



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KWACH & TUNOI, JJ.A. & BOSIRE, AG. J.A.)

CRIMINAL APPEAL NO. 31 OF 1996

BETWEEN

PATRICK MUGO MUCHIRA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction of the High Court of Kenya at Kisii (Mr. Justice T. Mbaluto) dated 22nd September, 1995

IN

H.C.C.R.A. NO. 214 OF 1995)

JUDGMENT OF THE COURT

This is a second appeal from the decision of the High Court of Kenya at Kisii (Mbaluto, J.) upholding the judgment of the senior resident magistrate convicting the appellant, Patrick Mugo Muchira, on a charge of manslaughter contrary to section 202 of the Penal code.

The facts leading to the appellant's conviction are relatively simple. The appellant was at the relevant time an administration police officer attached to Mongori Chief's camp in Nyamira District of Nyanza Province. On April 4, 1990, there was a fracas at Chepilat Market matatu stage involving the deceased, a local tout and other (Manambas) on one side, and the matatu vehicle owners on the other. The cause of the chaos was the demand for higher charges by the touts, a matter obviously that did not find favour with matatu vehicle owners. A report was made to the Chief's camp and the appellant and Sgt. Abuga proceeded to the scene of the chaos at the market. The appellant was armed with a G.3 rifle while Sgt. Abuga had a baton.

What exactly transpired before the deceased met his unfortunate death has not come out clearly in the evidence tendered by the prosecution during the trial. But in his defence in the form of a sworn testimony the appellant said:-

“The scene was at Chepilat Bus Stage. On arrival there they identified the suspect. We got near him and he ran away towards Mokomoni direction. When he was running he had an iron bar and a stone. We then followed him slowly and he got into the maize field. It had rained that day. We tried to surround the

plantation where he was and he started to throw stones from there. The complainants and the sgt. Went towards one direction and I followed the other direction. I had a G. 3 F.M.P. Rifle. The Sgt. Had a rungu. The plantation was about 3 acres. There was a homestead inside the plantation. When he emerged he emerged on my side. He saw me and I told him "You Stop!" he did not stop. He then threw a stone towards me. I was then 15 metres away.

I then shot in the air to scare him. The stone he threw did not hit me. I told him to put the iron bar and the panga down but he did not do so. He began to approach me speedily. I repeated that he should put the weapons down and that I would shoot him. He did not obey. He neared me and I shot him directly. He was about 4 metres from me by then. I shot him at the chest as he was facing me. The others came to us. When I shot the suspect he fell down. I had a whistle and I blew it and the others arrived. We went to where he was lying. He had died on the spot."

However, the post-mortem report on the cause of the death of the deceased and which was produced in the trial court without any objection from the appellant, who was ably represented by an experienced counsel, showed that the deceased was shot at the back meaning that the bullet caught him from the rear while fleeing from the appellant. The learned judge in his judgment fully went into this question and upheld the trial magistrate's decision. In our view, we are satisfied that there was sufficient evidence to justify that finding.

The learned judge observed that the appellant's defence was false as at no time did the appellant face the deceased whom he had no cause to be chasing. The plea of self defence, the learned judge held, was not in the circumstances available to the appellant. But he was mandated by duty to apprehend the deceased, if need be for it is part of the obligations and duties of a police officer to take all steps which appear to him necessary for preventing crime and to bring an offender to justice.

But was the killing of the deceased by this police officer justified in the circumstances? A killing of a person can only be justified and excusable where the accused's action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For the plea to succeed it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.

The case of Palmer v. Reginam [1971] 1 ALL ER 1077 is an authority on the subject before us:-

The Privy Council in pertinent part said at P.1088C:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances..... It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction....."

The senior resident magistrate who tried the case, in our view, fully and carefully considered all the evidence tendered in court, especially the plea by the appellant that he shot the deceased in self-defence. He made a finding that the facts conclusively proved that the appellant was guilty of manslaughter. The learned judge of the High Court on hearing the appeal also considered all the facts and made a concurrent finding upholding the trial's magistrate's decision. We have no reason to disagree with them.

The grounds of appeal submitted upon by Mr. Siganga were prepared by the appellant himself and the petition of appeal was lodged through the prison. The complaint in the main is on facts. But there is no appeal to this court on facts.

In the event, we are of the opinion that the appellant was properly convicted. We dismiss the appeal.

Dated and delivered at Kisumu this 13th day of March, 1997.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR