



-Mens rea not proved
-Charge reduced to manslaughter
-Mental state

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 1 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL LOROO KOPOE.....DEFENDANT

JUDGEMENT

SAMUEL LOROO KOPOE(the accused) is charged with murder contrary to section 203 Penal Code as read with section 204 Penal Code, the particulars being that on 24th November 2009 at Maji ya Chumvi area, Mariakani, within Kaloleni District, of the Coast Province, murdered **EDWARD NG`ANGA KURIA**(the deceased). Accused denied the charge. He is reported by **MR GEKANANA**, while **MR KEMO** appeared for the State.

The deceased was driving motor vehicle registration KAV 551B from Mombasa, along the Mombasa-Nairobi highway. He was accompanied by his turnboy **THOMAS MAINGI MUSYOKA**(Pw 1) on 24/11/09. They approached the **MARIAKANI** weighbridge at about 5.00Pm and found motor vehicles lining up to be weighed. They were not to go through the weighbridge, so the deceased drove on the murrum, avoiding the roadblock. He drove upto Mariakani Barracks, then commented to Pw 1 that there was a motor vehicle which was flashing its lights at them, meaning, they should stop. The deceased said he would not stop for persons he did not know. The Saloon motor vehicle overtook them and Pw 1 noticed a police officer in uniform, seated inside the motor vehicle which was a G-Touring registration KAT (figures not recalled). The driver was in civilian wear, and once it overtook them, drove on, then the deceased`s motor vehicle overtook the G-Touring, but again when they got to **MAJI YA CHUMVI** area, it overtook deceased`s motor vehicle then applied emergency brakes. The deceased braked, and his motor vehicle but the G-Touring resulting in the latter`s windscreen getting shattered. The deceased alighted from the motor vehicle and the saloon driver also alighted, while the police officer was left seated in the motor vehicle. Pw 1 saw the police officer (who is the accused) get out of the motor vehicle, stand on the pavement, cock his gun and shoot the deceased. Pw 1 watched this scenario while seated inside the motor vehicle he had travelled in. The salon driver got into the motor vehicle and drove towards Mombasa direction.

Pw 1 noticed that the gun shot entry was on the left side of the deceased`s chest. The Police officer who fired the shot, never uttered a word. Pw 1 then got out of the motor vehicle to try and make a call to their employer and inform him about the incident, but failed as there was no network in this area. He returned

to the shooting scene and realized that accused had left. Shortly police officers came and removed the body. Pw 1 identified the weapon accused had as the AK 47 Rifle which was produced in this court.

On cross-examination Pw 1 confirmed that their motor vehicle was loaded with 11 tonnes of steel and that any motor vehicle carrying over 7 tonnes must be weighed. However they did not go to the weighbridge because at no point in their journeys, have they ever been required to go to the weighbridge. He denies suggestions by defence counsel that they were avoiding the weighbridge, saying they were just avoiding the long queue as they did not need to be weighed. He also confirmed that the motor vehicle which overtook them signaled them to stop, but the deceased driver said he would not stop because they had not been stopped at the weigh bridge. He also told this court that he used to see the accused manning the weigh bridge each time they passed along that route.

PC PATRICK WAWERU KIMANI(Pw 2) who was at the Mariakani weight bridge told this court that he was with accused and **MOSES OSODO** on the date in question – they were diverting all vehicles exceeding 7 tonnes to the weighbridge. It was his evidence that the accused tried to stop the motor vehicle driven by Deceased but it failed to stop. It was then that accused got **MOSES OSODO** to drive his car in pursuit of the “offending motor vehicle’. After about ½ an hour, **MOSES** returned saying accused had shot the driver they had been pursuing. Pw 2 immediately informed their officer in-charge, **SERGEANT OUMA**, about the incident and ½ hour later, accused arrived aboard a saloon car, still carrying his gun(AK 47 Rifle) in his hand. Pw 2 requested him to give him the Rifle and he in turn handled it over to Senior Sergeant BIKETI who had arrived - he too identified the rifle SN 2095090 as the one he received from accused.

On cross-examination Pw 2 explained that when the motor vehicle failed to stop after being flagged down, he (I suppose the two police officers suspected that it was because it was carrying more than 7 tonnes) decided to pursue it. He further stated that;-

“Under the Police Act, if someone fails to stop after being ordered to do so by police, we pursue the motor vehicle and arrest the person who had failed to stop”

He also got to learn that a few days prior to the incident, the accused had not been off duty as he was ailing and had been admitted at Mariakani District Hospital. CIP **NAHASHON MUTUA** (Pw 3) confirmed on cross-examination that.

“The act of accused pursuing the motor vehicle which had failed to stop, was not an offence”

MOSES HENRY OSODO(Pw 7) who accompanied the accused gave evidence regarding the ‘chase” which more or less corroborated what Pw 1 stated. He explained that after overtaking the motor vehicle twice, signaling it to stop without success, he requested the accused to contact his colleague at the Highway Patrol Base, but accused said he did not have their contacts and that he would have to contact his other colleague at the Road Block, to help him get the telephone number of Highway Patrol personnel. Accused removed his phone from his pocket and just as Pw 7 was about to stop, the canter which they had been chasing rammed into the rear of his motor vehicle, shattering the rear windscreen. Pw 7 came to a complete stop and got out of the motor vehicle. The canter also stopped and its driver approached Pw 7 saying;-

“Do you see how close you were to me?”

Pw 7 told him the motor vehicle was not the problem at the moment and he should follow them back to the weighbridge for his motor vehicle to be weighed and also inspected to see what it was carrying. Just then Pw 7 heard a loud bang and noticed some drops of blood on his shirt. For a moment he thought he had been shot, so he took a step back and asked accused in surprise.

“What have you done?”

Accused replied that he had shot the driver on the leg. Pw 7 noticed the canter driver was holding himself at the chest, then he fell down. The turn boy came out of the motor vehicle and stood where the deceased had fallen. Pw 7 requested him to help carry the injured man to his car so he could rush him to hospital. The turn boy looked at Pw 7 in surprise and told him that the driver was dying. Pw 7 then rushed to Mariakani weighbridge to report the incident to accuseds scenarios. Pw 7 stated that when he got out of his motor vehicle to talk to the Canter driver, he did not talk to the accused. When he spoke to the deceased driver, he appeared scared and they did not argue? He also confirms that he was about 6 metres away from his car when talking to the Canter driver and anyone seated in the car could easily hear their conversation.

On cross-examination Pw 7 told this court that the canter driver drove on the murrum road, and appeared to be evading the road block, because other motor vehicle ordinarily used the tarmac. The deceased was driving at a relatively high speed during the chase. They tried to stop the canter by waving it down, signaling to it to stop, putting on the “chase cars” hazard lights, all in vain. Accused who was in police uniform tried to stop the motor vehicle using his left hand while seated in the passengers seat, but the deceased driver ignored.

CHIEF INSPECTOR MUTUA(Pw 3) was the deputy OCS Mariakani Police Station upon getting information about the incident he proceeded to the scene and found the deceased's body lying there in a pool of blood. He recovered the AK 47 Rifle which accused had, and he produced it as exhibit 3. He also went to the scene, he recovered an empty cartridge (exhibit 4). An extract of the Arms Movement Register (exhibit 5) which indicated that the Rifle had been issued to the accused on the same date of the incident. That movement register indicated that the Rifle was returned with one ammunition less in the firearm. The firearm had 29 rounds of ammunition and the same were submitted to the ballistics expert for examination – three were test-fired and have been produced as exhibit 6, 26 live ones remained and were produced as exhibit 7. The ballistics expert examined the firearm and his report, which was produced as exhibit 9 confirmed that the Rifle was an AK 47 Assault Rifle SN.2095090 in calibre 7.62mm in good general and mechanical condition and capable of firing. It was test-fired using three rounds of ammunition picked at random, and the ammunition were successfully test-fired using the rifle. The magazine was confirmed to belong to AK 47 Rifle with capacity of 30 rounds of ammunition and suitable for use by the Rifle. The fired cartridge was found to be of calibre 7.62mm. He formed the opinion that the same were firearms and ammunition as defined under the Firearms Act and a comparative microscopic examination revealed that the spent cartridge was fired from the AK 47 Rifle. Meanwhile photographs of the scene which captured the two motor vehicle, the deceased at different angles(lying dead) were taken, and were produced as exhibit 12. The deceased's body was identified by his wife **LUCY NDUTA**(PW 4) and his brother **BENSON KIMANI KURIA**(Pw 5) to **DOCTOR MANDALIA**(PW 6) who carried out the post mortem. Both stated that they observed a gunshot wound on the left side and exiting on the right hand side.

DOCTOR K.N.MANDALIA confirmed that deceased had a bullet wound on the left side of the elbow, laterally with an exit at the joint – the elbow joint had fractured, a left bullet wound on the chest just 2cm from the nipple – that was the entry. There was clotted blood on the chest. Internally the bullet path entry was in a space between the 6th and 7th rib known as the intracostal space, it passed through the base of the left lung, through the heart from the left to the right side, went to the right lung and exited out at the same position that is 6th and 7th intracostal space. At the exit point, there was a fracture of the rib. All the other systems were normal. As a result of the injuries, the Doctor formed the opinion that the cause of death was due to haemorrhagic shock due to gunshot wounds on the chest. The post mortem form was produced as exhibit 13. Six days later, Accused was escorted to the psychiatrist for examination and initial reports indicated that accused was not fit to plead as he was in a state of shock.

On cross-examination **CIP MUTUA** stated that investigation diary of 24/11/09 shows that accused was escorted to his residence, where treatment notes dated 7th August 2009, 10th August 2009 and 12th August 2009 were retrieved. The treatments notes for 7th + 10th August 2009, were still being used by the accused as it was a book. There was the OB extract No. 28 which read that accused had been admitted to Mariakani Hospital on 7th August 2009 suffering from cerebral malaria. The notes of 20th August 2009 were a confidential report by **DOCTOR M. CHIJKI** and were read in confidence by the court – the

recorded as follows:-

“After thorough examination and investigation, a diagnosis of TB, Hepatitis and HIV Enccephalopathy was made. He was later discharged and is still being followed up to monthly in our comprehensive care clinic. PTB clinic and was for psychiatrist review”

On being interrogated, accused could not remember cocking his rifle or aiming at the deceased and he told CIP MUTUA that he came to his senses after the blasting sound, at which point he secured the rifle. In frustration, accused tried to save the life of the deceased who had not died at the time but got scared at motorists who were angry at him so he returned to his station and surrendered the gun.

CIP MUTUA established that accused and deceased were strangers to each other and had not disagreed before, and none harboured a grudge against the other. It was CIP MUTUA`s finding that the deceased had avoided the road block thus offending section 20 of Cap 84:-

“When an officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something necessary for the purposes of such investigation is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the Criminal Procedure Code will in his opinion substantially prejudice such investigation, he may after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant as aforesaid enter any premises in or on which he expects the thing to be and there search or cause search to be made for, and take possession of, such thing:

Provided that:-

- (i) the officer shall carry with him, and produce to the occupier of the premises on request by him, his certificate of appointment;***
- (ii) if any thing is seized as aforesaid he shall forthwith take or cause it to be taken before a magistrate within whose jurisdiction the thing was found, to be dealt with according to law.***

(2)Section 119, 120 and 121 the Criminal Procedure Code as to the execution of search warrants, and the provisions of that Code as to searches, shall apply to a search without warrant under this section.)

and accused was armed for purposes of executing his duties at the road block and not for purposes of killing the deceased. Pw 3 was of the view that accused killed the deceased in the course of his duties and that malice aforethought could not be established. His conclusion was that accused acted in the heat of passion following the turn of events (that is the motor vehicle colliding with the one accused was in, coupled with his health condition).

In his sworn defence, accused confirms that he was on duty at the Mariakani Weighbridge Police Station performing traffic duties and to ensure free flow of travel and detection of any criminal activities in the area. Prior No.24/11/10 he had been hospitalized

at Mariakani District Hospital for one week, complaining of as per records (Dexhibit 1) dated 20/08/09.

“a long standing cough, night sweat, irritable, talking a lot..... exam diagnosis TB, Hepatitis and HIV Encephalopathy was made.....psychiatric review”

He explains that after being discharged from hospital, he was shocked and felt frustrated by the contents of the medical report. He got some counseling from the Doctor, then resumed duties, although he was still not OK. He confirms giving chase to a motor vehicle which had evaded the weighbridge. His narrative is similar to what the prosecution witnesses stated regarding the chase up until the point where the two motor vehicles collided. According to him upon hearing the splattering of breaking glass, he heard a sharp loud sound like a tyre burst. He was shocked, confused and out of his senses. He instinctively came out of

the motor vehicle to trace the origin of the sound, he saw the driver of the Canter seated on the side of the road, near the Canter. He was holding his chest. Accused tried to move towards him, to ask him what was wrong but deceased answer

“Kuna kitu kimedunga kifua” (There is something which has pierced my chest)

Thereafter, a crowd gathered and became arrogant and violent. Accused felt insecure – he realized he had shot the deceased and says he heard this from police officers who visited the scene, but at the time, he had no idea that he had shot him. His testimony is that he had no intention of shooting the deceased as he did not even know him.

On cross-examination accused denies suggestion that he was annoyed by the Deceased’s conduct and that at the time he was confused and out of his mind, he did not even know what was going on. He regained his senses only to see the deceased seated with an injury on his chest. Infact he did not even know when **OSODO** turned back and left the scene.

It is not in dispute that deceased died as a result of injuries sustained from gunshot wounds inflicted by a gun which had been issued to the deceased. The post mortem report confirms the object used to inflict the injuries. However accused’s defence is that he had no intention of ending the deceased’s life as he was not even known to him and in any event he was not even aware of what took place as he had been unwell and in a confused and frustrated state of mind following disclosures from a medical report which indicated that he was terminally ill.

The issue for determination is whether the evidence prior the offence of murder as contemplated under section 203 Penal Code and whether the ingredients set out in section 206 Penal Code have been met.

A vital ingredient in the offence of murder is malice aforethought which under section 206 Penal Code is deemed to be established by evidence proving inter alia any one or more of the following:-

a) An intention to cause the death or to do grievous harm to any person, whether that person is actually killed or not

b) Knowledge that the act or omission will probably cause death or grievous harm

The accused did not know the deceased, and although he was armed, it was not for the sole purpose of killing the deceased. As confirmed by Pw 3, he was armed for purposes of carrying out his duties. Although he was apparently distressed by the recent information regarding his health status, that did not appear to affect his reasoning capacity as demonstrated by evidence of Pw 7 and his own testimony regarding the action he took when the deceased driver failed to stop at the road block. He acted as is expected of a reasonable police officer – gave chase, signaled several times to the motor vehicle to stop and even told Pw 7 that he would attempt to get contacts of Highway Patrol Police from his colleague Kimani (whom he had left at the road block). Up until the point where the Canter crashed into the “chase” car, accused was in control of his mental faculties and fully aware of what was going on around him – he confirmed that in his evidence. However he says he cannot remember what happened between the time Pw 7 got out of the motor vehicle and the time deceased got shot. Did he suddenly become insane, did he suffer a lapse of memory? Is depression, agitation, anxiety, (which had been observed by the Doctor three months prior the incident the same as being insane or mentally incapable of reasonable action?

The medical examination carried out before plea could be taken dated 30/11/09 signed by **DOCTOR MWANGOME** indicated that accused’s mood was low, his cognition was disoriented and he was basically abnormal. The Doctor’s opinion was that accused was in a state of shock. Almost one year later, i.e ON 7TH July 2010, accused had gone back to normal and denied having a history of mental illness. The question is – did the abnormal status which existed after the incident, prevail at the time accused shot at the deceased. Did he have sudden livid moment or some momentary madness which just set in at the impact of the collision and carried on to greater intensity after realizing the result of his action? Those

questions are not given a clear answer by the medical report and I must consider the two medical reports (i.e one compiled three months before the incident, and the other compiled six days after the incident) visa vis the accused's own conduct before the incident. My understanding is that for one who is so depressed to the extent of being able to be responsible for his actions, he would have displayed action or thought processes demonstrating that he could not formulate a logical process and that he was not in his senses as to be able to plan and execute – in this instance accused was able to determine that the motor vehicle had failed to stop – requested, not one of the trucks which were waiting at the weighbridge to give chase, but a saloon vehicle belonging to Pw 7, who was assisting in manning the weigh bridge, to give chase, reasoned that he should call his colleague to give him Highway Patrol Police number – surely isn't that a logical process. None of the persons who were with the accused at the weighbridge gave evidence suggesting that accused had displayed abnormal behavior or thought process on that day or inability to execute anything logical on that day. My findings are that the observations made by the Doctors regarding accused's behavior were not a contributory factor to the events that took place near Mariakani Barracks, Maji ya Chumvi area on 24/11/09 at about 5.00Pm. His actions prior to the shooting were not consistent with an abnormal individual and I find that he knew what was happening. If he became confused again after the incident, then nothing has been presented to this court to persuade me that the same was continued existing state from what had been observed on 7th August 2009 – certainly he displayed an elated or depressed state three months before the incident, and six days after the incident **BUT** not a few hours or moments before the incident so as to make it wholly that he suffered diminished responsibility.

My evaluation of the evidence is that accused was definitely angered by the defiant driver, who even after seeing him wave out his hand as a signal for him stop, ignored that – and this to an individual in full police uniform, armed with a firearm, and in the presence of a civilian, must have caused the accused great embarrassment humiliation and frustration – so that when the canter hit the chase motor vehicle, it was the ultimate sign of total disregard for his authority, and he reacted to show his presence and power – that is why he shot the deceased, not aiming at his legs, but straight through the chest – it was an act done in the heat of accumulated passion, and with use of excessive and unwarranted and unjustified force. The Civilian was not armed, not violent, nor abusive – infact he appeared scared, according to Pw 7. Certainly malice aforethought is not established, but I have no doubt in my mind that accused's action led to the death of the deceased, and thus without reasonable cause. This was an unlawful act which caused the death of **EDWARD NGANGA KURIA** as contemplated by section 202 (1) of the Penal Code. My findings therefore are that the offence proves a charge of manslaughter and in compliance with the provisions of section 179 (2) Criminal Procedure Code. I reduce the charge from one of murder contrary to section 203 Penal Code as read with section 204 Penal Code to manslaughter contrary to section 202 (1) Penal Code and convict accused on the reduced charge.

Delivered and dated 1st day of July 2011 at Malindi

H A OMONDI

JUDGE

Mr Gekanana for accused

Mr Naulikha for State

c/c-Randu Eng/Kiswahili

Accused present