



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL CASE (MURDER) NO. 7 OF 2015

REPUBLICSTATE

VERSUS

MOSES KIBET KANGOGO.....ACCUSED

JUDGEMENT

The charge

1. The accused Moses Kibet Kangogo is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 4th day of December, 2015 at Ngao QRT camp Ngao trading Centre within Tana River County murdered John Nganga.

2. Both the Accused and the deceased were serving administration police officers stationed at Ngao Quick Response Team (QRT) camp in Tana Delta. Their individual tents were 50 metres apart. According to their colleagues PW3, PW4 and PW6, they heard gun shots at around 9:30pm. They immediately took cover thinking that the camp was under attack. They however shortly realized that their colleague Moses Kangogo (accused) and John Ng'anga (deceased) had engaged in a gun fight leading to the fatal wounding of the later.

3. The Accused was said to have approached his senior James Kasolo Mulenga (PW3) in an act of surrender by dropping his gun and raising his hands while asking to be placed in the cells. In the meantime, the deceased was found at the back of his tent bleeding and pleading for help. PW3 who was in charge of the camp ordered that the accused be put under arrest and the deceased be rushed to Ngao hospital. At Ngao, the deceased was referred to Malindi Sub County hospital. He died on the way and was pronounced dead on arrival.

4. The facts as stated above are fairly straight forward. However, for a charge of murder to succeed, the prosecution must prove the death of the deceased and the cause of such death. It must also prove that the death was caused by the unlawful acts or omission of the accused and that the accused acted with malice aforethought. The standard of proof for all the aforesaid elements is one beyond reasonable doubt. See **woolmington v. DPP(1935)ER 462**; See also **R. Vs. Philemon Chemas (2014)eKLR**; **R Vs. Japhet Munene (2018) eKLR**

Death of the deceased.

5. The death of the deceased was not in dispute in this case. He suffered gunshot wounds on the evening of the 4th December, 2015 and was rushed to hospital by his colleagues. He was pronounced dead on arrival at the Malindi Sub County hospital. His body was identified to the pathologist by his mother Jacinta Wangui Nganga (PW1) and his wife Agnes Bainya Samuel (PW2).

Cause of death

6. The post mortem examination was conducted by Dr. Gombe of Malindi Sub - County Hospital. At the time of trial however, Dr. Gombewas abroad on study leave. The post mortem report (Exhibit 1) was produced on his behalf by Dr. Fadia Swaleh his professional colleague. According to the post-mortem examination, the deceased's body had 3 bullet wounds. The 1st bullet entered the left leg through the front and exited through the back breaking the bones. The 2nd bullet entered through the front part of the abdomen on the side and exited through the back at the buttock. The 3rd bullet entered above the chest and exited through the back of the right chest. The pathologist opined that the cause of death was severe bleeding due to bullet wounds.

7. With the undisputed evidence above, I accepted the pathologist's expert opinion on the cause of death. Indeed the same accorded with the witness accounts of PW3 and PW4 that the deceased had been shot at their camp.

Whether the accused shot the deceased.

8. There was sufficient and undisputed evidence of the gun fire at the Ngao QRT Camp on the evening of 4th December, 2015. James KasokoMulenga (PW3) testified that he was the second in command at the camp. On that day he was in-charge as Inspector Justine Kimali who was his senior was away. PW3 told the court that he was woken up by gun shots which sound came from the direction of the tents occupied by Moses (Accused) and John Ngang'a (Deceased). He initially thought that the camp was under attack. He then saw Moses walking towards his (PW3's) tent. When PW3 asked him what was wrong, the Accused dropped his gun and raised his hands and said "take me to the cells! take me to the cells!". At that point other officers APC Mutaho and APCIrunguChege arrived and PW3 disarmed the accused and put him under arrest.

9. PW3 further testified that he sent APC Chege to Nganga's tent and shortly they shouted that Nganga had been shot. He left Kangogo (Accused) being guarded by APC Orwa and APC Charles Wage while he went to Nganga's tent and found him lying in a trench at the back of the tent. He was bleeding. PW3 directed Chege to look for Nganga's gun. On looking around, they found it near his camp bed. The magazine was open and there were bullets on the ground.

10. PW3's evidence was corroborated by No. 200603056 APC Nelson Chege (PW4). His evidence was that he was present in the camp on the material night. He stated that he was given the accused's gun by PW3 and directed to secure it. No. [...] APC ElijaMorijo (PW6) was also present at the camp when he heard gunshots. He testified that he took cover in the ditches thinking that the camp was under attack. He later saw Kangogo (Accused) surrender to Kasoko. Together with other officers they found Nganga at the back of the tent screaming and asking for water. PW6 further testified that Nganga died on the way between Ngao health centre and Malindi Sub County hospital.

11. From the evidence above there is no doubt in my mind that both the Accused and the Deceased were engaged in gun fire. The fact that each was armed, though undisputed, was proved by evidence. Due to insecurity in the Tana Delta, they had been assigned rapid response security duties at the Tana Delta and were encamped at Ngao Quarter Camp. PW3 testified that each officer had been issued a fire arm when deployed from Embakasi, Nairobi on 15th March, 2014 and that owing to the nature of their duties, they were allowed to keep their fire arms and ammunition even at night.

12. Sgt. James Kasoko (PW3) showed the court the fire arms register (MFI 2) which showed that the accused had picked his gun S/No. J68369 from the armoury on 26th November, 2015 at 7pm with 20 rounds of ammunition. The deceased had also been issued with a G3 A3 Serial No. J[...] on 30th November, 2015 with 20 rounds of ammunition. The fire arms register also showed that the two firearms were signed back into the armoury on 4th December, 2015 at 2.20hrs and 2.15hrs respectively after the shooting incident. There is therefore no doubt that both the accused and the deceased were armed at the material time.

13. There was further proof of gun fire exchange between the accused and the deceased. No. 235085 Inspector Michael Kibet (PW7) then Officer Commanding Police Station (OCPD) Garsen testified that he visited the scene of the shooting at Ngao Qtr. Camp together with one Cpl. Nthenye. The In-charge James Kisoko (PW3) briefed them on the incident. He inspected the firearms movement register (MFI 2) and confirmed that G3 Serial No. [...] (MFI 4) had been issued to Cpl Moses Kangogo (Accused). He received 15 spent cartridges and 2 magazines, 2 damaged live bullets and 14 live ammunitions and 2 fire arms. He prepared the Exhibit Memo (Exh7, (wrongly marked Exhibit 11) and forwarded the arms and ammunitions for forensic examination.

14. PW7 produced the following exhibits: Exhibit Memo (11), firearm and magazine Serial No. J[...] (Exhibit 3), firearm J[...] and magazine (Exhibit 4), 15 spent cartridges (Exhibit 5), Exhibit Memo (Exhibit 7), 44 rounds of live ammunition 6 test cartridges (Exhibit 8), 10 live Ammunition (Exhibit 9), 1 cartridge (Exhibit 10), and; 1 sketch map (Exhibit 11, wrongly marked Exhibit 12.

15. Forensic analysis of the firearms and ammunition was done by Chief Inspector Alex Chirchir, a ballistic expert (PW5). He testified that he received the exhibits and accompanying memo (MFI 7) on 17th December, 2015 from PC Driver Mohammed Salat. The exhibits were: Rifle S. No. J[...] Marked A; Rifle S. No. J[...] marked C; Rifle magazine marked B; Rifle magazine marked D; Sixteen expended cartridges marked Exhibit FI-F15 and J; Sixteen rounds of ammunition marked Exhibit G1 – G14; and B1-B2; and one damaged cartridge marked Exhibit E.

16. PW5 was required as per Exhibit Memo (Exhibit 7) to ascertain whether the exhibits A and C were capable of firing; whether the exhibit A fired any of the cartridges marked F1-F15; whether the exhibit marked C fired any of the cartridges marked F1 to F15, and; whether E was fired or exploded.

17. After expert analysis, PW5 arrived at the finding that Exhibits A, C and Exhibit G1-G14, B1-B2 were capable of being fired and that they were firearms and ammunition respectively. Exhibit B and D were G3 rifle magazine of 20 rounds ammunition in calibre 7.62X51Y mm. Exhibit B was complete and in good working order while exhibit D had a bullet hole. Exhibit F1-F15 were fired from one gun while exhibit J was fired from another gun. He concluded that exhibits (F1-F15) were fired in German Heckler and Koch G3 rifle (A) serial No. J[...] while exhibit J was fired in German Heckler and Koch G3 rifle (C) Serial No. J[...].

18. The expert findings above contained in the oral testimony of PW5 and his detailed ballistics report dated 22nd December, 2015 clearly shows that the Accused fired his gun G3 Rifle Serial No. J[...] expending 15 rounds of ammunition and that the deceased also fired his gun G3 Rifle Serial No. J[...], expending one round of ammunition. The forensic ballistic evidence corroborates the evidence of the officers who were present at the scene that the Accused and the Deceased exchanged fire. I have found no evidence or suggestion that the Deceased shot himself. It is therefore my conclusion that it was the Accused, and no one else, who shot the deceased.

19. The Deceased did not die immediately. However, according to the evidence of PW 6, he was wounded and was rushed to Ngao hospital from where he was referred to Malindi Sub-County hospital and was pronounced dead on arrival. As earlier stated, the post mortem report (Exhibit No.1) showed that the cause of death was gunshot wounds. It is therefore clear that it was the hail of bullets from the Accused's firearm that caused the death of the Deceased. I find it proved beyond reasonable doubt that it was the Accused's action of shooting the Deceased that caused the unlawful death of the Deceased.

Whether the accused was provoked by the deceased.

20. The Accused told the court in his unsworn defence that the deceased hurled abuses at him, went to his tent and started firing. He said that he (Accused) went and reported to their boss when the Deceased could not fire any more. The Accused however went on to state that he (Accused) had his gun and that he fired to defend himself as the Deceased was the first one to fire. He further stated that the Deceased was his friend and that they had never differed. The Accused also suggested in his defence that he was over-burdened with work since he was junior to the other officers and that their platoon had not been changed for longer than 3 months.

21. In final submissions, Ms Aoko learned defence counsel submitted that the Accused was provoked by the Deceased and that it was the Deceased who first fired. She submitted that the fact that the Deceased's gun had a hole showed that the accused was defending himself. She further submitted that the intention of the accused was to disarm the Deceased as there were only 3 bullet wounds on the body of the Deceased. She argued that the evidence did not point to murder and could only point to manslaughter.

22. I considered the entire evidence to consider whether or not the Accused was provoked into shooting the deceased. Provocation is a defence provided for under Section 207 of the Penal Code. It provides:

‘When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.’

23. **Section 208 of the Penal Code** defines provocation in the following terms: -

‘(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.....’

24. In **V M K v Republic [2015] eKLR** which cited the case of **Duffy [1949] I ALL ER 932**, the Court of Appeal defined provocation as: -

“Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...”

25. In this case the shooting incident took place in the evening around 9pm to 10pm. According to the witnesses who were present at the camp, they overheard an altercation between the Accused and the Deceased which died down and they all went back to their rest, only later to be shocked by gun shots rending the air. No.237234 APC Elijah Morijo (PW6) is the only witness who said that he heard the Deceased insulting the Accused. PW6 told the court that he was in his tent when he saw John Nganga (Deceased) walking around drunk. He said that he heard him abuse Moses Kangogo (Accused) by telling him that he had never seen such a stupid man; and, that Kangogo responded by warning Nganga not to abuse him. PW6 said that 30 minutes later, he heard gunshots and took cover in the ditches thinking that the camp was under attack.

26. No other witness corroborated PW6's account that the Deceased provoked the Accused by insulting or abusing him. What is clear is that there was a quarrel, as to who started the quarrel would be a matter of conjecture as no witness was present outside their tent and testified to the details of the quarrel. From the ballistic report however, it is clear that the Deceased fired only one shot while the Accused fired 18 bullets with three hitting the target who was the Deceased. The defence of provocation is therefore not available to the accused. I dismiss it as it is not borne by evidence.

Whether the Accused was justified in shooting the Deceased.

27. Police officers are charged with the duty of protecting life and property. The circumstances under which they can legally deploy their firearms are clearly set out in the Police Act and in the Police Service Standing Orders. I examined the evidence closely to see whether the Accused used his firearm justifiably and if the prosecution proved that the accused acted with malice aforethought.

28. In **I.P. Veronica Gitahi & another v Republic [2017] eKLR**, the Court of Appeal was categorical that the Kenyan law was now comprehensive and there was no need to look up to the common law (expressly provided for by Section 17 of the Penal Code) for guidance. The Court stated thus:-

‘In our view in light of the above express provisions of the National Police Service Act regarding use of force and firearms by the police in self defence, there is no room for invoking section 17 of the Penal Code and applying the principles of the Common Law on self defence. The provisions of the Act are a complete and exhaustive code and demand that a police officer must resort to non-violent means as the first option and to use force only when non-violent means are ineffective. In addition even where the use of force is justified, the officer does not have a carte blanche in the use of force. The Act demands that the force used must be proportional to the objective to be achieved, the seriousness of the offence and the level of resistance, and still, only to the extent necessary. When it comes to use of firearms, the Act makes that a last resort option.

To determine whether a police officer has used force or a firearm as required by the Act therefore cannot be a subjective issue. The court must evaluate all the circumstances surrounding the use of force or firearm so as to determine, for example, whether force was used as a last option; whether it was proportionate to the threat that confronted the police officer; or in a

case involving a child, whether the officer had made all effort to avoid the use of firearms.”

32. The case above aptly summarized the law as contained in the **National Police Service Act No. 11A of 2014** and in the **National Police Service, Service Standing Orders**. Both the Act and the Standing Orders provide demand that while a police officer may use force, such force must be reasonable and proportional to the objective to be achieved. Part B of the 6th Schedule of the Act that:-

Firearms may only be used when less extreme means are inadequate and for the following purposes—

(a) saving or protecting the life of the officer or other person;

(b) in self-defence or in defence of other person against imminent threat of life or serious injury;

€ protection of life and property through justifiable use of force;

(d) preventing a person charged with a felony from escaping lawful custody; and

(e) preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.

33. The **Service Standing Orders** under Paragraph 14 of Chapter 47 reiterates the provisions of the Act by stating that “***Firearms may only be used when less extreme means are inadequate and for the following purposes— (a) saving or protecting the life of the officer or other person; and (b) in self-defense or in defense of other person against imminent threat of life or serious injury***”

34. I have already dismissed the suggestion that the Accused was provoked. Looking at the circumstances of the case against the express provisions of the law restated above, I have found nothing to suggest that the Accused was justified to use his firearm in the manner that he did. He misused his firearm by pumping three bullets into his colleague.

Whether the accused in shooting the deceased had malice aforethought.

35. The prosecution urged the court in submissions at the close of the prosecution case to find that the accused acted with malicious intent when he shot the deceased. Learned counsel Mr. Kasyoka submitted strongly that the intent was manifest in that the accused pumped 3 bullets into the deceased. The critical question which follows is whether the Accused committed the unlawful act with malice aforethought.

36. Under **Section 206 of the Penal Code**, malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

36. In **Nzuki v Republic [1993] KLR 171**, the Court of Appeal stated that malice aforethought can be inferred from the acts of an accused person. The Court elaborated as follows:-

“...Malice aforethought” is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, [1950] 2 KB 237.”

37. In the circumstances of this case however, the prosecution did not prove that the accused had malicious intention to end the life of the deceased. From the evidence tendered it is doubtful that he had planned to kill his colleague. No motive was demonstrated and no prior disagreement was shown. Besides the Accused himself told the court that their platoon had not been changed for a while and that he was overburdened with work since he was the junior most officer in the camp. While it is clear that he acted irrationally, and misused his firearm, there is no clear evidence that he had malicious intent to end the life of his colleague.

38. As further stated by the court of Appeal in **Nzuki (supra)**:-

“.....but if on the totality of the evidence there is room for more than one view as to the intent of the accused, the court should direct itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if on review of the whole evidence either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt.”

39. The totality of the evidence in this case does not prove beyond reasonable doubt that the Accused had malice aforethought. It is both as likely as it was unlikely that he had malice aforethought. As the law demands, I shall give him the benefit of that doubt.

40. In the final analysis, I find that the prosecution has not proved that the accused in shooting the deceased had malice aforethought which is a necessary ingredient in a charge of murder. I apply the provisions of **Section 179 (2)** of the **Criminal Procedure Code** and substitute the charge of murder with one of manslaughter contrary to section 202 of the Penal Code. Consequently, I find the accused guilty of the offence of manslaughter contrary to **Section 202** of the **Penal Code**. He is convicted accordingly.

Judgment delivered, dated and signed at Garsen this 10th day of September, 2020.

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R. LAGAT KORIR

JUDGE

In the presence of:

The Accused

J.Kambi.....Court Assistant

Ms. Aoko.....For the Accused

Mr. Sirima h/b for Mr. MwangiFor the State