



**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL 10 OF 2008**

**ERIC AKEYO OTIENO..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Meru (Lenaola, J) dated 28<sup>th</sup> January, 2008*

**In**

**H.C.C.R.A. No. 24 of 2005)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

Eric Akeyo Otieno (*the appellant*) was tried and convicted of two counts of murder contrary to section 203 as read with section 204 of the Penal Code, and sentenced to death.

The particulars contained in the Information of the first count alleged that on 25<sup>th</sup> day of February 2005 at about 0015 hours at Marille Trading Centre in Marsabit District within Eastern Province he murdered MICHAEL OBUNGA (*hereinafter the first deceased*).

The particulars contained in the Information on the second count alleged that on 25<sup>th</sup> day of February 2005 at about 0015 hours at Marille trading centre in Marsabit District, within Eastern Province he murdered ABDI AHMED ALI (*hereinafter the second deceased*).

The appellant denied the offences on both counts when he first appeared in the superior court (Sitati, J) on 5<sup>th</sup> May 2005.

The prosecution case against the appellant as narrated by Mohamed Ahmed Ali (PW1) a businessman operating a hotel (Yassin travelers choice) at Merille trading centre was that on 25<sup>th</sup> April 2005 at about midnight he was asleep in his house within Merille trading centre, near the hotel, when he was woken up by a gun shot. He dashed out and saw his cousin Mohamed Suleiman (PW3) struggling with the appellant. They were about 50 – 70 meters away from him. His cousin Mohamed Suleiman called him to go and rescue him and also reported to him that the appellant had already killed his brother, the second deceased whose body was lying nearby. Mohamed Ahmed approached the two, and the appellant pointed his G3 rifle at him, and fired two shots at him, but they missed him as he fell down. His cousin Mohamed Suleiman held the appellant from behind and turned him away from Mohamed Ahmed Ali, who managed to get up and run quickly towards them, and managed to pull the G3 magazine, and also released the one

bullet which remained in the gun as he shot in the air. Together with his cousin Mohamed Suleiman they managed to disarm the appellant and took the G3 magazine from him. The appellant ran towards the police post, and Mohamed Ahmed Ali together with members of his family divided themselves into three groups. Some guarded the appellant's gun which was still at the scene, some guarded the body of the first deceased which was lying nearby, together with his G3 rifle, and others took the second deceased to Laisamis Catholic hospital, where he subsequently died. The appellant's gun was later handed over to the officer in charge (OCS) of Laisamis Police Station. Mohamed Ahmed Ali identified the appellant with the aid of moonlight. He knew him before that incident.

Mohamed Suleiman (PW3) was a cashier at Yassin Travellers Choice Hotel in Merille. He recalled the 25<sup>th</sup> February 2005, at about midnight, he was seated outside the hotel after close of business when he suddenly heard an argument coming from the direction the second deceased had just walked to. He started walking to the verandah but before reaching there, he heard a gun shot and met the second deceased, running into the plot. A second gun shot was fired, but it missed the second deceased. Mohamed Ahmed Ali, saw that it was the appellant who was shooting. He was about 10 meters away. He knew him as an Administration Police Officer in Merille. He saw him with the aid of moonlight. The appellant allegedly fired a third shot which hit the second deceased. He grabbed the appellant from behind and also held the gun, but the appellant continued shooting, so Mohamed Suleiman screamed for help, and it was at that juncture that Mohamed Ahmed Ali, a brother of the second deceased came and the appellant fired towards him, but the shots missed him and the two managed to disarm the appellant after overpowering him. The appellant ran away and the second deceased was taken to the hospital. The appellant's gun was guarded and subsequently handed over to the officer in charge of Laisamis Police Station, together with the bullets. The first deceased's body lay nearby in the verandah of the shop.

Ali Ker Hassan (PW2) testified that he was an employee of Yassin Travellers Hotel. He was on duty at the hotel on 25<sup>th</sup> February 2005. He closed the business at about 12.15 a.m. and went to the verandah where he found two police officers, the appellant and the first deceased talking to the second deceased who was the son of the owner of the hotel. They were arguing loudly. Ali knew all three of them and was able to identify them as there was moonlight. He saw the 1<sup>st</sup> deceased hit the second deceased using a torch. Ali Ker went to the appellant to find out what was going on, whereupon the appellant told the first deceased to shoot the second deceased. The appellant too fired a shot aiming at the second deceased who ducked and the bullet hit the first deceased who fell down. The second deceased started running towards their plot. The appellant chased him and fired at him twice and the deceased fell down. Mohamed Suleiman came out of the house and held the appellant from behind whilst screaming for help. His cries were heard by Mohamed Ahmed who came out and removed the gun magazine and disarmed the appellant. Ali Ker took the appellant's gun and kept it in the house as the appellant ran away. The gun was later handed over to the police.

James Ilmepiru Leupale, (PW4) is the Chief of Merille location. It was his evidence that he was seated in front of his shop near Merille Administrative Police camp, on the 25<sup>th</sup> February 2005. He heard the appellant and the first deceased arguing, about 20 meters away from him. He saw them with the aid of moonlight as it was full moon. The appellant commanded the first deceased to follow him, as he was going to kill somebody that day. The first deceased took his gun from his house and followed the appellant. The two walked towards Yassin Travellers Hotel. The time was about midnight. The Chief picked his gun and followed them towards the trading centre, but on arrival, he found the first deceased lying on the ground in a pool of blood, with his gun nearby. A crowd of people had already gathered at the scene. The Chief noted that the 2<sup>nd</sup> deceased had also been shot. He later handed over the first deceased's gun to the police.

Inspector Paul Wandaka (PW11) and Police Constable Martin Munene (PW7) arrived on the scene of the shooting at on the night of 25<sup>th</sup> February 2005, between 1.30 to 3.30 a.m. Their respective testimony is that they found the body of the 1<sup>st</sup> deceased lying in a pool of blood by the verandah of the hotel. They also learnt of the shooting of the second deceased who had been rushed to the hospital, but died on the way.

Inspector Wandaka took over the investigations of this case. He recovered a rifle from the family of the second deceased and another one from the area Chief. He also recovered 6 spent cartridges near the body of the second deceased.

Police Constable Godfrey Cheruiyot (PW8) and Police Constable Rodney Mogoi (PW9) both rushed to Merille Trading Centre, acting on information received about a shooting incident. They both testified that they heard gun shots as they headed to the trading centre and on the way, they met the appellant who was running away from an angry crowd who wanted to lynch him. P.C. Rodney fired shots in the air to scare the angry crowd, and P.C Godfrey rescued the appellant from the angry crowd; and took him to the police base from where he was handed over to the officer in charge (OCS).

The bodies of the 2 deceased persons were identified by their relatives for post mortem examination which was conducted by Dr. Mutonga Mwenda David (PW12) who confirmed that the two died as a result of gun shot wounds.

It was Inspector Paul Wandaka who collected a G3 rifle and an FN rifle and 6 empty cartridges as well as 13 rounds of ammunition from Laisamis Police Station and took them for examination at the CID headquarters. He later charged the appellant with the offences on the two counts.

Mrs. Ntarangwi counsel for the appellant at his trial posed several questions to Inspector Wandaka concerning the gun issued to the appellant. He answered in part;

“I confirmed the number of the rifle issued to him. He signed for it in the arms movement register. He signed for 20 rounds of ammunition. The rifle issued to Akeyo was serial No. 359359. I got the number from the rifle. It is not the same serial No. 369369. It is an error as it should be 369369. This is the gun issued to Akeyo, and the guns were recorded in error.”

Lawrence Ndiwa (PW5) the firearms examiner, received exhibits in this case from Inspector Wandaka on 3.3.2005. The exhibits were, G3 rifle serial No. FMP 369369, Ex 1 and an FN rifle serial No. 2332 Ex. 2. He also received 6 fired cartridges Exhibits (i – iv), as well as 13 rounds of ammunition Ex. 5. He examined them and concluded that the six spent cartridges were calibre 7.62 x 51 millimetres and each of them were suitable for use in the G3 rifle serial No. 369369 and were in fact fired from the G3 rifle No. FMP 369369. He also confirmed that the number FMP 369369 was indicated on the body of the firearm, and further, that the 6 spent cartridges were capable of being fired from the G3 rifle No. FMP 369369 only.

The appellant made a sworn statement in his defence and said that on 25.2.2005, he was on patrol duties with the first deceased. That he was armed with rifle G3 No. 359359, together with 60 rounds of ammunition, and the first deceased had an FN rifle with 40 rounds of ammunition. That they moved to the dispensary area towards Merille trading centre. That at about 11.00 p.m. they saw about 4 people moving towards Yassin Hotel, walking fast and as they followed them, the people split into 2 groups. He followed one group whilst the first deceased followed the other group, and suddenly he heard gun shots from people who ordered him to surrender and started assaulting him, and he had to run away. He denied shooting both the first and the second deceased. The appellant denied having been issued with rifle No. 369369, and said that his gun was No. 359359.

The appellant called one witness, Ahmed Abdi (DW1) a corporal with the Administrative Police Base at Laisamis Police Station. He brought the Arms Movement Register for Laisamis D.O's office, for the period 7.11.2004 to 25.2.2005. He confirmed that the appellant was issued with a G3 FMP 359359 with 60 rounds of 7.62 mm ammunition. He said that the appellant returned it on 16.10.2004, but the same gun was again issued to him on 7.11.2004, and never returned. The same register did not reflect a gun G3 rifle No. 369369 as one of those in the Laisamis armoury.

Mrs. Ntarangwi, learned counsel for the appellant filed 7 grounds in the Memorandum of Appeal dated 13<sup>th</sup> September, 2008. These are:-

- “1. The Learned Judge erred on a point of law and fact in relying on the evidence of PW1, PW2 and PW3 in making a finding that the gun allegedly repossessed from the appellant by the said witnesses was the same one that had been handed over to PW11 and was sent for examination.
2. The Learned Judge erred on a point of law and fact in making a finding that the appellant and one MICHAEL OBONGA had formed the intention of committing the offence of murder before they went to the scene.
3. The Learned Judge erred on a point of law in making a finding that the firearm that was used to commit the offence was G3 serial number 359359 when there was no evidence to the effect that the said firearm had been forwarded to the firearms examiner for examination and when there was contradictory evidence that the firearm submitted for examination was FMP 369369 and all the spent cartridges had been fired from the latter firearm whose serial number had been identified during the trial of the case.
4. The Learned Judge erred in law and fact in relying on the evidence of PW7, PW8 and PW9 in making a finding that the appellant conduct was inconsistent with his innocence.
5. The Learned Judge erred on point of law and fact in accepting the explanation given by PW11 as honest and reliable which explanation was to the effect that the serial number of the rifle that had been issued to the appellant was recorded in error.
6. The Learned Judge erred on a point of law in making a finding that the prosecution had proved its case beyond any reasonable doubt.
7. The Learned Judge erred on a point of law and fact in dismissing the defence offered by the appellant as an afterthought and in failing to consider the evidence of DW1.”

She submitted that the learned Judge made an error in relying on the evidence of PW 1, PW 2 and PW3, in making a finding that the murder weapon was recovered from the appellant. She submitted further that nobody has explained where the murder weapon was. That the mother of the second deceased who was said to have handed over the murder weapon to Inspector Stanley Nyaga, who in turn handed it to Inspector Wandaka, did not give evidence in court, and the ballistic expert confirmed in court the exhibits he received from the police were the ones he examined. He also physically checked the numbers on the gun handed to him and confirmed the number as 359359. Mrs. Ntarangwi complained that the learned trial Judge changed the version of the evidence after the Arms Movement Register was produced in court, yet there was evidence that the six spent cartridges were fired from the gun S.R No. 363969 and not the appellant’s G3 gun S.R 359359. She submitted that the appellant gave a reasonable defence which should have been accepted because it cast doubt on the prosecution case.

Mr. Orinda, Principal State Counsel conceded the appeal submitting that the evidence relating to the handling of the gun by the police was unsatisfactory. He submitted further, “as the record stands we do not know which gun is being looked at in court,” as the record did not show which gun was in court. Mr. Orinda referred to the prosecution case as a “mix up of evidence.”

We are aware of our duty as a first appellate Court to reconsider the evidence, re-evaluate it and reach our own conclusion. In so doing, we consider the main point in this appeal to be the identification of the gun used for the murder of the two deceased persons.

As the record shows, several prosecution witnesses identified the appellant as the person who shot both the deceased persons, then escaped from the scene because of an angry mob who threatened to lynch him. However, the gun he is alleged to have used was snatched from him after he had been overpowered and disarmed. It was kept by the family of the second deceased until it was released to Inspector Paul Wandaka who in turn handed it over to Lawrence Ndhiwa, the firearms examiner whose examination revealed that the 6 spent cartridges recovered from the scene were fired from G3 rifle serial No. FMP 369369, and not any other rifle. This evidence ruled out the possibility of rifle serial No. 359359, issued to the appellant having been used for the murders.

The learned Judge appreciated that the identification of the murder weapon used in this case was an issue when he said:-

“On my part, I should begin by determining the only unclear piece of evidence given in this case; the murder weapon. The Republic has put forth the argument that the alleged murder weapon is G3 rifle serial number 359359 officially issued to the accused and not G3 rifle serial number 369369 which appeared in the records of PW5, Lawrence Ndhiwa, the firearms examiner. The explanation given by PW11 was that an error was committed when recording the serial number of the gun and that the murder weapon was the same gun issued to the accused and that there was no evidence that G3 rifle serial number 369369 was ever involved in the alleged murder. The defence counters this argument by saying that the accused’s gun was never involved in the murder and there is no connection between him and the murder weapon.

I have carefully read over evidence tendered and I am convinced that the explanation given by PW11 is honest, reasonable and wholly answers the contentions by the defence. I say this and without shifting the burden of proof to the accused because the gun issued to the accused was recovered at the scene having been repossessed by PW1 and PW3 who refused to hand it over to anyone other than PW11 who later sent it for examination by PW5. It is wholly incomprehensible that even if there was an attempt at framing the accused person, I do not see how in the tragic circumstances of this case, gun serial number 369369, so close to serial number 359359 could have been exchanged with the real one and the results pointing to it as the one from which cartridges recovered at the scene were discharged from. Even if I am wrong, the other evidence as I shall evaluate below would lead to certain inescapable conclusions.”

With the greatest respect to the learned Judge, we do not find that his conclusions were supported by the evidence on record, which showed that the rifle G3 serial number 359359 issued to the appellant was not the one given to Inspector Wandaka who in turn handed it over to the firearms examiner who read the serial number of the gun he received from Inspector Wandaka and confirmed that its serial number was 369369.

We agree with learned counsel for the appellant that the appellant’s defence raised a reasonable doubt on the prosecution case, the benefit of which should have been given to the appellant.

In the result, we allow the appeal, quash the conviction and set aside the death sentence imposed on the appellant. We direct that the appellant be released forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 7<sup>th</sup> day of November 2008.

**S. E. O. BOSIRE**

.....

**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

.....

**JUDGE OF APPEAL**

**J. ALUOCH**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**