



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 41 OF 2014

REPUBLIC..... PROSECUTOR

VERSUS

1. IP VERONICAH GITAHU1ST ACCUSED

2. PC ISSA MZEE 2ND ACCUSED

JUDGMENT

The two Accused persons are charged with the offence of murder contrary to section 203 as read with section 204 of the penal Code.

The particulars are that:-

“On the 22nd day of August, 2014 within Kinango, Kwale County jointly murdered K M”,
Nestled along the undulating hills of Kinango is a village called [*particulars withheld*].

It is in this village that one finds the homestead of K M'S family. The Court visited the scene of murder and found a Makuti thatched mud house with one main door made of iron sheets. The roof was partly thatched and had gaping holes. This house consisted of three small rooms.

It is in this house that K and her two siblings PW 8 S M and PW 9 L slept on the fateful night of 22nd August, 2014.

While they slept and unbeknown to them, the first Accused IP Veronica Gitahi, the then DCIO Kinango assembled a team of thirteen officers drawn from CID Kinango and Administration police. The stated purpose for their mission was to flush out known murder suspects who were said to be hiding in the village. The team of thirteen was divided into two groups. All the officers were armed. The first and 2nd Accused fell into one group. The first Accused was armed with a Jericho pistol whereas the 2nd was armed with an AK 47 rifle. They proceeded to the house where K was sleeping with her two siblings and forced their way inside. It was while inside the house that K was shot dead.

The first Accused in her sworn statement told the Court that upon arrival at the house of Z they made a knock at the door and identified themselves as police officers in Swahili by stating “***Sisi ni polisi, fungua mlango na mwashe taa***”. Translation, “***We are police officers open the door and put on lights***”. She knocked at the Iron sheet door three times but there was no response. They pushed in the

door and it fell across, on the floor. She heard the sound of metal brushing against the wall. Her colleague PC Issa warned her that somebody could be armed with a panga waiting for them. Suddenly she heard a male voice shout in Swahili language "*nitaua mtu*" translation, "***I will kill somebody***". She called out G Z's name. G said he would kill somebody. She warned him to surrender himself. He refused to surrender and she fired on the air twice, stumbled and fell. It was very dark in the house. She heard her colleague PC Issa firing. She heard the movement of somebody running out in darkness. Suddenly there was an eerie calmness. She saw PC Ouma and PC Dida emerge while running. PC Ouma had a torch. PC Issa helped her to get up. It was at this moment that she saw a woman leaning against a wall bleeding. Beside her was a panga. PC Ouma and Dida tried to perform first aid procedures on her. They also observed that PC Issa's rifle had been cut with a panga. At the scene she collected two cartridges which she had used. PC Issa also collected his two cartridges and they left the scene so as to take the victim to Hospital. The other team was able to arrest M Z who was wanted in connection with murder cases and he was later charged in Court. She further testified that at the time of the incident they could not secure the scene on account of security fears. She denied having had the intention to kill as she had shot twice in the air so as to scare the suspect into submission. She had noticed the presence of two children who were lying on a bed but she denied having kicked them and ordered them to kneel on the blood stained floor. It was her contention that there was present in the house a man who escaped during the ensuing commotion. She denied having used tear gas as nowhere were teargases canisters reflected in the OB 's found at the police station.

She further told the Court that the arms movement register had some alterations but these were done by the in charge armory and that at no time did she instruct him to do so.

PC Issa in his evidence in chief told the Court that on the night in question he was in the company of IP Veronica Gitahi and he was armed with an AK 47 rifle. Upon arrival at G Z's house, they knocked three times without reply. He was instructed to kick open the door which he did. He heard somebody shout in Swahili saying "*nitaua mtu*" "***I will kill somebody***". Her colleague IP Veronica stumbled and fell. He went to cover her. His rifle was cut and that it was at that moment that he fired.

He denied having had the intention to kill. He further told the Court that they did not know that there were children in the house. That they had previously done surveillance procedures but did not get evidence of presence of children in the house.

The defence called as their witness, the then in charge CID Kwale Onesmus Towett who was the first Accused immediate boss. He testified to have authorized the operation after they received information that several murder suspects had been sighted at the area falling under her jurisdiction. She later informed him that during the operation she discharged her firearm and somebody had been injured. An inquiry file was opened. The file was compiled and forwarded to him.

He went through it and found no evidence of murder as there was no element of malice aforethought.

He recommended that a public inquest be conducted and forwarded the file to the Director of Public Prosecution.

It was his view that IPOA interfered in the investigations of the case.

PC Job Ouma (DW 4) testified that on the 10th day of August, 2014 he was tasked by the DCIO Kinango IP Veronica Gitahi to conduct surveillance duties at [particulars withheld] and Kasemeni villages where there had been a hue and cry over a spate of murders which were being committed in the area by known gangsters. He gave a history of murder cases which were committed by known gangsters some of whom were arrested and charged in Court. He was also involved in the operation that was carried out on 22nd August, 2014 but not in the house of G Z but M Z who they did not find at the time.

There is no dispute in this case that the Deceased died as a result of gunshot wounds.

What appears to be the defence case is that the officers were acting in self defence.

They had properly identified themselves as police.

Upon forcefully entering in the house they heard the voice of a man threatening to kill them.

They also heard the sound of a metal brushing against the wall and surmised that it was a panga and that when they fired, the panga had been used to cut an AK 47 rifle belonging to the 2nd Accused.

PW 5 G Z testified that on the 22nd day of August, 2014 his wife had visited him at Kikambala leaving the children M and L under the custody of K (the Deceased). That in the morning of 22nd August, 2014 his brother D Z called and informed him that his children were attacked by police and one of them K was killed. He was informed that he was a wanted man and he was not able to attend the funeral of K as it was conducted at night.

The prosecution produced Safaricom call data through PW 21 which showed that G Z was at Kikambala Kongoni, on the night of 21st August, 2014 at 9:38 p.m. He received a call at 6:30 am the following day.

It is the prosecution's contention that the theory that G Z was in the house on the material night cannot be true. Further that he cannot have issued threats to them while at the house at the said time of attack.

The National Police Act at the sixth schedule gives the conditions as to the use of firearms.

Section

B

Rule 1 provides:- 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.

(c) 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 custody”.

Rule 3.

“A police officer shall make every effort to avoid the use of firearms especially against children”.

I will revisit the issue of the legitimate use of firearms by police later in the Judgment, but certain facts have been established and are not in dispute. That five rounds of ammunition were fired by the two Accused persons on the fateful night. The first Accused firing two and the 2nd Accused firing three. K the Deceased died as a result of gunshot wounds one to the head and the other to the chest.

The two Accused persons have been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 of the Penal Code provides,

“Any persons, who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

Malice aforethought which forms the ingredients of murder is defined thus,

“Malice aforethought shall be deemed to be established by evidence proving any one of or more of the following circumstances,

(a) An intention to cause the death of or to 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 harm is caused or not, to by a wish that 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 “.

The defence had build up a case to the effect that there had been a spate of murders by known gangsters some of whom were being protected by local leaders and that they had information that the gangsters most of them who had gone into hiding had returned. This necessitated the carrying out of a stealth operation at night so as to flush them out. The officers 13 of them properly and procedurally booked out from the station and booked in upon return. It cannot be said therefore, that when they were leaving the station on the fateful night their intention was to cause death.

If that were to be so, then all the 13 officers ought to have been charged with the offence of murder alongside their two colleagues.

As argued Supra it had been established in evidence and its not in dispute that the two Accused persons fired five rounds of ammunition in the house where K (the Deceased) was sleeping together with her siblings. (PW 8 and PW 9) and she died as a result of gun wounds.

The main issue is, were the two Accused persons justified to use firearms bearing in mind the circumstances obtaining on the ground at that time and secondly did they have the intention to cause death?

To justify the use of firearms at the time the defence has contended that G Z a dangerous criminal was inside the house at the time of the incident and that he had threatened to kill somebody that night. Secondly that K was no ordinary girl of 14 years old. That she was five feet 3 inches tall and had a big body and on the fateful night she had attacked them with a panga cutting the butt of the AK 47 rifle.

On the issue of G Z's presence in the house, the two Accused persons testified to have heard a man's voice speaking in Swahili and threatening to kill somebody. They did not testify to have seen the said man as it was dark. G Z testified in Court to the effect that he and his wife were not in the house at the time as they were at Kikambala which is the other side of Mombasa Island and several hours from Maweni village. His evidence is corroborated by Safaricom call data which showed that at 9:38 pm he was at Kikambala on the night in question whereas the officers went to this house around 1:00 – 2:00 am.

On the issue of K's physique. The postmortem report Exhibit No.20 does show that she was 14 years old of good nutrition and of slight physique. The contention that she was unduly big for her 14 years age is not very attractive. It is also their contention that she swung the panga and cut the AK 47 rifle while intending to cut one of the officers. None of the Accused persons testified to have seen the deceased swing the panga and cut the rifle. They testified that after the incident and with the use of torches they saw the deceased having been shot and leaning on the wall with a panga besides her.

Several issues emerge from this case. That no proper surveillance was done to establish who where the occupants of the house at the time. PC Ouma DW 4 alleges to have done surveillance and established that it was G Z, the suspect and his wife who were staying in the house. What about the

children? Did they have children and where were they staying? It was necessary to establish that fact before storming the house.

Did the two Accused persons observe the provisions of Section 6 of the National Police Service which are contained in the sixth schedule which I have enumerated and which include self defence.

Rule 3 provides as quoted above that,

“ A polite officer shall make every effort to avoid the use of firearms especially against children”.

K was a child aged 14 years old. There was no demonstrable effort used by the Accused persons to avoid the use of firearms. There is evidence to the effect that this child was shot on the head and chest. If she was swinging a panga as alleged, as trained officers she could have been disarmed either physically or by shooting the hand but not shooting the head and chest. The two Accused persons also testified to have conducted the operation in darkness. It was not said that they were wearing night vision goggles. How were they to see and identify their suspect at night for purpose of arrest. The operation at Z's house was a botched one.

The Accused persons had gone to G Z's house with the intention of arresting him but ended up shooting and causing death to K the deceased.

Their intention as argued earlier was not to kill G Z but to arrest him in connection with murder cases connected to him, but was the shooting of K lawful and reasonable in the circumstances of the case? I find there was gross omission on the part of the Accused persons in their failure to ascertain who were the occupants of the house at the time. The occupants of the house that night were there children.

Rule 3 of the National Police Service Act was not followed. The two Accused persons did not make every effort to avoid the use of firearms, against those children. That omission was unlawful.

Section 202 of the Penal Code defines manslaughter thus,

“ Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm”.

In the present case, I am satisfied that the two Accused persons were recklessly negligent in the act of shooting in darkness without establishing who the victims were.

Whereas, I find the offence of murder contrary to section 203 of the Penal Code has not been proved, I find that the evidence adduced before the Court proves the offence of manslaughter beyond reasonable doubt. By dint of the provisions of section 179 of the Criminal Procedure Code. I find the two Accused persons guilty of the offence manslaughter contrary to section 202 of the Penal code and Convict them accordingly under section 322 of the Criminal Procedure Code.

Judgment delivered dated and signed in open Court this **10th** day of **February, 2016**.

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M. MUYA

JUDGE

10TH FEBRUARY, 2016.

In the presence of:-

Learned Counsel for prosecution Mr. Muteti

Learned Counsel for defence Mr. Magolo

Mrs Nzwii holding brief IPOA