



IN THE COURT OF APPEAL  
**H.C. Cr. C. No. 4**  
**of 2007AT NAKURU**

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

**CRIMINAL APPEAL NO. 401 OF 2009**

BETWEEN

**DANIEL MUTHUKU MUTHAMA ..... APPELLANT**

AND

**REPUBLIC ..... RESPONDENT**

*(An appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Koome, J) dated 18<sup>th</sup> December, 2009*

In

**H.C. Cr. C. No. 4 of 2007)**

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**JUDGMENT OF THE COURT**

**Daniel Mutuku Muthama**, the appellant herein, was tried by the High Court (Martha Koome, J) on a charge of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the Information charging him with murder were that on the **23<sup>rd</sup> day of December, 2006** at Ngorika Trading Centre in Olkalou Division of Nyandarua District, Rift Valley Province, the appellant murdered John Ndiritu Gakuru, hereinafter "*the deceased*."

It was agreed that the appellant was a corporal in the Administration Police and was attached to Ngorika Chief's camp as the officer in charge of the camp. During the night of 23<sup>rd</sup> December, 2006 at around 11.00 p.m. the deceased was among the patrons at Kenfolt Bar in Ngorika township. The bar was owned by Kenneth Gitau Muiruri (PW1), hereinafter "*Kenneth*" and his wife Rachel Wanjiku Gitau (PW7), hereinafter "*Rachel*". Among the patrons in the bar at 11.00 p.m. were Dickson Kimani Gichege (PW3), Peter Mwangi Kiburi (PW4), Paul Wangala Mutua, (PW6) and Dominic Chege Kimathi, (PW8). The Chief of the area and under whom the appellant was deployed was Josphat Maina Mbiru (PW2) but he was not present at the bar and was only summoned there after the incident, in which the deceased lost his life. The Chief in fact went there some thirty (30) or so minutes after the incident.

All the witnesses who were at the bar, except for Peter Mwangi (PW4), swore that they saw the appellant

whom they all knew as the local “Corporal” come to the bar at around 11.00 p.m. The appellant had a gun which was hanging on his shoulder. The witnesses said the appellant either called or beckoned the deceased to follow him outside and the deceased did so. As soon as the deceased stepped outside the witnesses heard gun shots and the shooting continued even inside the bar during which several of the witnesses were also shot on various parts of their bodies. When the shooting eventually stopped, the deceased was found lying on his back at the door of the bar; he was already dead and blood was oozing from his chest. A total of seven spent cartridges were collected from the door of the bar and from inside. They were all fired from a 7.62 mm G3 rifle and such rifle was admittedly part of the guns in the armoury at Ngorika Chief’s camp. The appellant was in charge of that armoury. Though nobody really saw the appellant actually shooting the deceased the witnesses had no doubt whatsoever that it could only have been him who shot the deceased dead and also came into the bar and shot and injured some of them. Paul Wangala Mutua (PW6) specifically said:-

***“I recall on 23/12/2006 at about 8.00 p.m. I was at Kenfolt Bar. I was taking liquor. I started from 8.00 p.m. upto 10.00 p.m. A police officer who was well known to me came to the bar. He called from the door; a woman went out and I do not know what transpired between the policeman and the woman when they were outside. I went on taking my drink at about a few minutes I heard a gun shot. I heard six gun shots I hid under the table. I saw the accused on that day he had a gun. I can identify the gun it is like this – “MFI 1” identified. The accused then entered the bar. There were lights I could see the accused person from the electricity lights. The accused threatened us. I was nearby under the table, he shot at me on the buttocks twice. He ordered us to stay where we were. -----”***

Kenneth and Rachel were in the bar serving customers and they also swore that the appellant whom they knew came to the bar at about 11.00 p.m. and called or beckoned the deceased to go out with him. The deceased followed and thereafter they heard a gun shot which was followed by further shooting inside the bar. As we have said the witnesses were consistent that it was the appellant who shot dead the deceased and then shot and injured other patrons in the bar.

*What did the appellant himself say in his sworn defence?* He swore that earlier that evening, some five or so people had attacked him and robbed him of Shs.5000/-. They ran into a bar and it is obvious from his evidence, he was saying that the deceased whom he had recognized well was among the robbers. He (appellant) then proceeded to the camp, armed himself and another officer called David Tirop with a gun each and they proceeded to the bar to arrest those who had attacked him. He left Tirop by the fence so that he (Tirop) could protect him. The appellant continued:-

***“I stood by the door this was at about 11.30 p.m. It was at Kenfolt Bar. Tirop stood on the (sic) I identified the deceased from the clothes he was wearing. I called him while I was at the door the deceased came to where I was. I only signaled the deceased when he came near me. I asked him to surrender so that I could arrest him. Tirop could hear what was going on. Instead of surrendering, the deceased jumped over to take my gun, the gun exploded and the deceased was shot four times and he fell down. When the deceased fell down I looked behind and I did not see Tirop. The deceased lifted his hands like he was surrendering but he aimed for my gun and in the scuffle the deceased was shot. I did not enter the club. If you struggle for the firearm it can explode. I am the one who held the trigger trying to fire in the air but unfortunately the deceased was shot. Four shots were fired. While struggling many shots were fired that is how the other people were shot. I did not know the deceased. I was a visitor in the area. I only knew people by their faces. I beckoned him with my hands. I did not know him by name. I wanted the accused (sic) to surrender so I could arrest him.”***

So that the appellant really agreed with the prosecution witnesses that he went to the bar armed with a gun; that he called or beckoned the deceased to come outside the bar and the deceased did so. The deceased was immediately shot but the appellant seemed to be saying that the deceased attempted to take away the gun from him and in the struggle the gun “exploded” and the deceased was shot four times. There is really no question of the gun having “exploded” whatever that may mean. Chief Inspector Emmanuel Langat (PW12), a ballistics expert examined the gun on 9<sup>th</sup> January, 2007 and in the words of that officer:-

**“-----it is caliber 7.62 mm G3 rifle; at the time of examination it was in good general and mechanical condition complete with all its components and capable of being fired. ----”**

The officer was not cross-examined at all about the issue of the gun “*exploding*” or on any other issue. In view of the whole evidence including that of the appellant, we do not attach any significance to the issue of the serial number of the gun which the appellant had. He himself must have known the serial number of the gun which he claimed “*exploded*” during the alleged struggle between him and the deceased.

In our view, there was overwhelming evidence that it was the appellant who shot the deceased and there was no question of the gun “*exploding*” by itself killing the deceased and injuring the other witnesses. The learned trial Judge was right in concluding that the appellant shot and killed the deceased and we reject the grounds of appeal which complain that the prosecution had not proved that the appellant shot the deceased.

Mr. Wambeyi Makomere, learned counsel for the appellant, argued that even if the appellant shot the deceased, it was not proved that he had malice aforethought.

For our part, we are fully satisfied that malice aforethought was proved. The appellant shot the deceased on the chest – according to him the gun “*exploded*” and fired four shots. By shooting the deceased, the appellant intended to either kill the deceased or to gravely injure him. As it turned out, the deceased died on the spot. Malice aforethought was self-evident from the act of the appellant in firing four bullets on the chest of the deceased – see **section 206 (b)** of the Penal Code.

In ground one of his “*Supplementary Grounds of Appeal*” the appellant complained that his rights under **section 72 (3)** of our repealed Constitution were violated in that he was arrested on **24<sup>th</sup> December, 2006** and was not produced before any court until the **18<sup>th</sup> January, 2007**. The issue was specifically raised before the learned trial Judge. The Judge considered it and came to the conclusion that the delay was satisfactorily explained in the circumstances of the case. There can be no basis, either in law or on the facts, upon which we can interfere with the learned Judge’s conclusion on that issue.

Like the learned Judge, we are fully satisfied that the appellant was convicted on sound evidence which proved beyond any reasonable doubt that he murdered the deceased. The sentence imposed on him was lawful and must have, in any case, been commuted to one of life imprisonment. Mr. Makomere cited to us various previous decisions of the Court in support of the appellant’s appeal. We have gone through those decisions but have found nothing in any of them which could have remotely altered the view we have taken of the facts and the law in respect of the appeal. Accordingly we have not found it necessary to deal with any of those authorities though we are, nevertheless, grateful to Mr. Makomere for his industry and valiant efforts on behalf of the appellant. The appeal wholly fails and we order that it be and is hereby dismissed.

Dated and delivered at Nakuru this 9<sup>th</sup> day of June, 2011.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**