



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 75 of 2002

REPUBLIC PROSECUTOR

VERSUS

ROBERT KIPLANGAT ACCUSED

JUDGMENT

The accused Robert Kiplangat, was charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code that he on 16/6/2002 at Heilu Police Post of Moyale District in Eastern Province, he murdered David Moturi Otiso. Eleven witnesses testified for the prosecution.

PW4 was no. 78739 P.c. Abdulahi Abdikadir Hassan. On 16/6/2002, he was stationed at Heilu Police Post under Moyale Police Station. Having had lunch together on the material day, P.c. Robert Kiplangat, P.c Richard Korir and the deceased, P.c David Moturi Otiso, and all decided to cross the border to Ethiopian part of Moyale Town. PW4 further testified that in Ethiopian Moyale, the four officers took many drinks, except that the witness took soda as the accused, the deceased and Richard Korir took beer at more than one bar. At about 6 p.m. PW4 returned to their Police Post, behind the accused who had returned a few minutes ahead of him. PW4 testified further that at the camp as he entered his own house, he saw the deceased P.c Otiso enter PW2, P.c Korir's house. PW4 soon joined them there. He saw both P.c Otiso and P.c Korir sitting on P.c Korir's bed as the two conversed. That is when he sat down, he saw the accused P.c Robert Kiplang'at enter the room. Accused was carrying a G3 rifle as he entered and talked to P.c Korir in Kalenjin language to which Korir did not respond. Meanwhile he saw the rifle as pointing to either P.c Korir or P.c Otiso. PW4 said that at this point he walked out of the room, leaving the accused still talking to P.c Korir and P.c Otiso who still did not respond.

PW4 did not stay outside for long. He decided to re-enter the room as he feared that the accused might use his gun. Inside, he held the accused on the shoulders from behind, holding down the rifle, with an intention of preventing the accused from shooting at anybody before he disarmed him. While holding the accused in that position, PW4 sought help from P.c Otiso to disarm the accused. P.c Otiso is said to have stood up and held the accused's gun at its muzzle and magazine hand guard, before holding the accused's shoulder with one hand. P.c Otiso is said to have then pushed both P.c Hassan and the accused, outside the room where the latter two fell on their backs.

It was as the two lay on the ground and as P.c Otiso stood at P.c Korir's door, that the accused shot P.c Otiso three times, using the rifle in his hands. PW4 testified that he stood up, confused by this turn of events. He ran to his house leaving the accused and the deceased lying there on the ground. From his house he saw the accused stand up and move to his own house. PW4 went to where P.c Otiso lay but confirmed that the latter was dead. He saw him bleeding from the chest. He went back to his room,

carried his rifle and joined other officers who had gathered on a given spot outside the camp, after informing Inspector Ngomo of the incident.

PW4 further testified that when the accused had walked to P.c Korir's room and talked to the latter in Kalenjin, he appeared totally drunk and disoriented in time and place. He appeared quarrelsome and serious in his manner of conduct. But the accused was not totally incapable. He was walking and could stand. PW4 denied triggering the accused's gun to discharge as he held the deceased. PW4 also ruled out any bad blood between the accused and deceased. He ruled out any quarrel between them immediately before the shooting.

PW5, P.c Richard Korir, testified that he was in the company of the deceased in Ethiopian Moyale after the four officers had crossed the border. He confirmed drinking heavily with P.c Otiso, the deceased and P.c Kiplang'at, the accused. PW5 crossed back to Kenya and entered his house at about 7 pm on the material evening. Soon he was joined by the deceased who sat next to the witness, on the bed. Then suddenly, saw accused P.c Kiplang'at enter the room armed with G3 rifle soon after P.c Abdulahi Hassan had entered. Accused held the gun in a shooting position but not directed at any particular person. Soon thereafter P.c Abdulahi held the accused from behind, but on the upper side of the hands on the shoulders. This witness then confirms in his evidence that at that moment P.c Otiso stood up, held the accused by the latter's hands and pushed him and P.c Abdulahi out of the door. It was after a minute or so that he heard a burst of three shots in a sequence. PW5 was afraid to go out immediately. When he did after three minutes, he saw P.c Otiso lying two metres outside the door, with blood oozing out of his chest. He went back, picked his G3 rifle and joined other officers who had begun to gather on a specific spot where they usually gathered. Later P.c Kiplangat was arrested and placed in cells. The body of P.c Otiso was later taken to mortuary. PW5 testified that there was no dispute between the deceased and accused throughout that day nor before and that the two were known friends. He also confirmed that accused entered his house with a gun and was totally drunk.

PW2, P.c No.78781 Bismark Cheriot Korir, testified that he served at Heilu Police Post at the material period. He knew both the accused P.c Robert Kiplang'at and deceased P.c Otiso. On 16.2.2001, he was still in the Post when he saw each of the two arrive back at the Post at about 6.00 p.m. They each appeared drunk as each left to his living quarter. At about 7.50p.m PW2 heard accused shouting the name of P.c Richard Korir before hearing three successive shots of a gun. He left the report office and rushed in the direction of the shots as he also heard P.c Abdikadir call the deceased's name "Otiso, Otiso, Otiso". At P.c Richard Korir's house, PW2 saw P.c Otiso lying on the ground outside the door. Otiso's shirt was torn on the chest from where blood came out. He entered Richard Korir's house and found the latter sitting on his own bed. On inquiry, P.c Korir who gave evidence as PW5, told PW2 that the accused had shot the deceased. This witness then went out and informed Inspector Dickson Ngomo, PW6, of the incident, over the station radio. Later he joined PW6 aforementioned to the accused's house where they found accused lying on the floor. He was present when the accused was arrested and put in cells. He saw Inspector Ngomo recover G3 rifle from accused's room during the accused arrest.

PW6 was Inspector Dickson Ngomo, who was the officer in charge of Moyale Police Station, which oversaw Heilu Police Post. He on 16.6.200, at about 7.30 p.m received a radio call from Heilu Police Post's night guard that there had been a fatal shooting of P.c David Otiso, by another officer, P.c Robert Kiplangat. Both officers were under his command and he therefore rushed to Heilu Post in a police Land Rover. He found the Post in complete darkness in accordance with command rules or procedure, after such a shooting.

In company of P.c Wainana and after noticing P.c Otiso's body lying outside one of the houses, he approached the accused's house. He used a torch to peep in. He saw accused lying on his body while carrying his G3 gun in his hand. He made forceful entry and arrested, the accused with the help of P.c Wainana and others. He recovered the G3 rifle from accused who apparently had been totally asleep and he handcuffed him. PW6 then moved outside and noticed that the body of P.c Otiso lay on its back. He turned the body which was bleeding from the chest and back and noticed that the bullets went through the body exiting through the other side. Later the OCPD of Moyale and the DCIO, Inspector Itieno, who had been informed, visited the Post and saw the body of the deceased. The body and the accused were then

escorted to Moyale General Hospital. Its PW6's further evidence that the accused even at this moment in time was shouting in Kalenjin language, calling out the deceased's name. Accused was detained in Moyale Police Station cells.

On checking the accused's rifle, PW6 testified that he noticed that it had jammed and could not discharge bullets any more. He collected spent cartridges near the door where the body of the deceased was recovered from. These were two spent cartridges plus a G3 rifle and 50 rounds of ammunition.

PW7 was PC Francis Njoroge. He testified that on 16.6.2002 he was given the following exhibits –

1. A fired bullet head in a khaki envelope marked
2. A K79 G rifle serial No. 97086870
3. Two bottles carrying blood samples K7 and K8
4. Two expended bullets –K5 and K6
5. 20 live rounds of ammunition of 7.6mm and 10 rounds of 7.62mm

He delivered the bottles to the Government Chemist at Nairobi on 19.6.2002. The rifle and ammunition was delivered to CID Headquarters for ballistic Expert's tests. Later experts reports were received back.

PW8, Chief Inspector John Otieno was at the material time the DCIO of Moyale Police Station and accompanied the OCPD to Heilu Police Post on receiving the report of shooting. He saw the accused who appeared to him totally drunk. He took possession of the firearm – the G3 rifle S.No. 97086870 and the two spent cartridges from Inspector Ngomo PW6, the unspent magazine of 20 and 10. He prepared an exhibit memo and forwarded them to Nairobi for relevant tests on 11.7.2002. He received the expert reports dated 22.8.2002. He also examined the Posts Arms Register Book and established that the accused had been supplied with the G rifle No. 97086870 on 13.9.2001. Accused had signed for the rifle and still kept it at the time of the incident. Copy of the register was introduced in evidence as exhibit 5. He arranged for postmortem of the deceased.

PW10, Lawrence Nthiwa is the firearm examiner at the CID Headquarter Nairobi. On 19.6.2002 he received:

1. G3 rifle Serial No. 97086870
2. Twenty live ammunition
3. Ten live ammunition
4. Two expended ammunition all from PW8 Chief Inspector John Otieno of Moyale Police Station for tests. He examined them. He established the following:

1. The G3 rifle was caliber 7.62 mm
2. In good firing condition, complete and capable of being fired.
3. The firearm was not prone to accident firing.
4. The two spent cartridges were both fired from the exhibit G3 rifle aforementioned.

He produced his expert report in evidence as exhibit 5.

PW11 Patrick Ochieng Nyaoke, testified that examination of blood sample taken from the accused

showed that he had taken about 6 ½ litres of beer equivalent to 14 tots of whisky. He termed it very high intake which would in normal takers of beer cause drunkenness that could impair mental judgment.

The postmortem was done on 27/6/62. The body of the deceased had been identified to the doctor who performed it by PW1 P.c. Ongaga Moseki and PW3, Samwel Otiso, the latter being the deceased's brother. PW9 took the accused for medical examination. The P3 exhibit 8, confirmed that accused was mentally fit to stand trial.

On being put in his defence the accused denied shooting the deceased. He also said that he was too drunk to understand what really happened after he got drunk on the material day. He could not even explain how he managed to cross the border from Ethiopia to their camp in Kenya. He could not remember nor did he know how the deceased, who was his friend, met his death.

The two assessors who were sitting with the court believed that the accused shot the deceased dead. They however believed that he cannot be guilty of murder because he was too drunk to form malice aforethought. They recommended a conviction to manslaughter.

I have carefully perused the evidence recorded by the prosecution. I have also considered the accused's statement in his defence. There is no doubt that the deceased was on the evening of 16/6/2002 at Heilu Police Post shot dead. A G3 rifle registration No. 97086870 was on the evidence on the record, used to discharge the 3 cartridges two of which appeared to have gone through the deceased's body. The cause of death was given as chest and abdominal injury following gunshot wound. It was not therefore an issue as to how the deceased died or what the cause of death was.

There was adequate evidence on record that the gun serial No. 97086870 had been supplied to the accused on 13/9/2001 and that he never returned it until the shooting incident took place. That aspect of the evidence was not disputed. At one stage the issue as to which gun was used in the shooting arose when PW6 Inspector Ngomo mistakenly quoted the serial number of the accused's gun as No. 970868962. However, in my view, this was corrected by Chief Inspector John Otieno to whom the gun was handed the same evening and who sent the gun to CID Headquarters Nairobi for tests. The court accordingly found the contradiction over the serial number of the gun, insignificant and not affecting the major evidence.

There is adequate evidence also that the gun originally supplied to the accused as aforesaid was recovered from his hands by Inspector Ngomo soon after the shooting incident. The gun and two expended bullets and 30 live bullets were recovered by Inspector Ngomo at the scene of crime. The expended bullets near the body of the deceased and the gun in the house and hands of the accused. These two expended bullets were later, after expert testing, confirmed to have been fired from the accused's gun.

The main and critical evidence came from PW4 P.C. Abdulahi Abdikadir Hassan. He said that he was at the material time in the house PW5, Richard Korir who was sitting on his own bed with the deceased. Accused entered carrying a gun and began talking agitatedly in Kalenjin pointing a gun at Korir and the deceased. PW4 dashed out but not for long in view of the tense situation inside. He decided to go back into the room. Inside the room he held accused's hands down from the back and sought help from the deceased, to disarm the accused. The deceased stood up, held the accused on the shoulder and pushed the two out of the door. Outside PW4 and the accused fell backward as deceased watched them. That is when the accused shot the deceased as the deceased stood there outside PW5's door.

PW5 confirmed this story although he did not follow the accused, the deceased and PW4 outside and did not therefore see exactly how the shooting took place. PW2 P.c Bismark Korir who went to the scene immediately after the shooting found accused in his own house appearing to be sleeping and PW5, sitting on his bed as he had been sitting before the shooting. When Inspector Ngomo later arrived, he found the situation little changed. The body lay there, except PW5 and PW4 had joined other officers where they meet. The accused lay on his own bed, with the G3 gun in his hand.

I have considered the evidence and I am satisfied that the accused shot the deceased as above described, outside the house of PW5 Richard Korir. I find further that no one else except the accused shot the deceased. I find that he used his officially kept gun serial No. 97086870, which was recovered from him by Inspector Ngomo the same evening as described above. I have reached this conclusion after taking into account the accused's defence that he did not shoot the deceased. Even considering his defence that he was too drunk to know what happened I find that it was him who shot the deceased, and not anyone else. This conclusion leads to my finding that the accused, using a G3 rifle serial No. 97086870, shot dead the deceased on 16/6/2002 night.

There is credible evidence however, that the accused in the company of PW4, PW5 and the deceased, had gone for a drinking spree in the Ethiopian Moyale in the afternoon of that day. There is also more than sufficient evidence that when they returned to their station in Kenya, they were totally drunk except for PW4, Abdulahi. There is as well more than adequate evidence that even at the time the shooting took place, those who were earlier drunk, were still drunk. Evidence shows that the accused and the deceased were friends and did not, during their drinking spree, have differences. It is not clear why the accused decided to pick a gun from his house and go to point at the deceased and PW5 in the latter's house. It may be said that the deceased and PW4's action of trying to disarm the accused may have annoyed him. But at that moment he had already carried the gun which he was menacingly pointing to innocent friends.

Taking into account all the facts and circumstances of the case, I am not satisfied that the prosecution proved the malice aforethought as defined in Section 206 of the Penal Code against the accused. In my view and finding the accused was too drunk to form the requisite intention or malice. Evidence on record, which was not rebutted confirm that he did not know how he crossed the border to Kenya or how he arrived at his house. He could not remember whether and how he indeed carried his gun and walked to PW5's house or whether or how he shot the deceased who was his own friend. While it is possible to think that his mind went and remained totally blank up to the time of the trial as he tried to assert, I have nevertheless, come to the conclusion and finding that he was incapable of forming the relevant malice aforethought.

I however find that he unlawfully caused the death of David Moturi Otiso contrary to the provisions of Section 202 as read with Section 205 of the Penal Code. I accordingly, as did the assessors, find him guilty of manslaughter and hereby convict him accordingly. It is so ordered.

Dated and delivered at Machakos this 27th day of October, 2006.

D.A. ONYANCHA

JUDGE