

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL DIVISION
CRIMINAL CASE NO. 31 OF 2019

STATE PROSECUTION

VERSUS

DANIEL YONA JAOKO ACCUSED

J U D G M E N T

1. On **17/8/2019** at about 5.45am, **Peter Otieno Ogolla** (‘the deceased’) rose up as usual to go to his daily chores. He lived in Polyview Estate, Kisumu with his family. He owned a matatu registration **No. KCU 552X** which he drove himself for his family’s daily bread. When he came outside the house, he discovered that he could not move his matatu as he found it blocked by motor vehicle registration **No. KCC 422T** belonging to **Daniel Yona Jaoko** (‘the accused’).
2. It happened that the accused was dropping a female passenger that morning at Polyview Estate. The deceased asked the accused to remove his vehicle. An altercation followed which resulted in the fatal shooting of the deceased. He died while undergoing treatment at Avenue Hospital, Kisumu.
3. On **26/8/2019**, the State laid before Court information charging the accused with the Murder of the deceased contrary to *section 203 as read with section 204 of*

the Penal Code. It was alleged that on 17/8/2019, at around 0500hrs at Poly View estate, Shauri Moyo location, Kisumu Central Sub-county, within Kisumu County, the accused murdered the deceased. He denied the charge and the prosecution called 9 witnesses to prove its case.

4. **Everlyne Adhiambo Otieno (Pw1)** widow of the deceased narrated how on the material day, the deceased prepared to go to work as usual. He used to operate a matatu as driver. When he opened the gate, he found that another vehicle had blocked him. The other vehicle had two passengers inside, the accused and a female passenger who lived in the neighbourhood. The deceased asked the accused to remove his vehicle. The accused tried to start it twice without success. The accused stepped out of the vehicle, walked about 4 metres ahead then turned, removed a gun and shot at the direction of the deceased. The accused run away. The deceased fell down. He had been shot 3 times on both hands and chest. Neighbours came and assisted in taking him to Avenue Hospital where he succumbed to the injuries.
5. When cross-examined, she stated that she witnessed two shots in the air and one directed at the deceased. That the accused was running away and was followed by people when he shot back and hit the deceased 50 metres away from her house.

6. **Bernard Clinton Otieno (Pw2)**, the deceased's son was awakened by his young sister that morning to go and assist his father remove a vehicle that had blocked the way. He saw two people in that car. The accused looked drunk. He tried to start the vehicle but failed. The accused alighted from the vehicle, removed the keys from the ignition, passed the witness and removed his pistol from the waist. The deceased was on the passenger's side. When the witness went to where the deceased was, he heard him groan '*amenipiga risasi*'. He had been injured in the hand and was holding his side. He was taken to hospital where he died.
7. When cross-examined, he stated that the accused started running away. **Pw2** and a neighbour pursued the accused and the deceased followed. The accused hid near a ditch. When the deceased saw the accused, he pointed at him to the others. Then the accused who was about 6 metres away, got out of the ditch and shot the deceased five times. That he had earlier on shot in the air twice.
8. **Peter Otieno Okwach (Pw3)** was preparing to go to school on that morning, when he heard a commotion outside. He heard a lady complain that there was a person shooting people aimlessly. In cross-examination, he stated that when he came out, he saw a person running away with about 6 people in hot pursuit. That the deceased was shot about 50 metres away from where the motor vehicle was parked. He had heard therefore, while in the house, two shots.

9. **Pw4 Silas Ogweno Otieno** identified the body at Avenue Hospital Mortuary for post-mortem on **19/8/2019**. **Pw5 No. 235253 CIP Reuben Kiptum Bett**, a Forensic Ballistic expert from DIC headquarters produced a fire arm examination report dated **26/8/2019** as **PExh 1** and the Memo Form dated **22/8/2019** as **PExh 2**. He had examined the items sent to him and ascertained that the cesca pistol could fire and the rounds of ammunition supplied were live. That the two bullets supplied had been fired from the cesca pistol. In cross-examination, he stated that the said pistols carrying capacity was 16 rounds of ammunition.

10. **No. 112427 PC Eliab Njehia (Pw6)** was the initial investigations officer. On the material day at about 5.35am, he was instructed by the OCS Kondele to visit the scene of a shooting incident. At the scene, he established that the accused had shot 3 times in the air before he run away. That he then shot the deceased from his hideout. He recovered one spent cartridge near where motor vehicle Registration **No. KCC 422T** was packed.

11. He later learnt that the accused had surrendered himself to Nyamasaria Police Station. That the accused also surrendered cesca pistol **S/No. B202780**, a fire arm licence No. 9150 with a Magazine loaded with 15 rounds of ammunition. That a letter dated **23/8/2019** from the Firearm Bureau confirmed that the accused was not a licenced firearm holder and that the Certificate No. 9150 were

fake. That the shooting took place about 100m away from where the accused had parked his vehicle. He produced the cesca pistol as **PExh 5** and the Magazine as **PExh 4(a) (b) and (c)**, respectively. The spent cartridge from the scene was produced as **PExh 9**. The two bullet heads recovered from the body of the deceased were produced as **PExh 10(a) and (b)**.

12. When cross-examined, he told the Court that when he visited the scene, he found the windscreen of motor vehicle registration **No. KCC 224T** shattered. The scene that had blood was about 100m away from the motor vehicle. That there were four bullets which killed the deceased. He did not agree that the accused had been accosted by 5 armed men.

13. **Dr. Dickson Mchana (Pw7)** was the Pathologist who conducted the post-mortem on the body of the deceased on **19/8/2019**. The body had no defence injuries. There were 4 bullet track injuries. There was injury to blood vessels along the bullet tracks. He opined that the cause of death was internal bleeding secondary to gunshot wounds. The shooting took place from the left side of the victim and at close range. In cross-examination, he stated that there was possible movement by the victim during shooting due to the different inlets of the bullets.

14. **Pw8 No. 237225 CIP Paul Mwangi** of the Firearm Licensing Board appeared and produced the letter dated **23/3/2019** as **PExh 14**.

15. When put on his defence, the accused gave sworn testimony and called 5 witnesses. He told the Court that on the material day at about 4.00am, he was dropping a colleague at her residence at Polyview Estate on his way home. After she alighted, the car refused to start as the back door was open. He got out to close it when he saw a group of about 5 people approach. Upon entering the car, he heard a loud bang and the screen to the driver's seat cracked. He left the car and ran but the said people pursued him.

16. After about 20m, he shot in the air to scare them. They stopped but then again started pursuing him for about 500m when he tripped and fell to the ditch. His glasses and the gun fell down. The people running after him drew closer and were armed. One of them who had a panga was so close to him and he raised the panga to cut him. He instinctively fired and the person dropped. The others surrendered and he got a chance to run away. He went to his house took the firearm book from the safe and the full magazine, went to Nyamasaria Police Station and surrendered them. He was a licenced civilian gun holder. He had never used the gun before. He was charged in Winam Court but was acquitted.

17. In cross-examination, he stated that the prosecution witnesses had lied about what has transpired. That there were flood lights within the estate. It is the one that contributed to his missing a step and fall in the ditch. That he fired only 4 times, two onto the deceased and two elsewhere. He denied there having been

any altercation with the deceased. He stated that he was remorseful for the loss of life even if it was via self-defence.

18. **Mike Otieno Nyagona (Dw2)** a mechanic told the Court how he was called to the scene on the morning of the material day to go and pull the accused vehicle. He found its windscreen broken and the body having some dents. **Pw3 Gerald Maruti Kendu**, a certified gun smith, security consultant and trainer of firearms handling told the Court how he had trained the accused. That a firearm can be used when a life is under threat. Once under a threat by an armed attacker, one should fire in the air to scare the attacker. However, if the attacker persists, it must be stopped. When cross-examined, he stated that one shoots an attacker to stop the threat and not to kill. The objective of shooting can be discerned from the points of impact of the bullet.

19. **Robert Michael Wafula (Dw4)**, a trained dog handler working for Bedrock Holdings at the time, was on the material morning parked at the parking lot at Polyview Estate. At about 4.25am, he saw an SUV vehicle enter the estate. There were floodlights with sensors. Shortly thereafter, he saw a group of six men in rain coats from within the estate go towards the direction of that vehicle. Five (5) minutes later, he heard two gun shots. He saw someone running from the direction of the SUV. Passing under a floodlight, it shone suddenly and the person lost his balance and fell onto a ditch. He scrambled as if looking for

something. A group of men pursued him and he heard two gun shots. One of the men fell while the others scattered. The man who had fallen run passed the witness and his colleague one **Derrick Ogena**, the night shift driver.

20. A few minutes later, a vehicle came and stopped at the spot and two people were put on it and it left. About 20 minutes later, a police vehicle came and the scene was secured. The place was a high crime area, that is why dogs had been deployed there.

21. In cross-examination, he stated that the six men were armed with crude weapons. He did not know why the police did not call him as a witness yet he had presented himself at Kondele Police Station.

22. **Dw5 was Abdalla Osman**, a watchman working with a private security company at the time. On the morning of **17/8/2019**, he was guarding two apartments at Polyview estate. At about 4.00am, he saw a vehicle enter the estate and park ahead of him and reversed to face where it had come from. The driver tried to start the vehicle but it failed. He then saw a group of six people pass him towards the direction of that vehicle. He heard a bang, then the driver of that vehicle run towards where he was. The man shot in the air but the people pursued him and disappeared towards the direction they had come from. He heard 4 other gun shots. He did not recognize any of the men.

23. In cross-examination, he could not recall the house number in which the person he was guarding the house for lived within the estate.

24. **Mercy Alusa (Pw6)**, the Court Administrator for Winam Law Courts appeared and produced the court file for **Criminal Case No. 721 of 2019 - Republic vs Daniel Yona Jaoko**. In that case, the accused had been charged with 4 counts of being in possession of a firearm without a firearm certificate, being in possession of ammunition without Firearm certificate and forgery. He was acquitted of all the counts in a judgment delivered on **31/3/2023**.

25. After the close of the defence case, the parties made oral submissions, which the Court has considered.

26. The accused face a charge of Murder contrary to **section 203** as read with **section 204 of the Penal Code**. To prove the offence, the prosecution had to prove four ingredients; the fact of death, the cause of death, that the death was as a result of the wrongful act or omission of the accused and finally, that the accused had malice aforethought.

27. As to the fact of death, **Pw1** and **Pw2** told the Court how the deceased woke up well on the morning of that fateful day. He found his vehicle blocked by the accused's vehicle. That an altercation arose between the deceased and the accused whereby the deceased was fatally shot. He died while undergoing treatment at Avenue Hospital. That ingredient was proved to required standard.

28.As to the cause of death, **Pw1** and **Pw2** testified that the deceased was shot with a gun. **Pw7** conducted the post-mortem on the body of the deceased at Avenue Hospital Mortuary on the **19/8/2019**. The body had four (4) bullet track injuries. There was injury to blood vessels along the bullet tracks. He opined that the cause of death was internal bleeding secondary to gun shots. **Pw6** produced the subject gun as **PEXh 5**. The cause of death was therefore proved to the required standard.

29.The third ingredient is whether the cause of death was as a result of the wrongful act or omission of the accused. The prosecution evidence was that the accused intentionally shot the deceased with a gun causing him serious injuries that resulted in his death. The accused also admitted that on that fateful morning, he shot the deceased. The cause of death having been as a result of gun shots, the prosecution was able to prove beyond reasonable doubt that it is the accused who caused the death of the deceased.

30.The last and final ingredient is whether the accused's act was as a result of malice aforethought. Malice aforethought is defined in **section 206 of the Penal Code** 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.”

31. According to the accused, he acted in self-defence. Self-defence is a complete defence for criminal liability that is provided for under **section 17 of the Penal Code** which provide thus: -

“Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property

shall be determined according to the principles of English Common Law.”

32. In Ahmed Mohamed Omar & 5 Others (2014) KECA 515 (KLR), the Court of Appeal discussed the common law principles relating to self-defence as followed in the case of R vs McINNES, 55 Cr. App. R. 551 wherein it was held as follows: -

“This is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ... 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 act 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 immediate danger, he may have to avert the danger by some immediate reaction. If the attack is over and no sort of peril remains, then the employment of force may be

a way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. ... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of the manslaughter.”

33. In Mokwa vs Republic (1976-80) 1KLR 1337, the Court of Appeal held 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.”

34. In the present case, the accused testified that he feared for his life. That he shot twice in the air as a warning. That, however, the group of 5 armed people continued to pursue him until he tripped and fell on a ditch. The prosecution witnesses gave different version of what happened. They told the Court that there was an altercation between the deceased and the accused whereby the accused drew his gun and shot the accused.

35. The evidence on record shows that the accused’s vehicle was stationary and parked on reverse towards some gate, probably toward the apartment of the lady

who was being dropped that morning. When it was being recovered, it had a broken windscreen and dents on the body. The accused had testified that when the 5 people accosted him, they hit the screen of his vehicle forcing him to alight and take flight.

36. The evidence of **Pw1** and **Pw2** that the accused moved to the passenger's door and shot the deceased was not supported by the reconstructed scene. The Investigations Officer admitted that when he visited the scene, he established that the accused had shot 3 times in the air and run away from his vehicle. He collected one (1) spent cartridge from where the accused's motor vehicle registration **No. KCC 422T** was parked. That where there was blood on the ground was about 100m away from the said vehicle. That was where the deceased was shot. That evidence was in agreement with **Pw3's** testimony that when he heard gun shots, he came out of the house. He saw a man running away and about 6 people in hot pursuit. That the deceased was shot about 50 metres away from the accused's vehicle. That testimony agreed with that of the accused and **Dw4**.

37. The totality of the evidence that was established at the trial through the testimonies of the accused, **Dw2, Dw3, Dw5, Pw3** and **Pw4** was that, there were several warning shots by the accused. That the accused run away from his vehicle after people hit and broke its windscreen, that he was pursued by 5 to 6

people before he shot the deceased about 100m away from where the hot pursuit began.

38. In the circumstances, was it an act of self-defence or was it use of excessive force? **Mr. Nyamweya** Learned Counsel for the accused submitted that the actions of the accused were prudent and of necessity. That the accused was cautious as the area was a high risk area as testified by **Dw4**. There was danger of immediate attack, attempted de-escalation by warning shots and attempted flight. That the hot pursuit by the 5 attackers, including the deceased, justified the use of force by the accused.

39. This Court has considered that the accused's vehicle was violently hit by people who were armed, the accused could not drive away as the vehicle had failed to start. It has also considered that there were two warning shots in the air, the flight for about 100m and the hot pursuit. The testimony of the pathologist was critical. That the shooting was at a close range and was in different parts of the body, the fore limbs and chest. That evidence corroborated the accused's testimony that when he fell on a ditch, his attackers caught up with him and the one nearest raised his hand with a weapon ready to hit him. That it is then that he discharged the gun on the attacker.

40. The Court is satisfied that the accused was in a mode of panic. That he genuinely feared for his life. That by pursuing an armed person for about 100m,

the deceased did not mean well for the accused. That the accused acted in self-defence and was not criminally liable for the consequences of his action. Self-preservation is a natural instinct for any sane human being.

41. That being the case, the Court finds that the prosecution has failed to prove that the accused's action was actuated by malice aforethought. The charge of Murder cannot stand.

42. Accordingly, the Court finds the accused innocent of the charge of Murder and acquits him of the same accordingly.

It is so decreed.

DATED and **DELIVERED** at Kisumu this 24th day of **April, 2026**.

A. MABEYA, FCI Arb

JUDGE