



REPUBLIC OF KENYA

IN THE COURT OF KENYA AT BUSIA

CRIMINAL CASE NO.18 OF 2019

REPUBLIC.....RESPONDENT

VERSUS

HARMONY SOMONI.....ACCUSED

J U D G M E N T

[1] The information filed herein on the 16th September 2019 by the Director of Public Prosecution (DPP) was a charge against **PC Harmony Somoni** and **P.C Justus Andera (accused one and two respectively)** for the offence of murder, contrary to **s.203** read with **s.204** of the Penal Code. **S.203**, provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. And, **s.204**, provides that any person convicted of murder shall be sentenced to death.

[2] It was alleged that on the 31st May 2018, at Adungosi police roadblock, the two accused jointly murdered Kelvin Wanyama (**deceased**).

The case for the prosecution was that on or about the material date after 9.00p.m in the night a motor vehicle with Ugandan registration number plates to wit **No.UBB 534P** carrying about five people including its driver was regularly stopped at a police road block erected near the Adungosi police station along a road leading to the border town or trading centre called Buteba. The two accused who were based at the said police station were at the time manning the roadblock.

[3] The driver of the vehicle was the deceased. He was in the company of **Simon Ogala (PW 1)**, **Vincent Wanekawo Maloba (PW 2)**, **Pascal Ewakal Ekapolon (PW 3)** and others. The group had just attended a meeting of a savings group at a place known as Marino centre and was heading to Buteba when their vehicle arrived at the road block aforementioned and stopped. The deceased driver allegedly alighted from the vehicle and held a brief conversation with a police officer before returning to the vehicle and driving off after allegedly being beckoned or signaled to do so by one of the police officers.

[4] Shortly thereafter, gunshots vent the air while the vehicle was in n motion. This attracted the attention of the police officers at the police station. They trooped to the scene led by the officer commanding the station (OCS) **Chief Inspector Luke Wechibe Wamocha (PW 6)** in the company of his deputy, **Inspector Lillian Onsongo (PW 7)**, **Cpl. Jared Mbaka (PW 9)** and others. They learnt from the accused and his colleague P.C Andera (**now deceased**) that the vehicle was shot at to deflate its tyres after its driver reversed it, circumvented the metal spikes placed on the road and drove off instead of stopping at the roadblock as required.

[5] The OCS, disarmed the accused and the late PC Andera and together with a larger group of police officers they went in pursuit of the vehicle towards Buteba. About four hundred (**400**) metres away from the roadblock they found the deceased driver lying unconscious on the road. They retrieved his national identification card. The deputy OCS was then instructed to rush the deceased to Alupe sub-county hospital. The vehicle was nowhere at that scene. It was found four hundred (**400**) metres away in a maize plantation without any occupant and was later towed away to the police station. It's driver was pronounced dead on arrival in hospital.

[6] The father of the deceased, **Adenya Mukanda (PW 4)**, was on the same night at about 10.00p.m informed of an accident involving the vehicle. He proceeded to the alleged scene of the accident and found the vehicle in a maize plantation with its windscreen shattered. He later identified the body of the deceased for postmortem purposes.

Dr. Edward Kibochi (**PW 5**), produced the necessary post mortem report (**P.Ex 1**) which was compiled by his colleague Dr. Lusamba, who carried out the necessary autopsy.

The report indicated that the deceased died from excessive bleeding due to suspected gunshot wounds.

[7] Photographs of the vehicle and the bullet entries thereon were produced by **Cpl. Johana Tanui (PW 8)**, of the scenes of crime section, Bungoma county.

At the time the vehicle was being stopped at the roadblock, a teacher, **Micheal Wanyonyi Okure (PW 10)**, was driving his vehicle from Buteba Uganda when he arrived at the roadblock and stopped. Ahead of him on the opposite side was the vehicle driven by the deceased. It had also stopped and its driver talked at length with a police officer manning the road block when suddenly the driver reversed the vehicle and then drove forward slightly off the road in a bid to avoid the metal spikes. The vehicle then veered back into the road and drove off amid gunshots fired by the police officers at the scene.

[8] Vincent Odeke Ojune (PW 11), was on the material night on duty as a security guard at an organization called Akukuranut trust whose premises, are situated opposite the Adungosi police station, when he spotted the ill-fated vehicle stopping at the police roadblock and a police officer approaching its driver. The officer ordered that the vehicles interior lights be switched on but the driver became argumentative and asked to be left alone. He then hastily reversed the vehicle causing it to veer off the road. He returned the vehicle on the road and drove off fast. The officer in the vehicles path jumped aside. It was after a few minutes that Vincent (**PW 11**) heard the gunshots but could not tell the source.

