IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), SICHALE & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 124 OF 2018

BETWEEN

TITUS NGAMAU MUSILA KATITU.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a Judgment of the High Court at Nairobi (J. Wakiaga, J.) dated 7th February, 2018

in

H.C.CR.C 78 OF 2014)

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JUDGMENT OF THE COURT

The "blue code of silence" is a common phenomenon, spanning across different countries and police cultures in America, Europe, Asia and even Africa. It is the unwritten rule according to which police officers never provide incriminating information about their colleagues; to close ranks in silence and to cover up knowledge of a fellow officer's wrongdoing with a collective blanket of self-preservation, a feeling of *esprit de corps* among officers who by and large depend on each other for their very risky lives as they confront the violent and hostile world of policing and crime. This background is important in our consideration of this appeal because the police in Kenya, as we shall demonstrate in this case as in others before it, has, in certain circumstances engaged in the practice of covering up for each other. For example a report by Kenya Human Rights Commission headed, ***'Kenya's scorecard on security and justice: Broken promises and unfinished business',*** July 2017 at page 32 states:

> **"However, the IPOA has faced a number of challenges. First, the success of the IPOA is dependent on total cooperation from the police they are investigating. Often the police fail to provide adequate cooperation for IPOA to prosecute police officers allegedly responsible for committing crimes. In March 2016, IPOA released a report stating that police deliberately bungle some of their investigations in order to protect fellow police officers…"**

Similarly the IPOA Board End Term Report May 2012 to May 2018 at page 93 enumerates the following facts;

> **"In addition, non-cooperation by the Service have seen concerted efforts by officers to cover up crimes, with official documents and exhibits being tampered with, shoddy and hasty investigations by police to defeat justice, charging in court of victims of police misconduct to circumvent IPOA investigations, skewed interpretation of applicable laws to justify police actions, poor record keeping and failure to maintain proper records as per the law or service standing orders, deliberate records tampering and loss of vital documents, manipulation of Arms and Ammunition Movement Register, un-serialised or unsealed documents to circumvent justice course."**

The decisions in **R V. Police Constable Samson Muriuki Mbui** (2006) eKLR and **I.P. Veronica Gitahi & another V. R.** (2017) eKLR are some of the examples of cases where the courts have expressed concern over police cover-up of crime involving police officers. A similar diversion will be seen in the present case. The learned trial Judge expressed his disquiet as follows on how the investigators treated some crucial evidence;

> **" 32. I have taken into account the evidence of PW18, DIANA MUTUNGA WATIKA the final investigator in this matter**

having taken over the investigation from the initial investigation by the police officers and would agree with her that there was an initial attempt by the police to cover up the matter which explains the custody and handling of the exhibits include the bullet head recovered from the body of the deceased, the guns issued to the accused and his two colleagues which they confirmed using even after the report of the shooting had been made and leading to the finding by PW7 that the said bullet head recovered was not fired from the accused pistol when looking against the evidence of PW2. Whereas the ballistic result was inconclusive, the same did not exclude the gun issued to the accused having fired the fatal shots".

The Judge was convinced that the failure to call PC George Omori Amemba and PC Steven Bunnet, the two officers who were at the material time of the fatal shooting, with the appellant, was part of a cover-up.

This is therefore how the appellant, a police officer ended up being charged with the fatal shooting of the deceased on 14th March, 2013. On that day the appellant, together with his colleagues, P.C Bunnet and P.C Amemba, were each issued with Ceska pistols loaded with 15 rounds of ammunition, except the appellant whose pistol had 12 rounds. They were assigned the duty of maintaining law and order at the Githurai 45 Bus Stage, which was notoriously famous for high crime rate. It was generally agreed by witnesses that the appellant was dreaded and loved in equal measure as a crime-buster. His presence sent shivers down the wrongdoers' spines but gave confidence to the law-abiding citizens.

At the bus stage, it was the prosecution's case that the appellant confronted the deceased, a notorious criminal in the area going by the street name, *mondo*, who had snatched a mobile phone from a passenger and tried to run away from the scene. PW2 who had been watching these events saw the appellant suddenly reach out to the deceased, push him down to the ground, draw his pistol and shoot the deceased. The appellant was immediately joined by another officer, as PW2 heard two more gunshots from the direction the deceased was with the two officers.

The explanation should obviously be the "blue code of silence", but the fact is that it took almost one and half years for the appellant to be arrested and charged. On 5th September, 2014 he was charged with the murder of the deceased contrary to **section 203** as read with **section 204** of the Penal Code.

The appellant denied the charge, and though confirming being at the scene of the shooting, he maintained that he only responded to an alarm which has been raised and upon seeing the deceased, who was in a group of several other youths, fleeing with a stolen mobile phone he shot three times in the air as he pursued him; that when he got to where the deceased was, he noticed that he had been shot and the stolen mobile phone was next to his body; that he could not tell who shot the deceased as there were many plain-cloth police officers at the stage at the time; and that he called the Officer Commanding Station (OCS) and informed him of the incident.

Wakiaga, J who conducted the trial in the High Court was satisfied from the medical evidence that the deceased's death was caused by gunshot wounds. There was undoubted evidence that the appellant had spent three rounds of ammunition. The key witness, PW2, according to the Judge, saw the appellant shoot the deceased. This evidence, in the learned Judge's view was corroborated by the evidence of PW4, the OCS who told court that indeed the appellant called him immediately after the incident and informed him that he had gunned down a robber and recovered, from him a mobile phone that had been stolen. As we have noted earlier the Judge discounted the ballistic evidence, which was inconclusive as it did not link the bullet found lodged in the body of the deceased with the firearm the appellant had. We have also observed the learned Judge's concern over an attempt by the police to cover up the real culprits in the manner the exhibits were handled making it difficult to identify the precise weapon from which the fatal shots were fired. This notwithstanding, the Judge was persuaded that the appellant caused the deceased's death; and that since he shot him when he posed no danger to anyone, the appellant killed him with malice aforethought.

Upon convicting the appellant of murder the learned Judge in a whooping 18 page ruling on sentence, quite uncharacteristically imposed on the appellant 15 years imprisonment, directing that 12 years of which would be served in prison **"to act as a warning to any police officers who takes the life of anybody and to appease the family of the victim…of the 12 years, the convict shall be given credit for a period from 1st September, 2014 to 29th January, 2016 being the pre-conviction period as already served…"** and 3 years thereafter to be on probation to rehabilitate and correct the appellant **"and to satisfy his supporters that their cry has been taken into account ".**

What is uncharacteristic about the sentence is the fact that, although the Sentencing Guidelines, 2016 encourages accountability and transparency in the sentencing process, we do not think they envisage some of the reasons advanced by the learned Judge. It was enough for the Judge to limit his considerations, as he, by and large did, to those principles enumerated in the guidelines, such as retribution, community protection, deterrence, rehabilitation and restorative justice. It cannot be the function of sentencing to "satisfy supporters". We stress the need to apply the guidelines so as to realize their objectives; to achieve proportionate and parity in sentencing process.

That apart the appellant was aggrieved by the decision and has proffered this appeal on 11 grounds, which we have summarized as follows, that the learned Judge erred in law and fact by: failing to exhaustively analyze the entire evidence; failing to take into consideration the ballistic evidence which confirmed that the bullet found in the body of the deceased did not come from the appellant's firearm; convicting the appellant on flimsy evidence exclusive of the evidence of his two colleagues; failing to subject the appellant to a mental assessment before asking him to plead to the charge; disregarding the material contradictions of the prosecution evidence; failing to properly evaluate the sworn evidence by the defence; and failing to consider the fact that the appellant had been denied a fair trial in contravention of **Article 50** of the Constitution.

Submitting on these grounds Ms. Jepleting, learned counsel for the appellant urged us to determine only two issues, whether the standard of proof beyond reasonable doubt was reached on the facts of the case and, whether the appellant's gun was the murder weapon. In our view, those issues amount to; whether the offence of murder was proved. It was counsel's argument that the evidence presented by prosecution did not meet the required standard of proof to warrant a conviction; that the prosecution only proved the fact and cause of death of the deceased but failed to link it to any unlawful act by the appellant; that there was witch hunt in the manner the appellant was isolated and charged alone yet there was evidence that he was in company of two other police officers who were not charged and whose firearms were also confirmed to have discharged ammunition; that even after acknowledging that there were material contradictions in the evidence of PW1, PW2 and PW15,

the learned Judge still went ahead to treat the contradictions as minor; that the Judge failed to evaluate the allegation that the guns movement book was capable of being manipulated; that the court erred when it relied on circumstantial evidence which did not meet the threshold set out by this Court in the case of **GMI V Republic** (2013) eKLR; and that the evidence of PW2, the single witness was uncorroborated as the rest of the witnesses only gave hearsay evidence.

In urging us to acquit the appellant, counsel borrowed the famous line "***If the glove does not fit, acquit"***, from the submissions in the **O.J Simpson** trial to draw a parallel with this case, that since the cartridge extracted from the deceased's body was not linked to the appellant's gun, then the doubt as to who killed the deceased ought to have been resolved in favour of the appellant. Finally counsel urged us to apply **Article 50 (2)(a)** of the Constitution and find that the appellant was innocent hence entitled to an acquittal. To persuade us to allow the appeal, the appellant cited the English cases of **Woolmington V. DPP** (1935) AC 462; **Miller V. Minister of Pensions** (1947) 1 ALL ER 372, the Nigerian case of **Bakare V State** (1985) 2 NWLR 465, and the American case of **United States V. Smith**, 267 F. 3d 1154, 1161 (D.C. Cir. 2001).

Mr. Gitonga, learned counsel for the respondent opposed the appeal and urged us to dismiss it as, according to him there was overwhelming evidence connecting the appellant with the fatal shooting of the deceased; that as a matter of fact the appellant himself admitted to the OCS, PW4, that he had gunned down a suspected robber; that this statement is admissible pursuant to the exceptions to the rules of hearsay under **section 33(c)** of the Evidence Act; that although the ballistic evidence was inconclusive as to the firearm from which the fatal shot was discharged, it did not exclude the gun that the appellant had which fact was sufficiently explained by PW7; and that there was a link between the 3 gun shot wounds found in the body of the deceased and the 3 rounds of ammunition shot from the appellant's gun.

Though not raised by the appellant, counsel drew our attention to the fact that the sentence was very lenient in the circumstances. He nonetheless had no problem with it.

This is a first appeal by which this Court is duty bound to subject the evidence recorded by the trial court to a fresh examination at the end of which it must make its own independent findings and draw its own conclusions on that evidence. Only then can it decide whether the trial court's findings should be upheld or set aside. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses first hand. See: **Okeno V. R** (1972) E.A. 32.

Before we embark on the determination of the single issue which we have identified earlier in this judgment, the appellant has complained that he was never subjected to a mental examination to prove that he was fit to stand trial. Our answer is drawn from the decision of the Court in **F U M V. Republic, Criminal Appeal No. 139 of 2010** where it was explained that:

> **"On whether or not the appellant should first have been taken for a psychiatric examination, we are unable to find a legal basis for that requirement. It little matters that some practice exists whereby murder suspects are first taken for such assessment. The law is quite clear that all persons are presumed to be *compos mentis:* Section 11 of the Penal Code states as much. If it is an accused person's defence that he was not of good mind at the time of the commission of the offence, the onus is on him to raise and prove it on a balance of probability. See section 107, 109 and 111 of the Evidence Act"**

The appellant did not raise a defence of insanity and there were no doubts raised as to his mental capacity. As the Court said in the above case mental examination of suspects accused of murder has been done as a matter of practice rather than law. No prejudice was occasioned to the appellant by the failure to subject him to a psychiatric evaluation. Therefore nothing turns on this issue.

Turning to the crux of this appeal, whether there was evidence upon which the trial court could justifiably have found a conviction? It is trite that to sustain a conviction of murder the prosecution has to prove that the deceased's death was caused by an unlawful act or commission on the part of the accused person; and that the accused person in causing death did so with malice aforethought.

The chain of events leading to the death of the deceased is largely uncontroverted. For example it was conceded that the appellant was at the scene of the shooting at the time the deceased was shot; that the deceased, who was of known criminal disposition had grabbed a mobile phone from PW8 and was fleeing from the scene when he was gunned down; that the appellant shot three times from his lawfully issued firearm; that when the body was examined the pathologist found one bullet lodged in the body of the deceased although in addition to this there were two more gunshot wounds on the body, making a total of 3 gunshot wounds; that the appellant was in the company of two colleagues who did not testify; that upon examination of their firearms, it was evident that they too had shot twice, that is, one bullet each; that it was the appellant who collected the mobile phone from where the lifeless body of the deceased lay; and that he handed it over to his boss at the station.

The million-dollar question, arising from the foregoing is, who fired the fatal shot? The appellant insisted that he shot three times in air as a means of stopping the deceased from fleeing from arrest; that the deceased ran behind a bus as he chased him; and that when he caught up with him he found him already shot. Because it was a market day in the area, the appellant suspected the deceased must have been shot by any one of the many armed police officers who frequent the area on market days. He also did not rule out any of his two colleagues shooting the deceased.

The prosecution on the other hand anchored their case on the evidence of PW2, an eye witness. He was clear that the deceased was a friend, a former schoolmate; and that he had known the appellant for approximately 5 years. Just minutes before the incident the witness had parted company with the deceased. It was his testimony that as soon as the deceased left he saw him in an argument with the appellant; that he witnessed the appellant suddenly pushing the deceased to the ground, removed his gun and shot the deceased; that he then noticed the two being joined by another officer in a black jacket who was also armed; and that after the appellant shot the deceased he heard a second and third gunshots but could not tell who shot them. Though the Judge made no mention of this, that evidence qualifies as testimony of a single witness respecting identification. As the Court warned in **Abdala bin Wendo & Another V. R.** (1953) 20 EACA 166, **Cleophas Otieno Wamunga V. R** (1989) eKLR and **Paul Etole & Reuben Ombima V. R,** (2001) eKLR, and a host of others, the testimony of a single witness respecting visual identification or recognition must be received with the greatest care, especially when the conditions favouring a correct identification are difficult. In such circumstances the court ought to examine closely the circumstances in which the identification by

the witness came to be made. In addition, and of significance, the court must look for some other corroborating evidence, pointing to the guilt of the accused person, so as to minimize the error in the identification by a single person.

Those authorities also warn that, although recognition may be more reliable than the identification of a stranger, mistakes are sometimes made in recognition of even close relatives and friends. They emphasize that when the quality of the identification evidence is good the danger of mistaken identification is lessened.

The learned Judge found corroboration of PW2's evidence in the testimony of PW10 who confirmed that indeed both the deceased and PW2 were together at the stage. Reading through the recorded evidence of PW2, it is apparent to us that he was a credible and compelling witness. The credibility of his account of events was considerably enhanced by the detailed graphic and candidness with which he described what he saw and heard. For instance he described how the appellant was dressed, in a jungle green half coat while the other officer who joined him was in a black jacket, and the deceased in a pair of blue jeans trousers, blue and white stripes T-shirt. He narrated truthfully how he watched the deceased and appellant engaged in what he thought was an argument but could not hear the words due to the noise from motor vehicles. He saw the appellant push the deceased down with both his hands; that he saw the appellant shoot the deceased only once though he subsequently heard a second and third shot.

Nothing from this account is suggestive that the witness had invented the story or was engaged in an entrenched fantasy. He did not have to give details like the appellant with both hands pushed the deceased down before shooting him. Similarly he could as well have said that he saw the appellant shoot the deceased three time. He repeatedly stated that he did not see the appellant fire the second and third shots. He saw the appellant shoot the deceased only once. Further, as an indication of his credibility, in our view, was his honest admission that the appellant had arrested him and others several times in the past for touting and extortion; that the deceased had been charged in 2006/2007 with robbery with violence but acquitted; and that after the incident there was word that he was the deceased's accomplice in the snatching of the phone; that due to fear of arrest he did not report to the police that he had witnessed the shooting of the deceased.

He withstood intense cross-examination and was indeed a courageous individual, considering that some civilian witnesses sought to be assured of protection before they could give evidence, others applied for testimony through video link, while others ended up praising the appellant for the great work he did in the eradication of crime in the area, even though they were prosecution witnesses. The learned Judge obviously had a better opportunity to assess the witness' demeanor than ourselves.

The incident occurred in broad daylight, at approximately 4 pm. The distance between the witness and where the appellant and the deceased were was only 10 to 15 meters. They were the only two people right before his eyes, first standing facing each other in an argument. There was no form of obstruction. In the end we saw nothing in PW2's answers, either in examination-in chief or under cross-examination to suggest that he had been caught out or had tripped himself up.

The respondent relied on three pieces of evidence as corroborating the testimony of PW2 that the appellant shot the deceased; the evidence of PW4, PW7, PW10 and that of PW12. The only support from PW10's evidence was that both PW2 and the deceased were at the scene at the time of the incident. For PW4, the OCS, it was his evidence that the appellant called him on phone to report that there was a robbery and that he had "gunned down" one of the robbers and recovered the stolen mobile phone from him. Learned counsel for the respondent argued that this statement was admissible under the exceptions to the rules of hearsay under **section 33(c)** of the Evidence Act. That, with respect is not correct. From those words, in terms of **section 25** of the Evidence Act, an inference may reasonably be drawn that the appellant admitted to the OCS that he had committed murder. That would amount to a confession, which is generally inadmissible, unless the safeguards in law are in place. There were no such safeguards in this case. The statement by the OCS was not admissible and could not, for that reason corroborate PW2's evidence. The importance of his evidence, however was that when he arrived at the scene he found the appellant holding the phone recovered from the deceased, a confirmation that he got there before everyone else, thereby corroborating PW2's evidence in that respect.

PW12, the pathologist confirmed the existence of three gunshot wounds and that the deceased's death was caused by **"head injury due to gunshots ….at close range"**. Just as this evidence lends credence to PW2's evidence that there were a total of three gunshots, it also confirms his testimony that the appellant was standing close to the deceased, hence the finding that the shots were from a close range.

All the gunshot wounds were on the head. Onne bullet marked Exhibit "A"was lodged in the head while the rest exited. The appellant himself admitted having shot three times. His two colleagues also discharged one bullet each from their guns, though there is no evidence that they discharged them at the scene of the deceased's murder or elsewhere, as they did not testify. If they discharged them at the scene, then there ought to have been 5 spent cartridges collected from the scene. It was therefore as strange as it was confounding, first, for the investigators to present only one bullet marked Exhibit "A" to PW7, the Firearms Examiner and then for the latter to categorically state that neither the appellant's nor his colleagues' guns fired Exhibit "A"; that Exhibit "A" **" could have been fired in any of the many pistols or sub machine guns (SMG's) chambered for the 9x19mm rounds of ammunition"** but not from any of the three guns he examined. This is indeed a baffling conclusion as the three firearms issued to the appellant and his colleagues were also 9mm calibre pistols designed to chamber 9x19mm rounds of ammunition.

We have said that all the doctor found was that the immediate cause of death was injury from three gunshot wounds. Even by eliminating Exhibit "A" and basing our conclusion on PW2's evidence, there is irresistible inference that the first shot fired by the appellant killed the deceased. The bullet fired by the appellant needed not be Exhibit "A". Our analysis and conclusion on this question disapproves the appellant's contention that he fired three times in the air.

With respect, we cannot help but fully agree with the learned Judge's observation that there was an active attempt to sweep the cause of the deceased's death under the carpet and, in death, deny him and his family justice. In our own assessment, the evidence was deliberately manipulated and improperly handled, while the scene of crime was not secured. As we have already observed, of all the five bullets fired at the scene, not a single spent cartridge was recovered from the scene, except Exhibit "A" that was lodged in the deceased's body and whose origin the prosecution treated as a mystery.

PW18, an officer from IPOA alluded to manipulation of the firearms movement register. Out of the 15 prosecution witnesses, 8 were police

officers, who were determined to maintain the “blue code of silence” and ensure they saved one of their own. Indeed, it was only after the intervention by IPOA and other pressure groups that the appellant’s nearly two years of freedom after the incident was brought to an end.

We are satisfied, in the end that there was proof beyond any reasonable doubt of the appellant’s hand in the deceased’s death. The circumstances prevailing at the time of the shooting were conducive; the time, the surrounding, recognition of the appellant, and the distance of PW2 from the scene. He accurately and unmistakably identified, indeed recognized the appellant as the person who fired the fatal shot. That evidence was supported, as we have demonstrated, by other independent evidence.

Considering that the deceased was not armed, that he was in fact subdued and on the ground and bearing in mind that he had even raised his hands in defenseless submission, we have no doubt that by shooting the deceased on the head at point blank position, the appellant acted with malice aforethought. His actions violated guidelines contained in the Sixth Schedule of the National Police Service Act, which enjoin police officers in effecting arrest to always attempt to use non-violent means first and only resort to force when non-violent means are ineffective. It directs that if force is used, it must be proportional to the objective to be achieved, to the seriousness of the offence committed, and to the resistance by the person against whom force is used.

A firearm may only be used for exceptional purposes, such as to save or protect the life of the officer or any other person; in self-defence or in defence of other person against imminent threat of life or serious injury; and to prevent a person charged with a felony from escaping lawful custody.

With that we reject the appeal on conviction.

Both in his memorandum of appeal and submissions, the appellant has not challenged the sentence imposed, and since it is not illegal, though unusual, we say no more, with the conclusion that this appeal fails and is accordingly dismissed.

Dated and delivered at Nairobi this 24th day of April, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR