



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MURGOR & SICHALE, J.J.A)

CRIMINAL APPEAL NO. 99 OF 2019

BETWEEN

BENJAMIN KAHINDI CHANGAWA.....1ST APPELLANT

STANLEY OKOTI.....2ND APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the judgment of the High Court at Nairobi (S.N. Mutuku, J.) dated 1st November, 2018

in

HC.C.R.C No. 66 of 2015)

JUDGMENT OF THE COURT

This is yet another incident involving reckless use of firearm by the police leading to senseless loss of lives of three innocent people. On 6th October, 2014 Joseph Obongo Onchuru, an administration police officer, (APC Onchuru) attached to the residence of a Member of Parliament in Loresho, Nairobi, armed with an officially issued Ceska Pistol Serial No. F9628 with 12 rounds of ammunition and in the company of his relatives, Geoffrey Nyabuto Mogoi (Nyabuto) and Amos Okenye Makori (Makori) and two other people, went to M-Club in Kangemi. Save for APC Onchuru, who is said to have gone to the back of the Club where he sat alone, the rest ordered for and took some alcoholic drinks. It is not clear why he sat alone at the back of the club without a drink. At one point he took to the dancing floor with one of the female bar attendants. It is this attendant who noticed that he was armed with a pistol and drew the attention of the watchman to this fact. In turn, the watchman approached APC Onchuru and requested for him to identify himself. Instead of doing so, APC Onchuru showed the watchman the pistol, and a confrontation between Onchuru and the watchman then ensued; that the other four men, who had accompanied APC Onchuru joined in the fray, in the process of which they attacked the watchman. Surprisingly, the watchman single-handedly overpowered the group and pushed APC Onchuru inside the kitchen and locked him inside. A supervisor at the club called the police. It is not apparent from the evidence what information was communicated to the police. It would, however, appear that the information relayed by the Police Control Room in Nairobi Area through police radio, was that there was an on-going robbery at the Club. For this reason, the Control Room cautioned officers going to the scene to approach it with utmost care.

It fell upon the officers from Kabete Police Station who were on patrol in Kangemi area being closest to the scene to attend to the incident at the Club. In the team were the 1st and the 2nd appellants together with CPL Alex Miheso, who was their team leader. Both appellants were armed with AK 47 rifles each loaded with 30 rounds of ammunition of 7.62mm calibre.

According to the prosecution, upon arrival of the three officers at M-Club they found the door into the Club locked; that when the watchman opened for them they were shown two of APC Onchuru's relatives, Nyabuto and Makori who were still in the Club. APC Onchuru was still locked up in the kitchen. Only the two appellants entered the Club while CPL Miheso remained outside. After the watchman had allowed APC Onchuru to come out of the kitchen, he, Nyabuto and Makori were ordered to surrender. Both Nyabuto and Makori who were not armed surrendered by lying on the ground. But APC Onchuru, again acting strangely, remained standing. There is evidence that he lifted up his pistol which the police officers picked from him. Then all of a sudden gunshots rang out in quick succession and when the guns fell silent APC Onchuru, Nyabuto and Makori lay dead. The appellants were charged with three counts of murder contrary to **section 203** as read with **section 204** of the Penal Code.

For their part, the appellants explained that, being aware that they were about to face armed “robbers”, they demanded that the suspects do surrender; that one of the suspects instead started to shoot at them; and that, at that point, they too were compelled to open fire shooting and killing all the three instantly. According to them, the shooting was in self-defense. In convicting the appellants, the learned Judge (S. Mutuku, J) stated that;

“My careful consideration of all the evidence before me and the applicable law leads me to the conclusion that the accused persons acted outside the law. Given the evidence, which this court believes, that the deceased persons had surrendered as ordered by the accused persons, it is my view that the accused should have used non-violent means to arrest the deceased persons because this would have served the purpose. It is my view too that the accused persons used force that was not proportionate to the objective to be achieved, that is, arresting the deceased persons.....The numerous gun-hot wounds suffered by the deceased persons is proof enough of the manner they were killed. The accused persons were not trying to immobilize the deceased persons..... They shot and used a total of twelve bullets, 10 of them from the rifle being used by the 1st accused and 2 from the rifle being used by the 2nd accused. The wounds were serious ones. Each of the deceased persons had gun shots on the head among other sensitive parts of the body including the chest and abdomen. The intention of the accused persons, given the nature of the wounds inflicted on the deceased persons and the part of the body shot, can only have been to kill the deceased”

The Judge was disturbed by attempts by some people to interfere with the scene of crime by making it appear that APC Onchuru used his firearm, to justify the self defence version. That evidence was to the effect that next to the lifeless body of APC Onchuru was a pistol; and that the gunshot wounds seen on his body were from both high and low velocity firearms. Only the pistol which APC Onchuru had qualified as a low velocity firearm. The Judge, however, came to the conclusion that no evidence was presented to show that APC Onchuru shot at the appellants. In her view the suggestion that APC Onchuru shot himself was ridiculous. She said;

“I doubt that Onchuru shot himself and the only logical conclusion I can draw is that one of the accused persons who took the pistol from Onchuru used the same gun on Onchuru as well as the AK 47 rifle in his possession. This is the only conclusion I can arrive at based on circumstances surrounding that shooting”.

With that, the Judge sentenced both the appellants to death.

Although the appellants have raised nearly 15 grounds to challenge their conviction and sentence, on our own evaluation of those grounds and arguments made before us, we discern only one question; whether the appellants were properly convicted for murder.

Murder, according to **section 203** of the Penal Code is committed when a person with malice aforethought causes death of another person by an unlawful act or omission. Malice aforethought, on the other hand is established, according to **section 206**, by evidence proving an **intention to cause the death of or to do grievous harm** to any person; knowledge that the act or omission causing death is **likely to cause the death of or grievous harm** to some person, even where **such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or even by a wish that it may not be caused**;

Dr. Oduor Johansen, the pathologist established, after examining the bodies of the three deceased persons that they died of multiple gunshot wounds from high velocity firearm or firearms, save for APC Onchuru, who suffered gunshot wounds from both high and low velocity guns. We shall return to this last issue later. The pathologist observed the following injuries on the bodies of the three deceased persons;

(a) APC Onchuru:

- (i) gun-shot wound on the right armpit
- (ii) gun-shot wound on the right ear with an exit wound on the left side of the head
- (iii) gun-shot wound at the back of the right leg from the knee joint
- (iv) gun-shot wound on the right leg below the knee joint fracturing the tibia bone.
- (v) fractured and fragmented skull with bullet track.

(b) Nyabuto;

- (i) graze bullet wound on the back part of the left hand
- (ii) gun-shot wound on the left side of the chest between the 1st and the 2nd ribs
- (iii) graze bullet wound on the inner part of the upper arm.
- (iv) bullet wound on the left upper arm above the elbow
- (v) gun-shot wound on the left side of the chin
- (vi) graze bullet wound on the right elbow.

- (vii) gun-shot wound on the lower abdomen
- (viii) collapsed right lung with bullet injury.
- (ix) tears in the liver and intestines leading to bleeding in the abdominal cavity.

(c) Makori;

- (i) gun-shot wound on the left side of the head
- (ii) two bullet graze wounds on the right upper arm
- (iii) gun-shot wound on the upper right arm
- (iv) multiple fractured fragments of the skull with inlet gun-shot on the left side and exit on the back of the head on the right side.

The appellants were categorical that, because they had genuine apprehension that their own lives were in danger, they shot at the three deceased persons to stop them from causing harm to them. There was also indisputable evidence that the 1st appellant shot 10 of his 30 rounds of ammunition while the 2nd appellant used two rounds out of his 30 rounds. It is therefore common factor that it was the bullets from the appellants' rifles that inflicted on the three the fatal wounds. This was further confirmed by the evidence of SSP Lawrence Nthiwa, the firearm examiner.

After establishing that the appellants caused the death of the three deceased persons, the next question is whether they did so with malice aforethought, the mental state described above in **section 206**.

From their evidence in defence, the appellants argued that they faced imminent danger from the deceased persons who were armed; that they had been warned as much before they got to the scene; and that as soon as they entered the Club and introduced themselves, there were gunshots fired towards them.

It has long been agreed in a long line of judicial decisions in many jurisdictions, that;

“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.....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”.

See the Privy Council decision in **Palmer vs. The Queen** [1971] AC 814, 832.

By **section 17** of the Penal Code, one is not criminally responsible for using force in the defence of person, including one's self or property, in accordance with **“the principles of English Common Law”**. We reiterate what this Court observed in **Ahmed Mohammed Omar & 5 others vs. Republic** (2014) eKLR, that the English common law position regarding the defence of self-defence has changed over time; that prior to the House of Lords decision in **DPP vs. Morgan** (1975) 2 ALL ER 347, the general view was that an act amounted to self-defence if the accused believed, not only that he was being attacked or was in imminent danger of being attacked but also that such belief was based on reasonable grounds, an objective test. However, the decision in **DPP vs. Morgan** (Supra) introduced a subjective test, that:

“....if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”

The burden is upon the prosecution to disprove that the accused held the belief that he was being attacked or was in imminent danger of being attacked; and that the violence used by the accused was unlawful.

Section 28 of the Police Act, the Kenya Police Manual of 1980 as well as the guidelines contained in the Sixth Schedule of the National Police Service Act, all of which enjoin police officers in effecting arrest to always attempt to use non-violent means first and only resort to use of force when non-violent means are ineffective; that if force is to be used, it must be proportional to the objective to be achieved, to the seriousness of the offence committed, and to the resistance presented by the person against whom force is used; and only when the officer has reasonable grounds to believe that he or she or any other person is in danger of grievous bodily harm. Again, a subjective test.

It is common factor that the report that the police received and circulated was that there were armed robbers in the Club. In truth, those referred to as robbers were just revellers who were merely having some drinks and fun, except that one of them who was lawfully armed refused to identify himself. It is this fact that triggered the whole episode. According to the eye witnesses, he was arrogant towards the watchman, calling him a small person who could not do anything to him. A scuffle ensued between the two in which those who had accompanied **APC Onchuru** to the Club joined in. **APC Onchuru** is said to have openly showed the watchman his pistol, perhaps to intimidate him. Even with the insults and threats, the watchman was somehow able to overpower **APC Onchuru**, pushed him into the kitchen and locked him in there. It is at this point that the police were called. The door to the kitchen was opened only when the police

arrived. It is agreed that three police officers were the first to get to the scene, CPL Alex Miheso and the two appellants. The evidence that CPL Alex Miheso remained outside while the appellants went into the Club is also not contested. When the appellants demanded that he identifies himself, **APC Onchuru** did not do so. When ordered to surrender, the other two deceased persons complied by lying down on the floor while **APC Onchuru** remained on his feet. The events that followed were related by four eye witnesses Francisca Mutei Mutua, Joan Bunoro Matsitsa and Lydia Nkuene. **Francisca Mutei Mutua** recalled that when she noticed that there might be trouble in the Club she tried to go out but the door was locked, that she;

“...remained inside and the door was opened and police came in holding guns..... They asked for the man with the gun. He was asked to show the gun. He showed the gun. I heard gun shots. I lay down. When I stood up I saw 3 people had been killed.”

On her part **Joan Bunoro Matsitsa**, another member of staff at M-Club, stated that;

“At 2.00am police came. ...Police asked the two customers who they were. They did not respond. The watchman was told to open for the one locked in the kitchen. He did so. Police asked him who he was. He did not respond. They told him to remove the pistol and he did so. He gave police the pistol. I heard gun shots. I fell down at the table. When it went silent we saw the 3 customers, one who had the pistol and the other 2, had been killed.”

Lydia Nkuene, another eye witness told the court that;

“I do not know which police officers Josephine called. I saw police with guns. They were in long jackets. I went to the place. I heard ‘Surrender’ and 2 of the customers lay down. The other one lifted the pistol and it was taken by the police. He is one of those who died. We heard gun shots..... I covered my eyes. When it got quiet I saw 3 people lying down. I was in shock. I saw blood on the floor. Other police officers came. There were lights at the Club. Many police officers came. One was examining the pistol. They took a wallet and a Tecno phone from the pocket of the man who had a gun. The word ‘surrender’ was uttered and immediately the police snatched the gun and shots rang out. When I opened my eyes I saw the man with the gun was down.”

