



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 67 OF 2000

REPUBLIC.....PROSECUTOR

VERSUS

BONIFACE JOHN NJOROGE.....RESPONDENT

J U D G M E N T

The accused Boniface John Njoroge was charged with the offence of murder C/s.203 as read with section 204 of the Penal Code.

The particulars of the charge were that on the 9th day of may, 2000 along Embakasi Road in Nairobi he murdered Moris Otieno Wanjala. He denied the charge and so, the Republic was duty bound to call evidence to prove the case against the accused beyond any reasonable doubt.

The prosecution called a total of 15 witnesses while the accused gave evidence on oath in his defence. After the summing up to assessors and closing submissions, two assessors, for different reasons cleared the accused of the offence while one assessor was of the view that the accused was negligent and therefore responsible for the death of the deceased.

The verdict(s) of the assessors is not binding on me and so I have made an evaluation of the entire evidence and come to independent conclusions.

The accused is a police officer and as at the time of the alleged commission of he offence was deployed to the Police headquarters, Nairobi.

On the 9th day of May, 2000 aforesaid, at about 8.00p.m two senior officers checked off duty at the police Headquarters. These were the deceased, inspector Moris Otieno Wanjala and inspector(woman) Jane Rose Njenga(Pw7).

There is a standard procedure that the officers would be driven to their respective homes and escorted by an armed officer. At that time, there was available motorvehicle Reg. NO. G.K. P906 make landrover 110 station wagon driven by P.C. Tobias Oganda (Pw4). The accused was to provide escort duties and was armed with an Ak47 assault rifle.

Inspector(woman) Jane Rose Njenga lived at South C in Nairobi while the deceased lived at Embakasi Police lines. The motor vehicle was therefore driven to South C to drop the lady officer before proceeding to Embakasi. The two officers were seated at the front, in he cabin, with the driver while the accused sat at the rear of the motor vehicle. There were no seats provided for passengers at the rear of this motor vehicle and so the accused sat on the raised part of the floor that provides for free movement of the rear wheels of the landrover.

On the way to South C there was general task among the group but in particular, the lady officer who happens to be a born again Christian shared her testimony with the accused who is also said to be a born again Christian.

After the lady officer alighted at her residence, the motor vehicle was driven towards Embakasi. At some point along Mombasa Road near the General Motors junction, the deceased inspector talked of some accident that had taken place earlier at that place. There were only three people in this motor vehicle at that stage: The Inspector seated with the driver at the front and the accused seated at the back. Other than the accused, the only living witness to what took place thereafter is the driver pw4 P.c. Tobias Oganda. The following is what he told the court:

“Before we joined Embakasi village I branched off the road was very rough. It had pot holes. I was used to the road as I had used it several times. I slowed down to gear NO.2. The motor vehicle was moving very slowly.

I then heard gunfire and realized it was inside the vehicle. I left the accelerator and the vehicle stopped by itself. I tried to take cover towards the steering. I looked at the Inspector and saw he had been shot the head and died. He did not say anything.

At that time I was also shot from behind right shoulder. I decided to look behind to talk to the vehicle escort. When I turned I was shot the second time right shoulder front. I asked him why he was killing us. He told me the rifle had discharged by itself and I told him no. At that time he was half standing in the motor vehicle with the rifle in the ready.

I decided to open the door of the vehicle and rush outside. I met him at the rear door. I held the muzzle of the rifle with my left hand. I used my right hand which was already injured to remove the magazine. I put it in my right pocket. I struggled with him at the same time telling him not to kill me because there was still one bullet remaining in the rifle even after I removed the magazine.

In an Ak47 when it fires another bullet is taken from the magazine. We struggled up to the front of the motor vehicle. That is when he fired the last bullet but it did not hit anyone. I was pleading with him not to kill me. He did not say anything.

When he fired the last bullet he surrendered the rifle to me. I then entered the motor vehicle and took a pocket phone and informed the controller of what had happened.”

Sgt Joab Otieno Mola (Pw5) arrived at the scene almost immediately and found two police officers struggling over a rifle. He first thought they had been attacked by robbers. Their uniforms were blood stained. He intervened and disposed them of the rifle and removed the magazine. A police radio phone was on the ground. He used it to communicate with the controller. He heard the accused say.

“ I know I have killed an officer. You shoot me.”

This witness was emphatic that he is the one who removed the rifle from the two struggling police officers. He is the one who also removed the magazine from the rifle.

Pw6 P.C. Peter Nyongesa with other police officers also encountered the scene after sgt Mola had arrived. He saw another officer walking away saying.

“You shoot me. You shoot me.”

The accused disappeared into the darkness on the night of the shooting. On 12th may, 2000 at about 8.30a.m. He have himself up to sgt Alphone Mburu(Pw13) at Embakasi Police Station.

On the same morning the accused surrendered himself, he recorded a statement before Inspector Justus Irungu(Pw12). The said statement which was self recorded was produced in evidence, without any

objection from the defence, as ext.6. The relevant portion of the said statement as relates to the incident appears at page 5 thereof and reads as follows:-

“while enroute there was the usual small talk and we proceed(ed) on until we came to a rough road where the landrover had to slow down and it was at this point while I was still seated at the back that I felt my rifle an Ak47 hit against he body of the landrover and I immediately heard bangs and I saw flashes of fire. I tried to stand up and I continued seeing the flashes and I knew that it was my rifle that was discharging I got confused as I saw the police Inspector body looking lifeless with his head bowed down. I could also smell blood and gun powder. The driver then stopped the vehicle and told me in Swahili “umeua afande” and he kept repeating and he opened his door and came out. I also came out of the vehicle in great panic and I went to him.... I started screaming and gave him the rifle and pleaded with him that he shoot(s) me but he told me no. I tired to insist but he refused.... I told him to give me back the gun that I may shoot myself but he told me not to think like that, he removed the magazine off the rifle and I took the rifle. I knew that there was still a bullet in the chamber and as I was turning the gun towards me so that I could shoot myself the gun went off and the round was expended.”

Dr. Alex Onzere Kirasi Olumbe Pw14 performed a post mortem on the body of the deceased and made a report which he produced as exhibit 7.. according to the doctor, the cause of death was gunshot wound to he head inflicted by a high velocity firearm.

The firearm, the magazine and spent catridges were all recovered and forwarded to Pw1 Benson Gichuki Nduguga, a firearms examiner who performed his duties and prepared a report ext.4. the firearm was a 7.62mm Calibre AK47 Assault Rifle S/No.769431. After examining the same, Pw1 concluded that it was in good general and mechanical condition complete in all component parts and is capable of being fired.

The magazine was loaded with 25 7.62mm caliber ammunition suitable for use in firearms such as the rifle he had examined. He picked three at random and each was successfully test fired in the said rifle.

The firearm examiner also confirmed that the three expended catridges were all fired from the same rifle, and this was the same rifle that was in the possession of the accused on the fateful night.

In his sworn statement of defence, the accused repeated more or less what he had stated in his statement which was produced in evidence. A surprising addition however was that he had never been trained in handling an AK47 assault rifle and took possession of the same on that evening as he was duty bound to do so. He was not alone in that lack of training. Even Ps. Tobias Oganda. Pw4 even added another dimension when he said that since 1986 he has not been to the shooting range.

Be that as it may, the prosecution established beyond any reasonable doubt that the deceased died of a gunshot wound to the head. That the bullet that killed him was discharged from the AK47 assault rifle produced in evidence and that it was the same gun that the accused had in his possession in his escort duties that evening. The accused person does not dispute all this.

The prosecution had the duty to prove beyond any reasonable doubt that he accused intended to kill the deceased and did in fact by his action or omission kill the deceased. By his own admission the accused had cocked the gun before they set off from the police headquarters to escort the two senior police officers. He did so because it was within his knowledge that the areas they were proceeding to was not safe and had to be prepared for any eventualities.

Where the accused sat at the rear of the landrover was not meant for any passenger. It was a provision for easy movement of the rear wheel of the motor vehicle. He placed the rifle between his thighs with the muzzle facing the roof of the motor vehicle.

The place at which the shooting occurred was rough stretch of a road full of pot holes. The motor vehicle had been slowed down but no one can say to what speed or to what extent the potholes affected

the movement of the landrover and the position of the accused sitting on top of the provision of the rear tyre.

There was no evidence that there were any supporting rails in this landrover which the accused could hold onto in case of an experience such as he went through just before the shooting. The conditions of that mode of transport, in my view, were most unsatisfactory.

At the first available opportunity when the driver asked the accused why he was killing them (the driver and the deceased), the accused said the rifle was discharging accidentally. He repeated this in his statement a few days later and in his defence in court about one and a half years later.

One of the issues that were required to be established by the firearms examiner according to the exhibit Memo Form was whether the rifle was capable of discharging any ammunition without applying pressure on the trigger. The firearm examiner was taken to task by the defence counsel as whether or not he answered that question in his report. His answer was yes, the rifle was in good general and mechanical condition.

I take judicial notice of the vast experience of Pw1 in the performance of his duties. This is not the first time he has given evidence in this court. He has nothing to gain in defence of his report and probably went through the standard procedure as required of him.

With respect however, there was in this case a very specific question. It therefore required a specific answer. This was not provided in the said report. The effect of that omission is that the contention of the accused may as well be right. He felt the rifle hit the body of the vehicle. The road was rough. The rifle started discharging. It was accidental. He has been consistent and that is a reflection of his credibility.

I saw and heard the accused testify. I assessed his demeanour I have no doubt that he said the truth. He had no reason to end the life of the deceased.

One last observation. The revelation that police officers can be issued with weapons they are not trained to handle is disturbing. I shudder to think of how many such cases are taking place everyday in the country. Secondly, there is evidence that police seldom return to the shooting range after their training. These are matters that must be brought to the attention of the Commissioner of Police forthwith for appropriate action. This judgment must therefore be forwarded to the Commissioner of Police without delay.

In the end, I find that the accused Boniface John Njoroge is not guilty of murder as charged. He is accordingly acquitted.

Unless otherwise lawfully held, he shall be set free forthwith.

Orders accordingly.

Dated and delivered at Nairobi this 12th day of November, 2001

A. MBOGHOLI MSAGHA

JUDGE

ASSESSORS PRESENT