



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA Criminal Case 19 of 2004
REPUBLIC.....PROSECUTOR

VERSUS

1. KIPSIGEI COSMAS SIGEI }
2. KIPKEMOI PHILIP NGERECHI }.....ACCUSED

JUDGEMENT

KIPSIGEI COSMAS SIGEI and KIPKEMOI PHILIP NGERECHI are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 26th day of June, 2004 at Ebushitinji Sub-location in Butere/Mumias District of the Western Province, the accused jointly murdered OCHANGO KWEYU.

On 26th June, 2004 there was to be a burial of one SIANJE at Elukaka village. PW1, PAUL HENRY MANANE testified that on that date 26/6/04 he joined demonstrators who had carried the coffin of the deceased SIANJE heading to the Chief's Camp at Ebushitinji. The demonstrators were singing funeral hymns and danced sukuti. There were human rights activists who had a video and were taking pictures. When the demonstrator's reached the Chief's Camp they heard gun shots and PW1 was shot in the abdomen. He was admitted for two months at Kakamega Provincial General Hospital. According to PW1 there were about 200 to 250 people in the demonstration.

PW2, ROBERT SAKWA ONDUME was a cousin to the late NIMORO OKWAYO SIANJE. He left Nairobi on 22.6.04 and attended the burial ceremony. PW2 testified that Human Rights Activists attended the burial as it was alleged that the deceased had been tortured. On 26.6.04 there was a demonstration from the deceased's home to the Chief's Camp and people sang funeral songs, danced sukuti and carried twigs. On arrival at the Chief's camp there was nobody but suddenly the A.P.'s emerged and started shouting at them. Soon there was shooting and PW2 was shot on his thigh. He was treated at Bukura Health Centre and later transferred to Kakamega Provincial General Hospital. In the process Ochango was shot and he died out of the injuries he sustained.

PW3, WILSON KWEYU ANDEKA was the father of the deceased, ESAU OCHANGO KWEYU. He identified the body of his son for postmortem purposes on 1/7/2004. The body's head had been blown off.

PW4, REV. MOSES SHIUNDU MASAKHWE was the grandfather of the late SHIANJE. He too joined the demonstration towards the Chief's camp with the demonstrators singing and carrying twigs. He heard gun shots. PW4 heard the A.P.'s telling the crowd to go back. He hid at a maize farm and later went back to the Chief's Camp only to find another grandson had been killed. His body fell near the coffin of the other grandson.

PW6, HARRISSON MANYASI LUBANGA participated in carrying the late Shianje to Ebukura Health Centre on a wheel barrow

on 9.6.2004 at 8.30 a.m. The deceased died upon reaching the Hospital and it was alleged that he had been tortured by the police. PW6 attended the funeral of Shianje on 26.6.04. He found a group of human rights activists who stated that they wanted to demonstrate against torture and would take the body of Shianje to the Chief's office. They had video and took pictures. They asked people not to take weapons. People sang funeral songs and danced sukuti. After reaching the Chief's Camp A.P.'s emerged and started shooting. PW6 saw the accused who asked for the person who was taking video to surrender the film and this was complied with.

PW7, NEWTON MUKUBA LUBANGA saw the demonstration but he did not participate. The demonstrators were about 100 to 200 and had twigs and were dancing sukuti. The crowd spread to a distance of about 100 metres.

PW8, JOHN KAMANDA MUCHEKA was at the funeral on 26/6/04. He used to work for an Organization called People Against Torture then. He had visited the deceased's home earlier on 24/6/04. He was with two other workmates and went to see the Acting Officer Commanding the Butere Police Division, MR. JULIUS GITAHI.

On 26/6/04 after consultation with the father of the late Shianje, it was resolved that a peaceful demonstration was to be held. Demonstrators had banners condemning torture. On reaching the Chief's camp the APs emerged and started shouting. There were two APS who are the two accused. The 1st Accused warned PW8 that he should go away otherwise he would be shot. Later police came in a Land Rover. The Chief's office had its doors broken.

PW10, PETER MBUGUA KABA, gave the same testimony as PW8. He worked for People against Torture in Nairobi. He was the one with a Video filming the demonstration. As the procession got near the Chief's Camp, APs emerged and started shooting towards the mourners. PW10 was told to hand over his video by the 1st Accused which he did. Police came and they told the mourners to go away.

Several police officers visited the scene and testified in court. PW11, CHIEF INSPECTOR MOHAMED OSIEMO visited the scene. He observed that windows were shattered and some bricks were lying on the ground. He saw two pools of dry blood some 30 metres from the Chief's Office. There were branches of trees on the compound. He picked one fired bullet head near the Chief's office and an empty cartridge near a cattle dip. He was given 7 live and 6 fired rounds of ammunition. He also took two G3 Rifles and a panga, a compact disc and some banners.

PW12, CORPORAL BENJAMIN WECHULI MUKINISA was the Scenes of Crime Officer. He visited the scene and took photographs. PW13 IS CHIEF INSPECTOR JOSEPH MUSYOKA who visited the scene on the same day 26/6/2004. He observed that there were stones around the scene and a coffin near the door of the Chief's office. PW14, INSPECTOR SHADRACK JUMA also visited the scene and assisted in having one of the injured victims to be taken to hospital. He collected a panga, pieces of glass from window panes, iron rod from the door of the Chief's office and nine expended cartridges and a video. He handed over the investigations to Chief Inspector Mohamed Osiemo. He was given the G3 rifles by the two accused persons. That of the 1st accused had 5 rounds of ammunition and that of the 2nd accused had 8 rounds of ammunition.

PW15, JOHNSTONE MUSYOKI MWANGALA is a firearms examiner. He testified that one of the G3 Rifles was used to fire 7 cartridges while the other riffle was used to fire 3 spent cartridges. PW16, NEHEMIAH BITOK Acting Superintendent of Police testified that he visited the scene the same day and found the other police officers and two District Officers at the scene. The deceased body that had been shot was about 10 to 15 metres to the right of the Chief's office. PW17, INSPECTOR JOSEPH NAIBEI was one of the first Police Officers to reach at the scene at about 9.00 a.m. He saw broken glass and a sharp metal bar and bricks scattered on the compound. The metal bar was next to the Chief's Office. He found the two accused persons together with one Assistant Chief, Charles Anekeya at the scene. Charles Anekeya was PW19 and was the prosecution last witness. He was notified about the incident by a fellow Assistant Chief by the name James Ingonga through his mobile phone. He went to the scene and found people scattered while others were running from the

chief's camp. The 1st accused informed him that there was a demonstration. PW19 called the area District officer and informed him about the incident.

I do note that the case was initially part-heard before Justice G. B. M. Kariuki with the aide of assessors. Justice Fred Ochieng took the evidence of the 2nd accused without the aid of assessors. I took over and heard the parties submissions without assessors.

The two accused persons were put on their defence and gave sworn testimonies. The 1st accused testified that he had rescued the late Sianje on 9th June, 2004 at about 5.00 a.m. The deceased was about to be lynched by the public on allegation of theft. The deceased died while being taken to Bukura Hospital on a wheelbarrow. The 1st accused went to rescue the deceased in the company of Corporal Alela and A.P.C. Liyai.

On 26/6/04 the 1st accused was at the Chief's camp at Ebushitnji. It was a Saturday and the Chief's office was closed. The accused was in the compound with his wife and child. He saw about 200 people carrying branches of trees, pangas, stones and metal rods. They entered into the compound and started throwing stones aimed at the accused. The 1st accused further testified that they retreated towards the door of the Chief's office.

The mourners threw stones that broke the windows of the Chief's office. 1st accused's evidence is that they shot several times in the air to warn the crowd that had reached about 4 metres away but the mob kept on getting angry and swinging forward. In the process of shooting, one person fell and he later realized that two others had been shot. They called the D.C.'s office at Butere-Mumias and the Butere Police who went to the scene.

On his part the 2nd accused gave sworn testimony. He gave the same evidence as that of the 1st accused. He stated that there was a construction site nearby and the mourners picked stones from the site and threw at the accused. He did not go to rescue the late Sianje on 9th June, 2004. The deceased claimed that he had taken poison (cattle dip) because he feared being killed by the mob. He died on the way to hospital. An inquest file was opened at Butere.

The 2nd accused testified that he fired nine shots in the air. His life was in danger and there was tension. The crowd did not disperse, they reached the Chief's office and began breaking windows including those of the armory. The mourners had broken into groups and some were behind the office. His rifle had the full 20 rounds capacity. The 2nd accused testified that they had no communication device with them. He was hit with a stone.

From the prosecution evidence, it is established that one Sianje died on 9/6/04. There was no Post mortem report produced so as to establish the cause of the death of Sianje. Sianje was to be buried on 26/6/2004 at Ebukaka village of Ebushitnji Sub-location in Butere/Mumias District. The mourners accompanied by Human Rights Activists from an organization known as "People against Torture" organized a demonstration upto the Chief's Camp at Ebushitnji. This was on 26th June, 2004 in the morning. The villagers alleged that the late Sianje had been tortured to death by the Administration Police officers at the Chief's camp.

The mourners numbering about 200 proceeded with the coffin of the late Sianje upto the Chief's camp. Some of the mourners had twigs from trees while others carried banners. The demonstrators sang funeral songs. There was a video camera which was used to record the demonstration.

Upon reaching the Chief's camp, the mourners managed to enter the compound. There were only two Administration Police officers at the Chief's camp who were armed with G3 rifles. These are the two accused persons. A confrontation ensued whereby the accused tried to repulse the crowd while the crowd defied the police.

The police officers who visited the scene did testify that they found at the scene stones, metal bars, twigs, a panga and the Chief's

office's windows were broken. PW11, Chief Inspector Mohamed Osiemo's testimony was that the mourners were not violent and that the panga found at the scene was planted by the accused persons. I do consider this testimony to have been the witness's own view as he was not an eye witness. The most important issue is whether the accused's lives were in danger and whether the accused's action was reasonable and just given the circumstances.

The accused's testimony is that their lives were in danger. They kept on shooting in the air but the mourners would not disperse. The firearms examiner, PW15, Johnstone Musyoki Mwangala testified that one of the rifle fired seven (7) cartridges while the second one fired three. The second accused's testimony is that he fired twelve times and surrendered eight live rounds of ammunition. PW14, Inspector Shadrack Juma recovered the G3 rifles which the accused had. He testified that the 1st rifle which was in the possession of the 1st accused had five rounds while that of the 2nd accused had eight rounds. This confirms the 2nd accused's testimony that his rifle had the full capacity of 20 rounds of ammunition and that he fired twelve times.

PW8, John Kamanda Mucheke, testified that the accused fired at him and some of the bullets hit the wall. One of the accused aimed his gun at him and he fell down and rolled. The accused asked his colleague to hand over the Video which he did as this demand was made at gun point. I do not think that PW8 managed to dodge bullets by falling and rolling and that the accused aimed their guns at him. The witness called the acting O.C.P.D., Julius Gitahi who came and he briefed him what had happened. It is clear that the accused did not have the time to arrange the scene and appear as if they were stoned. PW19, the area Assistant Chief went to the scene while some people were running from the scene. He described the scene as littered with bricks and broken window panes.

Section 203 of the Penal Code defines murder as follows:-

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

Malice aforethought is defined by section 206 of the Penal Code in the following terms:-

- 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 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.*

The Prosecution is required to prove that the two accused persons had malice aforethought in this case. The two accused person's testimony is that they were not aware of the procession and were caught unaware. The procession was not licenced and they tried to plead with the mourners who were demonstrating.

Did the accused have the intention to cause death or do grievous harm? Or did they intend to commit a felony? The accused contend that their act of shooting was aimed at scarring away the mourners and that they did shoot on the air. They had no intention of killing anyone. They had their guns fully loaded, meaning each had twenty rounds of ammunition. 1st accused returned five live bullets while the second one returned 8 live bullets as per their testimony and that of PW14, Inspector Shadrack Juma. If this is the case then the total shots made by the accused were twenty seven. Two people were injured while one sustained fatal injuries.

From the prosecution evidence and the testimonies of the accused, I do find that there was no malice aforethought on the part of the accused. Although malice aforethought does not require a long period of time or prior intention for it to be formed. I do not find any evidence to prove that the accused were shooting to kill having resolved to kill the mourners. Indeed the accused engaged the demonstrators in conversation and if they intended to kill they could have killed many people. Further, there was a mobile armory which had weapons and they could have re-loaded their weapons.

Having found that there was no malice aforethought on the part of the accused, it therefore follows that the accused are not guilty of the offence of murder they are facing. The prosecution evidence has established that the deceased, Ochango Kweyu met his death as a result of the shooting by the accused. On their part, the accused contend that their lives were in danger and they shot in self defence. They were fearing for their lives. The mourners were violent and were throwing stones at them. The 2nd accused contends that he was hit by a stone and that there was a construction site nearby.

The Blacks Law dictionary defines self defence as:-

“The protection of one’s person or property against some injury attempted by another. The right of such protection. An excuse for the use of force in resisting an attack on the person, and especially for killing an assailant. The right of a man to repel force by force even to the taking of life in defense of his person, property or habitation, or of a member of his family, against any one who manifests, intends, attempts or endeavors by violence or surprise, to commit a forcible felony. Essential elements of “self-defense” are that defendant does not provoke difficulty and that there must be impending peril without convenient or reasonable mode of escape. The law of “self-defense” justifies an act done in the reasonable belief of immediate danger, and, if an injury was done by defendant in justifiable self-defense, he can never be punished criminally nor held responsible for damages in a civil action.

A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor’s imminent use of unlawful force. One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes; (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger. It may be reasonable to use nondeadly force against the adversary’s nondeadly attack (i.e. one threatening only bodily harm), and to use deadly force against his deadly attack (an attack threatening death or serious bodily harm), but it is never reasonable to use deadly force against his nondeadly attack.”

Given the circumstances of this case the crucial issue is whether the accused’s lives were in danger. Is the accused’s contention that they felt their lives were in danger reasonable in the circumstance. Did the accused use reasonable force to repel the demonstrators?

The accused were armed with rifles which were loaded with live ammunition. On the other hand, the demonstrators had twigs, leaves and stones. Although the accused allege that the demonstrators had pangas, only one panga was found near the deceased’s body. It is not proved that indeed it was the deceased who had the panga as the produced photograph show that he had a twig in his hand.

In the case of *PALMER VS REGINAM, 1971 I ALL E.R. 1079* it was established that:-

“where the evidence is sufficient to raise the issue of self defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self defence.”

Given the circumstances of the case, I do find that the appellants did not act in self defence. Their lives were not in any eminent danger. Although they contend that there was no communication equipment, still they would have held the demonstrators at bay for quite sometime. Indeed it did not take long before police officers arrived at the scene. The 1st accused testified that he shot on the air as well as on the ground. This was dangerous as the demonstrators were on the ground. Infact it is the 1st accused’s testimony that he called the Police at Butere and the D.C. Butere/Mumias.

I do find that the accused are guilty of the offence of manslaughter contrary to section 202 of the Penal Code as read with section

205 of the same code. Their act of shooting at the crowd was unnecessary in the circumstances. They used unnecessary force to disperse the crowd. Some of the demonstrators even went closer to the accused and they engaged in discussions. I do not find that the demonstrators had the intention of killing the accused.

In the end, I do not find the accused guilty of the offence of murder as charged. I do however find them guilty of manslaughter contrary to section 202 as read with section 205 of the Penal Code. I do convict them accordingly.

Delivered, dated and signed at Kakamega this 7th day of October, 2009.

SAID J. CHITEMBWE

J U D G E