



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI

(CORAM: BOSIRE, GITHINJI & ONYANGO OTIENO, J.J.A.)

CRIMINAL APPEAL NO. 390 OF 2009

BETWEEN

PAUL MUIGAI NDUNGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nairobi (Muga, J.) dated 28<sup>th</sup> July, 2009.

in

H.C.CR.C. NO. 113 OF 2005)

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**JUDGMENT OF THE COURT**

The appellant was tried by the High Court, Nairobi with the aid of assessors for the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal code. He was subsequently convicted and sentenced to death.

He has appealed against conviction and sentence.

The appellant was an administration police officer stationed at Mundoro chief's Camp in Gatundu, Thika District. The chief's camp is about 70 metres from Mundoro Trading centre (market).

The appellant was alleged to have murdered **Isaac Kimiri Muriithi** on 30<sup>th</sup> October, 2005 at the market. The prosecution called a total of sixteen witnesses but only one, **APC. Abraham Kitilit** (PW1) (Abraham) gave detailed evidence of the circumstances leading to the death. This witness was also an administration police officer at Mundoro chief's camp and a colleague of the appellant. He testified in the relevant part, thus:

**"I went to Matheri bar where my friends bought me two beers. After I drank one beer, Paul Muigai Ndungi came in and ordered for a beer. Within a few minutes, three young men came in and though they ordered for alcohol, they were not served. A few minutes later, they started exchanging words with Paul Muigai. In response, the latter started slapping and kicking the young men before removing them from the bar. Subsequently, I prevailed over Muigai and he left them before sitting**

**down. In response, the young men started throwing stones. I went out of the bar and cooled the young men. Thereafter, Paul Muigai left the bar while saying “Ngojea kidogo .....”. When he came back, I observed that he was armed with a rifle. One of the young men went up to Paul Muigai and dared him to shoot. By then the young man was carrying a broken bottle. In response, Paul Muigai shot him”.**

He continued in his evidence in cross - examination:

**“I only saw accused drink one bottle of Allsopps. I told the young man to stop quarrelling.**

.....

**The deceased was standing about 5 metres away from the accused before the shooting. The accused never talked to him, he just shot him. I saw the accused shooting the deceased only once. The accused was by then standing next to the security light. The other men who were talking to me ran away after the deceased was shot. When I saw the accused he was already holding the rifle and was ready to shoot. The incident took place at around 11 p.m.”.**

**Jane Waithera Mumbi (PW9)**, the Matheri bar attendant testified among other things, that the appellant entered into the bar at about 10 p.m. and ordered two pilsner beers; that three young men entered the bar and ordered for beers; that the three men were not served as it was late; that the three men left the bar after which they threw stones at the door and windows; that the appellant drunk one beer and left with the other and that she heard gun shots after thirty minutes. **Teresia Muthoni Ngugi (PW11)** also a bar attendant at Matheri bar gave similar evidence, that, the appellant took one beer and carried the other; that three customers came to the bar; that the three customers were not served as it was closing time and as a result they hit the windows and doors with stones. **PC. George Ndegwa Wachira (PW15)** who went to the scene in the company of other police officers noticed that the deceased had a bullet shot and his body lying on the ground. There was an empty cartridge between Matheri bar and where the body was lying. According to **Sgt. Joseph Gichuki ((PW16)** the body was lying about 3 metres from the bar. The postmortem performed by **Dr. Muya George (PW3)** revealed that the deceased had two bullet wounds entry being on the lateral side above the waist and exit being on the left side next to the hip. The cause of death was diagnosed as massive haemorrhage due to fatal bullet injuries.

At about 11.30 p.m. **James Mwaura (PW6)** a night watchman at the market heard two gun shots and later many gun shots in succession. Eventually he saw the appellant crossing the road carrying a rifle on his shoulder heading to his house and entered into his house. He then came out with his rifle, headed to the matatu stage and fired three shots after which he returned to his house where he started shooting at Government vehicles parked at the camp for security. Later a contingent of about 50 police officers went to his house and found him asleep with the door locked. They opened the door and found him asleep on his bed holding a rifle, disarmed and arrested him. The police also recovered 12 rolls of cannabis sativa in his house. The appellant had a swollen face – on the left eye. The police searched for spent cartridges and recovered 25 spent cartridges between the scene and the house of the appellant.

The appellant stated at the trial, among other things, that on the material day he went to Blue bar at the market at 2 p.m.; that he drunk beer and got drunk; that he went to his house and slept; that he woke up at 9 p.m.; went to Matheri bar and ordered one pilsner; that about 10.45 p.m. four men entered into the bar but they were not served as the bar was closing; that the four men became annoyed and went to where appellant was seated and started shaking his table causing beer to pour on customers; that appellant told them to go home if they were drunk and that **Abraham (PW1)** entered into the bar and talked to them after which he (**Abraham**) sat on a different table and ordered drinks; that after a short while the young men came back and started throwing stones and bottles; that thereafter the bar was closed; that appellant left the bar with one bottle of beer and went to his house and put on his uniform; that he heard an alarm coming from the market; that he took his gun and went towards the trading centre; that on reaching nearby kiosks he saw three people approaching and he challenged them to identify themselves; and that they stopped without answering. He continued:

**“Thereafter one of them approached me and told me that he wanted to talk to me. Immediately he hit me on the left eye and I staggered. Subsequently, he started pulling the muzzle of the rifle and he was joined by two of his friends. One of them assaulted me on the hands to make loose grip of the gun. We later struggled and there was an explosion – though I never pressed the trigger. I also never opened the safety catch. The person who was holding the muzzle let the same loose. The third person pushed me and I fell down on my back. On rising up I shot several times in the air in order to scare them. From there, I went back to the camp .....**”.

The two assessors formed the opinion that the appellant was guilty of murder, the first one Grace Gor saying in part:

**“The accused left the scene to fetch his rifle to come back and shoot a helpless and unarmed young man whom he could disarm .....**”.

The second assessor concurred with that reasoning.

The superior court evaluated the evidence and concluded:

**“The evidence on record clearly shows that after the accused quarrelled with the deceased, he went to his house and armed himself with the G3 rifle. When the deceased dared him, he opted to shoot him in cold blood. From the conduct of the accused, he had malice aforethought to kill the deceased”.**

The appellant filed a petition (should be a memorandum of appeal) on his own. Later his counsel filed a supplementary memorandum of appeal containing two grounds, which were in effect, that, the conviction and sentence was erroneous as the appellant was not in control of himself as he was under the influence of intoxication as a result of taking beer the whole day and bhang, and, secondly that the superior court erred in convicting and sentencing the appellant for murder when the evidence on record supports a charge of manslaughter.

Mrs. Gulenywa, learned counsel for the appellant submitted in essence, among other things, that deceased provoked appellant by challenging the appellant to shoot; that deceased confronted the appellant with a broken bottle and the appellant had to defend himself; that there was mayhem as the deceased and his associates threw stones at the bar breaking windows; that the appellant was assaulted and had a swollen face; that the appellant had drunk the whole day and the manner in which he reacted-shooting randomly shows that he was not in a sane state of mind. The appellant’s counsel urged the court to re-evaluate the evidence and find the appellant guilty of a lesser charge of manslaughter.

On the other hand, Mr. Monda, the learned Senior State Counsel supported conviction for murder and submitted that the evidence proved murder and not manslaughter; that the appellant left the bar to arm himself; that the defence of intoxication was not raised at the trial and that the evidence did not show that the appellant was insane.

Although the submissions of Mrs. Gulenywa, with respect are confusing as she refers to provocation; self defence and insanity due to intoxication which would be complete defences to a charge of murder if established, it is clear that she in essence submitted that the evidence proved a charge of manslaughter and not murder and that the court should substitute a conviction for manslaughter and pass the appropriate sentence. She did not submit that the appellant should be totally acquitted.

Indeed, Mrs. Gulenywa did not challenge the findings of fact by the superior court regarding the circumstances under which the deceased died. Rather she relied on the evidence of the main prosecution witnesses **Abraham** (PW1) in an attempt to show that the appellant had no malice afterthought.

According to the evidence of Abraham, the appellant shot the deceased outside Matheri bar after the appellant had gone to his house to fetch a gun. But according to the defence of the appellant, he was attacked by three people near some kiosks on the way to the market to answer an alarm and that during

the struggle with the three men, one of them pulled the muzzle of the gun and there was an explosion.

The appellant was saying implicitly that the gun fired accidentally during the struggle without him pulling the trigger. However, the version of the prosecution case is as described in the evidence by Abraham the material part of which we have quoted. The statement of the appellant in defence shows that Abraham was his colleague and that he was present in Matheri bar and in fact talked to the young men who had caused commotion in the bar by throwing stones. The appellant stated that the four men had thrown stones and bottles before the bar was closed. The two bar attendants **Jane Waithera Mumbi** and **Teresia Muthoni Ngugi** also testified that the three customers threw stones at the bar after they were denied service.

The two assessors and the court accepted the version of the incident as described by **Abraham** and made concurrent findings that after the appellant quarrelled with the three young men he went to his house, armed himself, returned to the scene and shot deceased when deceased dared him to shoot. On the basis of that finding the superior court concluded in terms of **Section 206** of the *Penal Code* that the appellant shot deceased with malice aforethought. More particularly, malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievous harm to any person.

It is submitted that the deceased provoked the appellant by challenging him to shoot. That would not in law amount to provocation. It was further submitted that the appellant confronted the appellant with a broken bottle and that the appellant was assaulted on the face and his eye was injured. The superior court did not accept those facts. The evidence of Abraham which was accepted disproved those facts. The evidence established that the appellant overpowered the three young men and threw them out of the bar, that the young men started throwing stones, and, that it is after that he went for the gun.

It is true that the appellant said that he took beer from 2 p.m. and then went to sleep and returned to the market at about 10.45 p.m. He did not say how much beer he had drunk before he went to sleep. The evidence shows that after he returned to the market he took one beer and went away with one bottle. There is no evidence that at the time of the incident the appellant was so intoxicated either from smoking *cannabis sativa* or taking alcohol that he could not have intended to shoot the deceased. The appellant was represented by a counsel in the superior court. Neither the appellant nor his counsel claimed that the appellant could not have formed the intention to cause death or grievous harm to the deceased due to intoxication. The appellant was examined by Dr. Welime and found to be of sound mental status.

From the evidence, the conduct of the appellant was normal prior to shooting of the deceased.

From the evidence of Abraham and the findings of fact by the superior court the finding of the superior court that the appellant shot deceased to death with malice aforethought cannot be faulted.

In the light of the foregoing, the appeal has no merit and we dismiss it in its entirety.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of April, 2011.**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**