[9] The incident, inasmuch as it involved police officers was reported to the Independent Policing Oversight Authority (**IPOA**) whose officer, **Rashid Ngolo Wekesa (PW 12)**, carried out necessary investigations and concluded that the accused police officers had shot and killed the deceased who was the driver of a m/v Reg No.UBB 534P Toyota WISH.

A ballistic expert, **SSP Florence Karimi (PW 13)**, examined two firearms i.e G3 Rifles s/No.6738380 and S/N.6738736 (**Ex 6 a – b**) and two spent cartridges after they were handed to her for examination. Thereafter, she compiled a report (**P.Ex 5 (b)**) and formed the opinion that the two rifles loaded with sixteen (**16**) rounds of ammunition each were capable of being fired and were firearms and ammunitions respectively as defined under the Firearms Act (**Cap 114 LOK**).

[10] The two firearms were issued to the accused respectively on the 30th May 2018 by **Sgt. Suleiman Mohamed (PW 15)**, who was previously based at the Adungosi police station as the officer in charge of the police lines. He confirmed, that G3 Rifle No.673876 (**P.Ex 6 (b)**) and its twenty (**20**) rounds of ammunitions was issued to the first accused (**PC Harmony**) while G3 Rifle No.6738380 (**P. Ex 6 (a)**) and its twenty (**20**) rounds of ammunition was issued to the deceased second accused (**P.C Andera**).

[11] Sgt Mohamed (PW 15) also confirmed that upon surrender of the firearms on the following day, the rifle issued to the first accused had four less rounds of ammunitions while the rifle issued to the late second accused had five less rounds of ammunitions, **Benson Naiberi (PW 14)**, a retired police officer, was at the material time the divisional criminal investigations officer (**D.C.I.O**) in the then Teso North/South Division, when he was tasked with the investigation of the material shooting incident. He took over the task from the OCS Adungosi police station and after conclusion thereof forwarded the necessary file to the office of the **DPP** which recommended that the two accused attached to Adungosi police station be charged with the present offence.

[12] Both accused appeared in court and denied the charge. They were both represented by the learned defence counsel, **Mr. Onsongo**, in the trial. The learned prosecution counsel, **Mr. Mayaba**, represented the State of Kenya through the office of the DPP. Unfortunately, the second accused, late P.C. Andera (**R.I.P**) passed away prior to the conclusion of the trial. The case against him was withdrawn under s.87 (a) CPC and he was discharged posthumously on 19th October 2020.

[13] In his defence, the first accused and now, the only accused, reiterated his denial of the offence. He indicated that he had just passed out in the month of April 2018 at the Kiganjo police college when the shooting incident occurred barely a month thereafter on the 30th May 2018, when he was assigned the duty of a station guard or sentry. His role was to guard the entire Adungosi police station and the police roadblock situated just outside the police station compound along the Adungosi – Butemba Road. It was while on such duty that his superior officer Sgt Mohamed notified him of a tip-off received by him (**Sgt Mohamed**) to the effect that some stolen vehicles were about to be driven across the Kenya/Uganda border into Uganda.

[14] Such tip offs were normal as many vehicles stolen from Kenya are often driven into Uganda through the border town of Buteba or Butemba along the Adungosi-Butemba road. After being notified of the latest tip off by Sgt Mohamed, the accused and fellow police officers learnt that the stolen vehicles were traced at a place called Amukura. This was about 6.00p.m and the OCS proceeded to that place with his team of six police officers where they recovered two stolen vehicles and arrested three suspects of Kenyan and Ugandan nationality.

[15] Later, while the accused was on duty at the roadblock at about 10.00p.m the ill-fated vehicle arrived there with its lights switched off. He stopped the vehicle and instructed the occupants to switch the lights on. They defied and instead reversed the vehicle. He became suspicious that the occupants had the intention of escaping with a stolen vehicle. All of a sudden, the vehicle was driven towards him. He jumped to the side of the road as the vehicle went over the metal spikes erected on the road. He fired a warning shot but all in vain. The vehicle maintained its motion even as gunshots fired by him and colleagues vent the air.

[16] The accused's colleagues from the police station arrived at the scene of the shooting and pursued the vehicle on a police vehicle. The accused was in that team and after some metres from the scene, the team found the injured driver of the vehicle lying on the road. He was rushed to hospital. Further ahead the team found the vehicle having overturned but without occupants. A group of officers remained behind guarding the vehicle, while the accused and his late colleague returned to the police station and handed over their respective firearms.

[17] The accused contended that he did not commit the offence. He said that he did not know how the deceased passed away thereby implying that there was no intention on his part to kill the deceased. That, the shooting of the deceased was unfortunate even though it was him (**deceased**) who provoked the incident by his defiance of police orders and attempt to escape from law enforcement. The accused further implied that in any event, the bullet or bullets which caused fatal injury to the deceased was not fired from his official firearm.

[18] Basically, the evidential facts aforementioned form the bedrock of either sides case. Whereas the prosecution contended and implied that the bullet or bullets which ultimately caused fatal injury to the deceased was fired from the official firearm issued to the accused, the defence contended and implied that the deceased was not shot and killed by a bullet or bullets discharged from the firearm issued to him.

[19] The rival contentions clearly touched as the usage of official firearms issued to the accused and his late colleague. Indeed, it was from that usage that the death of the deceased occurred and brought the two police officers into conflict with the law, hence their arrangement in court for the present offence.

There was no dispute that the deceased died from gun shot wounds. This was established by the production of the relevant postmortem report (**P.Ex 1**) which indicated that the cause of the death was excessive bleeding following suspected gun shot wounds.

[20] The bone of contention was clearly with regard to the identity of the person or persons who fired the fatal gun shot or gunshots especially given the fact that the material shooting incident occurred in the night at a police road block in the vicinity of a police station involving several police officers. The source of the fatal gun shot/shots was capable of leading to the identity of the shooter who clearly misused his official firearm by targeting the deceased and causing his death. Such conduct was a reflection of an intention to assault the deceased and causing him fatal injury using a firearm.

[21] Notwithstanding the circumstances which led to the unlawful use of government issued firearms, the person or persons who fired the fatal shot or shots would be culpable of reckless and excessive use of firearm/s, hence, the death of the deceased who was at the time in the company of Simon (**PW 1**), Vincent (**PW 2**) and Pascal (**PW 3**) and driving the ill-fated motor vehicle with Ugandan registration plates. These witnesses suggested that the shooting incident was unnecessary as they had already been cleared at the police road block to continue with their journey towards the border town or village or trading centre known as Buteba.

[22] However, the suggestion was disproved by the defence as supported by the independent witness, Micheal Wanyonyi (**PW 10**) and Vincent Odeke (**PW 11**) when they all indicated that the shooting incident was actually prompted or provoked by the deceased's own action of defying police orders and preventing enforcement of law by angrily and hurriedly driving off his vehicle without necessary clearance from police officers manning the material road block.

[23] Be that as it may, the attempt by the police officers to prevent the escape of suspected offenders and probably effect their arrest in the manner of firing gunshots at the vehicle was rather excessive and uncalled for in the circumstances. It did not matter that the action was intended to disable the vehicle or the occupants thereof, it was simply an unlawful action undertaken in the cause of execution of duty by police officers and was tantamount to correcting a wrong with another wrong. Two wrongs have never been known to make a right.

[24] Apparently, the link between the accused's official official firearm and the "killer" bullet or bullets was crucial in establishing the criminal culpability of the accused in the entire saga as the firearm was ancillary or instrumental to the primary offence of murder.

Whereas, the ballistic expert (**PW 13**) provided sufficient evidence showing that the firearm which was used to cause fatal injury to the deceased was functional and was indeed a firearm for purposes of the Firearms Act (**cap 114 LOK**) she did not provide any or sufficient evidence showing that the fatal bullet (or bullets) was fired from the Firearm in possession of the accused.

[25] In fact, there was no evidence that the two spent cartridges which were not even produced herein as exhibits were recovered from the body of the deceased. Indeed, the postmortem report (**P. Ex 1**) indicated that no bullet or bullet fragments were recovered from the body of the deceased. It therefore remained unknown where the alleged two spent cartridges came from as there was no indication as to who actually recovered them and from where.

[26] The actual investigating officer, retired police officer, Benson Naibei (**PW 14**), said that the two cartridges were merely handed over to him after being collected from the scene of crime. He never offered any evidence of the recovery and by whom. The officer from IPOA (**PW 12**) did not recover any exhibit from the scene of crime and the scene of crime officer (**PW 8**) did not say that spent cartridges were found and recovered from the scene.

[24] Suffice to say that the recovery of the alleged two spent cartridges was a mystery. In any event, their connection with the firearms in possession of the accused and his late colleague at the time was insignificant if not irrelevant as they were not found in the body of the deceased and recovered therefrom.

It cannot therefore be said that the accused was the person nay police officer who caused the death of the deceased by firing the killer bullet or bullets shots from his official firearm while in the cause of his duty. The evidence against him created suspicion but fell short of providing probative value for a finding of culpability against him in the death of the deceased.

[25] In sum, the prosecution failed to discharge its burden of proof against the accused who must now and is hereby found NOT GUILTY as charged and is acquitted accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED & SIGNED THIS 21ST DAY OF OCTOBER 2021]