

REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

CRIMINAL CASE 47 OF 2004

REPUBLICPROSECUTOR

VERSUS

PAUL LESURU EKALEACCUSED

J U D G M E N T

Paul Losuru Ekale is before this court on information of the Attorney General on behalf of the Republic dated 14th October 2004 charged with offence of murder contrary to Section 203 of the Penal Code as read together with Section 204 of the same code. The particulars of the offence are that on the night of 1st January 2004 at about 11.30 p.m. at Likoni Ferry area, in Mombasa within Coast Province he murdered Lawrence Wasonga Owang.

The prosecution tendered the evidence of ten (10) witnesses to support their case. The accused on the other hand gave sworn testimony in his defence. Ayub Kinuthia Nduati (P.W.3) told this court that on 1st January 2004 at about 10.30 p.m. he boarded a matatu from Mombasa City centre towards the Likoni Ferry. At Likoni matatu terminus a fight broke out between the matatu conductors and some passengers who had alighted without paying the fare. P.W.3 said that in the scuffle, he saw the accused removed his pistol and shot the deceased. It is said the commotion between the conductors and the passengers took about one hour. P.C. Michael Katwa (P.W.2) said he visited the scene of crime at midnight on 1.1.2004 in compliance with the instructions given through the 999 Control room. On arrival P.W.2 found Cpl. Peter Kachonjo (P.W.4) the duty officer with other people. P.W.2 said he saw the deceased's body lying down while seated next to it was the accused. P.W.4 took possession of the firearm and 13 rounds of ammunition which had been surrendered by the accused. P.W.4 said that the accused told him that he shot at the deceased when the deceased attempted to snatch his pistol. P.W.4 handed over the pistol and the ammunitions to the O.C.S., Central Police Station. P.C. Paul Cheruiyot (P.W.6), a police officer attached to Likoni Ferry said he rushed to the scene of crime at 1.00 p.m. when a matatu conductor and driver informed him that there was a fight over non-payment of bus fare by passengers. At the scene P.W.6 was told by the accused that he shot the deceased when he attempted to grab his pistol. P.W.6 also said he saw the deceased's body lying on the stomach on the road. C.I.P. Eliud Langat a scenes of crime officer said he visited the scene where he took photographs which he produced in evidence. From those photographs it is clear that the deceased fell down while fleeing. Inspector of police, Sosthenas Makori (P.W.9), the investigating officer told this court that the accused told him he shot the deceased when he attempted to rob him of his mobile phone. Acting Inspector of police George Mukonesi (P.W.8) said he took the pistol and the 13 rounds of ammunition to the firearms examiner for examination on 8/3/04. CIP Lawrence Nthiwa (P.W.1) the firearms examiner acknowledged receipt of the pistol and the 13 rounds of ammunitions which he examined. P.W.1 said that the pistol was in good general condition complete in its component part and hence capable of firing. P.W.1 also found that the 13 rounds of ammunitions were appropriate for use in the ceska pistol. In the end P.W.1 said that the pistol and the ammunitions were found to be a firearm and ammunitions respectively within the definition given in the Firearms Act (Cap.114 Laws of Kenya). Dr. K.N Mandalya (P.W.10) produced the post mortem report in respect of the autopsy he carried on the deceased's body upon being identified by Jane Achieng Omware (P.W.5) amongst other relatives. In the report P.W.10 concluded that deceased died as a result of haemorrhagic shock due to gun wound. P.W.10 also pointed out that the deceased was shot from the back and that the bullet exited through the upper chest.

Paul Losuru Ekale (D.W.1), the accused herein testified alone in his defence. He told this court that he was assigned to guard one Mohammed Zubedi hence he was entitled to possess a pistol. He said he and his friends had gone to Florida Night Club to celebrate new year on 1st January 2004. At 11.00 p.m. he said he left for his place of residence at Likoni. He boarded a matatu while his pistol was tucked at his waist. While entering the matatu he said somebody attempted to snatch his pistol. A struggle ensued and he fell down when the matatu sped off. Five people emerged to attack him and in the process he said he lost his mobile. The accused (D.W.1) managed to disengage himself, removed the pistol and shot at the deceased to save his pistol. This action forced the attackers to run away. The accused said that he was forced to fire his pistol to save his life and the weapon.

At the end of the evidence, counsel for the accused person and counsel for the prosecution made detailed submissions. Mr. Magolo, learned advocate for the accused, submitted that the evidence adduced by the prosecution did not prove the prosecution's case beyond reasonable doubt. The learned advocate argued that the accused was entitled to shoot the deceased to save the pistol and his life in accordance with the police Act. Mr. Magolo further urged this court to find that there was political pressure from the human rights activists to have the accused arrested and charged for murder whereas he committed no offence. It was pointed out that it took the Attorney General about 10 months to prefer a charge of murder against the accused.

On his part, Mr. Monda, learned State Counsel urged this court to convict the accused for murder on the basis that the evidence tendered overwhelmingly established the ingredients of the offence of murder. The learned State Counsel stated that the accused person had no justification to shoot the deceased as he was not in imminent danger.

Having considered the evidence and the submissions of learned counsels, I have come to the following in this case. The evidence indisputably discloses that Lawrence Wesonga Owang was on 1st January 2004 killed by the use of a firearm fired by Paul Losuru Ekale, the accused herein.

The question which must be resolved is whether or not the accused had malice aforethought. The evidence on record show that the scene where the incident took place is a dangerous place. There is also evidence that there was a commotion before the shooting incident took place; According to the accused, it is his defence that he shot the deceased to save the pistol and his life. I observed the demeanor of the accused as he testified and he appeared to me to be a person who told the truth despite the fact that he occasionally was evasive in answering questions. It is also not in dispute that the deceased was a stranger to the accused. There was therefore no malice on his part. Of course I am aware that the penal code under Section 206, provides that malice aforethought shall be deemed to be established by evidence proving one or more of the circumstances enumerated therein. One of the circumstances enumerated therein is 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. It was incumbent upon the prosecution to prove that the accused person intentionally caused the death of Lawrence Wasonga Owang. There was no evidence to controvert the evidence tendered by the accused to the effect that his life was in danger and that his pistol was about to be stolen. There was evidence that the scene is a dangerous spot where criminal gangs rule the night. I am convinced that the accused acted in self-defence in the circumstances of this case. He only fired once to save his life and to prevent loss of his pistol. In order for one to be convicted for murder there must be evidence proving *actus reus* and *mens rea* i.e. malice aforethought. In this case actus reus was proved but there was no proof of malice aforethought.

In the end I find Paul Losuru Ekale not guilty of murder. He is hereby acquitted. He should be released from custody forthwith unless he is otherwise lawfully detained in such custody.

Dated and delivered at Mombasa this 29th day of February 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Monda for the State and in the presence of Mr. Magolo for the accused.