IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G.B.M. KARIUKI & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO.283 OF 2012

BETWEEN

DAVID MBURU MUKUHA .... APPLELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the High Court, Nairobi (N.R.O. Ombija, J.) delivered on 5.7.2012

in

H.C. CR. C. 39 OF 2010)

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JUDGMENT OF THE COURT

1. The appellant, David Mburu Mukuha, was convicted on 5th July 2012 by the High Court for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code, Cap 63, and sentenced to serve two years in prison after the trial Judge substituted the offence of manslaughter for murder with which he had been charged jointly with two other persons who did not appeal against their conviction and sentence for manslaughter. The particulars of the murder charge were that;

"APC David Mburu, APC Kainga Thianjuri and APC Sauloh Mosha on the 3rd day of August 2007 at Eastleigh Section three, Biafra within Nairobi Province murdered Ernest Marende Ahijah."

2. The appellant lodged his appeal in this court on 18.7.2012 against his conviction and sentence. He proffered six grounds of appeal as follows:

- ***That I had pleaded not guilty to the charge***
- ***That the learned trial Judge erred in law and facts by finding that I had a common intention of killing the deceased without considering that there is no evidence that I had a prior meeting with anyone to plan any killing.***
- ***That the learned trial Judge erred in failing to consider the fact that I did not fire a single shot from my gun.***
- ***That the learned Judge erred in failing to consider the shocking and confusing circumstances***

which prevailed at the scene could not have allowed any common intended shooting to kill.

- ***That my defence was not considered as required by law.***
- ***That as I cannot recall all what was said in court during this trial I humbly solicit your Court of Appeal to furnish me with the trial proceedings and judgment so as to enable me raise more reasonable grounds of appeal. I also wish to be present during the hearing of this application.***

3. The appeal came up for hearing before us on 3.6.2013. Learned counsel, Mr. F. N. Njanja, appeared for the appellant while the learned Senior Assistant Director of Public Prosecutions, Mrs. T. Ouya, appeared for the respondent. She opposed the appeal.
4. As this is a first appeal, the Court is enjoined to re-evaluate the evidence, draw its own inferences and conclusions and make its own deductions and findings from the evidence. We are, however, alive to the fact that the trial court had vantage position as regards observations of demeanor of witnesses because it saw them and heard their evidence as they testified before it and, therefore, as far as issues of credibility of witnesses are concerned, we shall be less inclined to interfere with the trial Court's findings save where it is patently clear that the material and evidence before the trial Court, does not support the trial Court's decision in that regard.
5. The evidence adduced in the High Court shows that the deceased, Ernest Marende Ahijah, was a gym instructor at the Central Bank of Kenya. He was betrothed to marry Stella Oigo (PW1) who was working as a programming officer at the Kenya Broadcasting Corporation. On 3rd August 2007, the deceased and PWI were in the latter's house at Biafra Estate which they hoped to make their matrimonial home once they celebrated their marriage. At the crack of dawn on 3rd August 2007, the deceased left for work leaving behind one of his cellphones. In her evidence in the High Court, PWI testified that the deceased had a habit of calling her from his cellphone after arriving at his place of work in the morning. On the material date, PW1 received a call. But the caller was not the deceased! Instead, it was one Duncan Mureithi whom PWI knew to be the deceased's colleague at work in Central Bank. The caller's concern was that the deceased was not picking his calls. PWI called the deceased's number. There was no reply. She was on her way to work a little later that morning when at a place called Biafra she observed as she sat in a bus on the way to work a crowd of people clustering around what seemed to her to be body of a person. She alighted. She saw it was the deceased and he was bleeding from the chest and the arm.
6. PWI's sister, Caroline Moraa Oigo, who testified as PW2, knew the deceased and regarded him as the husband of the PW1. She was told by PW1 on the morning of 3rd April 2007 what had happened to the deceased following which she went to the scene of the crime where the deceased had been gunned down at Biafra. She saw the deceased lying on the ground seemingly dead. The police later removed the body. PW2, like her sister, PW1, did not witness the commission of the crime.
7. The father of the deceased, Roland Cleophas Marende, a resident of Athi River, who worked as a referee with Kenya Railways, testified as PW3 on 6.12.2010. His evidence was that he was informed by his other son, Nashon, that the deceased had been shot dead. He saw the body of the deceased at Lee Funeral Home. He testified that he observed bullet wounds on the left side of the body which was subsequently released to him for burial. He did not witness the killing of his son.
8. In his evidence, Sergeant Kassim Abdi Baricha who testified as PW4 told the Court that he stumbled on a shooting incident along 1st Avenue at Eastleigh Section 3 close to Biafra Police Station while heading to work on 3rd August 2007. He gathered information that the deceased was suspected to be a thug and was shot as he fled. He did not witness the killing. He confirmed that Chief Inspector Daniel Muthia from Buru Buru police station headed the investigation.
9. On 2.8.2007 Corporal Dennis Omangi, PW6, was working at Eastleigh, Biafra Chief's office. At 5.00 a.m. on 3.8.2007, APC Masha, APC Mburu, the appellant, and APC Kainga who also worked at the Biafra chief's office went out on patrol duties leaving PW6 behind. It was the latter's testimony that he heard gun shots at 5.30 a.m. from the direction of 1st avenue. PW6 booked off-duty at 6.00 a.m. and proceeded to the scene of crime where he found the appellant and his two co-accused and the body of the deceased lying on the ground and beside it what seemed like a home-made pistol and one 9mm caliber ammunition which were produced as exhibits No.4 and 5 (in the trial in the High Court) respectively. PW6 did not know how exhibits Nos. 4 and 5 came to be beside the body of the deceased. He told the Court that the appellant and his two colleagues

were armed with G3 rifles when they went on patrol.

10. Chief Inspector Emmanuel Lagat (PW7), a firearms examiner based at ballistic section at Criminal Investigations Department headquarters, testified that he examined exhibits 4 and 5 and formed the opinion that the toy pistol and the ammunition (exhibits 4 and 5) were capable of being fired and that they were firearm and ammunition respectively as defined in the **Firearms Act, Cap 114**. He produced a ballistic report which was marked as exhibit No.7.
11. On 3.8.2007, Chief Inspector Alfred Muthua was the officer commanding station at Shauri Moyo police station. He was aware of the patrols organized by the officer-in-charge of administration police, Biafra, in the area of Biafra. We have perused his evidence. He was not in the team that went on patrol and his evidence as to what transpired was mere hearsay. When he got to the scene, he found the appellant and his two colleagues and the deceased lying on the ground having been shot. He was not in a position to state how exhibits 4 and 5 happened to be beside the body of the deceased.
12. Chief Inspector Daniel Muimdia (PW9) at C.I.D. Divisional Headquarters at Buru Buru was instructed by the D.C.I.O. Buru Buru to call for the file on the deceased's killing which he sent to the Attorney General who on its perusal recommended prosecution of the appellant and his two colleagues for the offence of murder.
13. The postmortem on the body of the deceased was conducted by Doctor Wasike whose report was produced by Dr. Johansen Odiwour (PW10). It showed that the deceased, a male aged 31 years died of chest injuries due to gunshot wounds.
14. In his unsworn statement, the appellant stated in defence that members of the public came to where he and his two colleagues were patrolling at Biafra, Eastleigh, and informed them that an armed gang was in one of the matatu vehicles. They blocked the road and when vehicle registration No. KAX 096K, a Toyota Hiace, got to the road block one person emerged from it armed with a gun. Two other members of the gang fled. It was his evidence that his colleague, Saulo Masha, shot the deceased.
15. The appellant's co-accused, APC Kainga Oreste Karinga Kiajuri testified on oath that a member of the public informed them that there were armed gangsters who had boarded a matatu number KAX 096K, a Toyota Hiace and that as a result they blocked the road using another matatu which they boarded and commandeered. When matatu KAX 096K arrived at the road block, the appellant and his two colleagues got out of the matatu they had used to block the road and took positions. He also stated that as they alighted he heard gunshots and that his colleague, Saulo Masha, told him that a man from the blocked matatu drew a pistol threatening to shoot him and that he then shot at the man and two members of the gang fled.
16. On his part, APC Saulo Vensencenus Mosha's testimony in his unsworn statement was that a member of the public informed him and his two colleagues that a matatu No.KAX 096K Toyota Hiace had been hijacked by robbers and that he and his colleagues commandeered another matatu and followed the hijacked matatu and blocked it at the junction of Eastleigh and 1st Avenue Section 3 where they ordered all the passengers out of the matatu one by one. As the passengers alighted, APC Saulo Mosha heard a gunshot and took cover. He saw two people running away from the matatu. One of the passengers threatened to shoot him and he shot in the direction of the two gang members running away. Two minutes later, the crowd gathered whereupon he saw the deceased lying on the ground with a homemade pistol and one round of ammunition of caliber 9mm. The appellant informed the OCS at Shauri Moyo and the latter went to the scene. The appellant and his two colleagues who had G3 rifles returned the rifles and reported off-duty. They later recorded their statements.
17. The learned trial Judge analysed the evidence and came to the conclusion that the appellant and his two colleagues were acting in concert and that they were guilty of killing the deceased and had common intention to prosecute an unlawful purpose in conjunction with one another. He relied on the provisions of Section 21 of the Penal Code in so holding. He proceeded to substitute the offence of murder with manslaughter and in error referred to *"in conformity with Section 194 of the Civil Procedure Code"* instead of Section 179 (2) of the Criminal Procedure Code, Cap 75. Clearly the reference to Civil Procedure Code instead of Criminal Procedure Code was just a slip which the secretary should have corrected.
18. When the appeal came up for hearing before us, **Mr. F. N. Njanja**, the learned counsel for the appellant abandoned grounds 1 and 6 and argued grounds 2, 3, 4 and 5. He conceded that the

deceased was shot dead by one of the three officers who were on patrol. It was his submission that the learned trial Judge of the High Court misdirected himself when he held that the appellant and his colleagues had put forward the defence of self-defence. Further, he contended that contrary to what the trial Judge held, there was no common intention and Section 21 of the Penal Code had no application. It was his submission that the driver of the matatu in which the deceased was travelling was not called to testify and that no civilian gave testimony.

19. On ground No.4, it was Mr. Njanja's submission that accused 1 and 2 namely, the appellant and APC Kainga respectively should have been acquitted as neither shot the deceased, the shooting having been done by the 3rd accused, APC Sauloh Mosha, and there being no common intention as inferred by the trail Judge.

20. **Mrs. T. Ouya**, the learned Senior Assistant Director of the Public Prosecutions, opposed the appeal. She conceded that it took the DPP 3 years to get the investigations file and that no eye witnesses were available but death of the deceased was caused by shooting which was proved and that the perpetrators were the police officers. It was Mrs. Ouya's submission that the prosecution demonstrated that the deceased was in flight when PW4, Sergeant Kassim Abdi Baricha stated that:

"that one passenger (male) removed a home-made pistol and threatened them. He ran away and that is what prompted the police officers to shoot at the fleeing thug who later on succumbed to his injuries"

21. We were urged by Mrs. Ouya to dismiss the appeal as the evidence clearly showed that the appellant and his co-accused had perpetrated the offence.

22. We have carefully perused the record of the trial Court. The deceased was shot by the 3rd accused, APC Sauloh Mosha. The appellant was charged under Section 203 as read with Section 204 of the Penal Code jointly with APC Sauloh Mosha and APC Kainga Thianjuri. These Sections state:

"S.203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

"S.204. Any person convicted of murder shall be sentenced to death."

23. For a person to be convicted of the offence of murder, it must be proved beyond any reasonable doubt that he caused the death of the deceased with malice aforethought. Malice aforethought is deemed to be established by evidence proving any one or more of the circumstances set out in Section 206 (a) to (d) of the Penal Code. Section 206 (a) to (d) (supra) provides:

"S. 206. Malice aforethought shall be deemed to be established by evidence proving any one or more 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 cause a felony;***

d. ***An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

24. In the circumstances of this appeal, there was no evidence to support circumstances referred to in subparagraphs (c) and (d) but was there evidence in respect of the circumstances in sub-

paragraphs (a) or (b)? If so, malice aforethought would be established. With regard to subparagraph (a), was here evidence of an intention to cause the death of the deceased or to do grievous harm to him or any person? And with regard to subparagraph (b), was there evidence that the appellant had knowledge that:

"the act that caused the death of the deceased would probably cause the death of the deceased or grievous harm to some person, whether that person was the person actually killed or not (although such knowledge is accompanied by indifference whether death or grievous bodily harm would be caused or not, or by a wish that it may not be caused."

25. The appellant and his colleagues were on police patrol. The only evidence in the trial was by the police officers themselves. But such evidence did not show that the deceased had a gun or in any way attacked or challenged the police when the matatu vehicle he was travelling in was blocked. The deceased was not the only passenger in the matatu vehicle. The evidence by the police officers was that when the matatu vehicle was blocked and forced to stop three gangsters came out and that one had a gun which he pointed at APC Sauloh Mosha who was the third accused in the trial Court. APC Mosha allegedly shot and killed the deceased in self-defence. The trial Judge found that APC Mosha had no reason to shoot the deceased because, according to the evidence adduced, the alleged gangsters were fleeing and the deceased posed no danger to the appellant and his colleagues. With respect, this finding is not misplaced. It was spot-on. In shooting as he did, APC Mosha clearly intended to cause death or to do grievous bodily harm. Self-defence which was invoked was misplaced because there was no evidence to justify the shooting. Under Section 206 (a), malice aforethought could be inferred. Moreover, APC Mosha knew that the shooting which caused the deceased's death would probably cause death or grievous harm. Again, the trial Judge correctly found malice aforethought established. In doing so he called to aid the decision in **MSENGI s/o MKUMBO and ANOTHER V.R. (1955) 22 EACA pg 500** in which the Court of Appeal for Eastern Africa, the predecessor of this Court, held that the two appellants were in a shamba with the intent to commit the felony of theft, to wit, break and remove maize cobs; their being armed with sticks showed that they were prepared to offer violence in pursuit of their common intention, and as death resulted from the act of one of them when he threw a stick at the deceased and thereby caused his death, the element of malice aforethought necessary to constitute murder had, having regard to Section 200 (c) (now Section 206 (a)) of the Penal Code, been established against both the accused.
26. In the instant appeal, there is no evidence that the appellant and his colleagues had intent to commit a felony. They were on police patrol, which was a legitimate police exercise in curbing crime. The principle in the case of **MSENGI and Another V.R.** has no application (under subparagraph 206(c) (supra)) where death occurs in circumstances that show that the accused had no intent to commit a felony and hence malice aforethought cannot be inferred. With respect, the trial Judge discerned this and saw the act of the appellant and his colleagues being on police patrol as "a saving grace" as malice aforethought could not be inferred under Section 206 (c). But where police officers shoot to kill in circumstances where their lives are clearly not in any danger whatsoever, malice aforethought can be inferred under Section 206 (a) or (b). It is important to point out that police officers are employed by government of the people and paid salaries with the tax-payers money to protect the public, not to harm the public. For this reason, where police officers become trigger-happy and with seeming impunity shoot the very people whose safety and security they are supposed to protect and safeguard, the law must infer malice aforethought under either Section 206 (a) or 206 (b) of the Penal Code. But it is not lost on the Court that the work of combating crime is not easy and sometimes it becomes dangerous forcing the police to shoot, as they must in such circumstances.
27. The trial Judge, not having found malice aforethought established, and relying on Section 21 of the Penal Code in his finding that the appellant and his colleagues were acting in concert and had a common intention in prosecuting the unlawful purpose, to wit, to kill the deceased, substituted the murder charge with manslaughter pursuant to Section 179 of the Criminal Procedure Code.
28. Section 179 (2) of the Criminal Procedure Code provides:

"Where a person is charged with an offence and facts are proved which reduce it to a minor offence,

he may be convicted of the minor offence although he was not charged with it.”

29. The term “minor” in this context refers to less serious offence which manslaughter is in reference to murder. The former is punishable with life imprisonment while the latter is punishable with a mandatory death sentence.
30. The learned trial Judge proceeded to convict the appellant and his two co-accused of the offence of manslaughter under Section 202 as read with Section 205 of the Penal Code and after mitigation sentenced each one of them to imprisonment for a term of two years. The appellant appealed but his two colleagues did not. The State also did not appeal against the learned Judge’s findings and conviction for manslaughter instead of murder. The only appeal before us was the appellant’s in which he challenged the learned trial Judge’s findings and conviction. In light of what we have stated above, there was evidence on which the learned trial Judge could properly make a finding that that there was evidence to establish malice aforethought. The appellant was lucky that the State did not appeal and he seems intent on stretching his luck too far in mounting this appeal. It has no merit. We have no hesitation in dismissing it which we hereby do.

Dated and delivered at Nairobi this 14th day of February 2014.

J. W. MWERA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR