



**Republic v Orwaru (Criminal Case 24 of 2020)
[2024] KEHC 16872 (KLR) (Crim) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16872 (KLR)

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

**CRIMINAL
CRIMINAL CASE 24 OF 2020**

**K KIMONDO, J
DECEMBER 13, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

PC BECKHAM OSORO ORWARU ACCUSED

JUDGMENT

1. An ill-advised decision to evade the Covid-19 curfew regulations ended in death. On the night of 13th April 2020, Reuben Karani Kiriinya (hereafter the deceased) and three other people were taking cover in a makeshift mabati kiosk owned by Harrison Mwanza Mulu (PW1). They were all chewing muguka or miraa.
2. At about 1:00 a.m., a uniformed police officer who was well known to PW1 knocked at the door. According to three witnesses, he assaulted them demanding to be given Kshs 2,500. He used either a whip (or a plastic pipe) and a pistol to hit them. PW1 testified that he offered the intruder Kshs 1,500 but he threw it back at him and hit him on the face. As he bent to collect it, he heard a shot ring out. Joseph Kilonzo Kivumbi (PW3), who was under a table also heard it. And so did Joseph Kakuna Mwendwa (PW5). PW1 later realized that the deceased had been shot through the chest.
3. The accused does not deny that he was the police officer referred to by the three witnesses; or, that he visited the kiosk. But his defence is that the gun went off accidentally during a scuffle with PW5. He claimed that the bullet's trajectory was towards the roof or the ceiling of the kiosk.
4. The Republic thus brought Information to the High Court charging the accused with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on the night of 13th April 2020 at Mathare Area Four within Nairobi County, he murdered the deceased.



5. He pleaded not guilty. The prosecution marshalled eleven witnesses. They were all heard by my predecessor, Bwonwonga J. Following retirement of the judge; and, pursuant to section 200 (3) of the *Criminal Procedure Code*, the accused elected to proceed from where the matter had reached.
6. On 8th June 2023, and in a considered ruling, I found that the Republic had established a prima facie case that called for a rebuttal from the accused person. He opted to make an unsworn statement.
7. I will now return to the evidence. PW1 testified that the deceased was a regular customer and a student at KCA University. At around 3:30 p.m., (PW3), an employee at the kiosk came into the premises. At 6:30 p.m., they were joined by another friend, (PW5). The latter was a police officer. When the Covid-19 curfew took effect at 7:00 p.m., they switched off the light inside the kiosk and locked the door. They continued to consume miraa until about 1:00 a.m. when the accused knocked at the door and was let in.
8. According to the witness, the accused was staggering or “very drunk”. PW1 had known him for more than a year as Beckham Osoro. He said he saw the pistol and whip from the security lights that were outside the kiosk. After the gunshot and exit of the accused, PW1 switched on the light in the kiosk. That is when he discovered that the deceased had blood on his left upper chest and was unconscious.
9. When cross-examined further on the lighting, he stated that-

When accused knocked I opened for him. I had put off the kiosk lights when accused was 30 metres away as he was coming to my kiosk. The kiosk light was inside the kiosk. We were using both the kiosk light and the outside security light. When this incident happened the light inside the kiosk was off. It is true that I told police I saw Karani (deceased) was unconscious after putting on the kiosk lights
10. PW1 testified that PW5, who was also a police officer, tried to reason with the accused but he also got a beating. The accused then took the Kshs 1,500, turned to leave and asked PW1 to assist the deceased. The accused then boarded a boda parked near the kiosk.
11. PW1 got assistance from a security guard who had contacts of other officers who were patrolling the area with the accused. Two police officers arrived at the scene. When they opened the deceased’s shirt, they saw a bullet hole in the upper chest exiting through the back. The police officers alerted the OCS Muthaiga Police Station. Scenes of Crime officers came to the scene and processed it. The body was then removed to the City Mortuary.
12. PW1 and PW5 recorded statements at Pangani Police Station. They were detained for about two weeks before being arraigned at Makadara Law Courts. PW1 could not remember the nature of the charge. Later, the police informed them that they would be State witnesses at the murder trial.
13. This version of events was largely confirmed by PW3 and PW5 as captured at length in the court record. The additional evidence from PW3 was that he crawled under the table to avoid punishment by the accused who was using a piece of water pipe. While under the table, he heard a gunshot. Shortly thereafter, he heard the deceased “crying in a choking manner as if he had breathing difficulties”. He learnt the following day that the deceased died.
14. PW2 was Boniface Kilinge Kitungu. He was on guard duties on the material night outside a building styled “Bachelors”. He testified that he heard people conversing inside PW1’s kiosk. He peeped inside and saw four young men. One was PW1 whom he knew as the proprietor of the kiosk. Later at 10:30 p.m., he saw a police car heading towards Bachelors Corner and park at Kanini Bar. Four officers alighted and entered the bar. Three of them left about two hours.



15. He learnt from Miriam, that the accused was the man left behind at her Kanini Bar demanding some money. The witness said he knew the accused as a policeman from Muthaiga. The accused came towards him saying “wewe soldier unajifanya kali sana,” while pointing a piece of water pipe at him. The witness said he saw the accused move towards PW1’s kiosk and knock on the door and that when it was opened, he asked for money. He also witnessed the accused beating up the occupants of the kiosk and heard a gunshot. When he went to the kiosk, PW1 told him that the deceased was injured.
16. PW4 was Joan Wanjiru, a relative of the deceased. She went to Muthaiga Police Station after learning of the death. She also accompanied the police to the scene. She testified that upon a search of the kiosk, the police recovered a spent cartridge. The following day, she and Stanley Mutungi, the grandfather of the deceased, identified the body for post mortem purposes.
17. Like I stated, PW5 was a police officer stationed at Kamukunji Police Station. On the material day and after his duties, he went to his residence at Mathare Area 4 and later to the miraa kiosk at about 8:00 p.m. He was in civilian clothes and unarmed. He had not met the accused before the incident.
18. PW5 largely corroborated the evidence of PW1. He added as follows-

As I sat down I heard a gunshot sound. Everyone was shocked including myself. The officer was still standing at the door looking into the kiosk. Immediately after the sound of the gun the officer left using a motor cycle. The time was around 3.00 a.m. I immediately left for my house. When the officer entered there were no lights. But outside the kiosk there were security lights and mast lights.
19. PW5 later received a call from a police officer at the scene summoning him back. He found many police officers standing on the road and a body lying on the ground near the door of the kiosk. He identified it as that of the deceased. Thereafter, he was called by the OCS Muthaiga Police Station to give more details.
20. In cross examination, he said that he “never tried to grab [the accused’s gun]” or push him. He denied that the gun discharged after he pushed him. He said he only learnt that the deceased was injured when he was summoned back to the scene by another police officer.
21. PW6 was Isaac Wamalwa Wekesa, a Police Officer attached to Muthaiga Police Station. He confirmed that on the material night, he, the accused and PC Harun Yator (PW7) were on the beat in Mathare enforcing curfew regulations. At around 11:30 p.m., the accused requested “that he be excused as he was feeling unwell so that he would go to his house”. They left him in Area 4 at a place called Bachelor’s Corner.
22. The witness was later informed of the shooting and rushed to the scene. He found a male adult lying in front of a miraa kiosk. On examining him, he saw a wound on his left arm, left chest and back side. It looked like a bullet wound. There were bloodstains on the floor of the kiosk. A bullet head was recovered from the kiosk (exhibit 2).
23. The following morning, PW6 got a call from the accused “who sounded remorseful”. He gave him directions where the keys to his house were so that the police could recover the gun. He said it was under his bed. PW6 informed the in-charge armory who went and recovered the gun.
24. PW8 was Inspector of Police, Odongo. At the time of the incident, he was attached to Muthaiga Police Station in charge of crime. At about 2:30 a.m., he received a call from PC Wekesa (PW6) about the matter. He went to the scene and found the body at the door of the kiosk. It had suspected



- gunshot injuries; the wound was on the left side of the ribs. He summoned scenes of crime officers who processed the scene and took photographs. The body was then removed to Nairobi City Mortuary.
25. There seems to be an error in the record numbering of the witness Chief Inspector Kenneth Chomba as PW6. He was attached to national CID Headquarters Nairobi. By consent, his ballistic report was admitted into evidence as prosecution exhibit 1 together with the accompanying Exhibit Memo (exhibit 1 (a)). This may explain why his testimony ended prematurely at the introductory stages of his evidence in chief.
 26. Cpl. Christian Samoei is again erroneously recorded as PW7. His true serialization is PW9. He and Cpl. Robert Ndungu (PW10), were the investigating officers in the case. According to the latter and the duty roster, the accused was on foot patrol night duties within Mathare North with three other officers. He was issued with a Ceska pistol serial No. F4274 and fifteen rounds of nine millimeters. When the firearm was retrieved from his house, it only had fourteen rounds of ammunition. By consent of both the defence and prosecution counsel, a certified copy of the arms movement register was produced as exhibit 10.
 27. Upon cross examination, he stated that the commotion between the accused and the persons inside the miraa kiosk was only verbal and that “there was no physical confrontation” from them.
 28. PW11 was the orderly officer for Starehe Sub-County Police Division. He was standing in for the OCPD for night duties. In the early hours of 13th April 2020 at about 3:00 a.m., he received a call from Police Constable Wekesa informing him of the shooting. He went to the scene where he found other police officers as well as PW1 and PW2.
 29. Two other documents were admitted into evidence without calling their makers: The first was the mental assessment report on the accused dated 22nd April 2020 (exhibit 3) which was admitted by consent. The second was the post mortem report by Dr. Johansen Oduor (exhibit 11). I should point out that the defence sought to dispense with the attendance of the maker. However, the DPP preferred the pathologist to testify in the matter. By a considered ruling dated 28th February 2023, the court (Bwonwonga J) ordered the report to be admitted without calling the maker and in the interests of justice. According to that report, the cause of death was heart and lung injury due to a gunshot from a low velocity firearm.
 30. When the accused was placed on his defence, he made the following statement-

At about midnight, I felt that I had a bout of malaria. My colleagues released me. I got a watchman at Area IV to get me a bodaboda. At 12:30 a.m. the bodaboda came. I then heard noise from a kiosk selling Miraa. It was not ordinary noise. I decided to investigate. I knocked the door. The people inside switched off the light. I asked them why they were trading out of curfew hours. The owner opened and I told him the space did not allow to have 4 people inside. I asked them to close and go home. The owner tried to bribe me. I declined. One of the occupants identified himself as a policeman. I did not know him and he was in civilian clothes. He did not convince me he was a policeman. He did not show me any work ID. He tried to leave. He pushed me. I had a pistol and apprehensive. I got the pistol out. He was still pushing. By accident, the pistol fired. It was dark in the kiosk. The echo from the firing was heard on the roof. I assumed no one was hurt. I left on the bodaboda.
 31. Learned defence counsel lodged submissions dated 26th June 2024. The gist of those submissions is that firstly, no witness saw the accused shoot the deceased. Secondly, that the accused was confronted by PW5 and that sensing danger, he shot in the air to scare his attackers. Accordingly, if the “stray bullet” hit the deceased, the accused did not know and never intended it. Thirdly, that crucial witnesses were



- not called to testify such as the bodaboda rider and the firearm movement officer. In a nut-shell, the defence submitted that the prosecution failed to prove the case beyond reasonable doubt.
32. The DPP filed submissions dated 26th June 2024. Noting that the accused did not call any witness; and, noting further that the case was not being prosecuted by the DPP personally; and, in view of section 161 of the *Criminal Procedure Code*, the prosecution was not entitled to reply. I have accordingly disregarded those submissions.
 33. The undated submissions filed by the victim’s counsel and filed on 2nd October 2024 suffer a similar fate at this stage and in view of the clear directions by the Supreme Court in *Joseph Lendrix Waswa v Republic*, Supreme Court Petition No. 23 of 2019 [2020] eKLR.
 34. I will now return to analysis of the evidence and the law. The burden of proof that the accused murdered the deceased lay squarely with the Republic. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.
 35. Section 203 of the *Penal Code* provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 36. There are three key ingredients that must be present: first, the prosecution must prove beyond reasonable doubt the death of the deceased and the cause of that death; secondly, that the accused committed the unlawful act that led to the death; and, thirdly, that the accused was of malice aforethought.
 37. There is no doubt about the death of the deceased in this case. His lifeless body was retrieved by the police from the kiosk moments after the shooting and taken to the City Mortuary. PW1, PW2, PW5, PW6, PW8 and PW9 all saw the corpse. Furthermore, the body was identified for post mortem purposes by two close relatives of the deceased, Joan Wanjiru (PW4) and Stanley Mutungi, the grandfather of the deceased.
 38. Doubt of the death is completely erased by the post mortem report (exhibit 11) made by Dr. Johansen Oduor and produced pursuant to the ruling of the court dated 28th February 2023. In the opinion of the pathologist, the death resulted from “heart and lung injuries due to gunshot using a low velocity firearm”.
 39. From that evidence, I readily find that the death was unlawful. The next question then is whether the Republic proved beyond reasonable doubt that the accused, of malice aforethought, killed the deceased.
 40. The identification of the accused and his location at the kiosk is not in doubt. PW1 knew him for about a year. PW3 had known him for two weeks. The accused readily admitted that he found the deceased and three other people in the miraa kiosk beyond curfew hours. I thus find that he was positively identified as the person who was let into the kiosk in full police uniform and who assaulted the occupants with a whip and pistol. See generally, *Wamunga v Republic* [1989] KLR 424.
 41. The accused does not also deny that a bullet discharged from his pistol. Like I stated earlier, his case is that PW5, who was an off-duty police officer, pushed him and he became apprehensive of his safety. He claimed that the weapon accidentally fired in the course of that commotion.
 42. I have weighed that line of defence against the overwhelming evidence of PW1, PW3 and PW5. I will repeat it for emphasis: PW1 had known the accused for about a year. The accused came into the kiosk dressed in police uniform and assaulted them. According to all the three witnesses, he was demanding Kshs 2,500. He attacked them using a whip (or a plastic cane) and a pistol. When PW1 offered Kshs



- 1,500 it was thrown back at his face and he was hit on the head. As PW1 bent to pick the money, the shot rang out. PW3, who was under the table also heard it. PW5 also heard it.
43. Another person who claimed to have witnessed the incident was PW2. I have however taken his evidence with a bit of caution. He was guarding some nearby premises; a distance of 30 meters away. At the time of the shooting, the lights inside the kiosk had been switched off. That is why PW1 realized a little later that the deceased had been injured. However, the evidence of PW2 reinforces that of PW1, PW3 and PW5 that the accused went into the kiosk and that a firearm was fired.
 44. I have also kept in mind that the accused had asked his colleagues to release him from duty early as he was “unwell” and needed to go home. It was not a genuine excuse because he instead went on a solo mission to confront the four occupants of the kiosk and to demand money from them with menaces: He was assaulting them all the time with a plastic pipe cane and the pistol.
 45. Fundamentally, there was no evidence that PW5 or any of the three occupants of the kiosk confronted him physically. Paraphrased, he was not acting in self-defence. His claim that the weapon fired accidentally as he shot in the air is unbelievable in view of the location of the entry and exit wounds on the chest of the deceased. In the opinion of the pathologist, the death resulted from “heart and lung injuries due to gunshot using a low velocity firearm”.
 46. I thus find that the accused deliberately shot the deceased at close range. From the duty roster (exhibit 9), the arms movement register (exhibit 10) and the ballistics report (exhibit 1), the accused had been assigned the Ceska Pistol from which one round was fired killing the deceased. The bullet head (exhibit 2) and a spent cartridge (exhibit 6) were recovered inside the kiosk. True, no one saw him shoot the deceased but he was the only person armed with a pistol inside that kiosk; and, from the combined evidence of PW1, PW2, PW3 and PW5 there is no doubt that the accused shot the deceased.
 47. I accordingly find that the conduct of the accused is inconsistent with his plea of innocence. By firing a lethal weapon to the chest of the deceased at close range, he knew or ought to have known that it was likely to cause grievous harm or death. From the mental assessment report (exhibit 3) he was of sound mind. Before the shooting, he had viciously assaulted the four occupants of the miraa kiosk using a short plastic pipe (whip) and the pistol. This further explains the bruises on the forehead and cheek of the deceased. Accordingly, the accused had malice aforethought as defined in section 206 (b) of the [Penal Code](#). As I have stated, the deceased died as a direct consequence of his conduct.
 48. In the end, I find that the defence set up by the accused is a sham and completely evasive. The entire corpus of direct and circumstantial evidence points irresistibly to his guilt.
 49. The upshot is that the prosecution has proved the charge beyond reasonable doubt. The accused, of malice aforethought caused the death of the deceased by an unlawful act. I accordingly enter a finding of guilty and hereby convict him of murder contrary to section 203 of the [Penal Code](#).

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF DECEMBER 2024.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of: -

Accused.

Ms. Tum for the Republic instructed by the office of the Director of Public prosecutions.



Mr. Nyakundi holding brief for Mr. Omenke for the accused person instructed by Omenke Andenje & Company Advocates.

Mr. E. Ombuna, Court Assistant.

