REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, TUNOI & LAKHA, JJ.A.)
CRIMINAL APPEAL NO. 65 OF 1993

BETWEEN

JAMES MURIMI MATHENGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court at Nairobi (Mr. Justice Mango) dated 18th June, 1993
in
H.C.C.CR. NO. 6 OF 1992)
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JUDGMENT OF THE COURT

James Murimi Mathenge (the appellant) was arraigned before the High Court of Kenya at Nairobi on a charge of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on 15th October, 1990 at Kibera Silanga within Nairobi area he murdered Achuwo Amayo (the deceased). At the end of a trial before the late Mango, J. the appellant was found guilty and sentenced to death. It is against his conviction and sentence that he now appeals to this court.

The material facts which are necessary in order to enable the points of law raised to be examined and determined are these. Patrick Acheya (PW 2) was a barman at Kagwira "B" Bar in Kibera Silanga Slums. On 15th October, 1990 at about 11:30 p.m. as he was preparing to close a person entered and went straight to him at the counter. The door was open and there were then few patrons. The person suddenly drew a gun or revolver and ordered Patrick to surrender the day's collection and a radio which was at the counter.Near the door and closer to the counter was the deceased, also a bar worker. Instinctively, he suspected the person to be a robber. The deceased ran out and bolted the bar door from outside and dashed to a nearby Kanu Youth Office where he informed the KANU youthwingers, including Dominic Nzomo (PW 3), that some robbers had attacked the bar. The deceased and the youthwingers then rushed to the bar where they found that person still there. The person armed with the gun is the appellant.

The appellant was apparently known to the KANU youthwingers as a policeman but the deceased was not convinced so. The deceased once again went out of the bar and bolted the door from outside locking the appellant and the rest of the patrons inside. The deceased insisted that he must call the police. The appellant shouted at the deceased to open the door or otherwise he would shoot but the deceased adamantly refused. The appellant then fired at the wooden door towards the direction from which the deceased's voice came and the deceased screamed that he had been shot. Panic ensued and the patrons and

the KANU youthwingers broke down the door and rushed out. The deceased was found slumped on the ground outside the KANU Youth Office.

The police from Kilimani Police Station were called to the scene and rushed the deceased to the hospital. A few days later he succumbed to his injuries. PW 3 knew where the appellant could be found that night for he led police officers Sgt. Peter Gitao (PW 7) and others to the house of the appellant's girl friend. After a search a Smith and Wesson Revolver .38 calibre, serial number R.476328 was recovered in a ciondo basket hanged on the wall. It had five live rounds of ammunition and one spent cartridge. The appellant was then arrested.

The appellant was a police constable attached to Makongeni Police Station, Nairobi. During the fateful night he was assigned duties of guarding prisoners at Kenyatta National Hospital. He had relieved P. C. Cheruiyot at about 10:25 p.m. and on changing guard he was given the said gun with six rounds of ammunition. The appellant so far does not dispute these latter facts.

A post-mortem examination on the body of the deceased revealed that the deceased had an entry bullet wound on the right groin. The intestines were torn and there was a massive bleeding in the abdominal cavity. The cause of death was found to be massive haemorrhage to the abdomen due to torn intestines consistent with a bullet injury.

The appellant in his unsworn testimony raised the defence of alibi. Though he was at the hospital guarding prisoners he left for home at about 10:30 p.m. as he was feeling unwell. On his way he was accosted by three strangers who forced him to accompany them to Ngumo Estate for tea. Before reaching there they attempted to snatch the gun from him but he struggled with them, freed himself and ran away. He hid the gun at a certain woman's house after which he called the police from a local public call box. He led the police to where he had kept the gun. He was informed that he had injured someone and he was placed in the cells.

The gun was examined and found to be mechanically sound and in good working condition. It had recently been fired. The empty cartridge was microscopically examined and found to have been fired from the said gun. The learned judge found as a fact that it is the same bullet that the appellant fired that hit and killed the deceased. He discounted the appellant's defence. As to whether the appellant had the requisite malice aforethought when he shot the deceased the learned judge had no hesitation in holding that when the appellant fired in the direction of the deceased, he had knowledge that his unlawful act was likely to cause death or grievous harm to the deceased.

On the basis of the aforegoing the learned judge convicted the appellant as charged. It is complained by Mr. Muigua, learned counsel for the appellant, in grounds five and eight of the grounds of appeal that the learned judge erred in finding that there was sufficient evidence to resolutely link the appellant with the death of the deceased. The more substantial issue raised in these grounds is that the appellant had not been properly identified as having been the person who was at the locus in quo. The whole question in these two grounds of appeal turns on whether the appellant was positively identified as the person who shot the deceased at Kagwira "B" Bar at Kibera Silanga. It has not been suggested that there was no adequate or insufficient lighting at the bar so as to diminish the factors for clear and positive identification.

PW 2 was in the bar for over half an hour with the appellant and had no problem identifying him. PW 3 had in fact known the appellant as a policeman and even led the police to the house of the appellant's girlfriend. There is therefore everything, as we view the whole evidence, which justifies our conclusion, as indeed of the learned judge, that the appellant was at the scene and inside the bar before the fatal shot was fired. In the result none of these grounds of appeal avail the appellant and it must follow that they are rejected.

With the issue of identification out of the way, we now turn to the issue of alibi raised at the trial as a defence by the appellant. We dispose of this issue by simply saying that having been seen at Kagwira "B" Bar in Kibera Silanga, at the material time, the appellant's defence of alibi is definitely not available to

him.

Mr. Muigua further argued that there was insufficient evidence to find that the bullet that the appellant fired did in fact kill the deceased. The appellant did not deny that the gun in question was in his possession during the material evening until the police retrieved it. P.C. Cheruiyot (PW 1) had duly handed it over to the appellant with six rounds of ammunition. When PW 7 recovered it one bullet had been spent.

The bullet recovered from the deceased's cavity could, as found by a fire-arms examiner, William Lubanga (PW 11), have been fired from the said gun. We are of the considered view that there was sufficient nexus between the appellant, the gun and the fatal shot.

Finally, Mr. Muigua urged us to find that when the appellant fired in the direction of the deceased he had no knowledge that his act was likely to cause death or grievous harm to the deceased and that this did not constitute malice aforethought sufficient to found a conviction on a charge of murder. There is ample evidence to establish that the appellant while armed with a gun ordered the deceased "to open the door or he would shoot".He knew or ought to have known that a wooden door could not safely shield the bullet fired from his gun from wounding or killing the deceased. We agree with the learned judge that when the appellant fired in the direction of the deceased he had knowledge that his act was likely to cause death or grievous harm to the deceased. Also, the plea of provocation does not arise. We content ourselves that the fatal shooting of the deceased occurred as the result of a voluntary act of the appellant which was intentional and unprovoked. There are no circumstances to be found in the evidence which was tendered in court which would alleviate the charge preferred so that it is reduced to manslaughter.

On our part we are satisfied that the conviction is safe. We find no grounds, notwithstanding Mr. Muigua's persuasive submissions to find otherwise. This appeal fails and is accordingly dismissed. This is our order.

Dated and delivered at Nairobi this 30th day of May, 1997.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR