



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kaumbuthu v Republic (Court Martial Appeal E002 of 2021)  
[2024] KEHC 630 (KLR) (Crim) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 630 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
COURT MARTIAL APPEAL E002 OF 2021  
LN MUTENDE, J  
JANUARY 18, 2024**

**BETWEEN**

**PATRICK KIMAITA KAUMBUTHU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence arising from  
Court Martial case No. 04 of 2020 held at Defsbe Langata Barracks)*

**JUDGMENT**

1. Cpl. Patrick Kaumbuthu, the Appellant was arraigned before the Court Martial for committing a Civil Offence Contrary to Section 133 (1)(b) of the [Kenya Defence Forces Act, 2012](#), that is to say manslaughter Contrary to Section 202 (1) as read with Section 202 (2) of the Penal Code. Particulars of the offence were that on the 6<sup>th</sup> September, 2020 at about 1805 hrs, information was received from MPC SOCE detachment to the effect that 1119150/Cadet Shadrack Kipkoech Malakwen of KMA intake 08 had been fatally shot at BP5 OP in the general area of Kamanga on the same day at about 1430hrs. Cadet Malakwen was part of the Burma Company class which was being taken through the M24 Remington Sniper rifle by 75214 Cpl. Patrick Kaumbuthu a Sniper instructor from School of Infantry (SOI). The incident was reported at Archers Post Police Station and booked vide OB No. 20/06/09/2020.
2. He was taken through full trial, found guilty, convicted and sentenced to serve eighteen months imprisonment less 164 days that he was in closed custody a sentence that took effect from the 7<sup>th</sup> day of May, 2021.
3. Aggrieved, the appellant appealed on the following grounds;



- a. That the Court Martial erred in law and fact when it failed to properly evaluate evidence on record thereby arriving at a wrong conclusion which has occasioned injustice to the Appellant.
  - b. That the Court Martial erred in law and fact by sentencing the Appellant when there is no evidence on record implicating the Appellant and in any event the Court relied on insufficient evidence which was not enough to lead to a conviction.
  - c. That the Court Martial failed to appreciate that the Prosecution had not discharged its burden of proving their case beyond reasonable doubt and thereby erred in law and fact by not giving the benefit of the doubt to the Appellant.
  - d. That the Court Martial failed to appreciate that the case before them was based on circumstantial evidence and none of the essential ingredients required to prove a case on circumstantial evidence was met.
  - e. The Court Martial erred in law and fact in failing to make a finding that the Appellant's prosecution was discriminatory as can be discerned from the proceedings on record.
  - f. The Court Martial erred in law and fact in not appreciating that there was no nexus between the appellant and the spent bullet since appellant had not utilized any bullet.
  - g. The Court Martial erred in law and fact in failing to appreciate the evidence on record that the gun the Appellant had could not discharge a cartridge and no cartridge was found within the chamber of the gun which meant that the gun had not fired.
  - h. The Court Martial was not transparent and erred both in law and fact by failing to give reasons for convicting and sentencing the Appellant.
  - i. That the Appellant was tried by members who take orders through the chain of command hence no justice or fair trial could be achieved in the circumstances.
4. Briefly facts of the case were that on 6<sup>th</sup> September, 2020, some approximately 153 cadets from Burma and Arkhan Company were to view fire power display at Bearing 2, Samburu. The appellant herein was one of the instructors. In the course of the exercise gunshots were heard and the deceased was fatally injured.
  5. To prove the case the prosecution called a total of thirteen (13) witnesses.  
PW 1 Sergeant Benard Wangila from Burma Company (the senior most instructor) testified to have escorted cadets for static weapon display to view an assortment of artillery of weapons. The Arkhan Company viewed from the left heading while the Burma Company was on the right heading and subsequently proceeded to the bearing point 5. He witnessed as the appellant instructed cadets subsequently he (appellant) started giving practical lessons with the rifle that was loaded facing the direction of the cadets. He signaled him through eye contact and the appellant positioned the sniper in the safe direction. A few minutes later he heard gunshots.
  6. PW 2 Corporal Raphael Emanyi heard a gunshot and saw the deceased lying on the ground.
  7. PW 3 Major Rashid Hussein Abdi was not at the scene at the time of the incident and when he ultimately went there he found several weapons at the scene namely the Dush gun, sniper rifle, Orlekan guns and other air defence guns.



8. PW 4 Major Allas Tago Gaga the Chief Instructor at the Artillery stated that there was to be no firing in the afternoon although he had no inventory of officers who had weapons at the scene and could not confirm the number of ammunition issued.
9. PW 5 WOII Tom Onyango could not state if the bullet was discharged from the appellant's gun as there were many officers with weapons even with personal ones.
10. PW 6 Senior Private Francis Makosi Musyoka heard a gunshot and rushed towards the accused rifle stand position and provided first aid to the cadet who was shot before he was pronounced dead by Capt. Dr. Mwaura.
11. PW 7 Corporal Aloice Lodan testified that as the appellant was demonstrating to the cadets, all the rifles faced the safe direction. That he gave the appellant five (5) live ammunition and also loaded his rifle as he dressed up in the camouflage clothing he heard gunshots and when he checked the appellant was lying down facing cadets while the deceased lay behind him.
12. PW 8 Second Lieutenant Simon Mutangili Kituo a cadet officer in Burma Company testified that an instructor that he could not identify who was demonstrating how the M 24 rifle works loaded it with ammunition as the rifle faced the cadets. The cadets had formed an arc and as the appellant traversed the rifle to the safe direction a shot fired and he shouted "you have shot a person" then on realizing what had transpired he fell down and buried his face while holding it with hands.
13. PW 9 Lieutenant Fanuel Steve Onywero, a cadet, stated that the instructor explained that the rifle had an internal magazine which could not be removed and when the appellant was demonstrating he heard a gunshot. He believed that the gunshot was fired from the appellant rifle because it emanated from where they were.
14. PW 10 Senior Sergeant Patrick Kinoti from the school of Infantry and a Qualified Master Senior Instructor (QMSI) render an explanation of how the M 24 rifle functions.
15. PW 11 Kennedy Chomba Chief Inspector Firearm Examiner and Ballistic Expert, examined the M 24 rifle submitted to him and made a report thereof.
16. PW 12 Major Antony Njoroge investigated the case and caused the appellant to be arraigned.
17. PW 13 Colonel Doctor Sila, a Chief Pathologist, conducted a post mortem on the body of the deceased and concluded that the cause of death was head injury due to a single high velocity gunshot to the head.
18. Upon being placed on his defence the appellant testified that he signed for the M24 Sniper rifle with 1200 rounds of ammunition. That on 5<sup>th</sup> September, 2020 he expended 200 rounds during the Brigade Commander rehearsal. Regarding the fateful day, the 6<sup>th</sup> September 2020, he stated that Galile Sniper rifle, M24, GPMG as well as scar firearms were in use at the Demo and he used the same ammunition. That after the incident he was taken to the guest tent, then to the ambulance. That Cpl. Lodam took his weapon at 21.00 hrs. That once a weapon has endangered someone's life it's not supposed to be touched by anybody else. The scene ought to be secured and experts called in. That during demonstration of the weapons he was kneeling down on the left knee and the rifle was facing the target when he heard someone had been shot and he lay down as first precautionary measure upon hearing a gunshot. He denied the allegation that his rifle is the one that fired as his rifle was on the ground.
19. The Judge/Advocate summed up evidence and tendered the necessary advice as required by law to members of the court. Following advice given members of the court retired, deliberated and returned a verdict of 'guilty' hence the conviction and sentence.



20. Pursuant to directions taken before this court the appeal was canvassed through written submissions. It was urged by the appellant that the circumstances from which the appellant guilt was inferred were not firmly established by the prosecution as there were other rifles at the scene hence the circumstances are not definite and they do not point to the appellant's guilt.
21. That no evidence was tendered to prove use of same ammunition from rifle of the appellant on the material day hence use of a firearm by other people could not be ruled out. In this respect, reliance was placed on the case of Republic Vs Stephen Nduati Maina (2008) eKLR. Where it was ruled that other people could not be ruled out as having committed the offence.
22. That M24 rifle that was being operated by the appellant does not eject cartridges as it chambers them hence the evidence could have been presented meaning that the shot was fired by another firearm. That the appellant's rifle faced a safe direction and not the cadet's and the deceased cadet was behind the appellant. That it was assumed that the appellant killed the deceased because he was the instructor yet no evidence was led to that effect.
23. That after the incident other instructors at the scene continued to use the appellant's rifle for the power demo instead of securing the scene and ensuring that it was processed. And later in the day the appellant was given his rifle and it was taken for examination three (3) months later. It is submitted that the rifle was tampered with and the charging of the appellant was an afterthought.
24. The Respondent through Senior Principal Prosecution Counsel, Ms Maureen Akunja opposed the appeal. It was urged that commission of unlawful act and death resulting from unlawful commission or omission were proved to satisfaction by the prosecution. That PW8 saw the appellant cork the gun and feed it live ammunition to internal magazine while pointing it to cadets and as he lifted it to traverse it to safe direction a shot was fired.

That considering the circumstantial evidence presented by the witnesses who were at the scene and did not actually state the loading of the gun, it could only have been the appellant who discharged the bullet and killed the victim. That death was proved and sentenced meted out was proper.

25. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. In the case of Okeno -vs- Republic [1972] EA 32, it was held that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses - See Peters v. Sunday Post [1958] EA 424”.

26. The appellant faced a charge of manslaughter which is created by law and provided for by Section 202 (1) of the Penal Code that enact that:

“Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.”



