



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kangongo v Republic (Criminal Appeal 57 of 2021)  
[2022] KECA 1292 (KLR) (18 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1292 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 57 OF 2021  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
NOVEMBER 18, 2022**

**BETWEEN**

**MOSES KIBET KANGONGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Garsen  
(R.L. Korir, J.) delivered on 10th May 2021 and sentence delivered  
on 14th April 2021 in High Court Criminal Case No. 7 of 2015)*

**JUDGMENT**

1. Based on Information placed before the High Court at Garsen by the Director of Public Prosecutions dated December 11, 2015, the appellant, Moses Kibet Kangogo, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence being that on December 4, 2015, at Ngao Quick Response Team (QRT) Camp, Ngao Trading Centre within Tana River County, murdered John Nganga.
2. After the trial, the High Court in its judgment delivered on May 10, 2020 substituted the charge of murder and convicted the appellant for the offence of manslaughter. In a subsequent ruling delivered on April 14, 2021, the trial court sentenced the appellant to a prison term of 7 years which took into account the “cumulative 2-year period” the appellant had been in custody.
3. The appellant, through learned counsel Miss. Aoko Otieno, has challenged the conviction and sentence on grounds that the trial Judge disregarded evidence of provocation and self defence; that there were material gaps and discrepancies in the prosecution case creating doubts; and that the sentence meted out is manifestly excessive and harsh.
4. The appellant and the deceased were administration police officers. They were part of an emergency Quick Response Team (QRT), based at Ngao Trading Centre within Tana River County, where their



camp, comprising of 12 tents, was situated. During the night of December 4, 2015, Sergeant James Kasoko Mulenga (PW3) who was the commanding officer on that day, was resting in his tent when he heard guns shots from another tent within the camp. His immediate thought was that the camp was under attack. He then saw the appellant approaching his tent holding his gun.

On enquiring from the appellant what was the matter, the appellant dropped his gun, raised his hands and surrendered and urged him (PW3) repeatedly, to take him to the cells. PW3 produced the firearms register before the trial court based on which firearm serial number J68602 was at the material time assigned to, and was in the hands of the deceased, while firearm serial number J68369 was assigned to and in possession of the appellant.

5. Shortly after, APC Nelson Chege (PW4) who was also part of the response team at Ngao and who had also heard gunshots from his tent joined them and together with PW3, they disarmed the appellant, took the appellant's gun, and removed the magazines and secured the same. PW3 then instructed two officers to guard the appellant and sent PW4 to the tent of the deceased, from where PW3 heard PW4 shout that the deceased had been shot.

6. PW3 went to the deceased's tent where he found the deceased lying near a trench at the tent bleeding on the left leg which was broken. PW3 instructed PW4 to look for the deceased's gun which was found near his camp bed. PW3 explained:

“I sent Chege to look for the gun of Nganga they found it near his camp bed. Chege took Nganga's gun. It had a bullet and the magazine had fallen down. The magazine was open and the bullets were lying down. He was not injured on his hands. I do not know his gun was used. I took the gun and the bullets lying down two were spoilt but 12 were good. I put the gun and bullet to the gun safe. I collected 14 bullets. I had given him the gun with 20 bullets. I have a copy of the arms register. The date the gun was supplied was indicated in the Register.”

7. PW4 stated that he found the deceased behind the tent, full of blood and his left leg was broken; that he removed his vest and saw a gun shot on the left side of the stomach. He stated that the tent of the deceased and that of the appellant were neighbouring.

8. Administration Police Constable Elijah Moriso (PW6) recalled that on December 14, 2015 at about 9.30 p.m., he was in his tent at the Quick Response Team (QRT) camp at Ngao; that the deceased was walking around drunk abusing the appellant calling him a stupid man; that he heard the appellant telling the deceased to stop abusing him; that the deceased provoked the appellant; that the deceased followed the appellant to his tent and continued abusing him; that prior to the incident the deceased had spent four days outside the camp drinking; that the deceased was drunk and had a gun; that he heard gun shots, ran and entered a ditch thinking they were under attack; that he then saw someone emerging from the tent of the deceased going towards the tent of PW3 and saw the appellant throw his gun and utter the words, “arrest me, arrest me”; that PW3 then handcuffed the appellant after which he sent him and PW4 to go find out what had happened.

