

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Case 24 of 2004

REPUBLIC.....APPLICANT

-VS-

ALFRED MORANGA KIMANGA.....RESPONDENT

JUDGMENT

The accused has been charged for two counts of murder, contrary to Section 203 as read with Section 204 of the Penal Code, Cap.63, Laws of Kenya. The particulars of each of the said offence in the information are as follows:

Count I:

“On the 21st January 2001 at Emarti area in Narok District within Rift valley province murdered JOSEPH KAMAU NDUNG’U.”

Count II:

“On the 21st January, 2001 at Emarti

Area in Narok District within Rift

Valley Province, murdered SIMON

NGENY.”

In his evidence, PW1 George Simiyu Ekwang recalled that on 21st January, 2001, he went to Emerti Market in Narok District and thereafter at around 6.00 p.m. he started heading towards their camp and met two strangers on the way. On the way, PW1 met his workmates viz, Kavachi, Kamau and Simon Ngeny who were also going back to the camp. According to PW1, they met a soldier with the Kenya Wildlife Service who was walking fast but in a zig-zag manner. PW1 identified the soldier to be the accused who was carrying a rifle and a green paper bag. The accused ordered them to lie down, but Kamau replied that they never had any grudge against him. When Kavachi tried to escape, the accused fired at him but missed. Subsequently, PW1 also managed to escape through the bridge despite the fact that the accused fired twice at him. PW1 reckoned that while he was at a distance, he heard four gun shots from the scene. Reaching the residential camp, PW1 explained to his co-workers what had transpired. Thereafter, PW1 stated that he later saw the accused staggering past their camp. On going back to the scene, PW1 found that Kamau was already dead while Simon was pleading for help as he had been shot on the left leg. From there, PW1, Maina and Okello reported the matter at the Administration Police lines where they were given two armed officers. On the way, they collected a green paper bag that contained maize flour, tobacco and vegetables. Though they also collected Simon, unfortunately he died while on the way to hospital. Consequently, they took the bodies of the two deceased to the residential camp. On the following day, PW1 accompanied police officers to the scene where they recovered two cartridges. PW1 reckoned that before the incident they never had any quarrel with the accused. On the

other hand, PW2 William Kavachi Epigo testified that on 21st January, 2001 at around 8.00 a.m. while accompanied by Josphat Ndung'u and Ngeny they went to Mara Camp to visit Cheserem. They stayed there from 10.00 a.m. upto 4.00 p.m. and while on the way to the residential camp they met Simuyu. They also met the accused who was not only clad in his uniform but was also carrying a rifle and blue paper bag. On seeing the accused raising his rifle, PW2 and Simiyu decided to escape. After hiding for about ten minutes, PW2 went to their residential camp where he agreed with his fellow workers to go back to the scene. On arrival, PW2 saw Ndung'u lying dead and he was later informed that Ngeny had died while on the way to hospital. In his testimony, PW3 Hesborn Okello Opee stated that on 21st January, 2001 at around 6.30 p.m. while he was resting in the residential camp, he heard seven gun shots. From there, he went to see Mr. Maina (the Site Manager) who gave him a lift in his vehicle. On the way, they met Simiyu who informed them that Ndung'u and Ngeny had been shot. On reaching the scene, PW3 saw that Ndung'u was already dead and that Simon Ngeny had been shot on the left leg. While there, Ngeny complained that they had been shot by the accused who works for the Game Department. Besides the above, PW3 stated that while pursuing the accused, they recovered a paper bag containing maize flour, "sukuma wiki" (green vegetables) and roiko. From there, PW3 and Ndung'u went to assist Ngeny by trying to take him to the hospital. Unfortunately, Ngeny died before reaching the hospital. On the following day, five CID officers visited the scene where they recovered two empty cartridges. Thereafter, the officers arrested the accused in the presence of PW3. On the other hand, PW4 Francis Kipkoech Keter introduced himself as a clinical officer at Mara Safari Club. PW4 recalled that on 22nd January, 2001 at around 1.00 a.m. he was woken up by security guards who informed him that they had a patient. On opening the door, PW4 saw the accused who claimed to have been attacked by some thugs near Emarti bridge. On examining him, PW4 found that the accused had a bruise on the nose, a cut on the back of the head and a bruise on the hand. PW4 observed that the accused was smelling alcohol and appeared drunk. In her evidence, PW5 – Rose Kerubo testified that on 21st January, 2001 the accused bought four kilos of maize from her while armed with a rifle. On the following day, PW5 saw the accused being arrested on allegations of killing two people. PW5 also saw one of the victims being taken to the hospital while blood soaked. On his part, PW6 David Paul Francombe introduced himself as a farm manager of Ole Rai Ltd. He recalled that on 21st January, 2001, he received a radio report that two of their employees at Mara farm had been shot. On being informed that those two employees thereafter died, he reported the matter at Mulot Police Post. On the following morning, PW6 took CID officers to the Mara Farm where they viewed the bodies of the two dead employees. PW6 also saw the officers taking possession of two cartridges. From there, they proceeded to the Kenya Wildlife Service Camp where the accused was. In his medical evidence, PW7 Dr. Gerishon Abakalwa introduced himself as a Medical officer of Health based at the Narok District Hospital. During the trial, PW7 appeared on behalf of Dr. Ndirangu since he was familiar with his handwriting. According to PW7, Dr. Ndirangu conducted a post-mortem on Simon Ngeny on 26th January, 2001 and observed that the body had undergone partial decomposition. Besides the above, Dr. Ndirangu observed a large wound on the left thigh extending from the medical aspect of the femurral triangle down to the mid-thigh with fracture of femurral shaft. He also observed more bruises over the medical aspects of the right lower leg that were consistent with gun shot wounds. That apart, he also observed severe contusion of the upper lung lobes bilaterally with haemothorax. Eventually, he concluded that the cause of death was severe blood loss, secondary to gun shot wounds, chest injury and lower limb injury. Dr. Ndirangu later performed a post-mortem on Joseph Ndung'u Kamau and found him in good nutrition and physique. By then, the body was partially decomposed and had undergone rigor mortis. Dr. Ndirangu found cloated blood from the right nuzzle criphyx towards the right cheek. He also found a gun shot wound whose entry was easterly to the left clavicle and exited through the right shoulder. There was also severe comminuted easterly one third tibia fibula fracture. As a result of the examination, Dr. Ndirangu concluded that the cause of death was severe blood loss secondary to gun shot injuries to the left femur involving vascular components. In his evidence, PW8 Chepkorir Simore recalled that on 21st January, 2001 he met the accused who was clad in a green uniform walking in a zig-zag manner and he appeared drunk. PW8 stated that the accused was walking towards Kamau and Phillip. When PW8 reached next to his home, he heard several gun shots. On the other hand, PW9 Andrew Odhiambo Onyima introduced himself as a Head Receptionist at the Mara Safari Club. He testified that on 22nd January, 2001 at around mid-night, he received a phone call from Ole Ntutu that an employee of Kenya Wildlife Service had been injured by thugs. Subsequently, PW9 stated that the accused was brought and thereafter taken to Mara Safari Club for treatment. PW9

also testified that the accused agreed to hand over the rifle to him while undergoing treatment. In turn, PW9 handed over the rifle to the driver. On the other hand, PW10 PC David Migwi introduced himself as a CID Officer in Narok District. He testified that on 22nd January, 2001 at around 6.30 a.m. he was called by Inspector Tabani who informed him of a murder incident at Emarti. Consequently, PW10 accompanied Inspector Tabani to the scene where he observed fresh blood stains. That apart, the witness also recovered two used cartridges – Ex.5. From there PW10 and Inspector Tabani went to the Mara Shamba that belongs to Hugo Wood. On interviewing the three survivors they told PW10 that they had met the accused on the way on the material day. They then explained that when they refused to obey the order of the accused to stop, he started shooting them without any provocation. The survivors also explained to him that during the shooting, they managed to escape. When the survivors later went to the scene, they found that Joseph Kamau had been shot dead and that Simon Ngeny had been injured. Eventually, PW10 and his colleagues proceeded to the Kenya Wildlife Service camp where they woke up the accused and arrested him. Though the accused conceded that he had shot two people, he explained that they had earlier wanted to rob him of his rifle. Ultimately, they arrested the accused and recovered the rifle – Ex. 4 and twelve rounds of ammunitions – from the administration police officer. After completing his investigations, PW10 charged the accused for the offences before the court.

In his defence, Alfred Maranga Kimanga (hereinafter referred to as the accused) introduced himself as a ranger with the Kenya Wildlife Service. The accused explained that since they never had any armoury at their camp, each officer used to keep his rifle. Besides the above, the accused also testified that on 21st January, 2001 he went to Emarti Market while armed with a rifle. Thereafter, the accused bought maize flour and vegetables before setting for home at around 6.00 p.m. According to the accused, he was attacked by about four to five people – some of whom were armed with sticks. In addition to the above, the accused also explained that some of the assailants were shouting that they should snatch the rifle from him. Sensing danger, the accused shot three times in the air as the group continued attacking him. Specifically, the accused conceded that he shot some of the attackers to save his life. After the attack, the accused left the goods that he was carrying and went back to the camp where he explained to his colleagues what had transpired. On the following day, the accused was arrested and taken for treatment. The accused recalled that earlier, on 4th September, 2000 some officers, tourists and a white rhino had been attacked at their camp. In conclusion, the accused stated that he never had any intentions of killing anybody and that he had acted in self-defence.

After the summing-up was delivered all the three assessors unanimously returned a verdict of “Not Guilty” against the accused for both counts. The assessors were of the opinion that the accused had acted in self-defence. This court has carefully considered the entire evidence on record. It is apparent that the accused had gone shopping to enable him prepare his supper. Specifically, the accused had gone to buy maize flour and vegetables for the meal. The evidence on record does not show any reason or motives for the accused to kill the two civilians. Despite the fact that PW1 and PW2 claimed that the accused had ordered them to lie down before he started shooting they never explained what triggered the whole incident. Granted the accused may have been drunk on the material day – but how many people did he meet on the way? Why didn't he shoot all the people that he had met? Whereas PW1 and PW2 portrayed themselves to have been innocent, how did the accused sustain the injuries that he had? It is obvious that PW1 and PW2 were economical on the truth. That means that they did not fully explained what had transpired on that fateful day. According to PW4 – Francis Kipkoech Keter – a clinical officer – the accused had a bruise on the nose, a cut on the back of the head and a bruise on the hand. The above evidence was adduced by a prosecution witness and nobody else controverted the above. Despite the fact that the accused was taken to Narok District Hospital and a P3 form was duly filled, the investigating officer deliberately omitted the above from the evidence that was adduced in court. The above behaviour can only lead the court to conclude that the said evidence was not favourable to the prosecution case. Given the above gaps and doubts, the court wishes to resolve the above in favour of the accused. The court hereby believes the story of the accused that he was attacked by the two deceased persons and others before the court before he acted in self-defence. Given the fact that he was defending his life and firearm, the accused never used any excessive force. He only used one bullet each in shooting the deceased on their lower limbs. The court hereby concurs with the assessors that the accused acted in self-defence. The upshot is that the prosecution has failed to prove their case beyond any reasonable for the two counts of murder, contrary to section 203 as read with section 204 of the Penal Code. I hereby find

that the accused is “Not Guilty” of the two offences and I hereby “acquit” him in accordance to section 306 (1) of the Criminal Procedure Code. The accused should be released forthwith unless held lawfully.

Those are the orders of this court.

MUGA APONDI

J U D G E

Judgment read signed and delivered in open court in the presence of the accused Mwongela for Orina, Defence Counsel Ndemmo for M/s Opati and State Counsel.

MUGA APONDI

J U D G E

28TH NOVEMBER, 2007