IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KOOME, MUSINGA & SICHALE, JJ.A.]

CRIMINAL APPEAL NO. 159 OF 2019

WILFRED MWITI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Wakiaga, J.) dated 21st June, 2016

IN

HCCRC NO. 61 OF 2011)

****

JUDGMENT OF THE COURT

This is an appeal from the conviction and sentence of the appellant, (**Wilfred Mwiti**), in a judgment dated **21st June, 2016** by **Wakiaga, J**. A brief background will give context to the appeal.

The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars on the information were that on **18th February, 2010,** at Kariobangi, Kiamaiko Junction along Outer-Ring Road in Nairobi, he murdered **Patrick Ndai Munyua** alias **Senior** alias **Stephen Kamau Munyua**. The appellant denied the charge. In a trial conducted by **Wakiaga, J**, the prosecution called a total of 18 witnesses whilst the appellant made a sworn statement of defence and called 3 witnesses. Subsequently, the appellant was found guilty of the offence of manslaughter contrary to Section 202 of the Penal Code. He was sentenced to serve seven (7) years' imprisonment. The appellant was aggrieved by the conviction and sentence and hence this appeal.

In a Memorandum of appeal dated **23rd June, 2020**, the appellant faulted the trial judge for:

> ***"(i) ascribing criminal liability for his legitimate use of force for his own self-defence;***
>
> ***(ii) erring in finding that the appellant used the firearm assigned to him illegally;***
>
> ***(iii) erring in finding the appellant guilty of manslaughter".***

On **30thJune, 2020**, the appeal came up before us for virtual hearing, in view of the Covid-19 Pandemic and pursuant to the guidelines issued thereof. **Mr. Njanja**, learned counsel represented the appellant, whilst the respondent was represented by **Mr. Hassan Abdi**, the learned Senior Deputy Public Prosecutor (SDPP).

Mr. Njanja began by pointing out that the appellant had fully served the sentence of seven (7) years but that notwithstanding, he was still desirous of pursuing his appeal. In his submissions, counsel relied on the appellant's written submissions filed on **24th June, 2020.** He contended that the appellant is a seasoned police officer who discharged his duties diligently; that on **18th February, 2010**, the appellant, together with five (5) other officers were instructed to do night duties from 6.30 p.m. to 6.30 a.m; that the appellant was armed with a Ceska Pistol, as they were to go to an area that is crime prone with a history of police killings; that the time was about 9.30 p.m; that in the course of his duty, the appellant was accosted by more than five (5) people and a horrible shoot-out ensued, resulting in the death of the deceased; that the appellant took it upon himself to inform the OCS, Muthaiga Police Station, who visited the scene and a toy gun was recovered from the deceased; that thereafter, the appellant continued with his duties until **May, 2011** when he was arrested, (a period of more than one (1) year since the date of the alleged commission of the offence). He submitted that the trial court erred in law in ascribing criminal liability to a

police officer's legitimate use of force in his own self –defence, more so as the trial court had established that the deceased's death was caused by multiple injuries caused by bullets fired by six police officers, including the appellant.

Counsel placed reliance on the Privy Council decision of ***Palmer vs. Republic [1971] At 814*** which sets out instances where one may defend himself/herself.

On behalf of the State, **Mr. Hassan Abdi** relied on the online submissions dated **29th June, 2020**. He contended that there was no dispute that the deceased died and his death was caused by the appellant and that all ingredients for the offence of murder were proved. He urged us to enhance the sentence as the appellant was guilty of murder and not manslaughter as found by the trial court. According to the respondent, the deceased was at Huruma Police Station and thereafter his body was found at the mortuary, the appellant having killed him. He discounted the appellant's assertion that the alleged shoot-out was in self-defence.

In a brief rejoinder, **Mr. Njanja** pointed out that there was no cross-appeal filed by the respondent to warrant our consideration of enhancement of a sentence for the offence of murder.

We have considered the record, the rival oral and written submissions and the law. This is a first appeal and the duty of a first appellate court of re-evaluating the evidence and giving an appellant a re-hearing of the case has been recognized in many decisions that have come forth from this Court. For instance, in ***Okeno vs. Republic [1972] EA 32,*** this Court stated thus as regards our mandate as a first appellate Court:

> ***"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 v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post, [1958] E. A. 424."***

The evidence before the trial court was that on **19th February, 2010** at 4.30 p.m., **Kenneth Chege Nganga** (P.W.1), a matatu driver, was driving motor vehicle registration No. KBA 350A, when his conductor, **Michael Kiarie Njoroge** (who died before giving his evidence and whose statement was produced in court as evidence), asked him to drive the motor vehicle to John Saga police station in Huruma as there was someone who had been arrested by the police inside the vehicle. On arrival at the police station, two people dressed in civilian clothes alighted from the vehicle, one of them was handcuffed with hands at the back and the other following the handcuffed person from behind. The two proceeded to the police station. He did not recognize any of them as he only saw them from the back. Prior to that, on the night of **15th -16th February, 2010** at 12.00 a.m, **Geoffrey Kariuki Kimani**, P.W.2 was heading to his home in the company of three people when they were arrested and taken to Huruma Police Station. According to P.W.2, on **18th February, 2010** at around 3.00 p.m. while he was still in the cells, a handcuffed person was brought to the cells. The handcuffed person told P.W.2 that his name was **Patrick**. Patrick gave him his brother's mobile phone number 0721 924692 and requested him, that upon his release to call his brother and inform him that he was at the police station. On **19th February, 2010** at 2.00 p.m., when P.W.2 was released he called **Samuel Kahura** (P.W.5), the deceased's brother, only to learn from him that **Patrick's** body had been found in the mortuary. P.W.2 told the trial court that at some point, the "***handcuffed man*** "(as his cell mates came to call the deceased) was removed from the cell and taken out. He was also taken out "***…for the second time at night and he was not returned to the cell".*** However, in cross-examination he stated that there was more than one cell at the station and that the deceased was thereafter taken to the next cell. **James Wainaina Munuwa** (P.W.3), a brother to the deceased, told the trial court how on **18th February, 2010** at about 6.30 p.m., he received a phone call from an unknown woman using phone number **0722-771-045** that prompted him to go to John Saga Police Station. At the police station, he found that his brother's name was not recorded in the OB. He however went round the cells and from outside, he called his brother's name. His brother responded and informed him that he was arrested by **Vaiti** (apparently, the appellant) and one**, Kamande**; that he went back to the OB desk to ask why his brother's name was not entered in the OB. In the process, he heard the name of his brother being called and his brother emerged from the cells. When the police officer who opened the door of the cells saw the resemblance of P.W.3 and the deceased, he ordered the deceased to go back to the cells immediately. The police officer then ordered P.W.3 to leave the Occurrence Book (O.B.) desk and even pushed him away from there. P.W.3 called his father, **Peter Munyua Mbugua**, (P.W. 4) to inform him that his brother (the deceased) had been arrested and was at the police station, but his name was not recorded in the O.B. As it was already late, his father reckoned that the deceased was safe in police hands and he should let the matter be resolved the following morning. He then left the police station and went home. The following day (**19th February, 2010**), at around 5.00 p.m. he received a call from his elder brother, **Samuel Kahura,** P.W. 5, who informed him that the deceased's body had been found at the City Mortuary. **Amina Mahat,** P.W.6, on the other hand told the court that on **18th February, 2010** at around 4.00 p.m., she was in the same matatu with the deceased heading to town when a police officer entered the vehicle and arrested the deceased, handcuffed him and ordered the driver and conductor to drive the vehicle to John Saga Police Station; that at the police station, the officer who arrested the deceased alighted from the vehicle with the deceased and they both proceeded to the building whilst the vehicle proceeded to town. On the same day (**18th February, 2010**) at around 6.00, **Esther Waithira Kiragu**, P.W.7 was arrested for not standing during the lowering of the flag while passing at a nearby police station. She told the court that while at the station, an unknown woman who was also at the station used her mobile (P.W.7's) phone to call a relative of another person who was in the police cells; that later on, the person who had been called using her mobile phone called her but she had already been released, so she referred that person to the police station. P.W.7 did not know the deceased or the person who was called using her mobile phone.

On **19th February, 2010**, at about 9.10 a.m. **Chief Inspector Augustine Mutembei** (P.W.8), the then OCS, Huruma Police Station, received the deceased's father (P.W.4) and two others who informed him that their son had been arrested the previous day (**18th February**, 2010) by one of the police officers and locked at the station. P.W. 8 called for the O.B. and the Cells Registers but he did not find an entry of the arrest in the O.B nor in the Cells Register. He advised the trio to check in the other police stations. On **25th February, 2020**, **PC. Musyimi Mwanzia** (P.W.9) attended a postmortem of the body of the deceased conducted by **Dr. Oduor Johansen** (P.W.12). According to P.W.12, the deceased died of multiple injuries due to gunshot wounds. P.W.12 prepared and signed a report which was produced in evidence. He also handed over the bullet head removed from the deceased's body to P.W.9. According to **P.C. Isaya Mikwa** (P.W.10), he together with **P.C. Jacob Kibo** were both on duty at Huruma Police Station on **18th February, 2010**. It was his evidence that he did not see the deceased at the police station and neither was his name entered in the O.B. On **18th February, 2010**, between 11.00 p.m. to 12.00 a.m.,

Inspector(I.P.) **Mike Opicho, (**P.W.13) on instructions of P.W.8 proceeded [We have already stated that] to Kariobangi at the National Concrete Site where he collected the body of the deceased and took it to the city mortuary. On **8th March, 2010**, **Inspector Jonathan Munyuoki** (P.W.14), accompanied **Mr. John Nyanzwi** (P.W.17) to Huruma Police Station where **Constable Kalulu** (D.W.4) briefed them of a shooting that had occurred between the police and some gangsters. They then proceeded to Kariobangi Police Station and checked the O.B which had an entry that there was a shoot-out between police officers and gangsters. On **29th March, 2010,** P.W.14 received six ceska pistols from **Nyanzwi (P.W.17)** who had recovered them from Kasarani together with a bullet head which had been removed from the body of the deceased during postmortem. After investigations and considering the circumstances, P.W. 17 compiled his report and made recommendations that an inquest be held to establish the circumstances under which the deceased had died.

On **18th February, 2010**, Sergeant **Peter Mwangi**, (P.W.15) from the scenes of crime took photographs of the deceased's body which were produced in evidence. On the other hand, on **9th April, 2010,** Chief Inspector **Emmanuel Langat**, (P.W.16), a ballistic expert attached to CID headquarters received six (6) Ceska pistols of different serial numbers and several magazines also marked for identification, all for purposes of examination. From his examination, he formed the opinion that the bullet recovered from the body of the deceased was fired from the pistol assigned to the appellant. Chief Inspector **Jared K. Nyaosi** (P.W.18) stated that in **February/March, 2010**, he was the in charge of the armory at Muthaiga Police Station; that on **18th February, 2010**, he issued a Ceska pistol Serial No. G. 7990 with 15 rounds of ammunition to the appellant which he returned on **19th February, 2010.** A toy pistol was also handed to him**.**

In his defence, the appellant gave a sworn statement of defence and called **PC Nganda** (D.W.2), his wife, **Ruth Kerito** (D.W.3) & **PC Kalulu** (D.W.4) as his witnesses. It was the appellant's defence that on **17th February, 2010,** at about 6.00 p.m. he went to Muthaiga Police Station. He was issued with a gun for night duties. The appellant, while in company of other police officers (namely **PC Kinyua, PC Kalulu**, **PC Njue**, **PC Iluku & PC Mulwa**), all in civilian clothes were in patrol within Outering Road near Sunflower Primary School, when they saw a group of more than 5 people coming from a thicket, they identified themselves as police officers and challenged the group to stop. The five people began shooting at them and they shot back. The deceased was one of the five. The appellant fired more than the others did as he was at the head of the arrow formation, formed for purposes of combating the gangsters. He also tried to pursue those who had fled but he was not successful. According to him, after the shooting ended, a toy pistol was found next to the deceased's body. **O**n **19th February, 2010,** he went to Muthaiga Police Station and returned his gun. He was arrested on **21/05/2011**. He maintained that on **18th February, 2010**, he did not go to Huruma Police Post at 3.00 p.m and his wife **Ruth Kerito** (D.W.3) corroborated his evidence that on the material day and time, he was in his house sleeping.

Leonard Kinyua Nganda, D.W.2, stated that on **18th February, 2010**, he was on night shift from 6.00 p.m. to 6.00 a.m. He met with his colleagues at Kariobangi police post at 6.30 p.m. where they were meeting for briefing by the duty officer. He was with the appellant among other officers and they were all armed with Ceska pistols. D.W.2 stated further that while on patrol along Outering road, they laid an ambush near Sunflower Primary school; that they saw a group of about five (5) people approaching from a nearby thicket; that they introduced themselves as police officers and challenged the people to stop; that thereafter, he heard a gunshot from the gang. He stated "***after we challenged them by shooting in the air and from there they responded by more shooting towards us. We then formed an arrow approach and started shooting to disarm them. At the head was P.C Mwiti, the accused. While shooting to disarm them P.C. Kalulu and P.C Njue were left behind as we pursued others, one fell into a ditch who was left with P.C Kalulu and P.C. Njue. The Other group was screaming so I thought they had gunshot wounds. When we came back after 5 minutes we confirmed that the person in the ditch had died. …. The OCS then came and called the scene of crime personnel and when they arrived we discovered the pistol on the right side of the body***".

In cross-examination, D.W.2 confirmed that he discharged three (3) bullets, **P.C. Mwiti** (the appellant) discharged the highest number of bullets as he was at the head of the arrow formation while **P.C. Njue** never shot any bullet because he fell on the ground.

PC Jelvasio M. Kalulu, D.W.4, who testified that he was amongst the police officers on patrol duties on **18th February, 2010,** corroborated the evidence of the appellant and D.W.2, in every material aspect.

Suffice to state that there were two versions of how the deceased met his death. The first version is the one tendered by the prosecution that the deceased was arrested in a matatu and he was led to the police station where he was locked in the cells until he was removed and subsequently his body was found at the city mortuary and that, for the duration of his stay in the cells, his name was not entered in the O.B. There were witnesses (P.W.1 and P.W.6) who stated that they were with the deceased in the matatu (driven by P.W.1) that drove him to the police station whilst handcuffed. There were also witnesses who stated that they were with the deceased in the cells at the police station. These were P.W.2 and P.W.7. His own brother (P.W.3) said he found him in the cells on **18th February, 2010,** although his name was not in the O.B. On **19th February, 2010**, the body of the deceased was found at the city mortuary by his father (P.W.4).

The second version is that propagated by the appellant that he was in company of his five other colleagues at night and they encountered persons who refused to surrender, and a shoot-out ensued. As the appellant was at the head of the arrow-formation, he fired the most shots against the gangsters. After that, he informed the OCS, who visited the scene and the body of the deceased was taken to the city mortuary. He denied having been at Huruma Police Station on **18th February, 2010** at about 3 p.m (the time the deceased was allegedly taken to the station) as he was in his house sleeping. His evidence that he was at his house was corroborated by that of his wife (D.W.3). Two of the appellant's colleagues, D.W.2 and D.W.4 testified that they were with the appellant when they encountered gangsters and a shoot-out ensued leading to the death of the deceased.

The learned trial judge considered the two diametrically opposed versions of how the deceased met his death. He concluded:

> ***"Having found as a fact that the prosecution did not prove that the accused had arrested the deceased, locked him in the police cells without booking him and later removing him and killing him in what the prosecution has submitted was extra judicial killing of a known criminal in the area, the next thing for the court to determine against the definition of malice aforethought as stated herein is whether the prosecution proved that the death of the deceased was caused with malice aforethought on the part of the accused? This can only be answered if the intention of the accused and his colleague in shooting at the deceased and his group is established.***

From the defence case, it is clear that the area at which the deceased was killed was known to be a dangerous place, it was the accused evidence in chief that several police officers including PC Wycliff Wanyonyi, PC Kamunde had been killed in the same area while the likes of PC Muthoka, PC Wagane and PC Rotich had been shot and injured at the same area and therefore their shooting at the group must have been in self defence. It was therefore the defence case that since their life was in danger, they were justified in shooting at the deceased and his alleged group of four as per the Forces standing orders. It was further the defence case as I understand it that though only a toy pistol was recovered from the place where the deceased had fallen, according to DW3 PC J.M. Kalulu if you saw it from a far you could believe that it was a real firearm.

In shooting at the deceased and his group, what was the intention of the accused person and his group? Was it to effect arrest or to protect themselves from attack? And did they use reasonable force therein? The evidence of the accused is that they saw a group of five and PC Kalulu DW3 challenged them and identified themselves as police officers but they started shooting at them. Since he was the one who was heading, he fired more shots than the rest. Having contrasted the evidence of the accused person in his defence against the circumstantial evidence herein, I find and hold that the prosecution failed to place the accused person at the place of the arrest of the accused person which would have proved an intention to kill the same later on thereafter and in as much as there is strong suspicion raised that the deceased who was a known criminal in the area might have been executed by the police, mere suspicion however strong cannot lead to a conviction in a criminal trial (emphasis ours). ***I therefore find and hold that the state did not prove beyond reasonable doubt the offence of murder against the accused person".***

From the above excerpt, it is clear that the trial judge discounted the allegation of extra-judicial killing and termed it as "***mere suspicion***". Consequently, the trial judge found the appellant guilty of the offence of manslaughter contrary to section 202 of the Penal Code and sentenced him to seven (7) years imprisonment w.e.f **11th August, 2011,** the last two years of the sentence were to be served on probation.

As pointed out, the appellant was aggrieved by this outcome and hence this appeal.

We also hasten to add that although during the hearing of the appeal, the learned state counsel urged us to find that the appellant was guilty of murder and that we should enhance the sentence, it is noteworthy to point out that no cross-appeal or a notice of enhancement of sentence were filed by the State challenging the findings of the trial judge and the sentence meted to the appellant. In our view, it is too late in the day to re- open the contention by the State that the appellant should have been found guilty of murder or to vary the sentence.

The trial court having come to the conclusion that the appellant killed the deceased without the necessary intention, and that it was not an extra-judicial killing as advanced by the prosecution and these findings having not been challenged by the respondent, it is for us to determine whether the trial court erred in ascribing criminal liability to the appellant, erred in finding that the appellant used the firearm illegally and finally, whether the appellant was guilty of manslaughter.

Section 17 of the **Penal Code,** Chapter 63 of the Laws of Kenya provides:

"17. 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".

In the English decision of ***Palmer vs. R*** [1971] AC 814 cited by the appellant's counsel, it was held:

"It 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".

Was the appellant's life and that of his colleagues put in immediate peril? From the findings of the trial court, which as stated above were not challenged by the respondent, the appellant and his colleagues were in an area of operation that was considered dangerous. The trial Judge noted that several police officers including **P.C Wycliff Wanyonyi** and **P.C. Kamunde** had been killed in line of duty in the area. Others like **P.C Muthoka**, **P.C. Wagane** and **P.C Rotich** had been shot and injured in the same area. The appellant and his colleagues saw a group of people emerge from a thicket. The time was about 9 p.m., the appellant and his colleagues fired in the air but the gang of people continued to advance against them whilst shooting. In our view, given the past antecedents that the area was a crime zone, the time being hours of darkness and the shooting that ensured, we are of the considered view that the appellant was justified in coming to the conclusion that his life was in danger.

In this Court's decision of ***Ahmed Mohammed Omar & 5 Others vs. Republic [2014] eKLR,*** this Court found that defiance of a police order to stop and confronting the police may rightfully lead to provocation leading to self- defence. The Court stated:

"In this appeal, there was no evidence from any of the prosecution witnesses that the deceased persons were armed with any guns, it is the appellants who asserted that the deceased persons shot at them. Perhaps the only weapons that the deceased had were pangas, swords and a toy gun. That is why the learned trial Judge held that the appellants used excessive force in the circumstances. However, there was evidence that the deceased defied a police order to stop and confronted the appellants".

In ***Ahmed Mohammed Omar & 5 others vs. R.*** (supra), the court further stated:

"We have already stated that the shootout occurred at night when there was no good visibility. The appellants identified themselves as police officers and fired at least twice into the air to disperse the deceased but the deceased kept advancing. In

these recent days when so many police officers are being killed in the line of duty by armed criminals, the appellants, not knowing that there had been physical confrontation between the taxi operators and motor cycle operators, could have reasonably believed that their lives were in danger and decided to open fire. As held in DEANE v R (Supra), in such circumstances, a police officer cannot wait until he is struck before striking in self-defence. The learned trial Judge rightly observed that police officers "perform their duties in circumstances that are often fraught with danger to their lives, it is not an easy job. That notwithstanding, the trial court blamed the police for shooting live bullets towards the taxi drivers".

It concluded:

"Taking into account the provisions of Section 17 of our Penal Code that import application of the English Common Law into cases of this nature, we are satisfied that the appellants' defences of self-defence were improperly rejected because the learned trial Judge did not apply the right test. For this reason, we allow this appeal, quash the convictions for murder and set aside the death sentence passed by the trial court as against each of the appellants. The appellants are set at liberty unless otherwise lawfully held".

The facts in the instant matter reveal a scene with police officers in an area that was known as crime zone. The time was during the hours of darkness. According to the appellant and his two witnesses (D.W.2 & D.W.4), they encountered a gang who began shooting the moment they fired, ordering them to surrender. They then formed an arrow formation and the appellant is put in a position where he was directly in front of one of the members of the gang. He fired no less than 8 bullets and a colleague fired one bullet.

If the version found by the trial court that the appellant and his colleagues were in a crime zone area and faced attackers who were shooting at them at night, then the appellant acted in self-defence and the trial court erred in ascribing criminal liability for the appellant's use of firearm in his self-defence.

Accordingly, the Judge erred by convicting and sentencing the appellant as he did. We find the appeal has merit and set aside the conviction and sentence, which had in any event already been served. We note that the appellant (in his prayers) asked to be compensated for damages and that he be reinstated. Those prayers, if at all, do not fall for our determination and we shall say no more on that.

The upshot of the above is that the appellant's appeal is allowed. We set aside the conviction and sentence meted out by **Wakiaga, J.**

It is so ordered.

Dated and Delivered at Nairobi this 29th Day of January, 2021.

M. K. KOOME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR