



**Republic v Mwaringa & another (Criminal Case 5 of 2020)  
[2024] KEHC 2849 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2849 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL CASE 5 OF 2020  
SM GITHINJI, J  
MARCH 14, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**EMMANUEL WANJE MWARINGA ..... 1<sup>ST</sup> ACCUSED**

**BRIAN OTIENO ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Number 95547 Pc Emmanuel Wanje Mwaringa and Number 2015118748 APC Brian Otieno are charged jointly with the offence of Murder, contrary to section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya.
2. The particulars of the offence are that on the 24<sup>th</sup> day of June, 2018 at Boka Market, Boka Township within Tana River County, the accused jointly murdered Abdullahi Hussein Omar.
3. The prosecution case is that on 24<sup>th</sup> June, 2018 Pw-2 in this case took a camel to Boka Livestock market for sale. It's not vivid from the evidence whether the said camel belonged to him or to his son, the deceased in this case. The deceased was in the said market as well as Pw-3, another son to Pw-2. When the deceased saw the camel he protested about it intended sale. According to Pw-1 the deceased claimed the camel was expectant and the father could sell another and not that particular one. The deceased took it and started driving it back home. Pw-2 was not contented with his son's action. He discussed the issue with Pw-3 and told him to seek the assistance of police to have it returned. It's then they contacted the two accused persons who were on duty in the market. The two officers pursued the deceased. Pw-1 claims that he was with the deceased as he drove the camel back while Pw-4 states that when the police pursued the deceased he also trailed behind them. The officers called upon the deceased to stop and drive the camels back to the market but he declined. The first accused made a gunshot into the air. He followed with another which hit the deceased on one of the legs. He fired another which



hit the deceased on the shoulder. Another still was fired by him which hit deceased on the stomach. The deceased had fallen down. After the first shot, Pw-1 had stood aside and surrendered. The second accused fired one shot which hit deceased on the forehead. The deceased fell dead. Many people in the market heard the gunshots and rushed to the scene. They include Pw-2. When Pw-2 got to the scene his son was already dead. He covered the body with a sheet. The OCS was called to the scene. The body was picked and taken to Garissa Referral Hospital. Pw-5 alleges that when the OCS booked the report he alleged the deceased had a knife, and he saw no such knife at the scene. Pw-9 had visited the scene of the incident. He picked 6 fired cartridge cases of 7.62mm. He gave 4 of them to an IPOA (Independent Policing Oversight Authority) Officer and the Other 2 to CID Officers. Pw-7 on his part took the two police officers (suspects) to Boka Police Station using a Toyota Probox vehicle. He noted they had some injuries.

4. At Garissa County Referral Hospital, Pw-6 conducted the postmortem on the body of the deceased on the very same day. There rose a dispute on the indicated brief facts on the incident as the author indicated the deceased had stabbed the police officers with a knife. The protest led to correction of the said report. Upon examination of the body, Pw-6 noted it had a degloving injury of the skull, laceration close to the eye and an oozing abdomen. The cause of injury was gun shots. The doctor was of the opinion that the cause of death was due to traumatic brain injury, due to gun shot. He thus filled the postmortem form.
5. On 26/6/2018 the G-3 Rifle, body No.6699199, issued to the 2<sup>nd</sup> accused person was retrieved from him and had eight rounds of ammunition. From the evidence and report of Pw-14, the first accused must have been issued with a G3 Rifle Body No.6928431 with 17 rounds of ammunition.
6. Pw-17 an IPOA officer, investigated the case. She had been given four fired cartridge cases by Pw-9. She handed them to the Ballistic expert (Pw-14) on 2/8/2018. They were marked IPOA GSA (A1) to (A4).
7. On 9/8/2018 Pc Malik Oduor took the following exhibits at Ballistic Laboratory: -
  1. Two G3 Rifles S/No.6699199 and 6928431 marked "A" & "D" respectively.
  2. Two magazines marked "B" and "E" respectively.
  3. Twenty-five rounds of ammunitions marked (C1-C8) and (F1-F17).
  4. Two fired cartridge cases marked (G1-G2).
8. Pw-14 was to ascertain the caliber of exhibit marked IPOA GSA (A1-A4) and whether the same were fired form G-3 Rifles body No.6699199 and No.6928431 as urged through IPOA Exhibit Memo Form.

The police exhibit Memo Form urged Pw-14 to ascertain; -

- a. Whether the exhibit marked "D" is serviceable and capable of discharging ammunition and if it has discharged any ammunition in the recent past.
  - b. Whether exhibit marked "E" is serviceable and can house ammunition marked C-1 to C-8.
  - c. Whether exhibit marked F1 o F17 are live ammunition and of which caliber.
  - d. Whether exhibit marked 'G1" and "G2" are spent cartridges and if they might have been fired from either "A" or exhibit marked "D".
9. Pw-14 carried out the examination. He found that the two Rifles, marked "A" and "D" were Heckler and Koch G-3 Rifles, of caliber 7.62mm. Each is designed to chamber and fire rounds of ammunition



in caliber 7.62x51mm. They were both complete in all their component parts. Each of the firearm was successfully test fired using three rounds of ammunition picked at random from C1-C8 and F1-F17. The test cartridge were recovered and marked TCI-TC3 and TB1-TB3 for each Rifle. Both detachable G3 box magazines marked B and E were in good working order. They worked effectively in their respective rifle. Each has a capacity of twenty rounds of ammunition in caliber 7.62x51mm, such as in exhibits C1-C8 and F1-F17. C1-C8 and F1-F17 are twenty rounds of ammunition each in caliber 7.62x51mm. Each is suitable for use in appropriate caliber firearm.

10. The expert was of the opinion that exhibit A and D, C1-C8 and F1-F17 are capable of being fired and are firearms and ammunition respectively, as defined under the *Firearms Act* Chap 14 Laws of Kenya.
11. Exhibits IPOA A1-A4 and G1-G2 are six fired cartridge cases. Each was formerly a component part of a round of ammunition in caliber 7.62x51mm.
12. Comparative microscopic examination of exhibits IPOA A1-A4 and G1-G2 in conjunction with each other, revealed that they were all fired in one gun. When they were examined in conjunction with the test cartridge cases in exhibits A and D, it revealed that they were all fired in G-3 rifle S No.6699199 marked exhibit A.
13. The finding was informed by sufficient matching ejector markings, breech face markings and firing pin indentation markings. Pw-14 made a report to the said effect.
14. Pw-17, the investigating officer from IPOA show the body before the postmortem. The right leg, abdomen and head had gunshot injuries. The skull was open and the brain was oozing out. What she noticed is that only the police officers, CI Naiberi, Sergeant Maroko and DCIO Madogo, spoke of presence of a knife. The said knife was not recovered and she saw no stones at the scene. She recommended that the two officers be charged with murder.
15. The first accused person in his defence stated that he is stationed at Gamba Police Station in Tana River County. On 24/6/2018 he was at Boka Police Post. In the morning while in company of the 2<sup>nd</sup> accused person (Pc Brian Otieno), they booked in the OB that they were going on patrol at the market. There was an animals market on that day. They each had a G3 Rifle. While in the market a man went and reported to them that his camel had been stolen. He was a Somali who never spoke in Swahili very well. He led them to Kora Park forest. He led them and ahead they saw a man who was driving camels into the forest. When they got near him, they stopped him and told him to drive back the camels.
16. The young man however picked stones and hurled them at the accused persons. He threatened them saying if they had blood they should get near him. He hit the first accused on the leg. The first accused shot a bullet in the air and warned him to stop throwing stones at them. He did not stop but continued. He hit the officers with stones. The fist accused tried to arrest him and he threw a club that hit him on the forehead. The first accused fell down unconscious. When he got conscious he saw the assailant on the second accused on the ground, holding a knife set to stab him. The first accused shot at the deceased prompting him to fall down.
17. The knife he had fell on his side. The second accused collected it. They called the OCS and informed him about the incident. The bullet had got the deceased in the head. Some officers arrived from the County Government. The deceased was rushed to the hospital.
18. The second accused stated he is APC Brian Onyango Otieno attached to Critical Infrastructure Protection Unit in Mombasa. On 21/6/2018 he was attached to Boka. On 24/6/2018 they went on patrol at Boka Market. They were to accompany County Government Officers in the market to collect revenue. The market was for animals. At about 8.00am they were approached by an old somali man who requested for their help as a thief had stolen his camels. He pointed at the direction the thief had



taken. They were led by the old man and about 100 metres away saw a young man driving the camels. They shouted at him telling him to return the camels. He defied the orders saying he will neither stop nor return the camels. He challenged the officers saying whoever had blood should get near him. The camel was going and the deceased was advancing towards them. He hurled stones at them. The second accused shot in the air to warn him. He did not surrender but hurled stones at them.

19. His knees and toes were hit. He was also hit at the belly. The 2<sup>nd</sup> accused also hurled stones back at the deceased and hit him on the stomach. First accused got near the deceased. The deceased hit him on the forehead with a club. The first accused fell down unconscious. The 2<sup>nd</sup> accused remained alone against two assailants. Deceased had been joined by a man from the thicket and there was another driving away the camel. He shot in the air to prevent deceased from getting the 1<sup>st</sup> accused's firearm. The 2<sup>nd</sup> accused pushed the 1<sup>st</sup> accused 30 metres from the scene. He shot at the deceased aiming at the legs but missed him. The two attacked him with stones and he struggled to dodge them. He was exhausted and fell on this back against a huge stone. The deceased advanced towards him. He drew a knife from his waist and aimed to stab him. The 2<sup>nd</sup> accused shouted to the 1<sup>st</sup> accused saying, "Wanje, I am dying", 1<sup>st</sup> accused was behind 2<sup>nd</sup> accused. The 2<sup>nd</sup> accused crawled and picked the knife. The deceased had been shot on the left side of the head. He then heard people saying that they had killed. He went to the 1<sup>st</sup> accused and they headed towards the market. Pw-7 using a probox took them to Boka dispensary. They were treated and referred to Garissa Referral Hospital. They were given P-3 forms of which were filled. He had back pains and had suffered harm while 1<sup>st</sup> accused had suffered grievous harm. They handed their guns and bullets that remained. On his part had 8 bullets.

#### PARA 20.

The two called a clinical officer at Garissa County Referral Hospital as a witness. He stated that the two accused persons were presented to him on 26/5/2018. He filled their P-3 forms. 1<sup>st</sup> accused had a cut wound on the forehead which was approximately 4cms. The wound was sutured. He also had bruises on the left side of the face and upper limbs. The knees were also bruised as well as the lower thigh of the left limb. The injuries were 3 days old them. The patient had been treated at Boka dispensary. The degree of injury was grievous. He thus filled his P-3 form.

21. For the 2<sup>nd</sup> accused, he had a swelling on the back, the left side. It was tender. The injury was 3 days old. He had also been treated at Boka dispensary. The degree of injury was harm. He thus filled the P-3 form. He produced the P-3 forms as exhibits.
22. An offence of murder under section 203 of the Penal Code is committed by person who of malice aforethought causes death of another person by an unlawful act or omission.

“Malice aforethought” under section 206 of the Penal Code is established by; -Intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not. 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; An intent to commit a felony. An intent by the act or omission to facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony.

23. The question then is whether given the foregoing, the accused herein jointly murdered Abdullahi Hussein Omar.



24. Pw-2 the father to the deceased in his evidence in chief stated the camel he took to the market belonged to the deceased. However, on cross-examination he said it belonged to him. Considering the action of the deceased where he confronted his father telling him he could not sell the camel as it was pregnant and could get another for sale, and then removed it from the market driving it home, the said camel must have been his. The father stated otherwise on cross-examination to justify his action which triggered a process that led to the death of his son. If the camel belonged to Pw-2, the deceased would not have had the audacity to do as he did.
25. Pw-2 and Pw-3 sought assistance of the accused persons to get the camel back to the market. The accused states that the report made was that the deceased had stolen camels. This cannot be correct. The incident happened during the day and at Boka market. The deceased is a son to Pw-2 and they deliberated before he drove the camel away. He was driving it back home. The officers could not have been informed otherwise. Their stated action when they first caught up with him, is that they ordered him to return the camels back to the market. Police pursuing a thief cannot just order him to get the stolen items to the owner. They arrest such a suspect and recover the allegedly stolen items. Their action shows they had the correct information that the deceased had prevented his father from selling the camel, and should help in returning the same to the market for sale. The accused persons were not therefore pursuing a thief and were aware of the fact. In law they had no business pursuing the deceased who had committed no known offence.
26. The accused were each armed with a G3 Rifle loaded with a good number of ammunitions in caliber 7.62x51mm. Boka Police Post Arms Movement Book was not well kept as what was produced as exhibit has only one entry for 2<sup>nd</sup> June, 2018 showing 1<sup>st</sup> accused, Emmanuel Wanje was issued with a G3 body No.692843 and 40 rounds of ammunition in caliber 7.62mm.
27. There's however no entry for 24<sup>th</sup> June, 2018 when the offence allegedly took place, and no entry at all regarding the 2<sup>nd</sup> accused person, Brian Otieno. However, from the evidence adduced in court and the defence, there is no dispute that both accused were armed with G-3 rifles though the number of ammunitions each had then is not clear.
28. When the two officers (accused) caught up with the deceased they ordered him to return the camel and he declined. The 1<sup>st</sup> accused made a gunshot in the air. He shot another and hit the deceased on one leg. He yet made another which hit deceased on the shoulder. The 4<sup>th</sup> one hit deceased on the stomach. The deceased had fallen down. The second accused then made a shot which hit the deceased on the forehead, killing him instantly.
29. The accused do not deny that they both made shots. They alleges when the deceased defiled their order to return the camels back, he as well hurled stones at them, telling them if they had blood should get near him. First accused was hit by one stone on the leg. He fired in the air to warn him. The deceased however continued throwing stones at them. When the 1<sup>st</sup> accused tried to arrest him he was hit with a club on the forehead and fell down unconscious. The deceased had been joined by a man from the thicket and there was another driving the camel away. When 1<sup>st</sup> accused fell down unconscious, the 2<sup>nd</sup> accused remained alone against two. He shot in the air to prevent the deceased from getting the 1<sup>st</sup> accused's firearm. The 2<sup>nd</sup> accused pushed 1<sup>st</sup> accused away. He made a shot at the deceased but missed him. The two hurled stones at him. He got exhausted and fell on his back. The deceased advanced towards him. He drew out a knife to stab him (2<sup>nd</sup> accused). The 2<sup>nd</sup> accused shouted to the 1<sup>st</sup> accused saying he was dying. The 1<sup>st</sup> accused shot the deceased on the head. The knife fell on his side.
30. Postmortem was conducted on the deceased on the very same day at Garissa County Referral Hospital and the cause of death was indicated as traumatic brain injury due to gun shot.



