



REPUBLIC OF OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO. 74 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JAMES NGANGA GICHURU.....ACCUSED

JUDGEMENT

1. The accused **JAMES NGANGA GICHURU** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on 29th day of July 2014 at Kamulu Market in Ruai Division, Njiru sub-county within Nairobi County murdered **CHARLES NJONJO NJUGUNA**.

2. He pleaded not guilty to the said charges and to prove its case the prosecution called a total of fourteen (14) witnesses and when put on his defence the accused tendered sworn statement in defence and called one (1) witness.

PROSECUTION CASE

3. The prosecution case was that the accused who was a police officer and a businessman was running a bar at a plot where the deceased was residing together with his wife. On the 29th day of July 2014 according to **PW1 CHRISTINE WAMBUA MUIGA** the wife of the deceased, while she was speaking to **PW8** and the deceased, they noticed a motor vehicle next to the gate which made them instruct their husbands to go and check the same. The accused then came out of the motor vehicle and started to abuse them before hitting **PW8**. It was her evidence that when the deceased asked the accused what the matter was he removed his gun and shot him three (3) times. They then took the deceased to hospital before calling police officers from Kamulu. It was her evidence that the accused was a friend of the deceased and they knew him as "**Baba Pato**". She stated further that there had never been any dispute between the deceased and the accused before that date.

4. **PW3 PC. SIMON N. NTHENGE** stated that he was on mobile patrol duties when he received a cell-phone call from one Charles Maingi a businessman with information on the shooting and proceeded to the scene where he found a big crowd and found the deceased laying on his back bleeding from the chest. The deceased who knew him called him and told him that he was dying. At the scene he was told that the accused "**Baba Pato**" had shot the deceased. They then took the deceased to Ruai Family Clinic which declined to treat him and proceeded to Mama Lucy Hospital where he was pronounced dead. In cross-examination he confirmed that the accused reported the incidence at Kamulu Police Station.

5. **PW4 RICHARD KIPSANG** corroborated the evidence of **PW3** and stated that while on patrol **PC NTHENGE** received a call with information that there was robbery incidence at Vina area and proceeded to the scene where they found the body of the deceased lying down outside one of the bars bleeding. **PW5 PC EVANS KIPLAGAT** stated that while on duty at report office he received the accused who told him that he had been confronted by a group of men who robbed him along Kang'undo Road. Thereafter **PW8 JACINTA MWIKALI** came to the station and reported the shooting incidence and stated that the accused had slapped her and when the deceased asked him the reason, he drew a pistol and shot him.

6. **PW6 CI JOHN WAINAINA** was the senior officer at Kayole stated that he heard communication from the duty officer **CPL MUTHONI** on a shooting that had occurred at Ruai. The following morning he decided to go to the scene since the members of the public had blocked the road demanding action against the accused where he interviewed witnesses who gave him the name of the accused. The duty officer who was with him collected three (3) cartridges at the scene which she handed over to him. They confirmed that the accused was a police officer but was not on duty on the material day. On 3/7/2014 he went to the accused place of duty where he handed over to him the gun for purposes of ballistic analysis.

7. **PW2 NICHOLAS NJUGUNA NJONJO** a son of the deceased was called by his aunt (**PW1**) and told of his death while **PW7 STANLEY O MUCHENYI** the officer in charge of Arms Training School confirmed that the firearm number **U420561** was under the

custody of the accused for repairs from forces arms stores as confirmed by the Arms Movement Register. He confirmed that the accused needed firearm at his place of work and was in lawful custody of the same.

8. PW8 JACINTA MWIKALI stated that the accused entered into the compound and spoke to her. The deceased then got hold of the accused who then had a problem with his leg causing him to fall down. As they were struggling the wife of the deceased told him that the accused had a gun "pistol" which he should take to which the deceased stated that he was looking for people with guns so that he can take them away. It was her evidence that the accused fell down and when he realized that the deceased was going to take the pistol away from him he shot the deceased three (3) times and left the scene.

9. It was her evidence that when **PW2** saw that the accused had removed a gun she ran to her house and therefore discrediting her evidence. In cross-examination she confirmed that there was no dispute between the accused and the deceased or his wife. She confirmed that it is the deceased who first attacked the accused with the intention of taking away the gun from him. **PW9 JACKSON KANIA MATHENGE** stated that he had given the accused his motor vehicle to use which he was using at the time of the incidence and which he used to go to the scene.

10. PW10 SSP LAWRENCE NDHIWA a firearm examiner examined the pistol and the three (3) spent cartridges and confirmed that they were fired from the pistol which the accused was using. **PW11 INS. ACHILLES OMONDI** visited the scene and interviewed witnesses. He further confirmed that the accused had made a report to the police that he had been confronted by a number of men well know to him who snatched his mobile phone and cash Kshs.7,000/= but did not indicate that he had shot or fired any firearm. He further confirmed from the Firearm Movement Register at the accused place of work that he was in possession of fireman at the said time which had been taken for repair.

11. PW13 CORP. MUTHONI GRUSTUS corroborated the evidence of **PW11** and stated that she was able to recover three (3) spent cartridges at the scene. She further stated that the two women they found at the scene were not co-operative. **PW12 DR. DOROTHY NJERU** performed post mortem examination on the deceased in which she confirmed that the deceased sustained gunshot wounds and as a result formed an opinion that the cause of death was chest injuries due to gunshots.

DEFENCE CASE

12. When put on his defence the accused confirmed having shot the deceased and stated that **PW8** used to be his employee at the bar which he sold. He stated further that he was attacked by the deceased when he went to the plot to collect his items from the bar. He stated that when he fell down his pistol was seen and the deceased came for it that is when he decided to shoot in the air to scare people away and in the process shot the deceased so as to stop him from taking away the firearm without any intention to kill him. In cross-examination he confirmed having worked with the police force for twenty six (26) years and that there was no grudge between him and the deceased. He stated that he did not give the crowd time to attack him.

13. It was his further evidence that since he had suffered a broken ankle before then, he was not very swift. He therefore acted out of fear arising from the deceased declaration that he wanted the gun and being surrounded by four men who would have taken the gun thereby justifying his shooting in the air. **DW2 JOSEPH NDIRANGU** was instructed by the accused to take photographs of the scene which he produced in court showing bullet marks.

SUBMISSIONS

14. On behalf of the accused it was submitted that the same gave a truthful and honest evidence as to why he was at the scene and only used the firearm when he sensed imminent danger and fear of the fireman being taken away from him. He did not quarrel with the deceased and therefore had no motive to shoot and kill the same. It was submitted that **PW8** contradicted the evidence of **PW1** both who were eye witnesses and therefore the benefit of doubt arising from their evidence should be given to the accused.

15. On behalf of the prosecution it was submitted that the accused was placed at the scene and that the accused in his defence admitted that he shot the deceased and further that he admitted that the persons at the scene were not armed and therefore his defence of danger was an afterthought. It was submitted that it is the accused who provoked the deceased and therefore violated the provisions of **Section 61** of the **National Police Service Act** on conditions upon which police officers may use firearms.

ANALYSIS AND DETERMINATION

16. To sustain a conviction on a charge of murder the prosecution is expected to prove beyond any reasonable doubt the following elements of the offence:-

a) The fact and the cause of death.

b) That the said death was caused by an unlawful act of omission or commission on the part of the accused persons.

c) That the said unlawful act was caused with malice aforethought - Mens rea.

17. The fact and the cause of death of the deceased are not in dispute in this matter. All the prosecution witnesses and the accused in his defence confirmed that the deceased died as a result of the gunshot injuries. **PW12 DR. DOROTHY NJERI** who performed post mortem examination on the body of the deceased and produced post mortem report thereon confirmed that the cause of death was chest injuries due to gun shots.

18. The fact that the said injuries were caused by the accused is further not in dispute. The accused was placed at the scene by **PW1** the wife

of the deceased, **PW8** who operated a bar at the plot both who knew him as "**Baba Pato**". The accused in his defence admitted shooting the deceased whom he knew at the scene. I therefore find and hold that the said death was caused by the unlawful act on the part of the accused person.

19. The only issue in dispute is whether the same was caused with malice aforethought put differently whether the accused had a criminal intent to kill the deceased. The evidence on record clearly shows that before the date of the incidence herein there was no dispute and or grudge between the accused and the deceased. The accused had been operating a bar at the scene and in his defence gave an account as to why he had gone to the scene to collect his items from the bar which he had sold. He went there in a motor vehicle which he had been given by **PW9** when he was confronted by the deceased as per the evidence of **PW8**. When **PW1** told him that the accused had a gun that the deceased attempted to take away the said gun from the accused who was a police officer and according to his evidence-in-chief having noted that he was in eminent danger of losing the gun he acted in self-defence thereby shooting the deceased. The accused action in the prevailing circumstances were expected of any reasonable man in his situation.

20. From the evidence on record in particular that of **PW8** and the accused in his defence, it is clear that the deceased provoked the accused into action. The deceased over powered the accused threw him down and at the behest of his wife attempted to take away the gun which the accused had lawfully in his possession and therefore to secure and protect the said gun the accused acted as a result of the provocation on the part of the deceased.

21. In the case of **PETER KINGORI MWANGI & 2 OTHERS v REPUBLIC [2014] eKLR** the court had this to say on provocation:-

"For provocation to exist the following two conditions must be established:-

- 1. the subjective condition that the accused was actually provoked so as to lose his self control and*
- 2. The objective condition that a reasonable man would have been so provoked."*

22. In this matter the accused believed he was in imminent danger of losing his firearm as confirmed by the evidence of **PW8**. **PW1** told the deceased that the accused had a gun and he said he was going to get the said gun and he indeed went for the gun. This therefore brings the case within the statutory provisions of **Section 207** of the **Penal Code** which provides that:-

"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. It is therefore clear that the accused acted in self-defence which according to the decision in **MOKUA v REPUBLIC [1976 - 80] 1KLR 1337** where the Court of Appeal had this to say:-

"Self defence is an absolute defence even on a charge of murder unless; in the circumstances of the case the accused applies excessive force."

24. In the circumstances of this case whereas the accused through the evidence tendered did not have the intention to cause the death of the deceased, it is clear that in shooting the deceased who was not armed with any weapon three (3) times and without checking that he does not shoot him at a spot that may endanger his life the same used excessive force thereby committing an offence of manslaughter contrary to **Section 202** of the **Penal Code** as read with **Section 205** thereof.

25. By virtue of the provision of **Section 179 (2)** I find and hold that the offence of manslaughter was proved by the prosecution beyond any reasonable doubt and therefore substitute the charge of murder to that of manslaughter and hereby find the accused guilty thereof and convict the same accordingly and it is hereby ordered.

Dated, delivered and signed at Nairobi this 14th day of February, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for the State

Mr. Orege for the accused

Accused present

Court Assistant - Karwitha