



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Papaa (Criminal Case 28 of 2019)
[2024] KEHC 1190 (KLR) (13 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 28 OF 2019
TM MATHEKA, J
FEBRUARY 13, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID KILENGWE PAPAA ACCUSED

JUDGMENT

1. By an amended charge sheet dated 4th November 2021 the accused person is charged with murder c/s 203 as read with s. 204 of the [Penal Code](#). It is alleged that on the 3rd February 2018 at Sosoma Village Ukasi within Kitui County, he murdered Abdi Ali Dirsame.
2. The record shows that the matter initially proceeded by way of inquest at Mwingi Magistrate's Court where the investigating court recommended that the accused person who was the suspect then be charged with murder. The matter also involved the participation of Indecent Police Oversight Authority IPOA who also conducted their own investigations.
3. The accused person took plea before Hon Ong'udi LJ on the 22nd October 2019. He was represented by Mr. Kioko. He pleaded not guilty. The matter proceeded for hearing and the learned Judge heard 4 witnesses before she was transferred. Hon Dulu J took over in 2021 and heard the rest of the 7 witnesses, made a finding that the accused had a case to answer, and heard the accused persons' defence.
4. It is evident that I took over the matter when it was pending Judgment.
5. At the close of the case for the defence the state indicated that they would not be filing any submissions but the accused person through his counsel filed submissions.
6. The brief facts of the case from the record are that on the 3rd February 2018 a shooting by the accused person took place and the victim was the deceased. The accused person was National Police Reservist under Ukasi Police Station. On the material date he was with his colleague and his explanation was that



- they were shot at by Somali gun men in the bushes within the area where they were. His position is that he shot in the air once and was not aware anyone had been shot. He and his colleague reported the incident to the station. However, later it turned out that a person had been shot and the person died.
7. A postmortem was conducted on 5th February 2018. It indicated that the body of the deceased had injuries inter alia an entry wound at

the upper back about 10cm below the neck on the right side adjacent to the right scapular region measuring 0.7cm in diameter ... Multiple posterior rib fractures noted. There was an exit wound at the neck (cervical region) on the right side approximately 5cm above the clavicle measuring about 5cm in diameter...neck vessels ...severed. The cause of death was ‘severe chest and neck injuries due to gunshot wound’.
 8. The evidence on the part of the prosecution witnesses consists of: the evidence of the family member identifying the body for postmortem, the evidence of the doctor who conducted the postmortem and prepared and produced the report, the evidence of police officers who visited the scene, recovered the body drew sketch plans, took photographs and made and produced reports , the ballistics expert who confirmed that the gun and firearm used to shoot the deceased had been issued to the accused, police officers who conducted the investigations and drew the conclusion that the accused person had fired the gun in justifiable circumstances , and the IPOA who from the same investigations drew the conclusion that the accused had used excessive force. The inquest agreed with IPOA’s position, and the DPP preferred these charges.
 9. Hence it is not denied by the defence that the accused fired his gun. What is denied is that he fired the gun to kill the deceased.
 10. In his submissions counsel for the accused asserts that the only issue for determination before this court is whether the prosecution has proved the charge of murder against the accused person beyond a reasonable doubt.
 11. It is submitted for the accused that the ingredients for murder were set out in *Anthony Ngari vs Republic* [2014] eKLR. That the prosecution must establish the death of the deceased, that the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought.
 12. It is submitted that the death of the deceased is not in dispute. However, that proof of the rest of the ingredients depends on circumstantial evidence. Counsel cites s. 111 of the *Evidence Act* and *Mohammed & 3 Others vs Republic* [2005] where circumstantial evidence was defined as

‘...evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved’
 13. He submits further that there are three tests that were set out in *Abanga alia Onyango v R* CRA no 32 of 1990(UR) cited in *Milton Kabui & 4others vs Republic* [2015] eKLR. It is argued that the evidence shows that the accused fired only a single bullet which clearly shows he was keen to disarm the deceased and not to kill him.
 14. On malice aforethought counsel relies on the definition of malice aforethought in *Nzuki v Republic* [1993] KLR 171 where the court expressed the view that for an act to be murder there must be the intention to cause death, intention to cause grievous bodily harm, the accused knows that there is a



risk that death or bodily harm will ensue from his acts and commits them without lawful excuse. That the test for these intentions is always subjective to the actual accused. He also relies on *Roba Galma Wario vs Republic* [2015] eKLR where it was held that ...without malice aforethought the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional...

15. It is urged that no evidence was led to prove malice aforethought hence the charge of murder has not been proved and the court ought to enter a finding of not guilty and to acquit him.
16. I have carefully considered the evidence before me. It is not disputed that the accused shot the deceased. What is disputed is whether he had the motive for so doing . According to the prosecution the evidence that supports malice aforethought is the evidence in the postmortem report that shows that the deceased was shot from the back and hence was not a threat to the accused at the time of the shooting. That the accused by shooting the deceased from the back was aware that the bullet would cause grievous bodily harm, even death, and that no other motive can be read from this.
17. For the defence it is submitted that the circumstances of the shooting as described were justifiable: that the accused was “a National Police Reservist in Kitui County deployed to maintain peace between the Kamba Community and the Somali Community who fight time to time due to drought. The Somalis attack the Kambas who mainly do farming while he Somalis do cattle keeping and mainly camel herding”. Unfortunately, no evidence was led on this alleged ongoing conflict.
18. In addition the report made at Ukasi Police Station vide OB 10/3/2018 is an Incident report was to the effect that the accused person, in the company of another NPR by name David Mutemi Kasina were in Sosoma area around 11;30 HRS while armed with G3 rifles. “on the way two more persons of Somali origin emerged from the bush while armed with knives and pounced on them with intend to snatch the G3 rifle from him. His colleagues acted swiftly and shot one of the Somali men as the other one escaped. The Somali man is feared dead. Scene be visited to establish what actually transpired....”
19. It is evident that these two scenarios do not match. The report made by the accused and his colleague was not about a shootout but an attack by men armed with knives. There is nothing about an ongoing civil conflict between the two communities. This made the accused’s person’s version of event s doubtful, and even when the prosecution did not call his colleague as a witness, he did not call him to support his position that there was a shootout.
20. The follow up of that report is recorded in OB 15/3 /3 2018 where the OCS then Chief Inspector Anthony Karisa and others established that the accused person and his colleague were attacked by the deceased in the company of another while armed with knives and tried to snatch the accused’s G3 rifle. Nevertheless, it does not explain how a person who was being disarmed ended up being shot in the back.
21. In his defence the accused told the court that they were shot at by Somalis and he shot in the air. He said the Somalis shot once. That neither he nor his colleague was injured. He did not see the shooter. He said the earlier statement he recorded under duress. He said he told IPOA that the first statement was recorded under duress. He said under cross examination that he told IPOA that his first statement was under duress but they cautioned him against changing his statement.
22. So then what version of the accused’s evidence should be believed? When they made the first report IPOA was not on board. When the OCS visited the scene IPOA was not there yet what was established and what the accused was telling the court did not agree. Whichever way one looks at it the fact is the accused shot the deceased, and did so from the back. There was no evidence collected at the scene to



confirm his story that the Somalis shot at him and his colleague. There was no evidence of any exchange of fire between the accused and the Somalis, only evidence is that the accused shot the deceased.

23. The accused said he lay down and shot into the air. There is no explanation as to how a shot in the air would end up in the back of the deceased. What makes it worse is the fact that the accused gave two different stories. Why? If indeed there was a shootout with the Somalis, why would he find it necessary to lie about it and say that the deceased attacked him with a knife?
24. In *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal had this to say:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated: -

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused;
- (iii) the circumstances taken cumulatively, 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.”

25. In this case the accused shot the deceased from the back. He knew a gunshot could kill a person. There is no evidence he was acting in self defence or in the protection of any lives or property. The prosecution established that the gun was issued to him and that there was threat to him from the deceased.
206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—



- (a) 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;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

26. The circumstantial evidence clearly points at the accused person and no one else.

27. I am of the view that the prosecution proved by the circumstantial evidence before confirms the same.

28. I find the accused person guilty as charged and convict him accordingly for offence of murder c/s 203 as read with s. 204 of the Penal Code.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 13TH DAY OF FEBRUARY 2024

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MUMBUA T MATHEKA

JUDGE

CA Nelima/Elizabeth

Accused: Present

Mr. Kioko for accused

Mr. Tanui for State

HCCRC No. 28 of 2019

13th February 2024

Before Mumbua T Matheka J

CA Nelima

Accused: Present

Mr. Kioko for Accused

Tanui for State

Court: judgment delivered;

Mr. Tanui- he is a first offender. We do not have any records

Mr. Kioko; We can have a pre- sentence report

Ms Mwalekwa PACS: The Pre-sentence report will be read in two weeks.

Court.

1. Mention on 29th February 2024 before the DR for he Pre -sentence Report. The report be served upon counsel for purposes of



2. Mention before me for Mitigation on 5th of March 2024
3. Accused 's bond is suspended
4. Accused RIC

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MUMBUA T MATHEKA

JUDGE

13TH FEBRUARY 2024