31. The IPOA officer who investigated the matter (Pw-17) indicated there were no stones at the scene and that only police officers spoke of the knife and not any other witness, and that the alleged knife was not recovered.
32. The fact is that several shots were made at the scene by the accused persons. At least six fired cartridge cases were recovered. It's also a fact that the deceased was shot at several times as he had a number of gunshot injuries. At least Pw-17 observed one on the right leg, another on the abdomen and the skull. Pw-1 also indicated of him (deceased) having been shot on the shoulder as well as the other stated areas. The evidence indicates the shot on the head came last and is the one that killed him instantly. Other shots must therefore have been made prior to that. It is unrealistic that the deceased having been first shot on the leg, armed with stones was determined to fight two officers armed with guns, and for that matter G3 rifles. It's also very unrealistic that even after a second shot on the stomach he was still fighting, prompting the deadly shot on the head. I disagree with the defence case that the deceased hurled stones at the officers who were armed with guns. If that was the case, Pw-17 would have seen stones at the scene and the police would also have collected or photographed them for use in evidence. The same applies to the story about the knife which though allegedly recovered was not seen by the independent eye witnesses and nor was it produced in evidence. The evidence was made to introduce a defence of "self defence".
33. The accused had injuries of which they claim were caused by the deceased who hit them with stones and a club. It's said when they shot the deceased dead members of the public appeared and alleged they had killed. During postmortem there was a problem which delayed the process as witnesses claimed there was introduction of a knife in the history part, of which was not the case. The report had to be corrected. The officers though had called OCS at the scene had to be ferried away using a probox vehicle. Considering the circumstances, there was an angry crowd at the scene. Could they have attacked the two suspects? It is not certain but the injuries they suffered were not occasioned by the deceased. The circumstances reveals he had no capacity and opportunity to cause such. Suppose they were; the case of *Palmer v Republic* [1974] AC 814 is clear that; -

“It's both good law and good sense that a man who is attacked may defend himself it is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, other may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to arrest the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it's rejected.....”

34. In *Mokua v Republic* [1976-80]1 KLR 1337, the court observed that; -

“Self defence is an absolute defence even on a charge of murder unless, in the circumstances of the case the accused applies excessive force.”

35. Assuming the accused were attacked by the deceased with stones as they alleged, what would have prevented them from just walking out of the scene (danger) and simply leave the deceased to drive the camel home? Stones hurled by one or two persons in measure of force and danger, is far below the force



of two trained officers armed with G-3 rifles with a good number of ammunition. The officers could not have been in danger that would justify use of firearms to a point of killing the deceased. Whichever way the facts are weighed the force used is unjustifiable.

36. The two officers acted in concert as described by prosecution witnesses and as they disclosed in their defence. It does not therefore matter who shot the fatal bullet that killed the deceased. Both are culpable. The weapon used and the manner used could cause grievous harm or death to the victim and the officers knew very well of this fact. They therefore had malice aforethought.
37. Having considered the foregoing, I do find that the offence of murder contrary to section 203 as read with section 204 of the Penal code is proved by the prosecution against both accused beyond reasonable doubt. They stand convicted of it.

**JUDGMENT FOR GARSEN READ AND SIGNED AT MALINDI IN THE OPEN COURT VIRTUALLY THIS 14TH DAY OF MARCH, 2024.**

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**S.M. GITHINJI**

**JUDGE**

**In the Presence of: -**

- 1. Ms Mkongo for the state**
- 2. Mr Muli for the accused persons**
- 3. Accused (both) present in the Open Court.**

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**S.M. GITHINJI**

**JUDGE**

**14/3/2024**

**Ms Mkongo; -They have no records. They are first offenders.**

**Mr Muli; - We can have a pre-sentence report. We can mitigate when the report is filed.**

**M/s Mkongo; -We can take the earliest date possible. There is vacation in April and I will be proceeding on leave. The bond should now be cancelled and accused held in Malindi G.K.Prison.**

**Court; Pre-sentence report be prepared and filed. The convicts beheld at G.K. Prison. Mention on 20/3/2024.**

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**S.M. GITHINJI**

**JUDGE**

**14/3/2024**

