



**Republic v Ndiang’ui (Criminal Case 17 of 2017)
[2023] KEHC 1939 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL CASE 17 OF 2017
RM MWONGO, J
MARCH 10, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

JUSTUS MWANGI NDIANG’UI ACCUSED

JUDGMENT

1. The Accused is charged with Murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars are that on August 2, 2017 at Engineer Township in Nyandarua Sub County Nyandarua County, he murdered Solomon Wainaina.
2. The prosecution made its case through twelve witnesses, and the accused gave sworn testimony in his defence. The facts are as follows.
3. Justus Ndiang’ui the accused, is an Administration Police Constable posted at Marungaru Police Post. Whilst there he met the deceased, also an AP Officer.
The two had served together before and knew one another for over two years. According to the accused they had never had any disagreements.
4. On the material day, Ndiang’ui and Wainaina had been assigned sentry duties at Nyandarua Sub County Commissioners Office at Engineer. According to the evidence of PW7 Bernard Thuku who was in-charge of the armoury, both the accused and deceased were issued with G3 rifles and ammunition and went on duty. The Accused’s gun was produced as PExb5.
5. PW6 Peter Njuguna and PW2 Salome Kinuthia each testified that they were attached to the Nyandarua Sub County Offices on the material evening. Peter Njuguna saw the deceased and accused talking whilst on duty together. Salome Kinuthia testified that she was on duty in her Sentry Box 1 when the deceased called the accused. They talked as they walked, but she did not hear the details of their discussions.



6. Shortly thereafter, according to Salome, the accused came to the Sentry Box and asked for the OB book. At this point she heard the deceased asking:

“Justus unanipointia bunduki? (Justus you are pointing at me with a gun?)”.

There followed a series of gunshots and she immediately took cover on the floor.

7. Peter Njuguna on his part said he was about 15 yards from the sentry box where he had been assigned with Salome. He heard the deceased ask in Kiswahili:

“Justus, you are pointing a gun at me?”.

Immediately, and before he completed speaking, there was a loud bang, and he also dived down for cover. He heard Salome ask:

“Justus umeamua kutua/kutumaliza”.

Justus then fired again, according to Njuguna.

8. When the firing stopped, Peter Njuguna looked up and saw the accused headed towards the road carrying his gun. Njuguna went to the Sentry Box and found the deceased lying down in a pool of blood. There was also blood splattered around the sentry box. He then saw the accused walk out of the gate towards the Police Station. So Njuguna took his phone and called Inspector Ndungu (PW5) and explained what had happened. PW5 arrived after a while together with the DCIO and OCS Kinangop.
9. PC Salome Kinuthia (PW2) who had been in the Sentry Box testified concerning the shooting incident. She identified the photographs taken at the scene by the police after the incident (MFI 4B - 4G); she also identified the Arms Movement Record Book (MFI - 2) indicating the G3 rifle issued to the deceased and the rifle issued to the accused (MFI - 3).
10. Dr. Titus Ngulungu, a Consultant Pathologist and Forensic Pathologist testified as PW1. He performed the post mortem on the deceased's body which was identified by PW4 Ibrahim Kimani and PW9 Fredrick Wainaina at Engineer Hospital on 9th August, 2017. He produced the Post Mortem Report as PExb1.
11. Upon examination of the deceased's body, Dr. Ngulungu found that there were gunshot wounds distributed as follows:
- Entry wound at the head, back, occipital areas exiting at right eye orbit. Two gunshot wounds on right and left shoulder; 3 exits located on lower chest with common exit; two entry gunshot wounds located at the lateral back of the chest exiting on left chest; gunshot wounds on right pelvis exiting on left thigh with entry on right hip joint; three gunshot wounds on right arm exiting on the inner arm.
12. Dr. Ngulungu stated that he found it difficult to track the trajectories of all gunshot wounds as they cross-crossed. In total there were nine entry gunshot wounds. He found that the right lung had contusions and had collapsed; the left lung had lacerations; Rib numbers 4 -10 on the left had fractures on left with massive bleeding in the chest cavity; the lower gall bladder, kidneys and intestines were all lacerated. The skull exhibited an explosive like fracture with the skull bones fragmented into small pieces. Equally, the brain showed extensive lacerations.
13. Ultimately, the body had multiple gunshot wounds on the head, chest, body and limbs, which caused severe injury to the organs. Dr. Ngulungu attributed the cause of death to multiple body organ injuries



of the head, chest and abdomen attended by massive blood loss caused by multiple gunshot wounds/ injuries morphologically in keeping with homicide.

He considered the multiple gunshot wounds as an indicator of overkill. He stated in cross-examination that it was difficult to confirm which gunshot had led to death, although he noted that all gunshots were dispensed when the accused was alive.

14. The court made a visit to the scene on 11.12.18 and PW2 Salome was recalled to clarify where the deceased's body was in relation to the Sentry Box (1) in which she was. Salome indicated that she had seen the accused with the deceased near Sentry Box 2; that the two then parted ways and he then went round towards the back of the compound. She did not see the accused come from behind Sentry Box 1. However, she heard the deceased say, as he walked to Sentry Box 1, as follows:

“Justus mbona unanipoint na bunduki”

It was then that the gunshots were fired, and the deceased fell. His head landed outside the Sentry Box, but his feet were still inside.

15. PW5 Inspector Joseph Ndungu was the Deputy AP Sub County based in Engineer. He confirmed that he was called by APC Njuguna (PW6) who informed him of the incident. He states that he in turn called his boss SP Wambugu and briefed him of the incident; that he then went to the scene and confirmed for himself the death of the deceased. In cross-examination he confirmed that the deceased's head was outside the Sentry Box 1, and the whole body had a lot of blood. He further said that he found that the DCIO and OCPD and other officers had reached the scene. He said he had never heard of any differences between the accused and deceased.
16. PC Nicholas Mwangangi who testified as PW8 stated that he worked with the regular police at Kinangop Police Station. On the material night he was on duty, about to change guard, when he heard a loud bang, followed by several other bangs. He knew the bangs were gunshots. Shortly thereafter, APC Justus, the accused, came to the Report Office, carrying a rifle identified as PExb5. Justus said to him:

“Mwangangi, kumbe mtu anaweza kujipiga risasi”

Which translates:

“Mwangangi, you mean someone can shoot himself”.

PW8 asked the accused who had shot himself and he said the deceased had wrestled his (Accused's rifle) and shot himself.

17. PC Mwangangi told the Accused to wait for the OCS. He noted the accused was shaking and sweating. The two agreed to do a safety precaution measure on the Accused's gun, and they took out the magazine. They counted eleven bullets on them which were produced as PExb 6. PC Mwangangi took charge of the rifle and bullets and awaited the OCS. People were heard shouting outside the station, and the two agreed that the Accused should hide in an empty cell. Accused entered into one and PW8 locked it.
18. A while later some officers and members of the public passed by, and later PW7 Corporal Thuku of the AP Armoury came by. Thuku asked for the serial number of the rifle that had been used, and Mwangangi read it out as KE APA 03695. When PW8 declined to release the gun opting instead to await instructions from the OCS, Thuku left. Later, Inspector Mulinge, the OCS and the Investigating Officer told PW8 that Sgt Wainaina had been shot. Mwangangi testified that he handed the gun and



- the eleven bullets over to the OCS Inspector Nyaga. PW8 stated that he knew both the deceased and the accused.
19. In his cross-examination, PW8 admitted that PW6 had recorded the Serial number of the Accused's G3 Rifle, PExb 5, as KE APA 03693, and he confirmed this was an error. The correct serial number, he said, was KE APA 03695. He further confirmed that he received the gun from the Accused and handled it together with the eleven bullets to Inspector Nyaga.
 20. The Investigating Officer PW10 Corporal Ezekiel Ngonde, pieced together the events constituting the incident from the accounts of the various witnesses, his visit to the scene, and his assessment of the exhibits availed. On the material night he was informed of the shooting and went to the scene. He found the accused at the Police Station and the OCS had the Accused's Rifle PExb5 Serial No. KE APA 03695.
 21. At the scene he found the deceased's body lying on a pool of blood at the door to the Sentry Box, feet inside head outside, but facing upwards. He secured the scene and took some pictures. He also ascertained that the accused had been deployed at the Sub County Office for night duties together with PW2 and PW6 according to the Deployment Roster.
 22. PW11 Corporal Edward Esanya testified that he is a document expert and that the investigating officer provided him with a compact disk and Exhibit Memo dated 3rd August, 2017. He processed the compact disk and obtained ten (10) photographs. He selected 7 which he printed out. They were produced as PExb 4 (a) - (g). He also produced his certificate of production of the photographs.
 23. PW12 Chief Inspector Kenneth Chomba is a ballistics expert. He testified that:
He was given the G3 rifle of the Accused serial No. A 03695 PExb 5; 11 rounds of ammunition PExb 6, 1 magazine PExb 9, and eight (8) fired cartridges PExb 8 marked CI - C8.
 24. On examining and testing the exhibits availed to him, PW12 found; that the G3 rifle Exb 5 is a firearm capable of firing in terms of Fire Arms Act; that the said rifle, can house the magazine PExb 9; that PExb 6, That the calibre of PExb 8 (C1 - C8 is calibre 7.62 mm; that the Rifle is designed to fire rounds of ammunition in calibre 7.62 mm x 51mm such as PExb 6 (B1 - B11); that the said rifle and magazine were in good working condition.
 25. Further, PW12, formed the opinion that PExb, 8 (C1 - C8) were 8 fired cartridge cases each in calibre 7.62 x 51 mm and were component parts of rounds of ammunition which on comparative microscopic examination revealed that all eight cartridges were fired by one gun. Further comparative microscopic examination of C1 - C8 revealed that they were fired from PExb 5 namely G3 Rifle Serial No. A 03695. His opinion was based on sufficient matching firing pin markings, ejections markings, and bridge face markings, showing firing pin markings transferred from the pin of the exhibited G3 Rifle.
 26. On cross-examination, PW12 admitted that owing to recoil effect the said gun jerks and bullets are not aimed at specific target, when firing under automatic basis.
 27. In his defence, Justus Ndiang'ui gave a sworn statement and was cross-examined. He said that he was employed in 2003 as an AP; that he knew the deceased; that he had stayed with the deceased for about two years at Murungaru AP Post; that he and the deceased had not had any disagreements during their time together; and that he had never had any disciplinary case.



28. The Accused further stated that the deceased was his senior. He testified that before August 2, 2017 his wife had told him that the deceased was disturbing her. His testimony was as follows:
- “.....my wife told me Solomon Wainaina was disturbing her as we all stayed on the same police lines. Deceased was seducing my wife.
29. He confirmed that he was on duty with Salome Kinuthia PW2 and Njuguna PW6; that they each signed for their guns and booked into work on patrol duty; that at about 10.00 pm:
- “Solomon deceased came and confronted me. He told me that the girl I was showing off with he can take her.... At that time, I felt Solomon was provoking me. I got angry and because I usually have blood pressure, then I heard suddenly a gunshot. When I got annoyed, we were within the Sentry Box. I heard a gunshot. It was my gun which discharged and I heard Njuguna also say he had cocked his gun.
- I got alarmed and ran for my life to Kinangop Police Station.....whilst there my colleagues asked me what had happened.....
- I told them I was not sure.....I gave them my gun.....and I was placed in a cell”.
30. The defence submissions are essentially that: None of the witnesses saw the actual shooting; that the gun issued to PW6 Peter Njuguna, was not subjected to ballistic examination; that PW7 Bernard Thuku did not maintain a full record of ammunition issued against that surrendered after the shooting incident; that the accused person’s gun was not surrendered back to the armoury thus there were no records of how many bullets were left in his gun; that the statement of PW8 Nicholas Mwangangi bore the wrong Serial Number KE APA 03693 and that the gun produced in court was No. KE APA 03695; that only the Accused’s gun was subjected to forensic examination; that there was a gap in the chain of custody of the accused’s gun.
31. The defence alleged a cover up; and suggested that what actually happened was that PW6 Peter Njuguna saw the accused point a gun at the deceased and upon hearing the first shot, he opened fire in the direction of the accused and deceased using a similar G3 Rifle that he had been issued. Being in front of the Sentry Box he was the only one who could have shot bullets that resulted in bullet holes in the exterior and interior of the Sentry Box walls.
32. The Accused statement when surrendering to the police was curious. According to PW8 he said “*Mwangangi kumbe mtu anaweza kujipiga risasi*”, suggesting that the deceased shot himself. At the same time, he admitted his gun discharged without suggesting it was in someone else’s hands. If it was in deceased’s hands, it would have been impossible to fire many bullets into his own body. The theory by the Defence that someone else for example Njuguna could have shot the deceased is mere suggestion, and the suggestion neither supported by any evidence nor creates any reasonable doubt as to whether the Accused’s gun was at all times on his own hands. I find that the Accused had his gun at all times.
33. The Accused also put up a defence of provocation on the basis that the deceased, a senior officer, had started an illicit affair with his wife. To add salt to injury, the deceased borrowed some money from the accused and had refused to return it. The accused reacted by threatening to shoot the deceased, but he only fairly remembered what happened next; except that his gun fired once; and that he heard a firing of other shots. That he may have pointed the gun at the deceased but had no intentions of harming him. According to the defence, the prosecution has failed to prove that he had a motive and a guilty mind.
34. All that is required to be shown in a case of murder is that the following ingredients are proved:



1. That the death of the deceased occurred.
2. That the accused committed the unlawful act which caused the death.
3. That the accused acted with malice aforethought.

This is what was set out in Criminal Application No. 352 of 2012 *Anthony Ndegwa v Republic* [2014].

35. The deceased's death is not disputed, and is clearly set out in the Post Mortem Report of Dr. Ngulungu. The cause of death is also not disputed. The Report concluded the death was caused by multiple body organ injuries of the head, chest and abdomen attended by massive blood loss cause by multiple gunshot wounds. The Doctor indicated the numerous wounds were an indication of overkill. He further stated that he could not tell the trajectories of all gunshot wounds but could tell at least eight gunshot entry points located at the back of the head, at the right and left shoulder, at the back of the chest; and on the right arm and on the pelvic.
36. There is no doubt in my mind, from the evidence adduced, and as already noted that the accused fired the gunshots. In his testimony he said he recalled his gun discharging and he heard a gunshot. In written submissions, the defence stated that the accused may have pointed his gun at the deceased but his intention was not to harm him. The Accused did not deny he gave his gun to Mwangangi.
37. The issue of gaps in the chain of custody of the Accused gun was raised by the defence. The accused stated that he was issued with a gun. PW7 provided the Arms Movement Register. It showed that the accused was issued a G3 Rifle No. A 03695 with 20 rounds of ammunition. PW8 Mwangangi of Kinangop Police Station confirmed that the Accused came to the station at the material time after the gunshots were heard and gave him his gun. PW8 said he gave the gun to Inspector Nyaga, the OCS. PW10, Corporal Ngonde the investigating officer confirmed that he received the G3 rifle from the OCS and confirmed that it was the same one issued by the armoury.
38. Whilst it is true that the OCS Inspector Nyaga was not called to testify that he handed over the gun to the Investigating Officer, and whilst it is true that PW8 recorded the Serial Number of the gun with the last digit incorrect, (i.e A 03693 instead of A 03695), PW8 confirmed the correct number of the gun he handed over to be Serial No. A03695. I do not see the error to be fundamental given the recorded evidence in the armoury register and the evidence adduced by the ballistics expert.
39. The ballistics report by PW12 was entirely uncontroverted. It concluded from the forensic microscopic examination that all eight cartridges found, namely PExb 8 (C1 - C8) were fired by one gun, namely the G3 Rifle No. A 03695 PExb 5; and that was the gun issued to the accused in which he said he handed over at the Police Station. The Accused also admitted that his gun had discharged, and there was no evidence that it had been taken from him or used by any other person.
40. As to whether the accused had malice aforethought when he discharged his gun, it is clear from his evidence not only that he had the opportunity, but also that he had a motive since his superior, the deceased was allegedly carrying on illicit affair with his wife, according to his own testimony. He testified that the accused was provoking him saying that he could take his girl; he stated that he, the accused, got angry and that was when he heard his gun discharge.
41. I do not consider the circumstances testified to on showing that the accused had no intention to harm the deceased. His gun was on his possession when he got angry and discharged it. It was semi-automatic rifle which could fire multiple rounds. When he discharged his gun he fired no less that more rounds.



All were aimed at the deceased, as shown by the Post Mortem Report. The doctor considered the shooting to be an indication of overkill.

42. I am satisfied that the accused, in his anger shot the deceased with many rounds of ammunition. This was not an accident or mistake. The accused had worked as an Administration Police Officer for 14 years since 2003. He had handled guns regularly. When he discharged it he knew what he was doing and the harm he could cause.
43. The defence has sought to show that the accused was not poised and physically placed in a position where he could shoot at the deceased. The court attended a visit to the scene and was taken through the various movements of the accused and deceased.

It was clear that the two were together and had been chatting between Sentry Box 2 and the New Administration Block. They parted and the deceased proceeded towards Sentry Box 1 whilst the Accused went round the Main Office Block and ended up next to Sentry Box 1. It was from around that area that the deceased was heard by PW2 Salome to ask the Accused: “Justus mbona unanipoint na bunduki?”. Thereafter the flurry of gunshots ensued.

44. I have no difficulty, having been at the scene, in comprehending that the accused was able to shoot at the deceased. The Sentry Box 1 had an open front at the side of the doorway. Thus, the deceased was an easy target and there are lamp posts both next to Sentry Box 1 and outside the fence along the road. The Sentry Box 1 was a wooden structure and bullets can easily penetrate through the wooden walls. I am unable to accept the suggestion by the defence that PW6 Peter Njuguna was the one who fired the shots towards above the deceased and accused were, notwithstanding that PW6 also had a G3 rifle which was not ballistically tested.
45. Ultimately, I find that the prosecution has proved its case beyond reasonable doubt. Accordingly, I find the accused guilty of Murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#). The accused shall be sentenced pursuant to a hearing on mitigation on a date to be fixed.

Orders accordingly.

DATED AT KERUGOYA, THIS 10TH DAY OF MARCH, 2023.

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R. MWONGO

JUDGE

In the presence of:

1. Mr. Karanja for the Accused
2. Atika for State
3. Accused Present at Naivasha Maximum
4. Q. Ogutu Court Assistant

