IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, WARSAME & MURGOR, JJA)

CRIMINAL APPEAL NO. 49 'A' OF 2017

BETWEEN

P.C. STEPHEN ARIGA ..... APPELLANT

=VERSUS=

REPUBLIC ..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 49'B' OF 2017

BETWEEN

P. C KENNEDY OMINDE ..... APPELLANT

=VERSUS=

REPUBLIC ..... RESPONDENT

(*Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, [Justice R. Lagat-Korir] dated the 8th day of December, 2016*

in

CRIMINAL CASE NO. 79 OF 2012)

****

JUDGMENT OF THE COURT

These are first Appeals resulting from the Judgment of the High Court **R. Lagat Korir, J**, dated the 8th day of December, 2016.

The background to the appeals is that the 1st appellant in Criminal Appeal **No. 49'A'/2017, No. 86231 P.C. Stephen Ariga,** and the 2nd appellant in Criminal Appeal No. **49'B'/2017, No. 83103, P.C. Kennedy Ominde,** were jointly charged before the High Court with four (4) others for the offence of Murder Contrary to Section 203 as read with Section **204** of the Penal Code (Cap 63), Laws of Kenya. The particulars of the charge were that on the night of the 14th day of January, 2011, along **Slaughter Earth Road at Ruaka area, Gigiri**, within the Nairobi County, jointly murdered **Stephen Gichuhi Njoroge**. The appellants denied the charge, prompting a trial in which the prosecution tendered twelve (12) witnesses to prove the charge, while the appellants were the only witnesses in their defences.

The prosecution's case was briefly that the appellants and their colleagues were Police Officers attached to **Gigiri Police Post**. On the 14th day of January, 2011, P.W. 10, **P.C. William Lekitau**, who was in-charge of the Armory at the Police Post, variously issued the appellants and their colleagues with Firearms and ammunitions for patrol duties. The 1st appellant was issued with **Rifle Serial Number 793928,** with thirty (30) rounds of ammunition, while the 2nd appellant was issued with an **A K 47 Rifle** Serial Number **3004114**, also with thirty (30) rounds of ammunitions. At the close of the patrol duties, the 1st appellant returned his Fire Arm with only one (1) round of ammunition,

while the 2nd appellant returned his with thirteen (13) rounds of ammunition.

On the same day of 14th January,2011, **Stephen Ng'ang'a Wamboi, P.W. 12,** employed by Urgent Tours as a taxi driver was on the material day assigned to drive motor vehicle registration number **KBK 952 L** (the carjacked vehicle**).** He was carjacked while in the course of his duties around Pangani area and driven to **Slaughter Earth Road** within the area of jurisdiction of the appellants' police post. A report of the carjacking was made to police who circulated that information. At around 11.30 p.m. **Sgt. Albert Njiru,** D.W.1**,** who was the Crew Commander of the appellants' Patrol Team, received information from the Criminal Investigation Unit, that the carjacked vehicle's signals had been detected in their area of jurisdiction. D.W.1 mobilized his crew members and headed for **Slaughter Earth Road** on the **Gachie Nderi Road,** in a Police Land Cruiser. They had hardly gone 500 metres into the said road when they were confronted by the carjackers. After an exchange of fire, the police crew managed to rescue P.W.12 and the carjacked vehicle, and headed for the police post.

On the way to the police post, the police patrol crew came across motor vehicle **KAW 058L** owned and driven by **Solomon Karomo Kiarie**, (P.W.2). P.W.2 was heading home from **Oasis Pub** in Ruaka, in the company of **Alex Kinuthia Ndungu**, (P.W1), **Nancy Wanda Njeri** (P.W.5), the deceased and two others. P.W.2's vehicle was allegedly flagged down to stop by the police crew members in the police Land Cruiser, but P.W.2 allegedly defied the order to stop and instead he accelerated, past the police Land Cruiser, and the carjacked vehicle which was trailing the Land Cruiser. A person who the appellants allegedly saw fleeing from P.W.2's vehicle shot at the appellants prompting them to shoot at the rear of P.W.2's vehicle, in the process of which the deceased, **Stephen Gichuhi Njoroge** sustained a fatal wound, while P.W.5 and two others sustained gunshot injuries, for which they were treated and subsequently assessed by **Dr. Zephania Kamau (P.W.3)** as indicated in the P.3 forms tendered in Court as exhibits.

A postmortem was carried out on the body of the deceased by **Dr. Johansen Oduor,** P.W.6. The findings were that there was only one entry gunshot wound located in the middle of the front of the deceased chest, with an exit wound located at the back. P.W.6 concluded that the cause of death of the deceased was a gunshot wound. He produced the post mortem report as exhibit No. 2.

The concurrent testimonies of the appellants in summary, was that they heard gunshots from the direction of P.W.2's vehicle directed at the carjacked vehicle in which they were traveling, as soon as they had by passed P.W.2's vehicle; that the appellants sensing danger, jumped out of the carjacked vehicle, returned fire directed at the rear of P.W.2's vehicle with the sole intention of immobilizing it, which they eventually succeeded in doing as the vehicle's rear tyres were hit by the bullets and got deflated, bringing the vehicle to a stop.

After the incident, investigations were carried out, and all the fire arms that had been issued to the appellants and their colleagues, together with an assortment of empty cartridges recovered at the scene of the second shooting incident and live ammunitions surrendered by the appellants and their colleagues were taken to the Ballistic Expert for forensic examination. **S.P. Lawrence Nthiwa**, P.W.7, the Ballistic Expert**,** carried out the forensic examination on the said firearms, ammunitions and empty cartridges and formed an opinion that the firearms then assigned to the appellants were in good mechanical condition and were capable of being fired; that they had in fact been fired; that three of the expended cartridges recovered at the scene of the second shooting incident had been fired from the firearm with a serial number **793928,** which had been issued to the 1st appellant. These were produced as exhibits 10 (a) (b) and (d), while one of the cartridges recovered at the same scene was fired from the firearm that had been issued to the 2nd appellant namely, serial number **3004114,** also produced as an exhibit.

At the close of the trial, the judge assessed and analyzed the record, acquitted four out of the six accused persons initially charged jointly with the appellants. However, the appellants were found guilty, convicted for the lesser offence of Manslaughter Contrary to Section 202 of the Penal Code, and sentenced each to three (3) years imprisonment.

The appellants were aggrieved by the conviction and sentence hence this appeal. They raised ten (10) grounds of appeal subsequently compressed into two main issues at the hearing of the appeal. The appellants complain that the learned trial Judge fell into error in:-

> ***(1) Finding the appellants guilty of the disclosed offence of manslaughter contrary to section 202 of the penal code,***
>
> (2) ***Holding that the appellants had a common intention in the commission of the offence they were ultimately found guilty of and convicted of, namely, manslaughter.***

The appeals were consolidated and heard together. However, before the hearing commenced, the Court formally administered a warning to the appellants that this being a first appeal, the Court had power after re-evaluating and re-analyzing the record to interfere with the findings of the trial Court with regard to the nature of the offence disclosed; the conviction and sentences handed out to the appellants. Both appellants upon being addressed personally with the said formal warning, intimated to the court personally that they had understood the implications of the formal warning and had elected to proceed on with the prosecution of their appeals.

The appeals were canvassed by way of oral submissions. In their submissions before the Court, the appellants admitted shooting at P.W.2's vehicle from behind for two reasons, firstly, with the sole purpose of immobilizing it; and secondly, in response to their being shot at by a person from the direction of P.W.2's vehicle, matters which the appellants submit, the trial Judge failed to properly appreciate and give weight to. They deny that they shot at random at P.W.2's vehicle, and reiterated that there was shooting from P.W.2's vehicle; that they saw a person jump out of P.W.2's vehicle and disappear into the darkness. It was also the appellants' arguments that the Judge did not also give adequate weight to the evidence of P.W.6, the Pathologist who said that the entry point for the fatal bullet on the deceased came from the front, while the exit point was at the back. In the appellants view, in the absence of any evidence linking them to the shooting of the deceased from the front, then the only logical conclusion that the trial Judge ought to have drawn from the evidence before her should have been that somebody else shot the deceased from the front, which proposition was plausible as it was corroborated by the unexplained recovery of foreign empty cartridges, J1 & J2 from the front passenger seat of P.W.2's vehicle, and which, according to P.W.7's**,** ballistic report were incapable of being fired from any of the firearms that had been issued to the appellants and their colleagues for patrol duties on that date.

Turning to proof of the element of common intention, relying on **Dickson Mwangi Munene and another versus Republic [2014] eKLR**,

the appellants urged us to fault the Judge for her failure to find that the sole objective for the appellants' presence at the scene of the second shooting incident was not unlawful as it was not for purposes of targeting P.W.2's vehicle in which the deceased was travelling as a passenger; that the appellants had just emerged from the first shooting incident and thereby reacted swiftly to the sound of shooting directed at them; that the appellants did not in the circumstances use excessive force as they stopped shooting at the vehicle as soon as it was immobilized; and that the large quantity of ammunition was expended at the first shooting incident.

Opposing the appeal, the respondent submitted that the conviction of the appellants was safe and sound as it was based on sound evidence corroborated by the appellants' own admission that they were armed with the firearms issued to them by P.W10 for patrol duties on the material date; that they were at the scene of the second shooting incident and had both fired at P.W.2's vehicle from the rear allegedly to immobilize it. Further that the ballistic expert's report indicated clearly that the firearms issued to the appellants had discharged ammunitions at the scene of the second shooting incident. On that account, the respondent urged us to affirm the trial Court's rejection of the appellants' case of defence that they shot at P.W.2's vehicle in self defence and the reason the Judge gave in absolving the appellants' colleagues from any blame in the fatal shooting of the deceased. Lastly, the respondent invited us to find that there was the possibility of the deceased who was traveling in P.W.2's vehicle turning to face the back, hence being shot with a bullet from the front.

In reply to the respondent's submissions, the appellants reiterated their earlier submissions and urged that the trial Judge failed to appreciate and resolve doubts as to who among the appellants discharged the sole fatal bullet that killed the deceased, and second, also as to whether there was a 3rd shoot out in line with the undisputed recovery of strange empty cartridges, **J1 & J2** in P.W.2's vehicle.

This is a first appeal. As a first appellate Court, we are entitled to have our own considerations and views of the evidence as a whole and arrive at our own conclusion on the evidence. We also have a duty to re-hear and reconsider the case that was before the trial Judge and arrive at our own conclusion thereon, bearing in mind that we neither seen nor heard the evidence by the prosecution's witnesses. In that regard we shall give premium to the trial court. See **Kariuki Karanja versus Republic [1986] KLR 190**. We are also reminded that it will not be sufficient for us to merely scrutinize the evidence to see if there was some evidence to support the trial Court's findings and conviction. See **Ngui versus Republic [1984] KLR 979**. Further we are also reminded that when it comes to a question arising as to which witness should be believed rather than another and that question turns on the manner and demeanor of such a witness, we must be guided by the impressions made by the trial Judge who saw and heard the witnesses who testified. See **Pandya versus Republic [1958] EA 336.**

We have considered the record, in the light of the rival submissions, and principles of law and case law relied upon by the appellants. In our view, the issues that fall for our consideration are:-

(1) Whether the appellants unlawfully caused the death of the deceased; and,

(2) Whether the element of common intention attributed to the appellants by the trial Court met the prerequisite threshold.

At the conclusion of the trial and after assessing and analyzing the record, the Judge made observations on the evidence and correctly so in our view, that on the material night, the deceased was a passenger in P.W.2's vehicle; that the unchallenged evidence of P.W.6, **Dr. Johansen Oduor** was that the deceased met his death as a result of a single gun-shot, wound where the bullet entry was in the middle of the chest on the front side, while the exit wound was at the back, with resulting gunshot injuries to the left lung and to the heart; that there was a shooting incident at **Slaughter Earth Road**, on the night of 14th January, 2011, involving P.W.2's motor vehicle KAW 058 L and the appellants and their colleagues who were headed in the opposite direction to Gigiri Police Station; that the appellants admitted that on the material night they were armed and discharged ammunitions at the second shooting incident using the firearms issued to them by P.W.10; that some of the spent cartridges fired at the scene were matched to the firearms issued separately to the appellants; that two cartridges allegedly found in P.W.2's front passenger seat namely, **J1 & J2** were not capable of being fired from any of the firearms issued to any of the appellants and their colleagues; that on the strength of the evidence from the pathologist (P.W.6), and the ballistic expert (P.W. 7), there was no doubt in the Judge's mind that the deceased was shot by the appellants.

Turning to the issue of common intention, the Judge took into consideration the definition of common intention in **section 21** of the Penal Code, its application in **Wanjiru d/o Wamerio versus Republic 22EACA 521**, and the identification of the ingredients for common intention as elucidated by the Court in **Eunice Musenya Ndui versus Republic, Criminal Appeal No. 534 of 2010.** Applying the distilled principles to the record before her, the Judge discounted the prosecution's theory that all the six (6) police officers who were on patrol duties on the material night were all involved in the fatal shooting of the deceased. It was the Judge's view that although all the six (6) police officers set out on a common mission namely, performance of their patrol duties, the evidence did not show the existence of a common intention to execute the unlawful act of in-discriminately shooting at P.W.2's vehicle thereby ending the life of the deceased and injuring two others; that to the contrary, the evidence showed the existence of a common intention in the actions of the appellants who shot at P.W.2's vehicle; which arose in the course of the shooting. On that account, the Judge found the appellants culpable for the fatal shooting that caused the unlawful death of the deceased.

As to whether the shooting by the appellants was justified, the Judge reviewed the Constitutional, Penal Code, and the Police Act provisions with regard to defence of national security, self defence and use of force in the lawful execution of police duties. The Judge went further to examine case law in which the subject provisions had been construed and applied. Applying the distilled principles to the facts before her, the Judge rejected the appellants' assertions that they shot in self defence and found the suggestion of the presence of a 7th person in P.W.2's vehicle unbelievable as the police officers made no effort to subdue the alleged person or recover any firearm from P.W2's vehicle when it eventually stopped.

Turning to the offence disclosed, the Judge took into consideration the elements of the offence of Murder contrary to **section 203**, as read with sections 204 and 206 of the Penal Code, in the light of case law assessed in which the said elements were considered and applied. Again applying the said principles to the facts before her, the Judge made findings *inter alia* that the appellants were responsible for causing the unlawful death of the deceased; that the deceased's death resulted from the indiscriminate shooting by the appellants at P.w.2's vehicle without consideration of the safety of any of the occupants in the said vehicle; that the manner in which the firearms were used by the appellants as highlighted above, may have been negligent, but there was doubt as to whether the appellants had a malicious intention to end

the life of the deceased. Neither did the evidence show that the appellants had malice aforethought in causing the unlawful death of the deceased. On that account, and pursuant to the provisions of section 179 of the Criminal Procedure Code, the Judge found the appellants guilty of the disclosed lesser offence of Manslaughter Contrary to Section 202 of the Penal Code, convicted them accordingly and sentenced them to three years imprisonment.

We have considered the above findings of the Judge in the light of the record and it is our finding that the Judge correctly found that the appellants and their colleagues were present at the scene of the second shooting incident; that their presence at the scene of the second shooting incident was not for purposes of targeting P.W.2's vehicle and those who were travelling in it, but to escort P.W.12 and the rescued carjacked vehicle to the police post; that the police crew had just emerged from the first shooting incident; that P.W.2's vehicle accelerated instead of stopping as flagged down by the police crew in the Land Cruiser triggering the appellants' action of directing and discharging their firearms as alleged to immobilize it; and lastly that it was correctly found by the Judge that it was only the appellants who directed and discharged their firearms at P.W.2's vehicle. We therefore affirm the trial Court's finding that the unlawful cause of death of the deceased was attributable to the appellants only.

Both appellants gave reasons as to why they shot at P.W.2's vehicle. The first was in self defence allegedly triggered by the action of being shot at from the direction of P.W.2's vehicle suspected to have been executed by a person who was alleged to have been seen fleeing from P.W.2's vehicle and disappeared into the darkness. According to the appellants, the action of this person is what accounts for the recovery of two strange empty cartridges, **J1** & **J2,** from the front passenger seat of P.W.2's vehicle which in the appellants' view, supports their proposition of the existence of a 3rd shootout line at the scene of the second shooting incident, thereby creating doubt in the prosecution's case as to who discharged the fatal bullet that caused the unlawful death of the deceased, and which doubt the Judge failed to resolve. We were therefore urged to resolve that doubt in favour of the appellants and hold that the person who discharged the ammunitions, from which the aforesaid foreign cartridges resulted, is the person who shot the deceased from the front, considering the uncontroverted assertion by the appellants that they only shot at P.W.2's vehicle from the rear. It is our view that, the appellants had advanced this same proposition before the trial Judge but was rejected as already highlighted above. We have on our own considered the reason the Judge gave for discounting that proposition. We find this sound and well supported by the evidence on the record. We find no reason to disturb the irrestible conclusion by the trial Judge that the appellants jointly and severally caused the death of the deceased.

The second reason the appellants' advanced for us to absolve them from any blame for the fatal shooting of the deceased was the claim that they directed their shooting at the rear of the vehicle, while the entry of the fatal bullet into the chest of the deceased was from the front. It is our finding that the Judge though satisfied with the testimony of P.W.6 that the fatal bullet came from the appellants' action of shooting indiscriminately at P.W.2's vehicle from the rear, did not belabor on the issue as to how it all happened.

The learned SPPC **Mr. Gitonga Muriuki** invited us to consider the possibility of the deceased turning back to face the appellants vehicle that was behind PW2's vehicle and hence was shot by a bullet from the front in the process. We have considered the above proposition and find that it is plausible. The deceased who was seated in the back seat of P.W.2's vehicle as per the uncontroverted testimony of P.W. 1, 2 and 5 definitely turned as it was humanly probable to face the direction of the shooting and that is how the fatal bullet entered his body through the front of his chest. It is therefore our finding as was the Judge's that it is the appellants who shot the deceased from the front.

