



REPUBLIC OF KENYA



**Republic v Obara (Criminal Case 94 of 2014)  
[2023] KEHC 1258 (KLR) (Crim) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1258 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL CASE 94 OF 2014**

**JM BWONWONG'A, J**

**FEBRUARY 15, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**PC FREDRICK OBARA ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya. The particulars of the offence are that the accused did on September 17, 2014 at Mukuru Kwa Reuben Slums in Industrial Area within the County of Nairobi murdered Robinson Omunyasi Karatashi.

The accused pleaded not guilty.

The prosecution called nine witnesses in support of their case.

The accused testified on oath in his defence and called no witnesses in his defence.

2. Before I took over this trial, I complied with the provisions of section 200 as read with section 201 (2) of the *Criminal Procedure Code*; since the case was part-head before Wakiaga, J.

**The case for the prosecution**

3. The prosecution called nine witnesses with the first being Jacton Ominde Karatashi (Pw 1). Pw 1 testified as follows. He is the brother of the deceased and is a business man. On September 27, 2014 at 6.00 pm Pw 1 went to Kwa Reuben. There he met his elder brother Charles Ominde Lukani (Pw 2) and the deceased playing sikuti (traditional Luhya music).



4. Pw 1 continued to testify that they had gathered there to raise funds for their relative, who had died at Kenyatta National hospital.

It was his evidence that while there three uniformed police officers arrived at that scene. They were at the scene until 11.30 pm. One of the police officers was armed with a gun. This police officer told them to end their fund-raising exercise; since the time allowed by the permit for the fund raising had ended at 11. 00 pm.

5. The deceased herein gave the accused the permit. The accused then asked the deceased to read the permit. The deceased told the accused that he did not know how to read.

The police officer took out a cane and hit the deceased on the head. The deceased asked why he was being hit. The accused ordered those in the gathering to be arrested. The deceased resisted being arrested; since he had not committed any offence. Shortly, thereafter Pw 1 heard two-gun shots and as a result, he decided to run away. As he took one step in running away, Pw 1 saw the deceased falling down. He then knew the deceased had been shot.

The police and the Maasai decided to run to the police (station) and Pw 1 ran after them. The police warned the Maasai not to enter into the police (compound).

6. Pw 1 continued to testify that it was the accused who hit his deceased brother. The accused then told him he did it in anger.

Pw 1 was told by his brother Charles Ominde Lukani (Pw 2) that the police wanted to take the body of the deceased. As a result, Pw 1 left the police post and returned to where the body was. They then chased the police. The OCS came and asked that they be allowed to take the body but they refused because they were waiting for the media first. They stayed with the body until morning at 8.00 am when the police came again. The police attacked them and took away the body.

Pw 1 with other people corrected two spent cartridges at the scene and took them to CID industrial police station.

7. Pw 1 continued to testify that the first group of police, who went to the fund raising gathering were not accompanied with Maasais. Pw 1 also testified that the accused asked the deceased to read the permit. The deceased told him that he did not know how to read. The accused took the permit and cut it into pieces and throw it down. It was also the evidence of Pw 1 that he was standing next to the deceased and saw what had happened. Pw 1 did not see the deceased hit the accused or abuse him. The deceased also did push the accused. Pw 1 was able to see what happened, since there was a bulb of 100 watts, which a neighbour had given them; although it was night. Pw 1 identified the permit given to them by the chief to hold the fund raising gathering exhibit 1.

8. In cross examination, Pw testified that they used forced to enter Kwa Reuben police post to know the truth from the occurrence (book). Pw 1 further testified that there were two youths who were in handcuffs and the Maasai guards. The accused together with the youth and the Maasai guards left the scene after shooting the deceased.

In re-examination, Pw 1 testified. that they declined to allow the police to take the body, since they did not know whether the police would change the story to say that the deceased was a thug.

9. Charles Ominde Lukani (Pw 2) also testified. His evidence is similar to that of his brother, Pw 1, except for the following. He (Pw 2) was in charge of the funeral fund raising; since he was the eldest brother of their first deceased brother (Soul Adala), who had died at KNH. Police went to where they were fund raising and some argument arose before they had gun shots. Pw 2 also testified that he saw two spent cartridges exhibit 2. Pw 2 further testified that he is the one who was given the permit, which



allowed them to gather from 6.00 pm to 11.00 pm. Pw 2 testified that there was scuffle but before he heard guns shots. The gathering according to Pw 2 consisted of about 30 to 40 people.

10. Caroline Ominde (Pw 3) recalled that at 11.00 pm she was preparing food for those who had travelled from home to attend the funeral of their brother Adala. The fund raising was by the road. As she was going to call people at the road side, she heard gun shots and met Pw 1, who told him police were shooting people.
11. Pw 3 the proceeded to scene and found the deceased lying down with papers scattered everywhere. She also testified that there was electricity at the scene and there was security light at the scene.
12. In addition to the foregoing witnesses, No 71503 Cpl Bernard Gituanja (Pw 4), who was the armourer at Mukuru Kwa Reuben police post issued firearms to the accused and other police officers on September 27, 2014. He testified that there were nine constables, the inspector in charge and three corporals at Mukuru kwa Reuben police post. He testified that he reported on duty on September 27, 2014 at 6.00 pm along with PC Tom Mghgendi, PC Chacha, PC Fredrick Obara, and PC Ekaronon. They went on patrol. At about 12.00 am they decided that PC Obara should be at the post to assist Chacha , while the other officers proceeded with the patrol.
13. As they were patrolling PC Obara called them on phone and told them something had happened at the post and that they should go back. They returned to the post. Upon arrival they found demonstrators stating that there was a person who had been killed by an officer who was at the post. They then proceeded to the scene, where there was a body that was bleeding. They called the duty officer who arrived at the scene. The people were hostile. They left the scene. They proceeded to inform the OCPD and the OCS Industrial Area police station.  
  
Pw 4 continued to testify that according to the duty roster (exhibit 3) the accused was on patrol duties during the material night. After they had taken the body of a deceased person, who they had recovered from the river, the officers returned to the police post. They then decided that the accused was to remain at the post to assist PC Chacha.
14. The officers went on patrol. Thereafter they were called by the accused, who told them that something was happening at the station. Upon arrival at the station, they found the accused and PC Chacha. The people there had told PC Chacha what had happened and they were hostile to the accused. Pw 4 went to the scene and found the people had surrounded the body and were raising an alarm. Since Pw 4 was with two other officers they felt threatened. Under cross examination, Pw 4 testified that there was a copy of the permit in the office in the file.
15. No 88597 Thomas Machiru Mugendi (Pw 5) testified as follows. The evidence of Pw 5 is similar to that of Pw 4 except that in his recalled evidence Pw 5 testified that there was a panga next to the body of the deceased. Pw 5 also testified that they took the panga to the police post as an exhibit. Pw 5 also testified that the permit allowed the funeral fund raising to end at 10.00 pam. He further testified that the mob was throwing stones at them and they were telling the police that they were going to cut them with pangas. The rest of the evidence of Pw 5 is similar to that of Pw 4. I therefore need not reproduce the evidence of Pw 5.
16. No 72953 Cpl Galma Arero (Pw 6) testified as follows. He was stationed at Mukuru Kwa Reuben police post. His duties included issuing firearms to the police officers at the post. He was on duty on 27/09/2014 and in the course of his duties he issued four AK 47 rifles to four officers, among them being the accused. He issued an AK 47 serial No. 17065549 to Pc Obara and he signed for it. The following day he received a call from IP Limo, who was the in charge that there was a shooting incident



within the slum. The gun of the accused had been taken by the OCS., which gun was eventually handed over to DCI Makadara. Pw 6 produced the arms movement register as exhibit Pext 4.

17. No 95686 PC Wambura Chacha (Pw 7) testifies as follows. His evidence is similar to that of Pw 4 except for the following. On 27/09/2014 he was on duty and was at the report office at Mukuru Kwa Reuben police post.

18. Pw 7 testified that on 27/09/2014, while his three other colleagues went on patrol, the accused and Pw 7 remained at the post. The accused was placed as the station guard, while Pw 7 was placed at report office duties.

As they were on duty the accused informed Pw 7 that he had been informed by the Maasai guards that there were young men who were mugging people at a Disco Matanga 3 kms away from the station. The accused requested for a handcuff. Pw 7 gave him the handcuffs. The accused left the station with the Maasai guards to the disco matanga place.

19. After a few minutes, Pw 7 heard screams. He then saw the accused with two people running to the station. Upon arrival, the accused told him to open the door to the report office, which he did. An angry mob followed saying that a police officer had killed their relative and they wanted to revenge. They were armed with crude weapons. One of them asked for petrol to burn the station.

20. As a result, Pw 7 asked for reinforcements and control room sent to the station Kifaru to control the mob. The OCS and OCPD went there and controlled the situation. Since the situation was bad at 5.00 am Kifaru went there but the angry mob could not allow them to go to the place. At 8.00 am Pw 7 handed over the shift and went home.