9. PW6 testified further that they found the deceased crying and he had gun shots on the left leg and abdomen; that they took him to Ngao Hospital where he was referred to Malindi Hospital but died before reaching that hospital.

10. Agnes Boinya Samuel (PW2) and Jecinta Wangui Nganga (PW1) the wife and mother of the deceased, respectively, received news of the death of the deceased on December 5, 2015. PW2 was in Gilgil at the time while PW3 was in Olkaleu. They both travelled to Malindi on December 10, 2015 when they identified the body of the deceased for purposes of post mortem which was performed by Dr. Gombe.



In his report which was produced before the trial court by Dr. Fadia Swaleh (PW8), Dr. Gombe noted that the body of the deceased had three bullet wounds. In his opinion, the cause of death of the deceased was severe bleeding secondary to multiple bullet injury.

11. Inspector Michael Kibet (PW7) was at the time the Officer Commanding Police Division (OCPD) Garsen. On December 5, 2015, on receiving a call he proceeded Ngao AP's camp and met PW3 who briefed him on the shooting incident. He received from PW3, 15 spent cartridges collected from the appellant's tent; two magazines, one which belonged to the appellant and was dented and had two live bullets which were also damaged; and 14 live ammunitions and took them to firearm analyst. After investigations, the appellant was charged with the offence. PW7 produced before the trial court as exhibits, the firearms, 15 spent cartridges, 14 rounds of live ammunition, 6 test cartridges, 10 live ones, one cartridge, and two magazines.
12. Corporal Alex Chirchir (PW5), was a firearms examiner attached to the Criminal Investigations Department, Nairobi in ballistics section. He received two firearms serial numbers J68369 and J68602; two rifle magazines; 16 expended cartridges; 16 rounds of ammunition; one damaged cartridge all accompanied by exhibit memo. He was required to ascertain whether the rifles were capable of firing; whether rifle serial number J68369 fired the expended cartridges; whether rifle serial number J68602 fired the expended cartridges; whether the damaged cartridge was fired or it exploded. Having examined those exhibits, PW5 in his report produced before the trial court dated December 22, 2015 reported that he established that the two firearms serial numbers J68369 and J68602 were G.3 rifles caliber 7-62mm; that while firearm serial numbers J68369 was in good general and mechanical condition, firearm serial numbers J68602 had a bullet hole at the magazine housing, the magazine was dented; he successfully fire the two rifles. He was able to tell that the 15 expended cartridges were fired from firearm serial numbers J68369 while one expended cartridge was removed from the chamber of firearm serial numbers J68602.
13. Put to his defence, the appellant in his unsworn testimony stated that on the material day, he travelled to Ngao Centre and on returning to the camp, the deceased hurled abuses at him; that the deceased then went to his tent and started firing his gun; that when he saw that the deceased could not fire anymore, he went and reported to his boss; that since that time he was taken to remand. He stated that he was defending himself and that the deceased was his friend and they had never differed.
14. In her judgment, the learned trial Judge found that there was no doubt that both the appellant and the deceased were armed at the material time; that the findings of the ballistic expert clearly demonstrated that the appellant fired his rifle expending 15 rounds of ammunitions while the deceased fired his gun expending one round of ammunition. The Judge expressed:

“The expert findings...contained in the oral testimony of PW5 and his detailed ballistics report dated December 22, 2015, clearly shows that the accused fired his gun G3 Riffle Serial No. J 68369 expending 15 rounds of ammunition and that the deceased also fired his gun G3 Riffle Serial No. J 68602 expending one round of ammunition. The forensic ballistic evidence corroborates the evidence of the officers who were present at the scene that the accused and the deceased exchanged fire. I have found no evidence or suggestion that the deceased shot himself. It is, therefore my conclusion that it was the accused, and no one else, who shot of the deceased.”
15. The Judge then concluded that it is “clear that it was the hail of bullets from the accused's firearm that caused the death of the deceased”; and that the action of the appellant caused the unlawful death of the deceased. The Judge dismissed the defence of provocation on the basis that it was not borne by the evidence; and that the appellant misused his firearm by pumping three bullets into his colleague. The



Judge was however not satisfied that the prosecution proved that the appellant had malicious intention to end the life of the deceased and that malice aforethought was not established. Applying section 179(2) of the Criminal Procedure Code the Judge, as already stated, substituted the charge of murder with that of manslaughter and subsequently sentenced the appellant to seven years' imprisonment as already noted.

16. Urging the appeal before us, Miss. Aoko Otieno, learned counsel for the appellant submitted that the evidence demonstrated that the appellant used his firearm in self defence; that the appellant was under attack from the deceased who had already cocked his gun; that under sections 49(5) and 61 of the Penal Code as read with Part B of the Sixth Schedule, the use of firearm in self defence is allowed; that on the strength of the decision of the court in Mokwa v Republic [1976-80] 1KLR 1337, self defence is an absolute defence in a charge of murder unless the force applied is excessive.
17. Counsel also referred to the English decisions in Palmer v Republic [1971] AC 814 and Republic v McInnes 55 Cr. Appeal 551 in urging that it is good sense and good law that a man who is attacked may defend himself. It was urged that the Judge erred in failing to consider section 17 of the Penal Code which requires the defence of self defence to be determined in accordance with principles of common law; that the test of self defence is subjective rather than objective and that in the present case the appellant believed that he was under attack and the use of force was necessary to defend himself. The case of Ahmed Mobammed Omar & 5 others v Republic, Cr App No 414 of 2012 and Lord Lane's judgment in R v Gladstone Williams (1984) 78 Cr App R 276 were cited.
18. Counsel submitted further that the Judge erred in disregarding the evidence of provocation; in this regard counsel reiterated that the Judge failed to consider that the deceased provoked the appellant by abusing him and by firing at him. The case of Peter Kingori Mwangi & 2 others v Republic [2014] eKLR was cited in urging that the conditions necessary for provocation to exist, namely, the subjective condition that the appellant was actually provoked so as to lose self-control and the objective condition that a reasonable man would have been so provoked, were met in this case. The decision of the court in Elphas Fwamba Toili v Republic [2009] eKLR was also cited. Moreover, there were material gaps and discrepancies in the prosecution case that weakened the prosecution case and raised doubts as to the appellant's guilt.
19. On the sentence, it was submitted that imprisonment for 7 years was harsh and excessive in the circumstances; that the Judge failed to take into account that the deceased's gun expended 3 bullets. It was urged that the case of IP Veronica Gitahi & another v Republic [2017] eKLR on which the Judge relied is distinguishable because in the present case the deceased was the aggressor and continually provoked the appellant; that the appellant did not only deserve leniency but an acquittal; that the appellant has received sufficient punishment, is a youthful offender with a young family and the mitigating factors ought to have led to a very lenient sentence.
20. Opposing the appeal, learned Principal Prosecution Counsel Ms. Keya Ombele submitted that the prosecution evidence established that the appellant and the deceased were colleagues stationed at Ngao QRT camp; that the deceased was shot by the appellant three times and the deceased died due to severe bleeding on account of those gunshot wounds; that although the deceased insulted the appellant, the shooting came after a while; that the 15 spent cartridges recovered were from the appellant's gun; that it was not established whether the deceased had fired the gun; that the deceased's gun was found in the tent whereas the deceased was in the trenches crying for help and it was not established that it was the deceased who fired the one shot.
21. It was submitted that based on the evidence, the death and the cause of death of the deceased were established; that the appellant committed the unlawful act which caused the death; that the only issue



is whether malice aforethought was established. In that regard, counsel submitted that there is no merit in the contention that the Judge disregarded the evidence of provocation; that the trial court correctly dismissed that defence as it was not supported by the evidence; that based on the tests in *Peter Kingori Mwangi & 2 others v Republic* [2014] eKLR, a reasonable person would not have been provoked by the insults attributed to the deceased to the effect that the appellant is stupid.

