



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL CASE NO.3 OF 2015

REPUBLIC PROSECUTOR

VERSUS

GURACHA BORU DECHISA ACCUSED

JUDGMENT

GURACHA BORU DECHISA , is Charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence were that on the 3rd day of April 2012 at Kate sub location, Moyale sub county of Marsabit County, murdered **JOHN MAINA MUMBI**.

The prosecution case is that on the material day the accused who is the area assistant chief was manning a road block after he had been alerted that some motorists were ferrying illegal immigrants. The motor vehicle in which the deceased was travelling in was stopped. After the illegal immigrants were asked to alight, the deceased drove the vehicle over the barrier in a bid to flee. This is when the accused shot at the vehicle and fatally wounded the deceased.

In his defence the accused contended that when the deceased drove over the barrier, they shot in the air to scare him. He later learnt that the deceased had been shot and succumbed to the injury.

The issues for determination are:

1. Whether or not the deceased was accidentally shot in a bid to stop him from escape; and
2. Whether the bullet that killed the deceased was fired by the accused.

Jackson Muchemi (PW1) was the driver of motor vehicle **KAN 981 Z** on the fateful day. His evidence is that when the accused stopped the vehicle at a barrier, they had on board twenty three passengers who were illegal immigrants from Ethiopia. The deceased alighted and was engaged in a conversation with the accused. At one time he heard the deceased ask the accused how much money he wanted to allow them to pass. At one point during the conversation the accused received a call and this witness heard him mention the name of the OCS. Thereafter the accused said the vehicle was not going to pass. The deceased and the accused struggled over the ignition key, and it would appear the deceased had an upper hand for Muchemi testified that Maina (the deceased) went to the driver's seat and drove off over the barrier. He further testified that this was when the accused cocked the gun and fired one round of ammunition behind the vehicle.

The evidence of **Chief IP Robert Sugut (PW6)** is that while the accused was still briefing him of the arrests, he overheard an argument and got an impression that there was a quarrel. He also sensed that the accused was running. Thereafter the accused informed him that the driver had escaped with the vehicle. The accused further told him that he had fired a shot at the escaping vehicle.

Dr. Amunzee Khalumi (PW7) adduced the medical evidence which was to the effect that the deceased had one gunshot wound with an entry at the back and an exit at the front.

The accused in his defence testified that when the deceased drove over the barrier, they shot in the air to scare him.

It is clear from the evidence on record that the deceased defied the order by the accused. When he met his death he was in a bid to escape from lawful arrest.

Although **chief inspector Edward Kamonjo** who allegedly collected the spent cartridges was not called as a witness, there is sufficient evidence on record to show that the accused fired from the gun he had. He testified to have fired a shot at least once. However the ballistic evidence adduced by **chief inspector Alex Chirchir (PW8)** was that all the three spent cartridges picked at the scene were fired from the same gun. This was the rifle that was presented for examination and which had been taken from the accused after the incident. I therefore make a finding that the accused fired three rounds of ammunition from his rifle. One of the bullets from the rifle of the accused fatally wounded the deceased who is the subject of this case.

Murder is defined **in section 203 of the Penal Code** as follows:

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

In the case of **Republic V Andrew Mueche Omwenga [2009] eKLR** Maraga J (as he then was), referring to the above Penal Code definition went on to say:

" It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought"

In the instant case there is no dispute that the deceased indeed died of a gunshot wound. I have already made a finding that the bullet that caused his death was fired by the accused. I will therefore endeavour to establish if the second and the third ingredients were satisfied or not.

Section 206 of the **Penal code** defines malice aforethought as follows:

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.

From the evidence on record malice aforethought has not been proved. The evidence of **(PW1)** that he heard the deceased ask the accused how much money he needed to allow them to pass does not appear to be in harmony with the utterances attributed to the accused. It would appear it was the deceased who was attempting to bribe the accused and which was rejected. We cannot therefore read malice from the conduct of the accused. What emerges is a scenario where the accused was compelled to act the way he did by the action of the deceased. We have evidence on record that previously the same night an escaping motorist who was suspect to trafficking on human beings, almost overran the accused at the same barrier.

The action by the accused to shoot at the vehicle was justified in the circumstances. It is unfortunate that the deceased was fatally wounded. The fact that the other two shots did not hit the vehicle further persuades me that he intended to deflate the tyres so as to immobilize the motor vehicle driven by the deceased.

The upshot of my analysis of evidence on record is that the prosecution has failed to prove their case against the accused . I accordingly acquit him of the offence of murder. He is set at liberty unless if otherwise lawfully held.

DATED at MARSABIT this 6th DAY of JULY 2016

KIARIE WAWERU KIARIE

JUDGE