Turning to the issue of common intention, section 21 of the Penal Code, defines common intention as follows:-

> ***"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purposes an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence".***

What common intention implies was set out by the predecessor of the Court in **Wanjiru d/o Wamerio versus Republic 22 EACA 521** as follows:-

> ***"Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with"***

In line with the above definition and principle, we agree with the appellants' contention that their meeting at the scene of the second shooting incident was not for an unlawful purpose. Neither was it for purposes of targeting P.W.2's vehicle as they were neither aware of its approach in the vicinity nor did they have any prior anticipation that their colleagues in the police Land Cruiser ahead of them would flag it down to stop for whatever reason, or that P.W.2 would defy the orders to stop. Further, there was no evidence that the appellants consulted each other before directing their firearms at the rear of P.W.2's vehicle as borne out from their own testimonies.

The ingredients of common intention were enunciated in **Eunice Musenya Ndui versus Republic, Criminal Appeal No. 534 of 2010 (2011) eKLR** as follows**:-**

> *(1) There must be two or more persons;*
>
> *(2) The persons must form a common intention;*
>
> *(3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;*
>
> *(4) An offence must be committed in the process;*
>
> (5) *The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.*

Applying the above ingredients to the rival submissions on the proof or otherwise of the elements of common intention as against the appellants, it is our finding that it was not disputed that the appellants are the only members of the patrol crew who shot at P.W.2' vehicle during the second shooting incident. This therefore satisfies the first ingredient of the need of two or more persons being participants in the execution of the act complained of. The second ingredient requires the forming of the common intention. It does not say that the said forming of a common intention must be before the execution of the act complained of. Both appellants were categorical in their testimonies and correctly so in our view, that their sole but separately formed reason for shooting at P.W.2's vehicle from the rear was to immobilize it. There is no evidence that the two consulted each other before firing at P.W.2's vehicle. The common intention which was to immobilize the vehicle was formed in the course of their separately intending to shoot at the rear of the vehicle with a view to immobilizing it. Ingredient two (2) is therefore also satisfied.

As for the 3rd ingredient, the unlawful purpose in the instant appeal does not result from the decision to shoot but from the end result of the shooting act complained of. We find nothing in the said ingredient to suggest that the unlawfulness of the act complained of can only result from factors that go to prove the onset of the action and not from the end result of the action. We find ingredient three (3) satisfied. As for ingredient four (4), it is undisputed and as correctly found by the trial Judge that the action resulting in the fatal shooting was not premeditated. That is why the Judge termed it unlawful, because it was unintentional. What the appellants intended by shooting at the rear of P.W.2'svehicle, which was accepted by the trial Judge was to immobilize the vehicle. Unfortunately for them, one bullet fatally injured the deceased. Ingredient four (4) was satisfied.

As for ingredient five (5), we find as did the trial Judge that P.W.2's vehicle was in motion. The intention to fire at P.W.2's vehicle was on impulse, allegedly provoked by the alleged failure by P.W.2 to stop. The appellants ought to have known that since it was at night, there was the possibility of their ability to focus only on the rear tyres of the vehicle could have been impaired, resulting in the bullets landing on other parts of P.w.2's vehicle as it infact did happen. That is why there were bullet holes at the rear of the vehicle instead of these being concentrated on the tyres as the appellants intended target. In this regard, we agree with the Judge's finding that the very fact that P.W.2's vehicle was in motion should have been warning enough for the appellants to anticipate the possibility of the presence of a person or persons other than the one propelling it. Likewise, it is also our view that there was the possibility of the occupants of P.W.2's vehicle being injured in the process of the appellants' attempt to immobilize it which was not also remote and could not be ruled out. The appellants therefore must be taken to have intended the consequences of their actions, and especially for their failure to exercise some restraint when discharging their firearms, especially at night and directed at a moving vehicle.

The upshot of all the above reasoning is that, upon consideration of the record and the rival submission before us, we are satisfied that the appellants were rightly convicted and sentenced. There is no basis for us to interfere and disturb the findings of the trial Judge which were based on sound evidence and correct application of the law to that evidence. We therefore uphold both the conviction and sentences as handed down by the trial court. There is no merit in both appeals. They are accordingly dismissed.

Dated and delivered at Nairobi this 21st Day of September, 2018.

R. N. NAMBUYE

…….……..

JUDGE OF APPEAL

M. WARSAME

…….…….

JUDGE OF APPEAL

A. K. MURGOR

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.