IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 78 OF 2014

BETWEEN

JOSEPH LESIRE CHEKEM.....APPELLANT

AND

REPULIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisii, (Sitati, J.) dated 26th April, 2012

HCCRA NO. 65 OF 2004)

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JUDGMENT OF THE COURT

[1] This appeal arises from a shooting incident in which the appellant **Joseph Lesire Chekem** allegedly shot and killed **Alois Gachau Mwichuhie** *(deceased)*. The deceased was at the material time the District Officer of Nyatike Division in the former Migori District. The appellant was tried and convicted by the High Court *(Sitati, J)* of the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. He was sentenced to suffer death.

[2] The appellant's trial commenced before Kaburu Bauni, Ag Judge on 24th September 2004 when he took his plea. Subsequently Bauni J heard the evidence of nine (9) prosecution witnesses. Although it is not reflected on the record, it is within our knowledge that Bauni J died sometime in 2010. On 24th April 2010, the hearing started *de novo* before Musinga J who heard the evidence of two witnesses before proceeding on transfer. Thereafter, Makhandia J took over the matter and heard further evidence from ten prosecution witnesses between 22nd February 2011 and 30th September 2011. Upon the prosecution case being closed, Makhandia J ruled that the appellant had a case to answer and fixed the matter for defence hearing. However, the learned judge was transferred from the station before the defence hearing. The burden fell on Sitati J who took over, heard the defence evidence on 25th January 2012 and thereafter delivered the judgment that is subject of this appeal.

[3] The facts leading to the conviction of the appellant as testified to by the prosecution were that the appellant was an administration police officer assigned to guard the residence of the deceased. He was living in the staff quarters within the compound of the deceased's residence. On the material night at about 8.00pm the appellant and Charles Odhiambo Nyagaya (PW4) (Nyagaya) were drinking at the bar in the police canteen at Macalder Police Station. The Canteen Manager, Moses Omondi Kiboye (PW1) was the one who was serving them. At about 9.30 pm, the two left the bar and proceeded to the appellant's house where they found the appellant's wife. The appellant then put on his radio cassette at full volume ignoring his wife's protest at the high volume. Meanwhile the deceased and his wife Geraldine Wanjiru (PW5) who were at home with their baby were disturbed by the loud music. The deceased left his house at about 11.00 pm to go to the washroom. The washroom was just behind the appellant's house.

[4] Shortly thereafter the deceased knocked the door to the appellant's house, and stood at the door. The appellant picked his Rifle and saluted the deceased. The deceased then requested the appellant to lower the volume of his radio cassette. The appellant responded that he was in his house and could do whatever he wanted. The deceased and the appellant walked out of the house. A few minutes later the deceased ran back into the appellant's house and tried to close the door behind him, but he was shot on the left arm from outside. The deceased pleaded with Nyagaya, who was still in the house, to talk to the appellant to leave the deceased alone. However, the appellant ignored the pleas of his wife and Nyagaya, followed the deceased inside the house to a corner where the deceased was trying to hide and shot the deceased 3 times. Nyagaya then ran out of the house and reported the matter at Macalder Police Station.

[5] At about 11.40pm, the appellant went to Macalder Police Station whilst armed with the G3 Rifle and reported to PC William Kimei (PW9) (PC Kimei) who was on duty at the report office, that he had shot the deceased. Ag IP Kichaba (PW6) then a Sergeant at the police lines was called from his house. On arrival at the report office he found the appellant who asked to be placed in custody for what he had done to the deceased. The appellant then surrendered to Ag IP Kichaba a G3 Rifle No FMB 392201. Ag IP Kichaba accompanied by the OCS Macalder police Station, proceeded to the house of the appellant where they found the deceased lying dead in a pool of blood with scattered spent cartridges lying around. Ag IP Gichaba then went back to the station and placed the appellant in the police cells.

[6] The body of the deceased was taken to Pastor Machage Memorial Hospital. On the 12th August 2004, the deceased's step-brother Alois Gachau (PW7) and father in law Paul Kamunya (PW 8) identified the body to Dr Aggrey Adagiza Akidiva (PW2) who carried out a post mortem examination. Dr Akidiva found that the body had a deep cut wound on the left wrist joint, a bullet entry wound on the anterior neck with exit in the mid scapula region, bullet entry in the chest with exit on the ribs, a bullet wound on the right thigh, and total collapse of vital organs such as left lung, coronary artery, and liver aorta. Dr. Akidiva formed the opinion that the cause of death was severe bleeding caused by bullet wounds.

[7] Chief Inspector Johnstone Lyambila (PW11) who was then the deputy DCIO Migori proceeded to the scene on the same night and collected seven spent cartridges of 7.62 mm, and also took possession of the G3 Rifle surrendered by the appellant. PC Jairus Nomini of CID Migori, later took the Rifle together with the magazine, 13 rounds of ammunition, the 7 spent cartridges, and a test fired bullet to CID Headquarters where he handed the items to Chief Inspector Emman Uel Lagat (PW12) (Lagat), a firearms examiner attached to CID Headquarters.

[8] Lagat examined the items and formed the opinion that the Rifle was a G3 German Rifle S/Number 392201, that was in good general and mechanical condition; that the 13 rounds of ammunition were capable of being fired from the rifle; that the 7 spent cartridges were expended cartridges in caliber 7.62 x51mm; that a comparative examination of the Rifle and 3 of the spent cartridges revealed features that led him to conclude that the spent cartridges were fired from the G3 Rifle; and that the test fired bullet was distorted and unsuitable for comparative examination.

[9] The appellant gave sworn evidence in his defence and called no witnesses. He testified that on 6th August 2004 he was given a G3 Rifle No 392208 by his senior Cpl Owiso Ochieng. His duty station was the DO's office where he worked from 6.00pm to 6.00am, after which he handed back the Rifle to Cpl Owiso. As he was going back to the AP Camp he met the OCS Moses Macharia who told him he was required at the station for reinforcement. On arrival at Macalder police station he was arrested. The appellant faulted the prosecution evidence pointing out: that the deceased's wife claimed to have seen two police officers at the time she heard gunshots; that the arms movement register was not produced, that the register produced by Chief Inspector Lyambila was for the period August 2002 to August 2003 while the crime was committed on 6th August 2004; that Cpl Owiso who was in charge of the armory on the date in question was not called to testify; that PW1 testified that the deceased was killed by one Moriere; and that the Rifle that was produced in court was G3 MP S/Number 39220 that was different from Rifle G3 A3 Standard S/No 392208.

[10] Under cross-examination, the appellant stated that he only came to know Nyagaya after this case arose. He denied having gone to his house with Nyagaya, or having a gun in his house that evening. He denied having any knowledge of an affair between his wife and the deceased.

[11] In his submissions, Mr Moracha, learned counsel who appeared for the appellant in the trial court, urged the trial court to find that there was no evidence linking the appellant to the G3 Rifle FMP 392201, nor was there any evidence that could support the charge.

[12] In her judgment the learned Judge, noted the danger of relying on the evidence of a single witness, but found the evidence of Nyagaya credible; and that in so far as the shooting was concerned the evidence was corroborated by that of Geraldine who heard the sound of shots fired, and upon looking through the window saw the appellant holding a gun. The learned Judge rejected the defence of the appellant and found that he had the *mens rea* to commit the offence, that was why he did not return the gun to the armory, and deliberately played the loud music to provoke the deceased; that both Ag IP Kichaba and Cpl Kemei testified that the appellant reported having killed the deceased; that the fact of the G3 Rifle having been surrendered by the appellant to C.IP Kemei was not in doubt; that the spent cartridges recovered from the scene were established to have been fired from the G3 Rifle surrendered by the appellant. She accordingly found the appellant guilty and convicted him of the offence as charged. On 14th May, 2012, the appellant was sentenced to death.

[13] The appellant is aggrieved by his conviction and sentence, and has appealed against the whole of the judgment of the High Court. His memorandum of appeal raises eight (8) grounds that may be paraphrased as follows:

> ***(i) "That the Honourable learned judge erred in law and fact by not considering that the appellant was issued with a G3 rifle A3 serial No.392208 yet the firearm produced in this court as an exhibit is G3 rifle serial No. FMP 392201;***
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> ***(ii) That the Honourable learned judge failed to realize that sergeant Andrew Omwenga, who was the armory man failed to produce the firearm movement register or the exercise book which he claims to have used;***
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> ***(iii) That the honourable learned judge failed to recognize the absence of corporal Zadok Ochieng who was in charge of armory at that time. He never came to court to direct and prove the right rifle that the appellant was issued with;***
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> ***(iv) That the learned judge erred in law and fact by ignoring Section 200 of the Criminal Procedure Code as the appellant was never asked in person whether he would like to proceed with the case or start afresh;***
>
> ***(v) That the learned trial judge erred on a point of law and fact in making a finding that the appellant had formed the intention of committing the offence of murder;***

(vi) That the trial learned judge erred on a point of law in making a finding that the prosecution had proved its case beyond reasonable doubt when there existed a reasonable doubt as to whether the fatal bullet came from the appellant's rifle;

(vii) That the learned trial judge misdirected herself by failing to observe that PW4 had a grudge against the appellant and falsely testified before the court because he had previously arrested him with bhang related offence;

(viii) That the learned trial judge erred in both facts and law by failing to establish that the most important forensic evidence was not proved by the forensic expert who was responsible in terms of dusting of the fingerprints of the person who first and last handled the alleged G3 rifle."

[14] In arguing the appeal, Mr. Odeny, learned counsel who appeared for the appellant before us, collapsed the 8 grounds into three clusters. The first cluster was the evidence relating to the G3 Rifle produced in court as the murder weapon. Counsel submitted that the learned Judge failed to properly consider and analyse the evidence adduced against the appellant. In particular, that the learned judge erred in rejecting the appellant's defence when there was evidence that the S/Number of the G3 Rifle issued to the appellant was different from the S/Number of the G3 Rifle produced in court; and that critical forensic evidence and evidence relating to the arms movement register was not produced, nor was the person in charge of the armoury called as a witness.

[15] The second cluster related to the finding that the appellant had the necessary *mens rea* for the commission of the offence of murder. Counsel argued that this finding was based on weak and speculative evidence that the appellant had deliberately gone home with the Rifle; and that the evidence adduced against the appellant was contradictory and conflicting.

[16] In regard to the final cluster related to failure by the court to comply with section 200 of the Criminal Procedure Code, counsel contended that the appellant was not informed of his right to have the trial start *de novo* or to have the witnesses recalled to testify. Further that the learned Judge who prepared the judgment did not have the benefit of seeing the demeanour of the prosecution witnesses, and that she exhibited prejudice by forming an opinion that the appellant was rude.

[17] Mr. Kiptoo prosecuting counsel who appeared for the respondent supported the appellant's conviction and sentence and urged the court to dismiss the appeal. Referring to the record of the trial court counsel pointed out that section 200 of the Criminal Procedure Code was complied with, and that the appellant opted to have the hearing of the case start *de novo* and this was done. As regards malice aforethought, Mr Kiptoo submitted that this could be deduced from the testimony of prosecution witnesses which show that the appellant was armed with a dangerous weapon that resulted in the death of the deceased; and that the deceased was killed with a G3 Rifle S/Number 392201 which is the Rifle that was recovered from the appellant.

[18] We have carefully considered this appeal, the record of appeal and the rival submissions made by counsel. In determining this appeal, this Court, is mindful of its duty and limitation as a first appellate court, and its obligation to ensure that the trial court properly discharged its mandate. This duty was well articulated by this Court in **Erick Otieno Arum v Republic [2006]eKLR** as follows:

"It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance for the same. There are now a myriad of case law on this but the well-known case of Okeno v. Republic (1972) EA 32 will suffice."

[19] The appellant denied having shot the deceased but Nyagaya who testified that he saw the appellant shoot the deceased contradicted this defence. Nyagaya gave a graphic account of how the incident occurred. His testimony that he was with the appellant on the material night was consistent with the evidence of Kiboye who had served the appellant and Nyagaya that night when they were drinking at the police canteen. Kiboye testified that the two later walked out of the canteen together.

[20] The evidence of Nyagaya was also consistent with the evidence of Geraldine, the deceased's wife. This witness confirmed that there was loud music from the appellant's house and that after the deceased went out of his house, she heard the deceased talk to the appellant and on peeping through the window saw that the appellant was armed with a gun. In addition, Nyagaya's evidence was consistent with the evidence of CIP Johnson Lyambila who proceeded to the scene and found the body of the deceased lying in a pool of blood in the house of the appellant. Lyambila also collected several spent catridges.

[21] In his defence, the appellant denied having been with Nyagaya and implied that Nyagaya gave false evidence against him because of a grudge arising from the appellant having previously arrested him. The appellant's defence was not credible given the evidence of Kiboye who saw the two drinking together and leaving the police canteen together. From the above it is apparent that the evidence of Nyagaya, the eye-witness was credible and with the other supporting evidence sufficient to establish the deceased died as result of the appellant shooting him.

[22] The above notwithstanding, we have considered the evidence of PC William Kimei and Ag IP Kichaba regarding the appellant's conduct on the night of the deceased's murder. Contrary to the appellant's contention that he was arrested after being asked by the OCS to go to the station for reinforcement, the evidence of PC Kimei and IP Kichaba reveal that the appellant went to the station of his own free will. While the report made by the appellant was a self-incriminating statement regarding the commission of an offence which therefore ought to have been treated cautiously, the evidence was admissible as evidence of the sequence of events regarding the appellant's conduct and particularly because what the appellant was saying was confirmed by the officers when they went to the appellant's house.

[23] The other evidence that has been of concern to us was the evidence relating to the firearm produced as the murder weapon. From the

record, it is apparent that the arms movement register was not produced to confirm the firearm that was issued to the appellant, when it was issued and whether it was returned. Nor did CPL Zaddock Onyiso who was said to be the officer in charge of the armoury at the material time testify. The situation was further compounded by the inconsistencies in the serial number of the firearm that was allegedly recovered from the appellant, and the serial number of the firearm that was examined by Lagat, the firearms examiner. These flaws notwithstanding, the evidence of Dr. Akidiva was that severe bleeding due to bullet wounds caused the deceased's death. The appellant had a rifle at the time the deceased went to his house. Although the appellant maintained that he had returned the rifle, it is evident that he had not done so, as Nyagaya saw him with the rifle and witnessed him shoot the deceased. Regardless of the uncertainty of the firearm that was used to shoot the deceased, the evidence is clear that the appellant shot the deceased and that the deceased died out of the gunshot wounds, and this was enough to link the appellant with the *actus reus*.

[24] On the issue of *mens rea* there was no evidence to show that the appellant intended to kill the deceased. However, **section 206** of the Penal Code provides that malice aforethought may be inferred from any of the following circumstances:

> ***"(a) An intention to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not;***
>
> ***(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused;***
>
> ***(c) An intent to commit a felony."***

[25] In this case, the appellant being an officer of the disciplined forces had full knowledge of the use of a firearm and no doubt knew that shooting the deceased would cause his death or cause him grievous harm. Given this knowledge the appellant's action was sufficient to infer malice aforethought.

[26] The appellant complained that the learned judge failed to comply with section 200 of the Criminal Procedure Code. Section 200 of the Criminal Procedure Code applies to the High Court by virtue of section 201(2). Therefore, the judges who took over the trial after the hearing had started had the obligation to give the appellant the opportunity to have the witnesses recalled or hearing commence afresh.

[27] We have perused the record of the High Court and do note that on the 18th July, 2007, the appellant sought to have the hearing start afresh because he wanted to get another lawyer. This application was not made under section 200 and was rejected by the learned judge who was the same judge that had heard the two witnesses who had already testified. On the 12th of February, 2009, the defence elected to have the case start de novo after Musinga, J. took over the hearing of the case. That application was granted. On 22nd February, 2011, when Makhandia J took over the case, section 200 was complied with and the appellant's advocate made it clear that his instructions were to proceed from where Musinga J left and that they did not wish to have any witness recalled. Similarly, on 13th October, 2011, when Sitati J took over the matter, she complied with section 200 and the appellant's counsel indicated that the appellant wished to proceed with the matter from where it had reached and did not wish to recall any witness. Under **section 200 (1) (b)** of the **Criminal Procedure Code,** the learned judge had the jurisdiction to finalize the hearing and deliver the judgment. It would have been desirable for the judge who heard all the witnesses and saw their demeanour to prepare the judgment. However, this was not possible, and the appellant was in any case not prejudiced. Therefore, there is no substance in the appellant's complaint. We come to the conclusion that there was sufficient evidence to prove the charge against the appellant. Accordingly, we uphold the appellant's conviction.

[28] As regards the sentence, the learned judge took into account the mitigating circumstances put forward by the appellant's advocate but nonetheless found that the circumstances were such that the accused was not deserving of leniency, and accordingly sentenced the accused to death as lawfully provided. We are aware of the Supreme Court's decision in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** in which the Supreme Court were in agreement with this Court's decision in **Godfrey Ngotho Mutiso v Republic,** Criminal Appeal No. 17 of 2008 that, although the Constitution recognizes the death penalty as being lawful it does not provide that when a conviction for murder is recorded only the death sentence shall be imposed. However, we appreciate as the Supreme Court did in the Muruatetu decision that sentencing is the exercise of judicial discretion. In this case, the trial judge having exercised her discretion, we find no reason to interfere.

[29] The upshot of the above is that, we find no merit in this appeal and do therefore dismiss it in its entirety.

Those shall be the orders of this Court.

DATED and delivered at Kisumu this 22nd day of February, 2018

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.