From this evidence, it is significant to note that the deceased persons offered no resistance at all. Even **APC Onchuru** who was armed simply handed over his pistol to the appellants. While it may be argued that the appellants may have been apprehensive upon seeing **APC Onchuru** draw his gun to hand it over to them while standing, there was no justification whatsoever to shoot the two unarmed deceased persons who had surrendered and were lying down on the floor. The evidence which was accepted by the learned Judge and with which we agree is, however, that **APC Onchuru** did nothing to warrant the kind of force employed by the appellants. It was, in our view, totally unnecessary to use such unwarranted force in the circumstances. The witnesses were unanimous that as soon as **APC Onchuru** surrendered his gun, the appellants opened fire on all the three deceased persons discharging a total of 12 ammunition, with the 1st appellant alone discharging 10 bullets. Elsewhere in this judgment, we have also noted that **APC Onchuru**'s pistol was also used in a manner to suggest that he shot at the appellants. Shots from his gun were said to have come from a low velocity firearm. Three bullets from the pistol were found to have gone through his body, suggesting that someone else shot him using his own gun. **CPL Gideon Mugambi** from DCI Kabete Police Station who arrived at the scene shortly after the shooting observed as follows:

“I observed the one alleged to be an AP. He was bleeding from the head. I saw a Ceska pistol and magazine which was detached from the pistol. There was a wallet beside the body of the AP Officer's body.

My view was that the magazine must have been removed from the pistol chamber and the wallet had been removed. It appeared as though someone had removed the magazine and placed it next to the body of the deceased.”

The scenes of crime personnel conceded that there were no marks left on the walls or floor by bullets shot from the pistol contrary to the appellants' defence that they only shot in return for **APC Onchuru**'s shots.

Having carried out our duty as a first appellate court by subjecting the evidence to fresh evaluation and looking at the evidence and the circumstances of the incident in totality, like the learned Judge, we come to the conclusion that the deceased persons were not robbers; that though **APC Onchuru** was armed, he never attempted to use his firearm on the appellants; that though he had an opportunity to use it as the watchman harassed him, he allowed himself to be pushed into the kitchen and locked up; that his two colleagues were not armed at all and were lying down in submission when they were shot; that shooting unarmed and helpless persons was unjustified; that **APC Onchuru**'s only blunder was that he misread the implications of his failure to identify himself in such crime prone area and in wee hours of the night; that his conduct and those of his colleagues did not justify the kind of all-out attack meted on them; that the attack did not come within **section 17** of the Penal Code as there was no immediate threat of being attacked or that they were in any imminent danger of being attacked; and that the violence they used was, in the circumstances, unlawful. The offence of murder was, for these reasons established beyond any reasonable doubt and to that extent the appeal on conviction fails and is accordingly dismissed.

In the last ground of appeal, the appellants have argued that the learned Judge failed to properly exercise her discretion in imposing death sentence, citing **Francis Kariuki Muruatetu & another vs. Republic & 5 others**, (2016) eKLR. While Dr. Khaminwa pleaded that we consider the volatility of Kawangware as a crime hub and the difficult conditions under which police work to provide security to the citizenry, Mr. Gitonga Muriuki for the respondent submitted that **Francis Kariuki Muruatetu & another v Republic & 5 others**, (supra) did not apply in the circumstances of this case, the deceased persons having been executed.

In our considered view, going by the appellants' mitigating circumstances, which include the fact that both were first offenders, their long public service, being 30 and 20 years respectively, their clean records of service with no disciplinary proceedings against them and the fact that they were both family men and bread winners, we are minded to allow the appeal on sentence and interfere with the sentence of death.

We accordingly substitute it with custodial sentence of ten (10) years from the date of conviction by the High Court.

This judgment is delivered in accordance with **Rule 32(2)** of this Court's

Rules, **Sichale, JA**, being of a different opinion having declined to sign it.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. OUKO, (P)

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR