



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 48 OF 2014

REPUBLIC PROSECUTOR

VERSUS

ISAACK ODUOR ABIERO ACCUSED

JUDGMENT

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 14th June 2014, at Manyatta Village in Kisumu North District within Kisumu County he murdered **Collins Okoth Owino**.

He pleaded not guilty to the charge and a trial ensued with the Prosecution calling twelve (12) witnesses and he opting to make an unsworn statement and not calling any witnesses.

Briefly the facts of the case are that on the material day the accused together with his colleagues PC Evans Mwamburi and PC Johnstone Mwangi who testified for the Prosecution as PW6 and PW10 respectively, were deployed to Manyatta Village on patrol. All three were issued with firearms that of the accused being being a G3 S/NO. 4854311 with 20 rounds of ammunition. According to the two officers (PW6 & 10) and this was confirmed by David Roni (PW5) they begun the patrol at 7.00PM when they went round the video shops and informed their owners to close by 9PM. When therefore they heard noise at one shop at around 11.30PM they went there and the accused who was the senior most entered the hall and found youths watching a football match. He went and unplugged the cable effectively switching off the television as well as the decoder. This annoyed the youths and there were murmurs in the hall which had now become dark. Suddenly one of the patrons made remarks to the effect that they were being disturbed by people who had not gone beyond class eight. The accused who had started walking away went back into the hall. He was incensed by the insult. According to Joseph Ochieng (PW1), Stephen Onyango Otieno (PW2), John Owino Onyango (PW3), Collins Odhiambo (PW4) and David Roni (PW5) who were among the fans watching the game the patron who made the remarks ran away when he saw the accused going back. Nevertheless the accused got hold of another youth – Stephen Onyango Otieno (PW2), and started going out of the hall with him. Since this was the wrong guy Collins, the deceased, followed him and started telling him to let him (Stephen) go as he was innocent. The accused would not relent. Collins, the deceased got hold of Stephen's (PW2) hand while the accused was holding the other hand and a tug begun. The other youths had then left, some through the rear door and the others the front door, but this was not without grumbling that the viewing had been cut short yet they had paid money for it. A confrontation followed with the accused dragging PW2 outside and the youths pulling him back. According to the prosecution witnesses on reaching the door of the hall the other officers who were, all the while, outside allegedly told the accused to forget about the youths and leave but he insisted. Then suddenly he pointed his gun to the direction of Stephen and the deceased, cocked it, took one step backwards and pulled the trigger. Stephen fell to the ground while Collins cried out saying “kwanini umeniua. Nimefanya nini” meaning “why have you killed me. What did I do” and fell to the ground.

Everybody took cover when the gun fired. Joseph Ochieng (PW1) who had followed the accused and Stephen PW2 to the door was also injured in the arm and was taken to hospital. The accused called the Officer Commanding Kondele Police Station who went and took the deceased to the Jaramogi Oginga Odinga Teaching and Referral Hospital where he was pronounced dead. Investigations into the incident commenced with the recording of witness statements. Thereafter the firearms that the accused and his colleagues had been issued were taken to a ballistic laboratory for examination and Postmortem was done on the body of the deceased.

The Postmortem confirmed that the cause of death was massive intra abdominal haemorrhage due to severed descending abdominal aorta due to gun shot injury. On her part the Firearms Examiner one Florence Karimi came to the conclusion that the firearm, its magazine and nineteen rounds of ammunition were a Firearm and Ammunition as per the Firearms Act. The opinion of the Director of Public Prosecution was sought and when he gave the go ahead to charge the accused he was arraigned in Court.

The accused who throughout the trial was represented by Mr. Onsongo Advocate elected to make an unsworn statement. He confirmed that on the material day he went to Manyatta with the two police officers. He also confirmed that he was issued with an AK47 rifle No. 4854311 with 20 rounds of ammunition. He stated that they went round ordering video shops to close at 10PM and narrated how on their second round they heard noise and sensed bhang from a certain premises and on going there found some boys watching football. He entered the premises but when he asked who the owner was nobody spoke. He therefore switched off the television. This agitated the crowd and they started abusing him with one of them saying **“these dogs have not stepped in class 8 yet they are disturbing us”**. He also heard one of them saying that those guns would belong to them come **“saba saba”** meaning 7th July. He stated that he got hold of one youth and started going out with him but two others followed them to rescue him. He stated that the crowd became violent. He identified the man he was holding as Stephen (PW2) and the men who tried to rescue him as the deceased and another. He accused them of trying to aid Stephen to escape from him. He stated that all this while he had cocked his gun and was having his finger on the trigger as it was deep in the night and he did not know who else was armed. He stated that when Collins the deceased, did not manage to grab the prisoner he tried to grab the gun and this caused a reflex action on the hand that held the gun and which was aimed at Collins causing it to fire. He, the accused, called the Officer Commanding Station who rushed Collins to hospital but on arrival he was pronounced dead.

Regarding the Prosecution witnesses he stated that Joseph Ochieng (PW1) confirmed he was insulted although the allegation this witness recorded a statement at 3AM was false. He stated that PW1 confirmed there was a lot of noise in the hall after the television was switched off. He wondered how PW3 could have identified him at night and not be shot if indeed he was behind the deceased. He also discounted that Owino (PW5) could also have been working at the video saying six or seven people could not work there as the earnings are small. He stated that Owino's (PW5) evidence that blood gushed from the deceased's back was a fabrication. He contended that the witness did however confirm there was a confrontation. Regarding the firearms he took issue with the fact that only his was handed to the investigating officer stating that there was sibling rivalry between the two divisions; meaning the administration police and the regular police. He alleged to have been arraigned four days after arrest instead of twenty four hours and urged this court to protect his right in that respect.

There is evidence that the deceased died from excessive bleeding from a gunshot wound. No forensic examination was carried out to conclusively confirm that the bullet that killed the deceased came from the accused's rifle, the examination by the Ballistic Officer (PW7) being confined to whether the rifle carried by the accused that night was a Firearm within the Firearms Act which in my view was never in doubt in the first place the accused himself having admitted it was a rifle – AK47 and that it had 20 rounds of ammunition. Be that as it may there is evidence from the accused himself that the bullet was fired by his rifle.

By and large the accused's statement corroborated the evidence of the prosecution witnesses. The only point of departure of the two accounts being who caused the gun to go off. According to the prosecution witnesses the accused intentionally pointed his gun to the direction of the deceased, cocked it and then

pulled the trigger. His account is that the deceased tried to grab the gun causing his (accused's) hand to reflex as a result of which the gun, which was directed at the deceased, went off and the deceased was shot.

The point for determination therefore is whether the deceased's death arose from an unlawful act of the accused and if so whether it was of malice aforethought or whether the death was caused by grabbing of the accused's rifle by the deceased himself thereby firing the bullet that killed him.

It is my finding that the accused person fired the shot that caused the death of the deceased. His evidence which was not tested by cross-examination that the gun went off accidentally when the deceased tried to grab it from him is not convincing. To the contrary I find that he cocked the gun and deliberately shot the deceased. Whereas the two officers PC Mwamburi (PW6) and PC Mwangi (PW10) who were in his team and the accused himself want this Court to believe that the group of youth they encountered was violently unruly that is not borne by the evidence and that including the accused's own statement.

Joseph Ochieng (PW1), Stephen Onyango Otieno (PW2), John Owino Onyango (PW3), Collins Odhiambo (PW4) and David Roni (PW5)PW1, testified that they were in the premises watching a football match. They all conceded that when the accused unplugged the television cable there were angry murmurs and that in fact the deceased together with another fan got hold of the hand of Stephen (PW2) who the accused was taking outside. There is nothing however in the evidence to prove that they did so violently. Indeed the accused himself admitted that he walked the youth up to the door without anybody confronting him save for the deceased who held Stephen's hand. He could not have done this if there was a violent confrontation. Evidence points to a heated argument but not a violent confrontation. It is instructive that whereas PC Mwangi (PW10) alleged the youths pelted them with stones the accused himself made no mention of this instead saying that the reason he kept his finger on the trigger was because it was at night and did not know who else was armed. As for PC Mwamburi (PW6) his evidence was that the youths were carrying stones and trying to throw them. In re-examination he stated that once outside the youths tried to get stones. This is not the same as saying the youths threw stones at them. This contradiction raises doubt in the credibility of the two police officers as well as the accused. If in fact stones were thrown the accused would not have forgotten to mention it. Moreover by the time the youths got out the shot had been fired and the deceased was lying on the ground. Throwing of stones thereafter is not a justification for what the accused did. Whatever danger he may have apprehended while he was inside alone with the youths dissipated when he successfully walked his prisoner out to the place he had left his two colleagues who were also armed. In any event he does not plead self defence but rather says his gun fired for reasons beyond his control; that the deceased shot himself. Which as I have stated is not convincing. From his own statement and the evidence of the prosecution being called a standard eight drop out enraged him. This Court however finds that it gave him no justification to shoot the deceased.

I find that being a police officer he must have known that shooting the deceased could probably cause his death or grievous harm. I am therefore satisfied that he acted of malice aforethought as defined in Section 206(b) of the Penal Code and that the charge against him has been proved beyond reasonable doubt.

Accordingly I find him guilty of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Signed, dated and delivered at Kisumu this 9th day of February 2017

E. N. MAINA

JUDGE

In the presence of:-

Miss Chelengat for the state

Mr. Onsongo for the Appellant

The accused person

C/A: Serah Sidera

A true copy of the Original