The duties of the accused were confined to the guard duties at the station. Later the accused returned with two prisoners who were in handcuffs and Pw 7 assumed that they were the muggers.

21. Pw 7 testified further that the law allows police to use force when the officer's life is in danger, when other people's life is in danger, when property in danger of being destroyed and in protecting prisoners.

Pw 7 further testified that the mob demolished the gate to the police post but they did not enter the report office.

22. In cross examination, Pw 7 testified that when an officer receives a distress call, he has to attend to it and then book it later. Pw 7 also testified that the accused booked the two prisoners that he came with and placed them in cells.

No. 236128 C I John Shegu (Pw. 8), was the investigating officer. He testified as follows. He recalled that on 28/09/2014 he was directed by the DCIO SSP Nangula to take over a reported case of murder at Reuben police station (post).

23. He visited the scene of crime, which was 200 metres away from the post. He checked the duty roster exhibit 3 and found that accused was on duty that night. He also found accused had booked two prisoners according to OB dated 3/27/09/2014. The prisoners had been booked for the offence of preparations to commit a felony. He recovered two spent cartridges (exhibit 2 a and b) that were used in AK 47 rifles. He also recovered a permit, which he was told was torn by the accused who then proceeded to throw it down. At that point in time, an argument arose between the mourners (including the deceased) and the accused. The accused then cocked his gun and shot the deceased.



Pw 8 interviewed prisoners at the post. He thereafter confiscated the four guns that were issued to the police officers at that station. Each gun was loaded with 30 rounds of ammunition.

The gun issued to the accused was loaded with 28 rounds of ammunition.

24. On 3/10/2014 he arrested the accused and charged him with the murder of the deceased. He produced the report of the pathologist as exhibit 7. He also produced the report of the mental assessment of the accused as exhibit 9. The deceased was shot at a close range according to the pathologist. The deceased was not armed. Apart from the deceased another person was shot and was in ICU when Pw 8 went to the scene.

Pw 8 also produced the spent cartridges as exhibit 14, which he received from the ballistic expert. These were the spent cartridges that the said expert had test fired during his examination as an expert.

While under cross examination, Pw 8 testified that he did not get hold of the panga, which PC Thomas Mugendi recovered from the scene. He gathered that the panga was not at the scene. It was allegedly planted by the police according to members of the public.

25. Pw 8 was told that an officer from the post collected the panga. Pw 8 also testified that the permit for people to gather was for only 5 hours. Pw 8 also testified that a duplicate copy of the permit remains in the custody of the issuing police station, which in this case was issued by the OCS of Industrial Area police station.
26. Furthermore, Pw 8 testified that the two prisoners who were arrested by the accused and booked at the post were Dennis Maina and Isaac Muriuki. Pw 8 also confirmed that the two prisoners were present when this incident happened. These two recorded their statements as witnesses. The statement of Dennis Maina was put in evidence as exhibit 2, while that of Isaac Muriuki was put in evidence as exhibit 3.
- 27 The OB entry under which the two suspects were booked was put in evidence as defence exhibit 1

Pw 8 also confirmed that two Maasai guards to wit Milau Kivuwu and Satabau Mukumaiya also had their statements recorded. That of Milau Kivuwu is defence exhibit 4, while that of Satabau Mukumaiya is defence exhibit 5.

Pw 8 further testified in respect of the circumstances when an officer is entitled to use force. These circumstances are as follows. He may use force when his life is in danger and the opponent is armed with a lethal weapon. Second, an officer may shoot into the air when he is faced with rioters.

28. Third, an officer may use force when the arrested hard core criminals are escaping. The officer may shoot after warning them to stop from escaping from lawful custody.

Fourth, an officer may use a firearm to protect property.

Fifth, an officer may shoot when people have come to rescue prisoners.

29. Pw 8 saw a panga at Mukuru Kwa Reuben police post. He did not lift any finger prints from the panga nor did he extract blood samples from that panga. The panga did not have finger prints on it.

Pw 8 further testified that that the accused did not fire into the air.



- 30 Still while under cross examination Pw 8 testified that it is true the accused fired into the air. Pw 8 also testified that the accused had been issued with 30 rounds of ammunition and only 24 were recovered from the rifle of the accused. He confirmed six rounds of ammunition were fired.
- Pw 8 also confirmed that the accused was confronted by a mob who were bent on rescuing the two prisoners. The accused was therefore entitled to shoot to scare the rioters or mob.
- Pw 8 further testified that if there is a distress call, an officer has to attend to that call even if he is alone.
- Pw 8 confirmed that a distress call had been made before the accused went to the scene to arrest Dennis Maina and Isaac Muriuki
- Pw 8 also testified that the strength of the officers at the station was too low to serve the entire area.
31. In his recalled evidence Pw 8 testified that statements were recorded from the two Maasai watchmen, who were Saitabo Sepere Lukumaya; who was from Arusha Tanzania and Milau Miskana Kivuyu. The statement of Saitabo Sepere Lukumaya was produced as defence exhibit 5. The other Maasai watchman was Mialu Miskana Kivuyu, whose statement was recorded and produced as defence exhibit 4.
- Pw 8 continued to testify that according to the statement of Saitabo Sepere Lukumaya, defence exhibit 5, the accused shot in self-defence, since the deceased was muscular and he advanced towards the accused.
- Pw 8 produced the torn permit which was handed to him by IP Limo, the OCS Mukuru Kwa Reuben police post, which he produced as a prosecution exhibit 1.
- Pw 8 testified that he did not know anything about the panga. And that if it was available he would have produced it as an exhibit. In re-examination Pw 8 testified that the two Maasai watchmen did not talk about the panga in their statements.
- 32 No. 23446 IP John Kiplimo (Pw 9), was the OCS of Mukuru Kwa Reuben police post. On 27/09/2014 Pw 9 received a call from the accused at around mid-night. Accused was on duty. Accused told Pw 9 that there was a commotion by members of the public and that his life was in danger. He further told Pw 9 that he had discharged a firearm since his life was in danger.
33. The accused told Pw 9 that he might have fatally shot a person. At around 7.00 am Pw 9 accompanied C I Shamalla to the scene of crime. Upon arrival they found the scene was rowdy and they were unable to collect the body of the deceased. They therefore called for reinforcement. At around noon they managed to collect the body of the deceased and took it to Nairobi city mortuary. They did not collect anything from the scene.
34. In cross examination, Pw 9 testified that with a strength of five officers, it was not possible to cover the entire area under his jurisdiction. Pw 9 further testified that he recorded statements under enquiry from Dennis Maina and Isaac Kariuki. Pw 9 further testified that the statements were in relation to the murder offence against the accused.
35. Pw 9 produced the statement of Dennis Maina as defence exhibit 2. He also produced the statement of Isaac Kariuki as defence exhibit 3. He handed these two statements to the investigating officer.



Pw 9 in turn told his immediate boss that is, the OCS Industrial Area police station, C I Shamalla.

C I Shamalla told Pw 9 to inform the duty officer, Cpl Maithya.

36. Under cross examination Pw 9 testified that he had five police officers under his command and for that reason it was not possible to cover all the area under his jurisdiction. He further testified that there were two prisoners namely Dennis Maina and Isaac Kariuki, whom the accused had arrested. These two witnesses confirmed to Pw 9 that they were at the scene and that they heard and saw what had happened.

Pw 9 recorded statements from Dennis Maina (defence exhibit 2) and from Isaac Kariuki (defence exhibit 3), which he handed over to the investigating officer.

The following expert reports were admitted into evidence as exhibits for the prosecution

1. The ballistic (firearms) expert report exhibit Pexh 6
2. Report of the pathologist exhibit Pexh 7
3. Report of the document examiner exhibit Pexh 8
4. Report of the psychiatrist exhibit Pexh 8.

#### **The submissions of the prosecution**

37. The prosecution did not file any submissions since the prosecution was not conducted by the Director of Public Prosecutions in person. See section 310 as read with section 161 of the [Criminal Procedure Code](#).

#### **The case for the defence**

38. The accused testified on oath denying the offence. He did not call any defence witnesses.

He testified that on September 27, 2014 he reported at 6. 30 pm together with his colleagues namely PC Benjamin, Ekaranon, PC Kinyanjui, PC Samini Chacha (Pw 7). He accordingly booked himself and his said colleagues at Mukuru Kwa Reuben police post.

The accused testified that at around 9.00 pm he received a report that there was a body submerged in water at the slum area. He proceeded there with PC Samini Chacha and recovered the body and took it to Nairobi city mortuary. They returned to the police post. Thereafter the accused and Pw 7 remained at the post and his colleagues went out on patrol.

39. At around 00.30 hours the OCS Industrial Area police station (C I Shamalla) rang the accused. He told asked him as to why some people were attacking others in that area.

The accused continued to testify as follows. He went to the gate of the post. There he met two Maasai watch men, who were accompanied with three people. The Maais told him that there was a gathering at Chifu's area, where people were no longer collecting money, but were robbing people. They were also mugging people.

40. The accused went to the office where he was given handcuffs by Pw 7. He rang PC Kinyanjui that he was going to where the people were collecting money to disband the gathering. While en route to where the gathering was, the accused met a third Maasai. The third Maasai told them that the two boys had left the gathering and had gone to play table pool. The three people had gone to the police post to report how they were robbed.



41. The accused and the Maasais proceeded to where the boys were playing table pool. There the Maasais identified the two boys. These boys were inside playing the table pool. The accused arrested the two boys and handcuffed them. The accused in the company of those Maasai decided to go to the gathering where money was being collected; since the two boys were initially at that place.

Upon arrival at the gathering, the accused asked for the permit. The accused was given the permit. He perused it and found it to be invalid; because the permit indicated that the time for the fund raising had expired.

42. The accused then handed the permit to the person, who had given it to him to read. In response the man answered him rudely that he did not know how to read.

The accused then asked the gathering what time it was. One of the people answered that it was 00.45 hours. The accused told them that they were illegally there. He directed them to disperse and go to sleep. They stared at the accused as if they wanted to fight. The accused sensed danger and decided to go away with the two boys.

After going away for five metres, the accused heard one of those in the gathering saying “*Maasai wewe ndio unatuletea askari hapa?*” (You Maasai, why are you bringing police here?.)

43. When the accused looked he saw that person knocking the Maasai with the back of his forearm folded. Accused then saw blood flowing from the nose of the Maasai. Accused then turned back and asked them why they were attacking the Maasai. They did not reply. They wanted to cause a commotion. The accused then told the Maasai to hurry up, because he wanted to protect himself and the two boys he had arrested.

After he left the scene, the accused heard a woman from behind saying “*Muache tue*” (just leave him). The accused turned back to see what was happening. He then saw the man from whom, he had requested the permit had stood up. The man removed his coat. This man was held in his right hand by a woman and in his left hand he was held by a man. The man overpowered them and freed himself from their grip. This man then asked the accused pointing his finger saying “*wewe ni kitu gani mbele yangu*” (Who do you think you are before me?).

He then approached the accused. He told the accused: “Shoot me. Shoot me *ua*”. The women began to scream. And the men were shouting: “*ua ua*” (kill kill). The men were shouting that the accused should be killed. The accused in response fired one ammunition in the air using his AK 47 rifle to scare them. The accused again fired another round of ammunition in the air.

44. As the accused was retreating, he found himself between iron corrugated slum houses. The accused then saw the man approaching him saying: “*ua ua*.” He then shot into the air as a warning to those who were chasing him in particular the one who was in front. The accused remembered the circumstances under which an officer is allowed to use a gun. After that he shot him. The accused continued to testify that:

“And I then saw another one running towards me signalling using his arms for people to give way for him. I thought he was coming to prevent the one I had shot from attacking me; only to find that he wanted to grab my gun. Then the gathering permit I had, I threw it to the ground after I had shot the 1<sup>st</sup> person. I shot the second person in the lower stomach. From there the situation calmed. I then started to escaped to the police post.”

45. It is at that time that the three Maasai re-surfaced together with the two boys the accused had arrested. They hurriedly went to the police post.



The accused then rang the OCS Mukuru Kwa Reuben police post (Pw 9) and told him what had happened. The people wanted to burn the police station and were throwing stones towards the post.

The accused then booked the two boys for the offence of preparations to commit a felony under OB 03/28/9/2014',

PC Kinyanjui and PC Mugendi told the accused that he was going to die since the deceased was armed with a panga/sword.

The accused then left the station to go and sleep.

PC Mugendi in his statement stated that the panga was recovered at the scene, which he took to the police post.

The accused testified that his evidence was similar to the statement of the Maasai watch man, Saitabo Sepere. In his statement the Maasai watch man described the deceased as a muscular man, who overpowered those who tried to restrain him from advancing towards the accused.

The accused testified that he was entitled to use force to prevent the people from rescuing the two boys he had arrested as robbery suspects. He also testified that he was entitled to use force to self-protect himself, the firearm, the handcuffs, the Maasai watchmen and the two boys he had arrested.

#### **The accused under cross examination.**

46. In cross examination the accused testified that he had an AK 47 rifle loaded with 30 rounds of ammunition. The accused also testified that the fund raising gathering was past time, since all gatherings were required to end at 10.00 pm. The expiry time for the permit was 10.00 pm.

The accused continued to testify that he fired six rounds of ammunition. He also testified that the second person that he shot was not armed.

47. When the deceased approached him the accused shot in the air as a warning to the deceased. At a close range of about two to three metres, he saw that the deceased was armed with a panga that was cut (damaged). As at that time the accused had entered a dark area. The accused further testified that when the deceased removed the permit from his jacket, he was not armed.

The accused testified that it was the 4<sup>th</sup> and 5<sup>th</sup> shots that were directed at the deceased and not the sixth shot. The deceased was the person who was trying to get hold of the legs of the deceased.

#### **The submissions of counsel for the accused.**

48. Mr Omenke, counsel for the accused submitted that the accused went to the scene of crime in response to a distress call and that he did not invite himself there. He further submitted that the prosecution failed to prove the case against the accused beyond reasonable doubt. He also submitted that the cause of death is not in dispute; since the deceased died of a gun shot wound.

Counsel further submitted that the accused was confronted by the deceased and other unknown people, when he was performing his duties as a police officer.

49. Counsel also submitted based on the evidence and the decision of the court in *Beckford v R* (1988) A C 130 that the accused acted in self-defence. According to the decision in that case, "a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike."



Counsel also cited *Abmed Mubammad Omar & 5 others v Republic*, Criminal Appeal No. 414 of 2014, in which the court held that the test to be applied in self defence is that a person could use such force in defence of himself or another as is reasonable in the circumstances of the case.

50. Counsel also submitted that the elements of self defence which have to be proved are as follows. The accused must have reasonable ground to believe that there is imminent danger or serious harm from the attacker. The accused must have a reasonable believe that his life is in danger or a third person or the life of another person is in danger or the property of another person is in danger. Additionally, the accused must not be the person who triggered the conflict or the assault.

Counsel therefore urged the court to acquit the accused, since the prosecution failed to prove the beyond reasonable doubt.

### **Issues for determination**

51. I have considered the evidence of the prosecution and defence in the light of the applicable law. I have also considered the submissions of counsel for the defence.

As result, I find the following to be the issues for determination.

1. Whether it is the accused who caused the death of the deceased.
2. Whether the accused acted in self defence and defence of Government property.
3. Whether the accused acted to prevent the rescue of suspects from his custody.
4. Whether the panga was planted by police

### **Issue 1**

52. According to the post mortem report, exhibit Pexh 7, the deceased died due to severe chest injury due to a single gunshot at close range. The report also shows that the bullet entry gunshot wound was on the left side of the chest and the it exited through the right side of the chest. Furthermore, the two spent cartridges that were collected from the scene of crime were fired from the gun issued to the accused, according to the firearms expert report exhibit Pexh 6. Additionally, I find as credible the evidence of the C I Shegu Augustino (Pw 8) that it is the rifle issued to the accused that fired the fatal shot.

I further find that the accused also admitted shooting and injuring a second person in the lower abdomen using the same gun.

It is therefore clear that it is common ground that it is the accused who caused the death of the deceased.

What is in contention is whether the accused acted in self defence and in defence of other persons. This is the subject of the second issue.

### **Issue 2**

53. I find as credible the evidence of PC Wambura Chacha (Pw 7) that he gave the accused handcuffs to use, when the accused went out in response to a distress call, which was brought to his attention by two Maasais (who were not called as witnesses.). The Masaais had gone to the police post to report that some boys were robbing and mugging people, who were fund raising for the funeral expenses for a person who had died in Kenyatta National Hospital. The deceased was a family member of the Ominde family (Pw 1, Pw 2 and Pw 3).
54. The went to the fund-raising ceremony and found the suspects had moved to a pool table, where they were playing the pool game. He proceeded there and arrested two boys and handcuffed them. The



- accused was in the company of two Maasais throughout. It is the Maasais, who identified the two suspects.
55. After arresting the two suspects, the accused went to where the funeral fund raising was taking place. The accused asked for the permit allowing the gatherers to fund raise. The deceased herein according to Jackton Ominde (Pw 1) gave the accused the permit. The accused asked the deceased to read the permit. The deceased told the accused that he did not know how to read. Pw 1 testified that the accused took out a stick and hit the deceased on the head. The deceased asked the accused why he hit him, since he had not committed any offence. According to Pw 1 the accused ordered that they be arrested. Shortly Pw 1 heard two-gun shots. As a result, Pw 1 ran away.
  56. The version of the accused in this regard is different. According to the accused, the deceased asked the accused pointing his finger saying "*wewe ni kitu gani mbele yangu*"(Who do you think you are before me?). A commotion ensued after the men in that gathering of ten to twenty shouted that the accused be killed. The accused retreated but the deceased followed him holding a panga in a striking position. The accused retreated into a dark place and then shot the deceased in self defence. The other person who was with the deceased followed the accused. The accused fired in the air, but this person still followed the accused. The accused in response shot this second person in the lower abdomen.
  57. I saw and heard the accused testify before me. He impressed as a person who was truthful in this regard. The version of the accused is rich in detail. Additionally, the family of Ominde had reason to be unhappy with the accused, since they were raising funds for a relative who had died in KNH. The time for their permit had expired. The accused was therefore entitled to demand that they disband and stop the gathering. Furthermore, I find that Pw 1 was telling the court half-truths. In this regard, the two Maasai watchmen (Milau Miskana Kivuyu and Saitabo Sepere Lukumaya) told C I Shegu, the investigating officer (Pw 8), that the deceased who was a muscular person advanced towards the accused, after the gatherers refused to disband. I find that his (Pw 1) evidence lacks a ring of truth.
  58. I find on the evidence that Pw 1, the deceased and those in the gathering chased the accused from the scene.
  59. I find that the accused fired into the air to scare away Pw 1, the deceased and those who were chasing the accused, but they still followed him. This version of the accused is supported by the C I Shegu, the investigating officer (Pw 8) that the accused acted in self-defence.
  60. Furthermore, the evidence of the accused is plausible. He testified that he shot the deceased and another person in the lower abdomen. He also fired four other rounds of ammunition, all totalling to six ammunition. This is confirmed by C I Shegu, the investigating officer (Pw 8).
  61. It was also the evidence of the accused that he was entitled to use force to protect the two Maasais, whom the mourners at the fund raising accused them of taking police to the fund raising place. Additionally, the accused testified that he fired to prevent the rescue of the two prisoners he had arrested and handcuffed, who were in his custody. This evidence of the accused is confirmed by C I Shegu, the investigating officer (Pw 8). Pw 8 testified that a police officer is entitled to use force to do what the accused did in self defence, to prevent the escape of prisoners, to protect the life of another person and property.
  62. I find that the prosecution failed to present the entire evidence to the court. The prosecution for reasons that are not clear failed to call the two prisoners, whom the accused had arrested as suspects in robbery and mugging charges. These suspects were Dennis Maina, whose witness statement was produced in evidence as exhibit Dexht 2 and Isaak Kariuki, whose witness statement was produced as exhibit Dexht 3. These potential witnesses were not called by the prosecution. The law according to *Bukenya & Others*



(1972) EA 549 required the prosecution to call these witnesses, even if their evidence was inconsistent with their case. The Court of Appeal in that case pronounced itself as follows:

- (i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
- (ii) That Court has the 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.”

63. According to the statements of the two prisoners, those in the fund raising defied the order of the accused to disperse and shouted that it was their right to continue with the fund raising. These people then charged at the accused.

64. Furthermore, there is no evidence on record to explain the failure of the prosecution to call these two witnesses. I am therefore entitled to draw an adverse inference against the prosecution in favour of the accused.

65. It is important to add that the public prosecutor is an agent of justice, whose function is to present all evidence in court. It is not the function of the prosecutor to choose which witnesses to call or not to call. If there are witnesses the public prosecutor does not intend to call, the public prosecutor must still bring those witnesses to court so that the defence may cross examine them. In this regard, it is mandatory for the public prosecutor to do so. Failure to do so amounts to an abuse of the court process.

66. Furthermore, the prosecutor failed to call the two Maasai watchmen as witnesses. One of those Maasai watch man was Milau Miskana Kivuyu, who told the investigating officer that he was a Tanzanian national from Arusha. The statement of this witness was put in evidence as defence exhibit 4. In his statement Milau Miskana Kivuyu stated that those in the gathering refused to disperse as ordered by the accused. Instead one of the gatherers who was muscular removed his jacket and advanced towards the accused and tried to grab his gun. The said man followed the accused and gain attempted to grab his gun. As a result, the accused shot him in self defence.

67. The statement of the other Maasai watchman, who was Kenyan Maasai (Saitabo Sepere Lukumaya) was put on evidence as exhibit 5. In his statement, this watch man supported the statement of his fellow watch man that the gatherers refused to disperse and one of those in the gathering tried to grab the gun of the accused.

C I Shegu, the investigating officer (Pw 8), testified that he was unable to trace this witness. This was a good attempt. However, the prosecution never attempted to trace the Kenyan Maasai namely Saitabu Sepere Lukumaya, who provided his cell phone No. as 0711983023. The particulars of this witness would be found in the books kept by the telephone service provider.

It seems to me that the failure to 'bring these witnesses to court to testify is because their evidence appeared to support the defence of what happened on that fateful night.

68. It is equally important to state that I admitted the statements of the two Maasai watchmen and the two prisoners; since the prosecutor failed to secure their attendance in court. Additionally, I admitted them because article 50 (2) (k) of the [Constitution of Kenya, 2010](#) guarantees to the accused the right to adduce and challenge evidence in court as one of the many fair trial rights of an accused. The provisions of the [Constitution](#) provide as follows:

“article 50 (2) Every accused person has the right to a fair trial, which includes the right—



(k) to adduce and challenge evidence;

These provisions confer on the accused the right to produce evidence in his defence and to cross examine the prosecution witnesses. The admission of the statements of the two Maasai and the two prisoners was in furtherance of the constitutional right of the accused to produce evidence in his defence.

69. For the defence of self-defence to succeed, the following elements must be established. It must be established that there was an imminent attack upon the accused or upon another person or property. The imminent attack must be felonious. The attacker need not be armed and it is not the law that the attacker must be armed. In those circumstances, the accused is entitled to use reasonable and proportionate force to repel the felonious attack. I find as persuasive the decision in *Beckford v R* (1988) AC 130, in which that court observed that “a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.”
70. In the circumstances of this case, I find that the accused took a pre-emptive strike shooting the deceased. I therefore find that his act of shooting justifiable and the resulting homicide was excusable.
71. If the accused uses excessive force, he may be convicted of manslaughter. See *Republic v Koin Ole Kukutia*, Criminal Case No 38 of 2017 (Narok).
72. Finally, I find that on the evidence the accused fired into the air to warn the deceased and others as required by the law. This is supported by the fact that he fired six rounds of ammunition, one of which fatally shot dead the deceased and the other injured another person. The four rounds of ammunition were fired into the air. The accused was at the end found with 24 rounds of ammunition in his fire arm, which supports his evidence that he fired into the air.

I therefore find on the evidence that the accused acted in self-defence, in the defence of the two Maasais and to prevent the rescue of the two prisoners in his custody.

### **Issue 3**

73. He also acted to prevent the gun, which is Government property from being snatched from him by the deceased and his group.

### **Issue 4. Whether the police planted the panga at the scene of crime.**

74. In his defence the accused testified that the deceased was armed with a panga that was cut (damaged), as he chased him. The evidence of the prosecution through PC Thomas Mugendi (Pw 5) is that he recovered the panga from the scene of crime. He then took it to the police post. C I Shegu, the investigating officer (Pw 8) testified that he saw the said panga at the post. He also testified that members of the public told him that the panga was planted by the police. Surprisingly, this panga was not collected produced as an exhibit in this court.
75. In this regard, I find that the potential witnesses to wit the two Maasai watchmen and the two prisoners, who were eyewitnesses when the deceased was chasing the accused were not called as witnesses. These were material witnesses, whose evidence might have assisted the court in finding whether the deceased was armed with the said cut (damaged) panga or not. The existence of the panga was confirmed by Pw 5 who recovered it from the scene of crime.
76. I therefore draw an adverse inference in favour of the accused that if it was presented in court as an exhibit, it would have supported the evidence of the accused that the deceased was armed with the said panga. I am unable to conclusively find that the panga was or was not planted by the police.



77. I have assessed the entire evidence on record as required by the decision in the case of *Oketch Okale v Republic* (1965) EA 555. In doing so, I have borne in mind that I did not hear and see all the prosecution witnesses and that I only saw and heard the evidence of Pw 8, Pw 9 and Pw 5 (partially). This followed the recall of Pw 5 after I took over the trial from Wakiaga, J pursuant to the provisions of 200 as read with section 201 (2) of the *Criminal Procedure Code*.
78. Finally, there are a number of instances where the accused contradicted himself while under cross examination. I have taken this into account. Those contradictions may point to a weak defence, but the said weakness cannot form the basis of a conviction.
79. As a result, I find on the entire evidence that the prosecution has failed to prove its case beyond reasonable doubt.
80. Consequently, I find that the accused is not guilty of murder contrary to section 203 as read with section 204 of the *Penal Code* and pursuant to the provisions of section 322 (1) of the *Criminal Procedure Code*, I hereby acquit him.

**JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15<sup>TH</sup> DAY OF FEBRUARY 2023.**

**J M BWONWONG'A**

**JUDGE**

In the presence of-

Mr. Kinyua: Court Assistant

Ms Maina for the Republic

Mr. Omenke for the accused.

The accused in person.

