



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Case 23 of 2009

REPUBLIC PROSECUTOR

V E R S U S

MICHAEL SIKURA WEKESA 1ST ACCUSED

JONATHAN MUTUKU MUNYOKI 2ND ACCUSED

J U D G M E N T

The two accused persons are charged with the offence of murder contrary to **section 203** as read with the **section 204** of the **Penal Code**. The particulars of the offence are that the accused persons *on the 26th day of March 2009 at Ebunyanza Village, Mulwanda Location in Butere District, within Western Province, Jointly murdered* **1. EVANS MUKOLWE, 2. HELLEN ASIKO, 3. MOSES OKONDA MATENDECHERE**.

The prosecution called thirteen witnesses. **PW1, EUNICE MUHINDI OMUYUNDI**, testified that on the 26.3.2009 at 8.00 p.m. police officers went to her homestead. One police officer entered her house while the other one remained outside. She was in her bedroom. When she came out she saw her worker **MOSES OKONDA** being slapped. The police said they had been sent to kill her. Suddenly her mother in-law **HELLEN ASIKO** and the worker **MOSES OKONDA** were shot. Then **ROSELYNE AWINJA** who was at the door was shot and her husband, **FRANCIS MUKOLWE**, came out from the bedroom and he was also shot. According to her there were two police officers. The one who was outside fled and it is the one who was inside the house who shot the deceased persons. There was light from a bulb as she used a battery to light up her house. She had three workers at the compound. One of the workers by the name **LIKOYO** was taking alcohol (chang'aa). Her husband used to sell chang'aa. She further testified that the police had gone to arrest illegal brewers of chang'aa but her husband did not use to brew chang'aa at home. The police officers did not find chang'aa at her compound. It is her evidence that it is the 1st accused who entered her house and shot at the deceased persons.

PW2, ROSELYNE AWINJA AKUTE, was at her house on the 26.3.2009. She decided to go out and call her mother **HELLEN** who was at her brother's house. Suddenly she heard gun shot from her brother's house. She rushed there and she was shot in the stomach. She lost consciousness and fell down. According to her the police officer who shot her was seated on a bed. **PW3, VINCENT MINADA AMAJEVA**, gave evidence to the effect that on the material night he was at his cousin's house, the late **FRANCIS MUKOLWE**. He placed food on the table and saw two people entering the compound in police uniform. One of them slapped **OKONDA** and the police said they had been sent to finish **OKONDA**. It is the 1st accused who slapped Okonda. The 2nd accused shot **HELLEN ASIKO** and a second bullet hit **OKONDA**. **PW3** ran away. He heard two other gun shots. He later returned and saw people had been killed. Helen was shot when she was inside her house and it is the 2nd accused who shot

both **HELLEN** and **OKONDA**.

PW4, JENNIFER MATENDECHERE, and **PW5, MARY BUKACHOOMUCHERE** went to the Mbale District Hospital on the 1.4.2009 and identified the bodies of **MOSES OGONDA, EVANS MUKOLWE** and **HELLEN ASIKO** for post mortem purposes.

PW6, JOHNSTONE MUSYOKI MWONGELA, is a ballistic expert. On the 7.4.2009 he received exhibits from Sergeant **MAURICE AMWAYI**. The exhibits included two G3 Rifles serial numbers 77096359 and 66984945, two G3 Rifles Magazine and 36 rounds of ammunition of 7.62 x 51 mm caliber. He also received 3 fired cartridge cases and one fired bullet. He examined the exhibits and concluded that the three cartridges were fired from G3 Rifle number 669845. He prepared his report on the 23.4.2009. **PW7, AP SGT. (Rtd) TIMOTHY CHONOMIA** was based at the Mulwanda AP post in 2009 being the officer in-charge. On the 28.3.2009 he gave two G3 Rifles numbers 77096359 and 66984945 to the 1st accused person before he went on leave. He also gave the 1st accused 72 live ammunition and the armory box. PW7 proceeded on leave and learnt about the incident when he came back.

AP SGT. GERISHOM MULANDA was **PW8**. On the 26.3.2009 he was based at the Khwisero AP line and got information about the incident which occurred on that date at 8.00 p.m. Together with other officers he went to the scene. They found in the house two bodies on top of each other. One was a body of a male person and the other of a female. There was blood all over. About 4 meters from the two bodies there was another body of a male. They were told the female body was that of one Helen. The male bodies were of Matendechere and Evans Mukolwe. They were also told that one Roselyne Awinja had been injured and taken to Mbale sub-district hospital. **PW9, ANNE NEKESA** was the assistant chief of Muluwanda Sub-location. She heard three gun shots that night and she called the area chief Paul Ambaisa. She later went to the scene and saw three bodies of people known to her. Two bodies were in a house while the other body was outside the house. She further testified that the homestead was used to sell chang'aa and she was aware.

PW10, PAUL OCHANGO AMBAISI, testified that he was informed about the incident through the phone and went to the scene. He saw the three bodies at the scene and the police went to collect them. The following day he went to Butere Police station and saw the 1st accused **MICHAEL WEKESA** with injuries on the left hand and lower joint. The 1st accused also had a shoe that had been cut with a sharp object. According to him the scene of the incident was a place where chang'aa used to be sold.

PW11, was **SP PETER KIMULWA** who was the District Criminal Investigation Officer Butere/Mumias. On the 26.3.2009 at about 9.30 p.m. he was in his house at Butere when he received information about the incident. He went to the scene with other officers and saw three bodies with gunshot wounds. Two bodies were inside the house while the 3rd body was a few meters from the house. According to him he got information that two AP officers had gone to the homestead on allegation that there was an illegal brew in the house. They conducted a search and a confrontation occurred. The 1st accused used his gun and three people were fatally injured. Those at the homestead knew the police officers as they had visited the homestead before. He preserved the scene and took away a G3 Rifle Number 36698945 from the 1st accused. He removed the magazine of the G3 Rifle and found that it had 16 rounds of ammunition. He then took from the 2nd accused G3 Rifle number 77096359. The G3 Rifle had 20 rounds of ammunition. The 2nd accused had not fired any round. They removed the bodies and took them to Mbale District Hospital. He observed that the boot the 1st accused was wearing had a cut and he was bleeding from a wound on his leg. The cut on the boot pierced through his leg. The 1st accused told him that one of the deceased had cut him on the leg with a panga. They searched the house and did not recover any chang'aa. It was about 9.30 p.m. when they reached the scene. The jacket the 1st accused was wearing was torn and it had blood. PW11 later sent the two Rifles to Nairobi for examination by a ballistic expert.

PW12, DR. MASIKA COLLINS, produced a postmortem report on the body of Evans Mukolwe

that had been conducted by Dr. Limo Kipkurgat. The body had an entry wound at the back. There was exit wound on the anterior chest. The cause of death was cardio respiratory arrest secondary to excessive bleedings from gunshot wound. PW12 further testified that Dr. Limo examined the 1st accused and noted superficial cut on the head, swollen face, bruise on the left side of the neck, tenderness on the chest and cut wound on the left lower limb.

PW13, SGT. MAURICE AMWAYI, investigated the case. He got information about the incident on the 26.3.2009 at about 9.30 p.m. He went to the scene and saw the three bodies of the deceased persons. The District Criminal Investigation Officer was at the scene and he took the two G3 Rifles from the accused persons. At the scene the 1st accused complained that he had been assaulted by family members of the deceased. The 1st accused had a cut injury on his right hand and right foot. A cut had penetrated through the police boot. The following day PW13 went back to the scene and recovered one spent cartridge and bullet head in the middle of the house. The bodies were taken for post mortem and he sent exhibits to Nairobi for examination by ballistic expert. During his investigations he noted that the 2nd accused had been issued with G3 Rifle number 77096359 and 20 rounds of ammunition. The 2nd accused did not use a single live ammunition. The 1st accused used his G3 Rifle number 36698945 and fired four rounds of ammunition in self defence after he had been cut twice.

The two accused persons were placed on their defence. The 1st accused gave sworn testimony while the 2nd accused opted to remain silent. The evidence of the 1st accused is that on the 26.3.2009 he was in charge of the Muluanda AP post. He went on patrol with the 2nd accused while armed with two G3 Rifles. While on patrol they heard noise from one village and they decided to go and check. The 1st accused entered in one house while his colleague entered in another house. He saw someone running towards him and before he enquired that person jumped on him and tried to take his rifle. The accused was just entering the house. Some other people attacked him from behind and started struggling with him. He was cut on his left hand twice and they tried to cut him on the neck but he pushed his rifle and blocked the panga. They also tried to cut him with a panga on the head as he had fallen down and he blocked the panga with his right leg and they managed to cut the boot. He did not know where his colleague was and he decided to use his rifle and shot so as to scare the people. While shooting the other people were also struggling with him trying to take the gun from him. The people dispersed and he managed to escape. He was taken for treatment and produced his P3 form and medical card. He was later charged with the offence. The 1st accused further testified that he had no intention of killing anyone and he was only defending himself.

Counsel for the accused, submitted that the prosecution failed to prove its case against the accused persons. There was no evidence that the accused persons had premeditated plan to go to the homestead and kill people. The two accused persons went to the homestead on official duty. The 2nd accused ran away while the 1st accused defended himself when he had no option but to do so. He was cut on the body and the boot. His life was in danger and he decided to use the gun in accordance with the law.

The prosecution case does establish that three people lost their lives on the 26.3.2009 as a result of shooting by the police. The accused persons are charged with the offence of murdering three people on the 26.3.2009. The prosecution evidence establishes that the two accused persons went to the homestead of PW1 on the material day at about 8.00 p.m. It is also established by the prosecution evidence that PW1's homestead was used as a place of selling chang'aa. On that date the police did not recover any chang'aa from the homestead. From the evidence of PW6 Johnstone Musyoki Mwongela it is established that the G3 Rifle that fired the fatal bullets was rifle number 36698945. According to PW7 the two G3 Rifles were handed over to the 1st accused person who seemed to have taken over the command of the AP post. It is the evidence of PW11 SP Peter Kimulwa that when he went to the scene he took G3 Rifle number 36698945 from the 1st accused and the Rifle had 16 rounds of ammunition. PW11 also took the 2nd G3 Rifle number 77096359 from the 2nd accused and it had 20 rounds of ammunition. The 2nd accused did not fire any round of ammunition. The evidence that the 2nd accused did not fire any ammunition is confirmed by the investigating officer PW13.

It is clear from the evidence on record that the 1st accused fired 4 rounds of ammunition from the G3 Rifle number 36698945. It is the evidence of PW3 Vincent Minada Amajeva that he saw two people being shot and he ran away. He also heard two more gunshots as he was running away. When PW11 took the G3 Rifle from the 1st accused it had 16 rounds of ammunition and he concluded that the 1st accused had spent 4 rounds of ammunition. The 1st accused in his defence admits that he used his gun as he was protecting himself having been attacked by the family members at the scene.

The main issue for determination is whether the accused persons murdered the victims as per the charge sheet. According to PW1 the 1st accused informed her that they had been sent to kill her. He slapped Moses Okonda who is one of the deceased. Her husband was in the bedroom and when he came out he was shot in the chest. The officers fled after her husband was shot. It is confirmed by the prosecution evidence that Evans Mukolwe one of the deceased used to sell chang'aa at the homestead. From the evidence of PW3 it is clear that he does not know who shot at the deceased persons. According to him it is the 2nd accused who fired the shots while the evidence on record shows that it is the 1st accused who did the shooting. According to PW10 Paul Ochango Ambaisi who went to the scene he saw the 1st accused with cuts as well as his shoe having been cut with a sharp object.

From the evidence on record I do find that what happened was not random shooting by the 1st accused. Although the police officers who went to the scene did not recover any weapon in form of a panga or an axe as indicated by PW8 Sgt. Gerishom Mulanda, it is clear that the 1st accused was attacked by the members of the family at the homestead. The witnesses who saw the 1st accused at the scene do confirm that he had injuries on his hand and his right boot had been cut. I had the advantage of seeing the boot and it was cut through just missing the 1st accused's toes. The cut was clearly made by a sharp object. The evidence on record shows that the accused persons ran for their safety and went back to the scene when their colleagues arrived at the scene. The fact that the 1st accused was injured did not arise the following day. The investigating officer PW13 saw the 1st accused who had some injuries and his clothes were torn. The torn jacket and shirt were produced as exhibits and they had blood stains. The evidence on record disproves the evidence of PW1 and PW3 to the effect that the 1st accused shot at the deceased persons for no reason.

From the evidence on record it is established that the 1st accused was attacked at PW1's homestead. The 2nd accused sensed danger and ran away without using his G3 Rifle. The 1st accused's evidence is that he was attacked by people as he entered a house in PW1's homestead. The attackers struggled to take the G3 Rifle from him and also tried to cut him with a panga. Although no weapon was recovered I do find that the 1st accused was assaulted by the family members and the weapons were removed before the police officers went to the scene. The cut on the 1st accused's boot could not have been done by any other object other than a sharp one. I do believe the 1st accused's evidence that the cut was done by a panga.

The next issue would be whether the 1st accused lawfully used his gun or whether he used excessive force under the circumstances. The accused persons are Administration Police officers and governed by the provisions of the Administration Police Act Chapter 85 Laws of Kenya now repealed and replaced by the National Police Act, Act No. 11A of 2011. The offence occurred in 2009 when the new Act had not been enacted. **Section 14** of the then Administration Police Act states as follows:-

14. An officer may use firearms, if and to such extent only as is necessary, against –

- a) **any person in lawful custody charged with or convicted of a felony, when that person is escaping or attempting to escape:**
- b) **any person who by force rescues or attempts to rescue any other person from lawful custody:**
- c) **any person who by force prevents or attempts to prevent the lawful arrest of himself or any**

other person:

Provided that resort shall not be had to the use of firearms-

i. under paragraph (a), unless the officer has reasonable ground to believe that he cannot otherwise prevent the escape, and unless he shall give warning to such person that he is about to use firearms against him and such warning is unheeded:

ii. under paragraph (b) or paragraph (c) unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise prevent such rescue, or, as the case may be, effect such arrest.

Under the above section a police officer is allowed to use firearm if the officer believes that he or any other person is in danger of grievous bodily harm. The officer is supposed to give warning first to the effect that he is about to use firearms. Given the evidence on record I do find that the 1st accused was entitled to use his firearm as his life was in danger. He was attacked and the attackers wanted to take the firearm from him. Although the number of those shot is high, given the circumstances at the scene, I do find that the 1st accused had no option but to shoot. I do not that the postmortem report for Evans Mukolwe, the entry point was from the back. Given the circumstances of the case, it cannot be concluded with finality that the 1st accused shot at Evans Mukolwe while he was running. According to the accused there was struggle and he fell down. He was attacked with a panga and this is proved by the fact that he sustained injuries at the scene. His jacket that was produced in court was also torn. The bodies of all those who were shot were within the same place. Indeed one body was on top of another. It can be concluded that the 1st accused was aiming his shots at people who were running away.

Section 18 of the Penal Code states as follows:-

“Where any person is charged with a criminal offence arising out of the lawful arrest, or attempted arrest, by him of a person who forcibly resists such arrest or attempts to evade being arrested, the court shall, in considering whether the means used were necessary, or the degree of force used was reasonable, for the apprehension of such person, have regard to the gravity of the offence which had been or was being committed by such person and the circumstances in which such offence had been or was being committed by such person.”

In the case of **PALMER V REGINALD [1971] ALL ER 1077**, at 1088, the Privy Council stated as follows:-

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances..... It may in some cases be only sensible and clearly possible to take some simple avoiding action. 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 action of retaliation which was wholly out of proportion to the necessities of the situation....”

In the case of **CHARLES MUNYEKI KIMITI VS CPL MWENDA & 3 OTHERS**, the plaintiff sued the defendants claiming damages arising from shooting by the police that had caused fatal injuries. The Court of appeal stated as follows:

“Whether or not police have used excessive force in effecting arrest is a matter of degree dependent on the peculiar circumstances of each case. In deciding whether liability should attach for alleged careless or negligent use of firearm by police in effecting arrest, the court should take into account, among other things, that the pursuit and arrest of dangerous and armed criminals is a hazardous operation and that it is in the public interest that the police operations are not unreasonably impeded by the decisions of the courts”.

The main issue is whether the 1st accused person used excessive force in the circumstances. In some occasions it has been noted that the use of force to defend oneself can become an act of provocation leading to a verdict of manslaughter. In the current case I do find that although the 1st accused was acting in self defence returning a verdict of manslaughter will not be fair given the circumstances of this case. The 1st accused was attacked inside a house and the attackers wanted to take away the gun from him. It is clear from the prosecution evidence there was chang'aa being served at the homestead of PW1 even though when the police went there after the incident they did not find any chang'aa. Similarly the police did not recover any weapon yet the 1st accused had his police boot cut in two almost two pieces which could only have been done by the use of a sharp object. It is clear that before the police went to the scene the offensive weapons and the chang'aa were removed from the scene. The incident occurred within a house and the 1st accused- could not have directed his shots to any other place other than within that vicinity.

In the end I do find that the two accused persons are not guilty of the offence of murder contrary to **section 202** as read with **section 204** of the **Penal Code**. The accused persons are hereby acquitted of the charge of murder and shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 29th day of May 2013

SAID J. CHITEMBWE
J U D G E