



**Republic v Golicha (Criminal Case 9 of 2018)
[2024] KEHC 2634 (KLR) (7 March 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE 9 OF 2018**

**JN ONYIEGO, J
MARCH 7, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

ADAN BORU GOLICHA ACCUSED

JUDGMENT

1. The accused person herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on 15.10.2017 in Mandera Township within Mandera East Sub County in Mandera County, he murdered one Yussuf Ali Adan.
2. The accused pleaded not guilty to the charge and the case proceeded to full hearing.

Prosecution’s evidence

3. PW1 Kulmiye Ali Adan stated that on 25.10.2017 at 10.00 a.m., he was at metameta driving his car in company of some passengers. That while at metameta junction, he saw his brother, the deceased herein was carrying some luggage from a Nissan. That accidentally his(pw1) car hit a Toyota car ahead on the bump thus prompting him and the driver of the Toyota, the accused herein to alight. To him, there was no damage caused and so, he offered an apology to the accused who declined to accept the same. He testified that the accused demanded to know why he had hit his car. That despite him telling the accused to remove the car from the road to facilitate a dialogue, the accused who was adamant reacted by slapping him on the face.
4. It was his evidence that upon being slapped, he fell down and on standing, picked a stick. Before he could hit the accused, PW2 appeared and informed him that the accused was a police officer and so, PW2 took him to her shop which was nearby. That the accused started firing gun shots at the crowd that had milled around thus fatally injuring the deceased.



5. It was his evidence that while in PW2's shop, he managed to see the accused shooting the deceased using a pistol. That when PW2, let him free, he rushed the deceased and a lady who was lying on the ground having fainted to Blue Light Nursing Home where his brother later died. On cross examination, he denied the allegation that they confronted the accused for the reason that he was a Borana by tribe.
6. He denied the allegation that he had asked the accused whether he was a member of Al Shabaab or an officer for the reason that the accused was in plain clothes. He averred that the accused wanted to kill him due to the existing feuds between the Garre and the Borana.
7. PW2, Saida Maalim Ibrahim testified that on 15.10.2017, she was at her place of work when she saw a motor vehicle slightly hit another mv in front it. That she knew both drivers. It was her testimony that the driver of the mv in the front the accused herein got out of his car and slapped PW1 who fell down. She testified that she told PW1 who had picked a stick not to hit the accused for the reason that he was a police officer.
8. That she took Kulmiye(pw1) to her shop and thereafter came back to the scene where she begged the accused to spare the life of PW1. It was her case that at that point, the accused drew his pistol and started firing at the crowd thus fatally injuring the deceased and a son to Nuria. She testified the accused thereafter drove away as they took the two to the hospital. She stated that Nuriah's son died as he had wounds on his right cheek and stomach while Ibrahim was referred to Nairobi as he had a bullet stuck on his leg.
9. On cross examination, she stated that the accused shot at them unprovoked yet PW1's mother had assured him that she would repair his car. That she moved in at the point when PW1 wanted to hit the accused with a stick he was carrying and then separated the duo. She stated that when the shooting took place PW1 was in her shop.
10. PW3, Nuria Yusuf Sheikh testified that the deceased was not her biological son in as much as she lived with him. That on 15.10.2017 at 9-10 am., she was at her house when she received a call that her car was involved in a road accident. She stated that she went to the scene and while there, she saw a man slap her son((PW1). It was her evidence that upon falling down, PW1 stood up carrying a stick but she convinced him not to use it.
11. That people pleaded with the accused not to do anything worry but he did not heed. It was her case that the accused instead started shooting at the crowd thus fatally injuring the deceased, Ibrahim who was shot at the leg and a young girl. On cross examination, she reiterated that the accused aimed at PW1 but instead ended up shooting the deceased.
12. PW4, Khadija Ali Ibrahim testified that on the material day, she was at the scene when one taxi hit another car from behind. She stated that the accused whose mv was hit from behind got out and slapped PW1 the driver to the mv that hit his car from behind. That PW2 took PW1 to her shop even as people pleaded without success with the accused person not to harm PW1. She stated that at that point, she saw a customer approach her shop and so she left to go serve the customer. While there, she heard gun shots thus prompting everyone to take cover. That after shooting stopped and upon coming out of the shop, she realized that two people had been shot by the accused among them Ibrahim who had an injury on his leg and a girl who was just lying down. That they rushed Ibrahim and the girl to Blue Light Nursing Home for treatment. She stated that she also found the deceased in the referral hospital but later on, he died.
13. PW5, Ibrahim Ibrein Adan testified that on 15.10.2017 he saw many people gathered at a point there were two cars which had stopped on the road. That he didn't bother as he continued with his work. It was his evidence that he then heard gun shots and so, he fell down. While there, he managed to



- see blood oozing from his right leg. That he was taken to the police station before being escorted to the Blue Life Nursing Home for treatment. On cross examination, he confirmed having recorded a statement with the IPOA. Additionally, he confirmed that there was commotion and a small crowd at the scene but he did not pay much attention to it. That he heard there was someone who was killed by the name of 'cartoon'.
14. PW6, Kalah Hassan Issak testified that on 19.10.2017, he identified the body of the deceased to the doctor who carried out post mortem.
 15. PW7, James Onyango testified that he received the following from PC Mwinyi: a Jericho Pistol S/No. 45302109 as exhibit 1, 9 rounds of ammunitions as exhibit (B) 1-9. 2 spent cartridges cases C1 and C2 and a Jericho pistol magazine as Pexh D. He was tasked to determine whether exhibit A was a fire arm under Cap 114 of Laws of Kenya; whether B 1-9 were ammunitions under the *Firearms Act* and whether C1 and C2 were fired.
 16. He testified that he examined the same and came up with the following findings: Exhibit A being an Israel made Jericho pistol was in good and general mechanical condition; Exhibit B1-B9 were rounds of ammunition in caliber 9x19mm; exhibit C1-C2 fired cartridge cases each of them formerly and component ammunition of caliber 9x19mm. That microscopic examination comparison of C1 and C2 revealed they were fired from one firearm and further, that C1 and C2 and spent cartridges were fired by exhibit A.
 17. PW8 Lukas Juma testified that he was involved in the general investigations and that he visited the scene where he found that two vehicles were involved in an accident. From the information that they gathered, they found that two people had been shot at and thereafter, rushed to the hospital. That one Yussuf had been seriously injured and was undergoing treatment. He stated that he also visited Blue Life Hospital where he found PW5 who had a bullet lodged in his right thigh.
 18. It was his evidence that he took custody of the firearm, Pex 1 and the spent cartridges and then prepared an exh. memo of the same. He interviewed witnesses and further gathered exhibits. On cross examination, he conceded that the witnesses gave various versions of the incident. It was his case that during that time, there was tension between the Borana and the Garre communities and as such, MetaMeta area was a polarized area. He further stated that he gathered information that there were many people at the scene and PW1 and the deceased were part of the crowd chanting at the accused person and therefore, it was necessary for the accused to protect his fire arm.
 19. PW9, Albert Kipchumba testified that he was the OCS Mandera from 14.09.2017 and that he had 105 officers in the station among them the accused person. That on 15.10.2017, he received a report from the accused person on the incident and that he was not sure of the fatalities.
 20. That he booked the report in the OB as 16/15/10/2017. It was his testimony that the accused was the head of the armoury and therefore was entitled to have a firearm. He stated that after the incident, the said fire arm was taken by the investigating officer for investigations. On cross examination, he responded that the accused was justifiably armed. That he learned that there was a group of people who confronted the accused and in a situation like that, an officer is allowed to fire a warning shot and if the crowd fails to disperse, he may use the firearm.
 21. PW10, Mustafa Mohamed Hassan stated that he was an investigator with IPOA and that he recorded statements and further carried out investigations. It was his evidence that on the material day, the accused was involved in an accident with another motorist thus leading to a confrontation where a person was fatally wounded. On cross examination, he stated that the complainant in this case was an MCA, Adan Maalim who was facilitating the witnesses.



22. PW11, Dr. Peter Muriuki Ndegwa testified that on 19.10.2017, he conducted a post mortem on the body of the deceased. From his examination, he formed the opinion that the cause of death was multiple injuries due to multiple gunshots at close range. He produced the same as Pex 11. In cross examination, he stated that the three shots were at close range, a distance of about 30 metres. That there was a downward trajectory degree of 45degrees and all shots were fired from the front side.
23. PW12, Christopher Ogega, an investigator attached to IPOA stated that he carried investigations as guided by PW1 and PW3. Additionally, he recorded statements from the witnesses and further took possession of the post mortem report.
24. He stated that he collected documents from the Mandera Police station where he picked the incident report, duty roaster, arms movement register and an abstract of the incident. That he conducted investigations alongside that of the police and learned that the accused was attacked by people armed with crude weapons and a person even tried to snatch the pistol from him. On cross examination, he stated that the incident was reported through an MCA known as Adan Maalim. He reiterated that the use of the fire arm was not justified as they recommended that the accused be charged with the offence of murder.
25. PW13, Hudson Masake testified that he took the photographs of the body of Yussuf Ali Adan and motor vehicles Toyota Probox KDV 658C and Toyota Corolla KDF 697M station Wagon white in colour.
26. Having closed its case, the court found that the prosecution had established a prima facie case warranting the accused to be put on his defence.

Defence's case

27. DW1 Aden Boru Golicha, recalled that on 15.10.2017 he went for shopping and on his way back while driving his personal car registration number KBC 658C he saw a suspicious vehicle following him. That the driver using a motor vehicle reg. No. KBC 619M indicated to overtake his car severally but didn't. He told the court that upon reaching Metameta road, he decided to branch but suddenly he was hit from behind. It was his case that his effort to negotiate with the driver to repair his vehicle fell in deaf ears.
28. That a confrontation ensued and the driver of the other vehicle held his collar and thereafter pushed him directing him to remove his vehicle and drive away. That he too held his collar and pushed him backwards. That the other driver went back to his car and came out with a rungu that had a metallic bolt and started hitting him. That upon realizing that his life was in danger, he drew his pistol and shot in the air to scare him. That the said driver started shouting 'thief, thief, Al-shabaab' and people responded among them PW3 Nuria who pleaded telling them not to hurt him since he was a police officer in Mandera, but the driver became more violent.
29. He stated that over 100 people gathered and started beating him. That two people grabbed him from behind thus discharging one bullet. He further stated that one of the people who held him bent the gun at the tip and a struggle ensued thus discharging 3 rounds of bullets; that one of the bullets hit him and he got injured but managed to run away. That after he was released, he headed to the police station at Mandera where he later explained to the OCS Mr. Kipchumba on what had transpired.
30. On cross examination, he testified that he is trained and knows when to use his firearm and that he never threatened anyone. He insisted that the rounds were fired from his gun and that the deceased was shot and the other person who held him was injured.



31. Having closed the defence case, parties agreed to file submissions.

Submissions

32. The prosecution filed its submissions on 19-09-23 thus contending that the evidence tendered was sufficient to sustain a charge of murder as the elements of the said offence were proved. That the deceased sustained multiple gunshot injuries thus fulfilling the first requirement that indeed death occurred. On the second leg, it was submitted that the evidence by the witnesses' point at the accused person who was placed at the scene of crime as responsible for shooting the deceased. Reliance was placed on the case of *Republic v Mwangangi Mbeu Muchungu* [2018] eKLR where the court held that: ...it is not a legal requirement in a case of murder that the murder weapon must be produced. That the recovery of such weapon only serves as additional or corroborative evidence to other evidence in the case. A conviction is sustainable even without recovery of the murder weapon.
33. That even in the absence of the bullet head fragments, the prosecution produced and relied on all other concrete evidence to prove its case. Counsel contended that the said shooting was unlawful in the circumstances of the facts established by the witnesses.
34. On intent, the prosecution submitted that the accused is a well-trained officer who was knowledgeable of the gravity of his actions (likely to cause death or cause serious injuries) especially since he was deemed to uphold high standards of professionalism. That opening fire in an open market place was overly reckless, unwarranted and unnecessary. That he must be put to task to answer for his actions.
35. The accused through Mr. Nyipolo Advocate filed his submissions on 19th July 2023. Learned counsel submitted that it was not in doubt that the deceased herein was killed by the accused. That the same notwithstanding, the prosecution did not prove that the accused caused the said death unlawfully. Learned counsel urged that the firearm was justifiably used for the reason that the mob that surrounded him at that very moment desired to kill him as they chanted 'kill him' 'kill him'. That PW1 was responsible for inciting the crowd by claiming that the accused was an Al Shabab terrorist.
36. Further, counsel contended that the said fire arm was used as a result of the fact that the accused felt apprehensive of his safety having been struck on the back with a log. Counsel placed reliance on the case of *Republic v Benson Baita Mwita* [2021] eKLR where it was held that where a death occurs as a result of a struggle over a firearm, the same cannot be attributed to the accused but to the act of the deceased.
37. It was contended that the prosecution did not prove the element of malice aforethought for the reason that the accused was not a party to the initial traffic accident. That one would therefore wonder what the deceased person was doing at the scene if not to accost the accused. Learned counsel placed reliance on the case of *Republic v Andrew Mueche Omwenga* [2009] eKLR where it was held that where an accused person is lawfully issued with a firearm for use in his normal duties and such firearm ends up killing a deceased whom the accused did not know nor had heard of previously, then the intention to kill cannot be attributed to such a person. This court was therefore urged to find that the prosecution did not shift the burden.

Analysis and determination

38. I have considered the evidence tendered before this court and rival submissions by the prosecution and the defence. The accused herein was charged with the offence of murder contrary to Section 203 as



read with Section 204 of the Penal Code. The offence of murder is defined under section 203 of the Penal Code in the following terms; -

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

39. From the above definition, it is clear that for the prosecution to secure a conviction on a charge of murder, it has to prove, beyond reasonable doubt, three ingredients interalia;
- a. the death of the deceased and the cause of death;
 - b. that the accused committed the unlawful act which caused the death of the deceased; and
 - c. that the accused had malice aforethought.

(See Anthony Ndegwa Ngari vs Republic [2014] eKLR and Johnson Njue Peter vs Republic [2015] eKLR).

40. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with and in this case, prove that the accused herein murdered the deceased (see *Woolmington vs DPP* (1935) AC 462). The standard of proof which is required of the prosecution is that of “beyond any reasonable doubt” (See *Miller vs Ministry of Pensions*, [1947] 2All ER 372). The question therefore is whether the above ingredients were proven to the required standards.

41. As for the proof of the death of the deceased and the cause of the death, PW1, PW2, PW3, PW4, PW5, PW7, PW11 and the accused person all testified that the deceased herein died as a result of the shooting triggered by the accused. PW11 further testified that he conducted post-mortem on the said body and formed the opinion that the deceased died as a result of multiple injuries due to multiple gunshots at close range. He produced the same as Pex 11. As such, the death of the deceased was proved.

42. Right to life is protected by our Constitution under article 26 and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. In *Guzambizi Wesonga v Republic* [1948] 15 EACA 63 the court held that; -

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”

43. Was the shooting of the deceased an unlawful act. According to the accused, he did not shoot the deceased intentionally. He claimed that the shooting was as a result of his attack by the people claiming that he was an Alishabab fellow thus prompting him to shoot into the air and in the process a struggle ensued hence necessitating the accidental discharge of rounds of ammunition which fatally shot the deceased. Was there malice afore thought?

44. Malice aforethought is the mental element (mens rea) of the offence of murder. Section 206 of the Penal Code defines it as follows;

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.

45. The Court of Appeal in *Bonaya Tutu Ipu & Another v Republic* [2015] eKLR stated as follows on the prove of malice aforethought; -

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit -vs- Uganda*, CR. APP.No. 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *REX vTubereS/O Ochen* [1945] 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....”

46. In the instant case, the evidence by PW11 was to the effect that the cause of the death was as a result of injuries caused by a gunshot a fact that the accused did not deny. The witness testified that the three shots were at close range, a distance of about 30 metres. That there was a downward trajectory degree of 45degrees and all shots were fired from the front side. PW 7 testified that a microscopic examination comparison of C1 and C2 revealed they were fired from one firearm and further, that C1 and C2 and spent cartridges were fired by exhibit A.
47. The accused raised the defense that he fired once in the air to disperse the crowd at which point the deceased grabbed the nozzle of the firearm leading to a struggle and accidental discharge of a bullet which hit the deceased. That the deceased was not a party to the initial traffic accident and therefore it remains a mystery why exactly he was at the scene of the accident. The prosecution on the other hand argued that the accused person being a police officer of many years’ experience, he would have known and acted better. [See *IP Veronica Gitahi and Another v Republic MSA CA Criminal Appeal No. 23 of 2016* [2017] eKLR].
48. In determining whether there was an accidental discharge or whether the accused person intentionally shot the deceased herein, this court took liberty to assess the process of releasing a shot from a gun/ pistol. Indeed, it is its finding that the process includes loading ammunition(s) into the magazine, inserting the magazine well in the gun, cocking the gun, removing the safe catch and thereafter pulling the trigger.
49. Of importance to note is that the incident herein was as a result of the accident that occurred of which almost all the witnesses herein agree to. In the same breadth, it appeared that the accused person and the deceased and/or PW1 were persons who were unknown to one another. I say so for the reason that



from the testimony of PW2, the same informed this court that she was the one who informed PW1 that the accused was a police officer and that he should not fight him. It is evident from the evidence on record that the shooting leading to the death of the deceased was not intended but came as a result of the confrontation between pw1 and the accused. There was no evidence of planned shooting. The accused was under the prevailing circumstances under attack from a crowd of people after he slapped pw1 following the road accident. In other words, his life was in danger hence the shooting in self defence.

50. However, his act of indiscriminate shooting to the crowd was a careless act or worse still an act of negligence. He should have driven off and make a report over the accident to the police. He ought to have known that his shooting to the crowd was likely to injure somebody. By shooting to the crowd he is deemed to have known the consequences of his action. However, his action was in the heat of the moment and act out of provocation by pw1 hence no malice a forethought can be inferred. see Republic v Ismail Hussein Ibrahim [2018] eKLR and VMK v Republic [2015] eKLR]. Nevertheless, the act was unlawful considering the excessive force applied by shooting towards unarmed persons.
51. Under Section 207 of the Penal Code provocation is a defence to murder. That Section provides that: -
- “When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”
52. Taking into account the totality of the facts of the case and circumstances under which the offence was committed, it is apparent that the offence was committed without malice aforethought and that the appropriate charge should have been manslaughter. Accordingly, accused is acquitted of the charge of murder and instead convicted of a lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 7TH DAY OF MARCH 2024.

J. N. ONYIEGO

JUDGE