27. The unlawful omission is expounded in Sub-section (2) of the provision that stipulate as follows;
- “(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.”
28. This being a Criminal Case, the duty was upon the prosecution to prove the case beyond reasonable doubt. The prosecution was obligated to present evidence that would prove its case and the elements of the crime as charged. The prosecution was required to prove elements of the offence as follows;
- i. proof of death.
  - ii. That the death resulted from an act/omission of the accused (appellant).
  - iii. That the killing was unlawful.
  - iv. That the act/omission constituted culpable negligence.
29. Witnesses who testified pointed to an incident having occurred that resulted into one of the cadets being instructed by the appellant herein with two (2) other instructors. PW12 the Medical Doctor and Chief Pathologist conducted a post mortem on the body of the deceased cadet and confirmed occurrence of the death. This was proof of the death.
30. Regarding how the death occurred and if it were as a result of shooting. According to the finding of the pathologist, the deceased died out of a gunshot. The bullet entered through the right external zygomatic region and exited through the right auricular region resulting into the right external ear. Witnesses who were at the scene of the incident and even the defence agree that he sustained the injury to which he succumbed to while taking part in the fire power demonstration.
31. Investigations conducted resulted into accusation of the appellant as the culprit. None of the witnesses who testified would state with certainty that they saw the appellant shoot the deceased. This means that there was more facts based on eye witnesses senses. Evidence against him was hence indirect or circumstantial in nature. The prosecution was obligated to adduce evidence that would result into a logical conclusion of the existence of the alleged fact.
32. Conditions upon which the court can base a conviction on circumstantial evidence was stated in the case of *Abanga alias Onyango Vs Republic Cr. Appeal No. 32 of 1990 (VR)* where the court of Appeal held thus:
- “ 1. The circumstances from which an interference of guilt is sought to be drawn, must be cogently and firmly established;
  2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
  3. The circumstances taken circumstantively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”



33. In the case of *Sawe Vs Republic* (2003) KLR 364 the court of Appeal held that;

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of *Mary Wanjiku Gichira vs Republic* (Criminal Appeal No. 17 of 1998 (unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

34. PW1’s evidence was that as the appellant lectured the cadets he started giving practical lessons when the rifle was facing the direction where cadets were. On realizing the weapon was loaded he signaled him by eye contact and the appellant positioned the sniper on safe direction. However he heard a gunshot minutes later and heard a cadet saying someone had been shot. Then he saw the appellant lying down with the gun facing behind him. PW 7 heard the gunshot and saw the appellant lying behind him. The rifle was down. PW 8 on the other hand saw the appellant loading the rifle. With the ammunition he witnessed as he corked the rifle while bending on his knee, and during the traversing there was firing. By then the witness had already turned and he saw the deceased falling. PW 9 also saw the appellant turning the rifle and in the process he heard gunshots then saw the deceased fall. The appellant argued that he did not fire the bullet and that there were other people with guns who may have fired the bullet. That he faced the same direction as he loaded the rifle. That he lay down as a pre-cautionary measure, upon hearing the gunshot. To disapprove the allegation that the bullet was not discharged from the firearm in possession of the appellant’s evidence of use of ammunition from the firearm was key.

35. The ballistic expert PW 11 received the firearm M 24 some three (3) months, Four (4) days later. When it was forwarded to him he was not informed who had kept it prior to being forwarded and at the time the chamber was empty. Curiously, after the incident, the live firing continued as it was part of the program. Investigations commenced two (2) days later, on the 8<sup>th</sup> September, 2020. PW 12 who reconstituted the scene found a disturbed scene. There was neither preservation of the scene nor the firearm. It was confirmed by prosecution witness and the Ballistic expert that the weapon in issue, M24 rifle upon discharging a bullet, it does not eject the cartridge. Yet at the time of prosecution for examination it was empty. No explanation was given as to the chain of custody and who removed the cartridge from the chamber if any. There is hence a possibility of the bullet having been fired by another weapon.

36. The Investigation Officer PW 12 upon conclusion of the investigations caused Major Leiyan and Sergeant Wangila to be charged for negligence. This left a lacuna in the prosecution’s case, especially considering the fact that they were not availed to testify.

Section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides: -

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”

In the case of *Bukenya v U* (UGC 1952), the court stated that:

- “(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
- “(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.



(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.”

37. The question begging is whether the evidence would have been detrimental to the prosecution’s case.

38. The conduct of the appellant of lying down after the gunshot was heard was concluded by the prosecution to have been some guilt on his part. Hence the question whether it was the case? The question could be answered in the affirmative had evidence been presented to prove that the appellant fired the firearm as alleged and the bullet wounded the deceased causing him to succumb. Evidence adduced failed to establish the actual weapon used to discharge the bullet that hit the deceased.

Secondly, the apparent interference with investigations could not have resulted into a conviction.

39. The upshot of the above is that the appeal succeeds and is allowed. The conviction is quashed and sentence imposed set aside. The appellant shall be at liberty.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 18<sup>TH</sup> DAY OF JANUARY, 2024.**

**L. N. MUTENDE**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In The Presence of:**

Habiba: Court Assistant

Ms Anondo holding brief for Mr. Were for Appellant

Ms Ntabo for Respondent

Appellant - present

