

**IN THE COURT OF
APPEAL AT NAKURU
(CORAM: MATIVO, GACHOKA & ODUNGA,
JJ.A.) CRIMINAL APPEAL NO. NAK E009 OF
2022 BETWEEN
EVANS MALIACHI WIYEMA.....APPELLANT
AND REPUBLIC**

.....

RESPONDENT

*(Being an appeal against the judgment of the High Court at Naivasha
(R. Mwongo, J) dated and delivered on 22nd February 2021 and the sentence
delivered on 28th July 2021*

in

Criminal Case No. 38 of 2016)

JUDGEMENT OF COURT

1. This is an appeal by the appellant, **Evans Maliachi Wiyema**, against the judgement delivered on 22nd February 2021 by the High Court at Naivasha (**R. Mwongo, J**) in High Court Criminal Case No 36 of 2026. The appellant was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code.**, particulars of which were that on 25th July 2014 at Crescent Island in Lake Naivasha, he murdered Moses Kinyanjui Wanyoike (deceased).

2. The evidence was that on 25th July 2014 at about 8.00am
PW1, Douglas Tutu, PW2, Johnson Ndichu and the

deceased went fishing at Crescent Island. They fished until about 3.00pm, but upon realising that the catch was not much, they decided to fold their nets. Whilst they were still in the water, PW3 accompanied by some police officers in uniform arrived in a vehicle. They were ordered to stop but fearing arrest, since they did not have fishing licences, they went into deeper waters among the reeds. A boat was brought and deployed to search for them. As the boat approached, the fishermen ducked beneath the hyacinth. According to PW2, the boat had one police officer and two Crescent Island guards in it and he heard some shots ring out as they reached some reeds where the fishermen hid. The occupants of the boat threatened to shoot PW2 when they spotted him before pulling him out of the water after which they placed him in the boat and took him to the shore before returning to search for the others.

3. PW2 denied that they had weapons and that they were involved in theft. In cross-examination, he said that shots were fired towards them; that he heard them whizz past him; that the shots were not into the air; that he did not know that a sheep had been stolen the previous day

from

the farm of one Barry Gaynor; that they had five big fish in a gunny bag but no sheep; and that he did not see the deceased being shot.

4. According to PW1, although inside the water, he was able to see the appellant who was 3 metres away since the water only reached the level of his eyes. He saw the appellant fire his gun and the deceased's body floated up. When he called the deceased, who was bleeding in his head, there was no response. It was then that he stood up and surrendered. It was his evidence that the appellant threatened to shoot him if he did not advance fast enough. He was then taken back to the shore where he was asked "*where is the goat?*" to which he responded that he knew nothing about it. According to PW1, the deceased's body was not taken out of the water.

5. The two fishermen were then handcuffed together and taken to the police station where PW1 recorded a statement. The police officers asked him to show them where the deceased's body was, and the next day he took the police to the scene but they failed to find the body. Both PW1 and PW2 were later charged with theft

of sheep

in **CMCR Case No. 1420 of 2014** but were acquitted. He stated that the deceased neither had a panga nor did they at any time have mutton.

6. PW3, Henry Ndungu Mungai, a security manager at Crescent Island narrated that in the evening of 24th July 2014, they realised that one sheep was missing and reported the same to the owner of the camp, Barry Gaynor. The following day on the instructions of Barry, he reported the incident at the police post and was referred to Mirera Anti Stock Theft Police Unit where he reported the matter but was informed that all officers were out, although there were some patrolling within Karagita area who would be asked to go to Crescent Island. On his way back, he met two police officers from whom he learnt that they had been detailed to visit Crescent Island. At the Island the police officers proceeded to the grazing area while PW3 went to talk to Mrs Barry. While updating Mrs Barry, he heard 3 gunshots and when he headed towards the direction of the gunshots, he met the police officers, one of whom was the appellant, in the company of two people. The officers were carrying a gunny bag in which was the

head, skin and

hooves of the sheep. He was informed by the police officers that the two people were found in the sheep pasture with the remains of the sheep in the gunny bag and that they had tried running away. PW3 drove the police officers and the two people to the Anti-Stock Theft Unit.

7. PW13, Corporal Mapinga, in his evidence stated that on 25th July, 2016 at about 4.00pm, while on patrol in the company of the appellant, they met PW3 at Karagita area; that PW3 informed them he was coming from the camp where he had gone to report theft of sheep at Crescent Island; that PW13 confirmed from the camp that information and was told to assist PW3; that together with the appellant, they proceeded to Crescent Island arriving there at about 5.00pm; that on reaching the farm where the sheep had allegedly been stolen, they saw two people as they approached the lakeside; that they followed the duo who hastily retreated towards the lake; that the officers then split with PW13 going to the left and the appellant to the right and in the process PW13 lost sight of the appellant; that he heard two gunshots; that at that time PW13 and the appellant

were 70 - 100 metres apart;

that on inquiring from the appellant, the appellant informed him that the men they were trailing had pangas; that as the two men were surrendering, he heard a third gunshot and saw the appellant emerge into view with a machete and when he approached where the appellant was, he saw a sheep head, skin and legs; and that he suspected the two men, and arrested them and together they went back to the camp.

8. PW13 added: that he entered the incident in the OB both at Naivasha Police Station and at their Mirera Anti Stock Theft Unit on 25th July 2014 and on 26th July 2014 respectively; that although in both reports they recorded the alleged stock theft and the use of three bullets, they did not report that there was a third person at the scene who attacked the appellant and was shot; and that the guns which the two officers had used were returned to Mirera Anti Stock Theft Unit for safe custody and were later handed over for forensic analysis.
9. According to PW7, Nathaniel Waruiru Njuguna, a boat operator on Lake Naivasha, on 27th July 2014, the family of the deceased sought their help in retrieving the

deceased's body. In the company of others, they retrieved the body under the papyrus. It was his evidence that the body had gunshot wounds on the temple and the right hand was cut off. The body was thereafter taken by the police. PW7's evidence was supported in material respects by that of PW8, Dennis Omari. The body of the deceased was identified by his father, PW4, Joseph Kamau Njenga on 27th July 2014 after it had been retrieved from the water.

10. On 1st August 2014, PW9, Titus Ngulungu, a pathologist at Nakuru Provincial General Hospital performed the postmortem examination on the body of the deceased. According to him, on the head was an entry gunshot wound located on the front of the right ear with the exit on the left parietal region above the ear. There was a large laceration measuring 50mm diameter on the right wrist and two bruises on the neck. There was an extensive comminuted scar bone fracture on the head and extensive lacerations as a result of the gunshot. He formed the opinion that the cause of death was severe head injury due to a single gunshot on the head.

11. PW12, CIP David Koech Chemngetich who at the material time was attached to Mirera as a platoon commander confirmed that three rounds of ammunition were used at the scene and that during the debriefing of the police officers who had gone to the scene, it was disclosed that the same were used by the appellant who said he did so while effecting the arrests.
12. The investigation was conducted by PW16, Emmanuel Kiptanui Langat, an investigator with Independent Policing Oversight Authority who eventually formed an opinion that the appellant ought to be charged with the offence of murder.
13. Upon being placed on his defence, the appellant, in his sworn evidence stated: that they were on foot patrol at Karagita area on the material day with PW13 when they met PW3 who had reported the theft of a sheep at Crescent Island; that they proceeded to Crescent Island in PW3's vehicle to investigate the theft and when they arrived, they were shown where some sheep were grazing; that they saw some men entering the reeds; that on his suggestion, they agreed to split to catch up with the men, with him going to

the left and PW13 going to the right to prevent the men from escaping; that some places were swampy and soggy; that he shouted to the men to come out while identifying themselves as police officers; that one person came out of the hiding holding a panga at which point he fired a bullet in the air; that the man told him not fire into the air and instead shoot him; that by this time the man was about three metres away; that despite firing a second shot, the man, who was close to him seemed not to be scared; that he shot a third time as he slipped and fell backwards; that when he got up, he did not see the man again.

14. According to the appellant, it was now beginning to get dark but he saw a shiny object and as he went closer, realised that it was a panga; that as he went forward to pick it up, another person came out of the reeds with his hands up; that he picked the panga and grabbed the man and took him to where PW13 was; that he found PW13 holding another young man; that although the men said they were fishermen, he also saw the head of a sheep, four legs and a skin; that shortly after, PW3 arrived and confirmed that the feet, head and skin of

the sheep were

from his flock; that the men said they were only two; and that they all boarded PW3's vehicle and proceeded to Mirera Anti Stock Theft Camp and the men were eventually charged for stock theft.

15. The appellant added that the following day he learnt from Naivasha Police Station that one of the persons had remained in the water at the lake.

16. In his judgement delivered on 22nd February 2021, the learned Judge found: that it was clear from the overall evidence of the appellant, that he shot the deceased from a distance of about 1 metre; that he knew of the fact that this person was the one who attacked him; that his attacker was not PW1 or PW2 and that the third person went or ran into the water; that the deceased's body was found on 27th July, 2014 and it was duly identified by the deceased's father (PW4), with the help from PW7 and PW8 and some divers; that a post mortem was carried out by Dr. Ngulungu PW9 who formed the opinion that *"the cause of death was severe head injury attended by skull fractures and extensive brain lacerations due to a single gunshot to the head"*; that given all the foregoing circumstances the

appellant acted with *mens rea*, recklessly and in violation of the law which actions were made all the more unacceptable by the fact that he did not report the incident but instead chose to assist in prosecuting the fishermen; and that his actions did not add up and did not support the defence of self-defence.

17. The learned Judge found the appellant guilty of murder and convicted him for the same. In his subsequent decision titled "Judgement on Sentence", the learned Judge, on 28th July 2021 sentenced the appellant to Twenty Years' (20) imprisonment with effect from the date of conviction. He, however, suspended the latter ten (10) years should the appellant attend a Programme of Rehabilitation to include counselling over a period of three (3) years designed by the Probation Officer and not get involved in any offences or matter of a criminal nature for the next five (5) years. He directed that the court shall in the fifth (5th) year of the sentence term review the appellant's conduct and sentence based on Reports of the Probation Officer and the Prison's Service.

18. Dissatisfied with the decision, the appellant appeals to this Court on the grounds that learned Judge erred: in concluding that the appellant shot the deceased with malice aforethought; in relying on surmise and conjecture as the basis for convicting the appellant and rejecting the appellant's defence of self-defence; in dismissing the appellant's defence and relying on evidence that was never adduced during the trial that the deceased could not have been a threat to the appellant when he deceased was in water; in failing to consider evidence of criminal and violent character of the deceased which supported the appellant's defence; in dismissing the defence of self- defence by the appellant when the same was supported by cogent evidence; and in sentencing the appellant to serve 20 years imprisonment which was excessive in the circumstances.

19. When this appeal was called out for virtual plenary hearing on 13th May 2025, the appellant was represented by learned counsel, Mr Kenda while learned Senior Assistant Director of Public Prosecution, **Mr Omutelema**, appeared

for the respondent. Both parties relied entirely on their written submissions.

20. Although Mr Kenda informed us that he was relying on the submissions filed by Mr Ongoya together with his own submissions, the only submissions availed to us were those filed by Mr Kenda dated 29th April 2025. In those submissions, it was contended: that the fact of death was not in dispute and that the central issue was whether the killing was unlawful and whether the appellant acted with malice aforethought; that the killing occurred in the course of lawful duty under circumstances that necessitated self-defence and that the burden was on the prosecution to exclude this possibility which the prosecution failed to do; that based on the decision in the case of ***Jennifer Wanjiru Ngángá v Republic [2018] eKLR***, for homicide to constitute the offence of murder under section 203 as read with 204 of the ***Penal Code***, the offender must be shown to have caused the death by an unlawful act or omission and “of malice aforethought”; that in this case, there was no evidence to show that the appellant intended to kill or cause grievous harm as the

use of the firearm was spontaneous, in response to a perceived imminent threat; that in assessing whether malice aforethought existed, the factors to be considered as stated in **Republic v Tubere s/o Ochen (1945) 12 EACA** are the nature of the weapon used, the manner in which it was used, the part of the body targeted, the nature of the injuries inflicted either a single blow or multiple injuries and the conduct of the accused before, during and after the incident; that in this case, the appellant, a police officer, acted in self-defence and reference was made to section 61 of the **National Police Service Act, 2011**, paragraphs 1 & 2 of Part A of the Sixth Schedule to the Act, and the case of **IP Veronica Gitahi & Another v Republic [2017] eKLR** where it was held that the provisions of the **National Service Act** regarding the use of force and firearms by the police in self-defence are complete and exhaustive and there is no room for applying the principles of Common Law and that the use of force must be the last resort; that in this case the deceased was armed with a machete and the appellant warned him before firing two shots in the air but the

deceased was not deterred and that the deceased's death was only caused by the fact that the appellant fell backwards and the bullet hit the deceased's head; that the appellant was justified and acted in self-defence and his conduct does not support a finding of malice aforethought; that the decision of the learned Judge was contrary to the holding in **Ahmed Mohammed Omar & 5 Others v R [2014] eKLR** where this Court emphasised that self- defence is available not only where actual danger exists but also where an accused reasonably perceives imminent danger; that on the authority of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** imposing a 20 year sentence, in light of the appellant's belief that he was acting lawfully and in self-defence, was harsh and manifestly excessive; and that the appeal ought to be allowed, the conviction quashed and the appellant be released. Alternatively, we were urged to set aside the sentence and substitute therefor a more lenient and appropriate sentence.

21. On behalf of the respondent, it was submitted: that, on the authority of **Nebart Ekalta v R (1994) eKLR**,

Ernest

Sami Bwire Abanga Alias Onyango v Republic Criminal Appeal No. 32 of 1999, Karani & 3 Others v R (1991) KLR 622 and **Morris Oluoch v Republic Crim App No. 47 of 1996**, in order to discern an intention to kill it should consider whether the weapon used was lethal or not, the manner in which it was used, the part of the body targeted, whether the injuries were aimed at vulnerable part of the body or not, whether the injuries were inflicted repeatedly or not and finally the conduct of the accused before, during and after the attack; that the fact that the deceased was shot in the head by the appellant at point blank range in full view of PW1 leaves no doubt that the appellant intended to kill or grievously harm the deceased; that the learned Judge properly analysed the prosecution evidence and properly concluded that the appellant had acted with *mens rea*, recklessly and in violation of the law and especially since he did not report the incident; that the prosecution evidence was water tight and the trial court properly evaluated the evidence and came to the correct conclusion that the appellant shot the deceased with malice aforethought; that

on the authority of **IP Veronica Gitahi & Another v Republic** (supra) the defence of self-defence

was

inapplicable in the circumstances since the appellant cannot be said to have been acting within the guidelines set in the **National Police Service Act**; that the aggravating circumstances in the case called for an even more severe sentence since the appellant was a police officer who took away the deceased's life without justification and was not remorseful as he lied about the incident; that the sentence was neither harsh nor manifestly excessive; and that the sentence should not be disturbed.

22. We have considered the submissions made in this appeal.

This being a first appeal, our duty, as a first appellate court is stated in **Okeno v Republic [1972] EA 32** in the following terms:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence

and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not

the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

23. The predecessor to this Court had itself appreciated that position in ***Pandya v Republic [1957] EA 336*** when it held that:

"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from

manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact

turning on the credibility of witnesses whom the appellate court has not seen.

24. Section 203 the **Penal Code** provides that:

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

25. In the case of **Chiragu & another v Republic [2021]**

KECA 342 (KLR) this Court restated the ingredients of murder and held that:

“The prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the appellant and that the appellant had malice aforethought as he committed the said act.”

26. All the three ingredients must converge so that in the event that the prosecution fails to prove any one of them the charge of murder must fail. In this appeal it is not contested that the deceased passed away and that his death was caused by a gunshot wound caused by the appellant. What is in contest is whether in inflicting the said fatal injury the appellant had malice aforethought or

whether he did so in self defence. The other issue for
our

determination is whether the sentence meted was harsh and excessive in the circumstances.

27. As to whether malice aforethought has been established.

Section 206 of the **Penal Code** sets out the circumstances which constitute 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 caused death or to do grievous harm to any person whether such 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 such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.***
- c)An intention to commit a felony.***
- d) An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.***

28. This Court in the case of **Nzuki v Republic [1973]**
KLR

171 stated that in the offence of murder it must be committed with the following intentions: -

**“(i) The intention to cause death;
(ii) The intention to cause grievous
bodily harm;**

(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those circumstances to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”

29. It is sufficient to say that the mental element required by section 206 above can be equated to broad guidelines set out in the case of **Tubere s/o Ochen v Republic [1945] 12 EACA 63:**

“The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being

whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene

afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted.”

30. In this case the weapon used was a gun. A gun by itself is a lethal weapon. According to PW1 and PW2, shots were fired at them without any provocation. According to PW1, he was 3 metres away from the appellant when he saw the appellant fire the shot and the deceased's body popped up with injuries on the head. On the other hand, the appellant's evidence was not very consistent. His initial position was that he did not know that he shot the deceased, stating that:

“I did not know I shot him. If I did then he is the person who endangered me with a panga.”

31. In the cross-examination he admitted that the person who confronted him was neither PW1 nor PW2, stating that:

“At Crescent Island I met 2 suspects. I saw 2 suspects. It is true that I was attacked by someone who was not witness 1 or 2 (Tutu or Ndichu). My attacker had a machete...I did not hear PW1 or PW2 say they needed to retrieve their colleague on the material date...During the time of arrest I could not test if there was a third person. It was impossible to trace him. True, the third person went

into the water as he

ran into the water...I spotted only two people at the scene."

32. In his own evidence, the appellant seemed to have fired the third shot without caring where he was shooting for he stated that:

"My attacker attacked me with machete. He was about 5 metres. When he came out of the reeds I could only see him from the hips upwards. The water was at his waist. I shot in the air first when he raised the machete. He advanced towards me, I shot again he continued coming. I shot facing backwards when he was close. When I looked he was not there and I fell. The ground was slippery - it was at the edge of the water. I shot towards attacker. When I got up I did not see him. I did not see any blood in the water." [Emphasis added]

33. Despite being well aware that there was a third person at whom he fired the shot and who was not accounted for, the appellant did not bother to record this in his report. In his own words:

".....I said I fired in self defence. I fired three shots in self defence. There is no mention in the report of the third person. I found the panga at the reeds. This is at the place where the person was in the reeds and where I was. This was not in the water."

34. In his re-examination the appellant, in attempt to clarify his evidence, he stated that:

“At the time of firing [the] third shot, the distance between me and deceased was 1 metre. No one raised any complaint about a third person...At the time, the arrested persons did not raise the issue of a third person. I came to learn of the third person the following day.”

35. The proceedings in Naivasha CMCRC No. 1420 of 2014 -

Republic v Johnson Ndichu and Douglas Tutu - in

which PW1 and PW2 were charged with the offence of stealing livestock were exhibited by PW5 and in those proceedings, the appellant described the shooting incident as follows:

“After a while my colleagues spotted two people near the sheep but outside the stream. They entered the lake and took cover behind the reeds which were inside the water. We kept watch. When I went near I could not see them. I called one of them and challenged them to get out of the water but they did not come out nor respond. I went nearer to get a clear view and I saw one of them. He was holding a machete as though he was ready to kill something. The person is not before court. This is the machete. PMFI 1 P. Exhibit 1. He was coming towards me and so I shot in the air. He told me not to fire in the air but to shoot him. He was by then so close and was about to cut me with the machete. I moved backwards and fired the 2nd fire in the air. The third time when he struck at me I moved backwards but fell and so while shooting the bullet did not go upwards. On waking up I did not see anyone.”

36. From the evidence of the appellant, he was confronted by a person who was neither PW1 nor PW2. That person had a panga. In attempt to scare the person he shot twice in the air but this did not deter the attacker. The third shot was fired when, according to him, the attacker was a metre away and it was directed towards the attacker although he *“shot facing backwards”*. He looked back and the attacker was nowhere and then fell down. The panga that the attacker was carrying was discovered amongst the reeds where the attacker had been. Yet despite this clear evidence, the appellant did not record the presence of the third person and the confrontation between him and the attacker.
37. It is true that the appellant raised the defence of self-defence and it is correct, as held in ***Barisa v Republic (Criminal Appeal 60 of 2022) [2024] KECA 219 (KLR)*** cited with approval the decision in ***Mokwa v Republic [1976-80] 1 KLR 1337***, that:

“Self-defence is an absolute defence even on a charge of murder unless, in the circumstances of the case, the accused applied excessive force.”

38. Did the appellant apply the necessary force in these circumstances? In **I.P. Veronicah Gitahi and Another v Republic** (supra), this Court confirmed the conviction of police officers for recklessly firing their guns and using excessive force, stating that:

“One of the objectives of the National Police Service Act is to give effect to, among others, Article 238 of the Constitution and Article 244, which sets out the objects and functions of the National Police Service, and demands compliance by the police with constitutional standards of human rights and fundamental freedoms. In addition the Act makes express provisions regarding self defence by police officers and the use of force, in particular the use of firearms. Sections 49(5) and 61 of the Act as read with the Sixth Schedule sets out the circumstances under which a police officer may resort to the use of force and firearms. Part A of the Sixth Schedule provides for use of force by the police in the following terms:

“1. A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result.

2. The force used shall be proportional to the objective to be

achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while

adhering to the provisions of the law and the Standing Orders.

3. When the use of force results in injuries—

(a) the police officers present shall provide medical assistance immediately and unless there are good reasons, failing to do so shall be a criminal offence; and

(b) shall notify relatives or close friends of the injured or affected persons.

Part B of the same schedule makes provisions on the use of firearms by the police as follows:

1. 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; and

(b) in self-defence or in defence of other person against imminent threat of life or serious injury.

2. An officer intending to use firearms shall identify themselves and give clear warning of their intention to use firearms, with sufficient time for the warning to be observed, except-

(a) where doing so would place the officer or other person at risk of death or serious harm; or

(b) if it would be clearly inappropriate or pointless in the circumstances.

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

In our view in light of the above express provisions of the National Police Service Act regarding use of force and firearms by the police in self defence, there is no room for invoking section 17 of the Penal Code and applying the principles of the Common Law on self defence. The provisions of the Act are a complete and exhaustive code and demand that a police officer must resort to non-violent means as the first option and to use force only when non-violent means are ineffective. In addition, even where the use of force is justified, the officer does not have a carte blanche in the use of force. The Act demands that the force used must be proportional to the objective to be achieved, the seriousness of the offence and the level of resistance, and still, only to the extent necessary. When it comes to use of firearms, the Act makes that a last resort option.

To determine whether a police officer has used force or a firearm as required by the Act therefore cannot be a subjective issue. The court must evaluate all the circumstances surrounding the use of force or firearm so as to determine, for example, whether force was used as a last option; whether it was proportionate to the threat that confronted the police officer; or in a case involving a child, whether the officer had made all effort to avoid the use of firearms.”

39. The learned trial Judge after evaluating the evidence stated that:

“Evaluating the evidence on record concerning the accused’s firing of three rounds of ammunition, my view is as follows. The accused herein said he saw the suspect ran to hide in the reeds in the water by the lakeside. It was daytime and there was plenty of light. He shouted to them to come out. He issued a power threat by firing a round of ammunition. Then he says the deceased told him not to shoot in the air, but to shoot him. He shot a second round in the air. What does not add up is how the deceased who the accused said was in the water, yet managed to approach the accused allegedly wielding a panga. I find that highly unlikely or credible. All in all, the accused asserted that the suspects were in the water upto their waists. So how did the deceased run to the accused through the water with a panga and in such a way as to threaten the accused. I find the accused’s explanation rather incredible.”

- 40.** On our own re-evaluation of the evidence, we see no reason to disagree with the learned Judge. The appellant’s evidence in support of his defence of self-defence was clearly incoherent. There was no clear evidence that he was in such danger as to warrant the use of the firearm. When he used the firearm, he did so while facing backwards, a clear indication of recklessness in the use of firearm. This Court in **Isiah Muoki Musyoka & Others v R. Nairobi**

Court of Appeal Criminal Appeal No. 52 of 2001 (UR)

expressed itself as hereunder:

“If an accused person finds that he is in evidence danger from his opponent, he must retreat from that danger; if he finds that he cannot retreat further, then he can use force to defend himself: See Manzi Mengi vs. R. [1964] EA 289. The accused persons in this case were not in any danger...We have considered this aspect and conclude, as the learned trial judge did, that the firearms were in the circumstances used and force applied was unjustified, unnecessary and in our view, unlawful...The only areas of the Land Rover which were hit were those immediately above the spare wheel and directly behind the driver. No areas near the tyres were hit by the bullets. In our view. It is clear that other than shoot the Land Rover tyres so as to immobilise it, the accused fired at the body of the driver. The aim seems to have been to shoot but not to immobilise. We have no hesitation, on the facts of this case, in sustaining the finding by the trial judge that the accused were not justified in shooting at the deceased vehicle - that shooting was unlawful. The accused were not entitled to use any force at all against the deceased and they unlawfully shot him dead. There are other areas where the use of the firearm by police officers have been set out and permitted. Section 28 of the Police Act, CAP 84, Laws of Kenya sets this out in detail. Nothing in that Section appears to authorise the use of firearms by police officers in circumstances such as those obtaining in the present case. Nor did we find

anything in Section 17 of the Penal Code to authorise that a person is

entitled to use a firearm against an imaginary attacker whenever a person feels unsafe and unsure of the situation or feels fearful of his life.”

41. Similarly, in **Gideon Miano v R. Nairobi Court of Appeal Criminal Appeal No. 13 of 1999** this Court noted that:

“Section 18 [of the Penal Code]... should be understood in the context that it envisages a situation where a suspect is offering resistance to arrest or trying to evade it, and that where any force has been used against him, it is with a view to effecting the arrest. It is not, in our view, intended to protect officers who use their weapons recklessly or negligently. The appellant, according to the evidence, did not appear to have seriously intended to arrest the deceased. The court below found as a fact, properly so in our view, that the appellant never attempted to run after the deceased. The appellant did not say that he intended to shoot the deceased on the lower limbs or body, but accidentally hit him in the chest area. He aimed and shot him on the back of his chest. Besides...it was night time and the likelihood of the appellant hitting the deceased when the former fired his gun was foreseeable. The appellant was an experienced police officer and was therefore expected to know of the great risk which was entailed by his own action and the need for more care being exercised in the use of a firearm. His action was indeed reckless.”

42. The appellant, by shooting facing backwards, did not

attempt to shoot with the object of disarming the
attacker

but simply did not care where the shot hit. His conduct after realising that the person at whom he shot disappeared leaving the panga behind is indicative of a person who intended to conceal the fact of shooting of the deceased. That is a fact which this Court must consider in determining the existence of malice aforethought.

43. In the circumstances we have no basis for interfering with the finding that the death of the deceased was caused by malice aforethought on the part of the appellant.
44. As regards the sentence, The predecessor of the Court of Appeal in the case of **Ogolla s/o Owuor v Republic, [1954] EACA 270**, pronounced itself as follows:-

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

45. In **Shadrack Kipkoech Kogo v R., Eldoret Criminal Appeal No.253 of 2003 (UR)** this Court stated thus:-

"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of

principle must be

interfered (see also Sayeka -vs- R. (1989 KLR 306))"

46. In our view, no error of principle has been shown to have been committed by the learned Judge. We agree with the respondent that the sentence imposed was very lenient in the circumstances. Since there was no notice of enhancement of the sentence we will say no more on that issue.

47. We have considered this appeal and we find it devoid of merit. Accordingly, it is dismissed in its entirety.

48. We so order.

Dated and delivered at Nakuru this 3rd day of October, 2025.

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCI Arb.

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

*I certify that this is the
true copy of the original
signed*

DEPUTY REGISTRAR