



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJA)

CRIMINAL APPEAL NO. 351 OF 2011

BETWEEN

JOSEAH KIPNG'ENO KOECH.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the judgment of High Court of Kenya at Malindi (Omondi, J.) dated 24th January, 2012 in H.C.Cr.A. No. 9 of 2008)

JUDGMENT OF THE COURT

[1] *Joseah Kipng'eno Koech* who is the appellant before us was arraigned and tried before the High Court sitting at Malindi (*Omondi, J.*) for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence as contained in the information dated 17th April, 2009 were as follows:

Joseah Kipng'eno Koech: on 10th April, 2009 at Kiunga Police Station within Kiunga Division of Lamu District of the Coast Province murdered Victor Masese Onchoke.

[2] During the trial eleven witnesses testified for the prosecution. These were *Sergeant Justin Gitonga* (Sgt Gitonga), *James Nyota Masese* (Masese) *Steven Monte Oigo* (Oigo), *PC Leonard Najoli* (PC Najoli), *Corporal Pius Wanyama* (Cpl Wanyama), *Corporal Gabriel Karugui* (Cpl Karugui), *IP James Nyaga* (IP Nyaga), *CIP Alex Muthithi Mwandawire* (CIP Mwandawire), *CIP Joseph Owiti* (CIP Owiti), *Sergeant Erick Opagal Okisai* (Sgt Opagal) and *Dr. Beryl Kaudia* (Dr. Kaudia).

[3] Briefly, the prosecution evidence was that on the 9th of April 2009, Corporal Wanyama who was the incharge armoury at Kiunga Police Station issued the appellant who was a police officer attached to Kiunga Police Station with a G3 rifle serial No. 6740874 and 20 rounds of ammunition. On the 10th April, 2009 the appellant was due for orderly room proceedings for failing to report on duty, having been booked on 6th April, 2009 by Sgt Gitonga. The appellant was escorted to the GSU Camp for the proceedings but the proceedings were adjourned to 14th April, 2009 after the appellant claimed to be unwell. The appellant and Sgt Gitonga then went back to the station. At around noon, the appellant

passed near Sgt Gitonga's house holding a G3 rifle. Upon being asked by Sgt Gitonga where he was going with the G3 rifle the appellant responded that he was going to see the deputy OCS and if granted permission he would come back to give the rifle to Sgt Gitonga to keep for him. The appellant then left.

[4] In the meantime, Sgt Opagal was seated outside his residence with the deceased and Cpl Karugui, when the appellant arrived. Cpl Karugui excused himself and went to his house surrendering the seat where he had been sitting to the appellant. On being questioned by Sgt Opagal where he was going, the appellant explained that he was returning the rifle to the armoury. The appellant then asked the deceased for permission to go to Lamu to collect his salary which he had not received. The deceased responded that the matter was official business which he would address at the police station. The deceased then took out a piece of paper from an envelope he had, and started reading. It was at that stage that the appellant got up, turned as though going towards the station, and after about four metres turned back and shot the deceased. Sgt Opagal struggled with the appellant in an effort to disarm him and managed to snatch the G3 rifle from the appellant. He then dragged the appellant to the police station and booked him in, handing over the G3 rifle to PC Najoli.

[5] In the meantime, Sgt Gitonga who had heard the gunshots called Cpl Wanyama and together they cautiously approached the police station. It was before reaching the station that they saw Cpl Opagal trying to disarm the appellant. They noticed the body of the deceased in a pool of blood on a plastic chair. The deceased had a gunshot wound on the right side of the head with a bullet exit wound on the left. The deceased was also holding an envelope and a letter indicating that he had been reading the letter at the time he was shot. The body of the deceased together with the appellant were later escorted to Lamu where the appellant was detained at Lamu Police Station and the deceased's body taken to Lamu Hospital Mortuary.

[6] PC Najoli noted that the G3 rifle that was handed over to him by Sgt Opagal was serial No. 6740874. He also recovered one spent cartridge for 7162mm that had lodged in the chamber of the G3 rifle. He later handed over the G3 rifle and the spent cartridge to Cpl Wanyama who kept the G3 rifle and the spent cartridge in the armoury. According to Cpl Wanyama and PC Najoli the rifle had 18 rounds of ammunition. The G3 rifle, rounds of ammunition and spent cartridge were later handed over to CIP Owiti and submitted to the ballistic expert for examination. They were later examined by Superintendent Nthuwa who prepared a report in which he formed the opinion that the G3 rifle and the 19 rounds of ammunition were firearms as described in the Firearms Act. He also formed the opinion that the expended cartridge was fired from the G3 rifle as there were sufficient markings of the firing gun. The report was produced in evidence by CIP Mwandawire who identified the signature of Superintendent Lawrence Nthuwa.

[7] The body of the deceased was later identified by his brother Masese and his cousin Oigo to one Dr. Odhiambo who carried out a postmortem examination and prepared a report. In the report, the doctor noted that the body had a gunshot wound to the skull and that the cause of death was penetrating skull injury (gunshot wound to skull) with extravasations of brain matter. The postmortem report which was duly signed by Dr. Odhiambo was identified and produced in evidence by Dr. Kaudia, a medical officer at Malindi District Hospital. The appellant was subsequently arraigned before court.

[8] When put to his defence, the appellant gave an unsworn statement and called no witness. He explained that on the material day at 8a.m., he proceeded to GSU Camp for police duties in the company of Cpl Wanyama. After completing the duties, he was sent by the incharge GSU Kenya Platoon to go to Mikokoni to relay a message. He booked the journey in the Occurrence Book at Kiunga Police Station and went to his room, to change from his civilian clothes intending to return the rifle to the armoury for safe custody before proceeding to Mikokoni as there was a vehicle about to leave for the same destination. On his way to the armoury, the appellant passed through the house of the in charge armoury and asked him to keep the G3 rifle in the armoury for safe custody. The officer agreed and asked him to proceed to the station armoury. On the way to the station, the appellant found the deceased and Sgt Opagal seated on plastic chairs outside the ATPU residence. The deceased was reading a magazine. The appellant greeted them, and upon being asked where he was going and noting that there was already a vehicle ready to leave for his destination, he surrendered the rifle with the ammunition to Sgt Opagal who

assured him that the in charge armoury was on the way coming and would keep the rifle in safe custody. The appellant then turned and proceeded to the motor vehicle. It was while he was at the veranda of the station building that he heard a gunshot. He looked behind but could not see the deceased or Sgt Opagal because of the flower fence. While he was still waiting for other passengers to book their journey, Cpl Wanyama, Cpl Gitonga, Sgt Opagal and others arrived at the station, and after talking aside, Cpl Wanyama ordered the appellant to be placed in the cells. He was thereafter taken to Lamu Police Station and later charged with the murder of the deceased. He maintained that he was innocent and that he had no rifle or pistol at the time the offence was allegedly committed. He also had no grudge or ill will towards the deceased.

[9] Learned counsel **Ms. Chepkwony** who appeared for the appellant filed written submissions in which he urged the learned Judge to acquit the appellant maintaining that the prosecution did not prove the offence against the appellant. She attacked the witnesses for the prosecution as being untruthful and their evidence inconsistent. She maintained that it was not established that the rifle alleged to be the murder weapon was the one actually used to shoot the deceased as the spent cartridge was not examined.

[10] In the judgment prepared and signed by **Omondi, J.** but delivered by **Meoli, J.**, the learned Judge found that the deceased died within the vicinity of Kiunga Police Station as a result of a penetrating injury on the head caused by a gun shot. She identified the issue for determination as to which gun was used to shoot the deceased, who pulled the trigger and why. She found that the appellant had strained relations with the deceased and established that the deceased was shot using a G3 rifle and that the rifle which had been earlier issued to the appellant, was recovered from the appellant with one round of ammunition less. She concluded that it was the appellant who shot the deceased and rejected the appellant's contention that it was Sgt Opagal who may have shot the deceased.

[11] Being aggrieved by that judgment, the appellant has lodged this appeal raising seven grounds in which he contends that the learned Judge erred in both law and fact: by convicting and sentencing him to suffer death on evidence marred by glaring contradictions, fabrications and inconsistencies; for relying on the evidence of PW10 (Sgt Opagal), the only eye witness, when his evidence was contradictory and unreliable; relying on the ballistic report which had errors; and failing to take into account that the ballistic report exonerated the appellant; failing to reject evidence obtained from investigations done in an unprofessional, shoddy, and insufficient manner; failing to take into account that Kiunga is an operation zone and that several police officers had guns on the fateful day which guns were not taken to ballistic expert for examination; for finding that there was strained relationship (bad blood) between the appellant and the deceased without the same being satisfactorily proved; and for rejecting the appellant's defence merely because it was unsworn.

[12] During the hearing of the appeal, learned counsel **Tukero Ole Kina** appeared for the appellant while **Mr. Musyoki**, Senior Principal Prosecution Counsel appeared for the respondent. In arguing the appeal, **Mr. Ole Kina** condensed the grounds of appeal into two main areas. First, the insufficiency of evidence regarding the identification of the murder weapon and general investigations. Secondly, evaluation of the evidence. Mr. Ole Kina submitted that the appellant's conviction was not safe as there were many flaws in the prosecution's case.

[13] He identified such flaws as follows: that no forensic examination was carried out to confirm that the bullet which injured the deceased was from the rifle issued to the appellant; that the rifle that was used in the murder was not positively identified as there was a mix-up of the serial numbers of the rifle allegedly used; that without the evidence of the rifle, the evidence against the appellant was purely circumstantial; that the circumstantial evidence did not lead to the irresistible conclusion that the appellant was the one who shot the deceased as there were other possible scenarios; that since the evidence was that all the officers in Kiunga area were armed as the area was an operation area, all the guns in the possession of the officers ought to have been examined; that taking into account that the deceased was shot with a bullet of a high velocity caliber, the evidence relating to the entry and exit point of the bullet was not sufficient to lead to a conclusion as to whether the deceased was shot by someone seated or standing; that the possibility that the rifle malfunctioned was not ruled out; that the appellant handed over the gun to Opagal and this should have raised doubt in the Judge's mind as to the veracity of the circumstantial evidence;

that there was no forensic examination of the appellant's clothes and hands to establish the presence of explosives residue; and that as a result, the possibility that someone else fired the gun was not ruled out.

[14] Mr. Musyoki opposed the appeal arguing that the evidence against the appellant was overwhelming; that malice aforethought was established as there was sufficient reason, the appellant having been subjected to disciplinary proceedings and also having been denied permission to go and follow up his salary; that the evidence of Sgt Gitonga and Sgt Opagal was clear on what had transpired; that the allegation that Sgt Opagal was the one who fired the fatal shot was never put to Sgt Opagal when he gave evidence; and that the mix-up in the serial numbers was explained.

[15] In response, Mr. Ole Kina pointed out that the allegation implicating Sgt Opagal was not an afterthought as the same had been put to him during cross examination. He maintained that the alleged circumstantial evidence did not irresistibly point to the appellant.

[16] This being a first appeal we have an obligation in considering the appeal to subject the evidence which was before the trial court to a fresh analysis and re-evaluation in order to reach our own conclusion, but also bearing in mind that the trial Judge had the advantage of seeing and assessing the demeanour of the witnesses. (*Okeno v Republic [1972] EA 32*). We also take note of the fact that a Court of Appeal will not normally interfere with the findings of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. (*Chemagong v Republic [1984] KLR 611*).

[17] In this case, the appellant having been charged with the offence of murder, it was necessary for the prosecution to establish that the deceased died as a result of an act or omission on the part of the appellant; and that the appellant had malice aforethought. From the evidence adduced before the trial court, it was clear that the deceased died as a result of a gunshot wound. The question was, who shot the deceased and did the person have malice aforethought?

[18] Cpl Wanyama who was the in charge armoury stated that on 9th April, 2009, he issued a G3 rifle serial No. 6740874 with 20 rounds of ammunition to the appellant. This was not denied by the appellant. The appellant's contention was that he handed over the rifle to Sgt Opagal shortly before the deceased was shot. Cpl Wanyama had no doubt that the G3 rifle which was handed over to him by PC Najoli was the same G3 rifle serial No. 6740874 which he had earlier issued to the appellant. This was the rifle which he kept in safe custody and later handed over to Chief Inspector Owiti who submitted it to the ballistic expert for examination.

[19] The evidence of Cpl Wanyama regarding the identity of the G3 rifle is consistent with the Arms Movement Register which was produced in evidence as well as the evidence of PC Najoli who identified the G3 rifle by the same serial numbers as the one handed over to him by Sgt Opagal, and which he in turn handed over to Cpl Wanyama. The report by the ballistic expert which was produced in evidence revealed that the G3 rifle which was forwarded to him for examination bore the same serial number No. 6740874. The confusion regarding the identity of the G3 rifle arises from the evidence of Cpl Karugui and Sgt Opagal who gave serial numbers different from that which were given by Cpl Wanyama and PC Najoli. However, it is noteworthy that Cpl Karugui identified the rifle which was produced in court as the rifle that the appellant had, and that it was only in cross examination that he claimed to have assisted PC Najoli in marking the G3 rifle after it was handed over to him by Sgt Opagal and stated that the serial number was G3 8770874. Obviously, he was either mistaken or deliberately lied as the G3 rifle produced in court did not bare that number.

[20] Sgt Opagal identified the G3 rifle which he claimed to have recovered from the appellant immediately after the shooting as bearing serial no. SN 8740876. The evidence of Sgt Opagal in this regard was as follows:-

“I see the gun PC Koech had. It is this one. A G3 rifle SN 8740876 loaded with two rounds of magazine. The SN is not clear and the last two figures are not very clear. This is the magazine which has a capacity of 20 words. At the time of recovery one

round had been fired. The caliber is 7.62 mm x 51mm...”

[21] It is apparent that Sgt Opagal did not have the opportunity to examine or record the serial numbers of the G3 rifle that he recovered from the appellant as he handed over the weapon to PC Najoli immediately he recovered it. In his evidence, Sgt Opagal was merely purporting to identify the G3 rifle by reading the serial numbers from the G3 rifle produced in court. Apparently he had difficulties in doing this as he found the numbers on the G3 rifle not very clear. Although Sgt Opagal’s evidence regarding the serial number was not accurate, it was not in doubt that he handed over a G3 rifle to PC Najoli. Moreover, his evidence did not stand alone as the rifle that he had recovered from the appellant and handed over to PC Najoli was clearly identified using its serial number by PC Najoli and the armourer Cpl Wanyama both of whom had ample opportunity to examine the G3 rifle. In our view we are satisfied that the evidence of PC Najoli and Cpl Wanyama was reliable and consistent and do find that the G3 rifle used to shoot the deceased was in fact serial No. 6740874 which was the same G3 rifle that had been issued to the appellant.

[22] There was uncontroverted evidence that the deceased died as a result of a single gunshot wound. The question is whether the prosecution established the weapon and the identity of the person who shot the deceased. In this regard, the evidence implicating the appellant as the culprit was that of Sgt Opagal the only eye witness to the shooting. Sgt Opagal explained what transpired between the appellant and the deceased leading to the appellant shooting the deceased.

[23] We have examined the defence of the appellant which casts aspersions on Sgt Opagal’s evidence and suggests that it was in fact Sgt Opagal who shot the deceased. The trial Judge did not make any note on the demeanor of the witnesses but appears to have preferred the evidence of Sgt Opagal over that of the appellant. On our part, we find that the evidence of Sgt Opagal was corroborated to some extent by Cpl Wanyama who ran towards the police station in response to the gunshot sound; saw Sgt Opagal struggling with the appellant as Sgt Opagal tried to disarm him; and noted that the deceased was seated on a plastic chair with a gunshot wound. This evidence contradicts the appellant’s contention that he had earlier left the G3 rifle with Sgt Opagal to return to the armoury. The evidence of Sgt Opagal is also consistent with that of PC Najoli to whom Sgt Opagal handed over the G3 rifle that he had recovered from the appellant. Any further doubt is dispelled by the fact that the G3 rifle serial No. 6740874 had actually been issued to the appellant with 20 rounds of ammunition but when recovered from the appellant there were only 19 rounds of ammunition. Although the spent cartridge remained lodged in the chamber of the G3 rifle, and the bullet was not recovered, the report of the ballistic expert confirmed that the G3 rifle was in good mechanical condition and was capable of firing. The appellant had the G3 rifle when he attempted to obtain permission from the deceased to go and follow up his salary.

[24] We find that there was sufficient evidence establishing that the appellant was the one who shot the deceased and that he used the G3 rifle serial No. 6740874 which had earlier been issued to him. The appellant had been subjected to orderly room proceedings on the deceased’s instructions, and from the way the deceased responded to his request for permission to go and follow up his salary, the appellant’s reaction of shooting the deceased must be deemed to have been intended to cause death or grievous harm to the deceased.

[25] We find that both the *actus reus* and malice aforethought required to prove the offence of murder under **section 203** of the Penal Code were established as there was overwhelming evidence implicating the appellant. His conviction cannot therefore be faulted. As regards sentence, the learned Judge having taken into account the appellant’s mitigation, sentenced the appellant to death which is the legal sentence provided by law under **section 204** of the Penal Code.

[26] Accordingly we find no substance in this appeal. It is dismissed in its entirety. Orders accordingly.

Dated and delivered at Malindi this 26th day of February, 2015

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR