property namely, a cellphone, cash money and a wallet. He may have had a right to prevent any person from taking his property. But, the question lingering is whether stealing from his person, if indeed it happened justified use of gunfire? There is an allegation of a man having been violent without elaboration of the nature of violence. The accused did not suggest that he retreated to avoid the person. He did not attempt to escape, he simply opened gunfire and shot at patrons. The force used in the circumstances, in response of what may have transpired was not justified as it not only caused grievous harm but death. In the result, the defense of property put up fails and is accordingly dismissed.

22. The accused herein was an Administration Police Officer with experience of three (3) years. He was aware of the consequences of using a gun. He was aware that by firing ammunition he would either wound a person or cause death. Therefore, when he pulled the trigger he had the knowledge that the act which was unlawful would probably cause death. It did not matter that the deceased may not have been the person he intended to kill. Indeed he acted with malice aforethought.

23. With regard to the count of **Attempted Murder**, it is stated that he attempted to murder **Munyao Ikulumi**. PW2 described himself as **Benson Munyao Kimanthi**. He alluded to injuries he sustained and identified a P3 form. However, the P3 form was not adduced in evidence. Without medical evidence there is no proof of the alleged injuries having been sustained. Therefore, there is no evidence of an intention to commit murder having not been fulfilled. In the result the accused stands acquitted of the second count.

24. In respect of the first count, from the foregoing, it is apparent that the accused caused the death of the deceased by malice aforethought.

25. Following the reasoning above, I find the accused guilty and convict him of the offence of murder.

**Dated at Kitui this 16<sup>th</sup> day of November, 2015.**

**L. N. MUTENDE**

**JUDGE**

**Dated, Signed and Delivered at Machakos this 9<sup>th</sup> day of December, 2015.**

**P. NYAMWEYA**

**JUDGE**