22. On the sentence, it was submitted that section 205 of the *Penal Code* provides for a sentence of up to life imprisonment; that the 7-year imprisonment term was meted out after considering the appellant's mitigation, probation officer's report and victim impact assessment report and that the sentence is appropriate, adequate, just and proportionate. It was urged that the 7-year term was in fact lenient considering that deceased had three gunshot wounds, that the appellant expended 15 bullets, that the deceased left behind a young family and that the appellant did not show remorse for his actions to the family; that contrary to the contention by the appellant that time spent in custody was not considered, it was in fact considered.
23. We have considered the appeal and in keeping with the court's duty on a first appeal have reviewed and re-evaluated the evidence with the object of drawing our own conclusions as we bear in mind that we did not hear or see the witnesses testify. See *Okeno and anor v Republic* [1972] E A 32.
24. There is no dispute that the deceased died of severe bleeding from gunshot wounds inflicted by the appellant. As indicated, the conviction is challenged on grounds that the Judge disregarded the evidence of provocation as well as that of self defence. In that regard, it is noteworthy that in her judgment, the learned trial Judge noted that in his defence, the appellant stated that "the deceased hurled abuses at him, went to his tent and started firing" and that he "went on to state that he (accused) had his gun and that he fired to defend himself as the deceased was the first to fire" and that the defence counsel had also submitted that the appellant was provoked by the deceased and that it was the deceased who first fired. The Judge considered the provisions of section 207 and 208 of the *Penal Code* and the case of *VMK v Republic* [2015] eKLR.
25. The Judge noted that the incident took place between 9.00 p.m. and 10.00 p.m. and that according to the witnesses, there was an altercation between the appellant and the deceased which died down only for gun shots to rend the air later; that it was the testimony of PW6 that he heard the deceased insulting the appellant; that PW6 was in his tent when he saw the deceased walking about drunk and heard him abuse the appellant "by telling him that he had never seen such a stupid man"; that the appellant responded by warning the deceased not to abuse him; that PW6 said "that 30 minutes later, he heard gunshots and took cover in the ditches thinking that the camp was under attack." The Judge went on to state:

"No other witness corroborated PW6's account that the deceased provoked the accused by insulting or abusing him. What is clear is that there was a quarrel, as to who started the quarrel would be a matter of conjecture as no witness was present outside their tent and testified to the details of the quarrel. From the ballistic report, however, it is clear that the deceased fired only one shot while the accused fired 18 bullets with three hitting the target who was the deceased. The defence of provocation is therefore not available to be accused. I dismiss it, as it is not born by evidence."

26. The learned trial Judge went on to consider whether the appellant used his firearm justifiably. In that regard the Judge made reference to the *National Police Service Act* and the National Police Service, Service Standing Orders and the case of *IP Veronica Gitahi & another v Republic* [2017] eKLR and expressed that it is incumbent upon the court to evaluate all circumstances surrounding the use of force or firearm so as to determine, for example, whether force used was used as a last option; whether



it was proportionate to the threat that confronted the police officer, and whether the police officer had made all effort to avoid use of the firearm. Having done so, the Judge concluded that looking at the circumstances, she “found nothing to suggest that the accused was justified to use the firearm in the manner that he did. He misused his firearm by pumping three bullets into his colleague.”

27. We are unable to fault the Judge in the manner in which she analyzed the circumstances. Provocation is defined in section 208 of the *Penal Code* thus:

“The term “provocation” means and includes, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self- control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

28. As this court stated in *Lucy Mueni Mutava v Republic* [2019] eKLR, provocation is a defence available to a person who by his or her actions causes the death of another person and entails some act or series of acts done by the deceased to the accused person which would cause any reasonable person, and actually causes in the accused person, a sudden and temporary loss of self-control, rendering the accused person so subject to passion as to make him or her for the moment not master of his or her mind. See *Duffy* [1949] 1 All E R 932.

29. In effect, it would be necessary to demonstrate, for the defence to hold, that the accused is under diminished capacity and acted in the heat of passion or anger. As counsel for the appellant submitted on the strength of the decision of this court in *Peter King'ori Mwangi & 2 others v R* [2014] eKLR two conditions are necessary for the defence to hold namely:

“The “subjective” condition that the accused was actually provoked so as to lose his self-control; and

The “objective” condition that a reasonable man would have been so provoked.”

30. In the present case, the details of what transpired that evening as narrated by the appellant in his testimony in his defence are rather scanty. He stated they took early supper and then travelled to Ngao Centre; that he went back and “the deceased hurled abuses at me” and that the deceased “went to his tent and started firing” and that when “I saw that he could not fire anymore I went and reported to my boss.” He went on to say that “I was defending myself. It came out of the evidence that he had fired. It means he fired before me” and that “the deceased was my friend we had never differed” and asked the court to have pity on him and consider his plea.
31. Having reviewed the evidence on record, particularly that of PW6 and that of the appellant, we are not persuaded that the defence of provocation was established. As the learned trial Judge noted in her judgment, the testimony of PW6 was that there was passage of time of about thirty minutes after the hurling of abuses had ceased before the gun shots were then heard. Moreover, applying the objective test, would a reasonable person in similar circumstances have been provoked by being called “a stupid man”? We do not think so. There is nothing to show that the appellant acted under diminished responsibility. Such insult from a person he referred to as his friend could not reasonably have provoked him to fire fifteen rounds of ammunition with three fatally hitting the deceased.
32. As for the defence of self defence, the learned Judge found as a fact that the deceased fired one shot from his gun but was not persuaded that the manner in which the appellant deployed his firearm was



proportionate to the threat that confronted him. In the case of *Victor Nthiga Kiruthu & another v R* [2017] eKLR this court stated:

“

- “ (i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one’s family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.
- ii. The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.
- iii. It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.
- iv. The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.
- v. What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.”

[Emphasis added]

- 33. Based on the post mortem report produced by PW8, the body of the deceased had three bullet wounds, the first of which entered through the left leg and exited the back, the second one entered through the front part of the abdomen and exited through the back at the buttock, and the third at the posterior wall exiting anteriorly to the right chest. The forensic evidence by PW5 was that the appellant’s gun fired fifteen shots. In our view, and as the learned Judge correctly stated, the force the appellant deployed was not reasonable and proportionate to the objective to be achieved, which according to counsel for the appellant was to disarm the deceased. In our view, the force used by the appellant in the circumstances, was far too excessive and negated self defence.
- 34. All in all, we are not persuaded that the learned trial Judge disregarded evidence of provocation and of self defence as contended by the appellant.
- 35. As regards sentence, the learned Judge in her considered ruling delivered on April 14, 2021 in sentencing the appellant to serve seven years imprisonment took into account that the appellant was remorseful; that appellant was under enormous stress because his platoon was in a hardship area for a long time and was burdened with work; that the court had a duty to balance the scales of justice and victims of the offence should not be relegated to the background; that taking all factors into account the appellant “shall benefit from a lenient prison sentence” to afford him an opportunity, “upon release, to seek out the victims and reconcile in order to bring complete closure to the affected parties.” Furthermore, the Judge took into consideration the cumulative two-year period the appellant was in custody.
- 36. It is not evident that the Judge overlooked some material factor, or took into account some immaterial factor or acted on wrong principle or that the sentence is manifestly excessive in the circumstances.



An appellate court can only interfere with the sentence imposed by a lower court if it is shown to be unlawful and illegal or if it is manifestly harsh and excessive as to amount to a miscarriage of justice. See generally *Ogola S/O Owuora v Republic* (1954) 19 EACA 270, *James v Republic* (1950) 10 EACA 147, *Nilson v Republic* (1970) EA 599 and *Wanjema v Republic* (1971) EA 493. We do not have any basis for interfering with the learned judge's exercise of discretion in the sentence meted out.

37. In conclusion therefore, this appeal fails and is dismissed.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF NOVEMBER 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

