



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL 151 OF 2005**

**NICODEMUS ARASA ONZEMBE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT OF THE COURT**

This is an appeal from the judgment of J.L.A. Osiemo J. convicting the appellant Nicodemus Arasa Onzembe of manslaughter and sentencing him to four years imprisonment. The appellant was charged with murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya. The alleged offence was committed on 30th August 2003 in Njathaini Village in Nairobi. The superior court convicted the appellant of the lesser offence of manslaughter having found that the appellant “though he used his gun carelessly, had taken some drinks and had quarreled with the deceased and they had struggled before the shooting.” Osiemo J. held that these facts tended to reduce the offence to manslaughter, which was also the unanimous verdict of the three assessors. The appellant was a police officer of six years standing when the incident occurred. He was armed with a revolver. He admits that he fired the gun, shooting the deceased Paul Kamau Wamaitha in the head resulting in the death of the deceased. The appellant gave sworn evidence in his defence stating as follows:- “.....I recall on 22nd August 2003, I and PC Kinoti booked and went out on patrol duties at about 6pm.....We patrolled ... until 9 p.m. when we decided to go back to the Police Post.

When we reached Njathaini one P.C. Kinoti entered a bar to buy some cigarettes. I later followed him. I entered the bar and found him drinking a beer. He ordered one beer for me and I started drinking. I decided to go out to buy batteries for my torch. I went to a canteen shop (sic) but found it closed. I decided to go back to the bar so that we could proceed to the post. On the way back I was confronted by 4 people. One was ahead and the others were about 1 metre behind him. The one in front stretched his hand and caught me on the hip. I pushed him back to the others and he almost fell down.

He came back to attack me. I saw he was armed with a shining object in his hand. I realized it was a knife and he advanced towards me. I managed to block the attack but the knife caught me by the chest. The officers (sic presumably “others”) also advanced towards me. I was forced to draw the revolver I had and fired one shot in the air. The others hesitated. But the deceased rushed to me with the knife, which he had. I was forced to shoot him and he fell down.

I ran to the bar but on the way, I met Kinoti coming towards me and I informed him of what had happened. We called 999 Nairobi Area and police came and took me to custody. That is all. I had been at the post for 2 months by that time. Previously I had service in Garissa before I was transferred to Nairobi. I was newly posted to that post. I had not met the deceased before. In my mind I was dealing with

assailants. Already the assailants had injured me and I was apprehensive. The lighting is poor in that village. I could not be able to see properly.” He was then cross examined by Mr. Bifuoli for the State. “.....It was the deceased who first charged at me. He was close to me about 6 feet away. I pushed him and he almost fell down. At time (sic) the others were behind him. The others prevented him from falling down. Yes all the 4 people were directly facing me. Yes it was the deceased who charged back at me. He charged very fast. Yes that is the time I pulled out the gun and fired in the air. But he still charged at me and I was forced to shoot at him.

When I fired him (sic) he was very close. About 4 feet away. At that time I had already drawn my gun. I pulled my gun when the deceased started charging at me. Yes he moved quite fast. When I shot him he was facing at me. I could not see him properly. I shot him as he charged towards me. There were no other people around apart from those four people who attacked me. I had not met the deceased in the bar earlier. There was no struggle between me and the deceased.

Yes when Kinoti came the deceased was lying on the ground. Yes Kinoti found me at the scene. Yes I stopped the people from coming where I was. The shirt of the deceased did not come out during the struggle with him. Yes I shot the deceased as he charged towards me. Yes I see this document Ex. 4. Yes the entry wound was from the hospital (sic) (should be “occipital”) region. The entry wound is from the back. I did not shoot the deceased while he was running away. Yes I agree if the victim is facing you and you shoot the bullet cannot enter him from the back. Yes I admit I shot the deceased. Yes I signed out 6 bullets and returned only 4. Yes two had been used. In re examination he said:-

“I signed for a revolver on 22nd August 2003 for patrol duties. I did not aim to shoot the deceased. Yes I prevented people from coming to the scene because they wanted to attack me”. It was on the basis of this evidence that the appellant claimed that he was acting in self defence and should not have been convicted of manslaughter. The prosecution evidence, while proving through the medical evidence that the deceased was shot in the back of the head thereby causing his death, was very different as to the events leading up to the shooting. This evidence was accurately summarised by Osiemo J. as follows: - “The deceased before he was called out by the accused was drinking at the Mwireri Busaa Club together with Christopher Kamau (PW 1), John Kahara (PW 2), John Muiruri (PW3), James Karuru (PW4), and Monicah Muhaye (PW5). PW 1 in his evidence told the court that on the material date, the 22nd August, 2003 at around 10.30 pm he was drinking busaa at Mwireri Club in company of P.W 2, PW 3, PW 4, and PW 5 when the accused came there and called the deceased outside.

The deceased obliged and got out and as they talked after about five minutes the deceased screamed. He (i.e. PW1) got out together with the other patrons to find out what was happening. They found the deceased struggling with the accused. The accused had held the deceased by the shirt while the deceased was struggling to release himself from the accused.

After a while the deceased managed to release himself from the accused by the unbuttoning his shirt and leaving it in the hands of the accused and started to run away. But he as he ran away the accused in hot pursuit and on realizing that he could not catch up with him, the accused removed his revolver and shot him dead on the head from behind. This was also witnessed by PW2, 3, 4 and 5 who gave similar testimony. That the deceased was shot from behind as he tried to escape from the accused is confirmed by the evidence of PW13 Dr. Jane Wasike who performed the postmortem on the body of the deceased. She testified that the deceased was shot from behind and that the cause of death was due to a bullet wound.”

It is clear from the report of Dr. Wasike who examined the appellant on 3rd September 2003, some 12 days after the incident that the only injury then discernible on the appellant was a healed bruise on the upper part of the sternum and the probable type of weapon causing the injury was “sharp”. While this is possibly some corroboration of the appellant’s claim to have been injured by the deceased, it is inconsistent with the appellant’s evidence in his sworn testimony that there was no struggle between him and the deceased. The evidence of PC Henry Kinoti who was on patrol with the appellant that night was that he was in a different bar, the Royal Bar, when he was told by three people that the appellant had shot someone outside. The incident took place about 100 metres from the Royal Bar. When he arrived at the scene he found the deceased lying on one side and the appellant lying on the other side.

The deceased was not armed but there was a penknife lying beside the deceased. The deceased had no shirt. The appellant told Kinoti that he had been injured on the left side of his chest. Kinoti said that the appellant had no visible injury on his body. Kinoti did not mention in his evidence having heard, from inside the Royal Bar where he was drinking, either of the two shots alleged by the appellant to have been fired by him. PW2, PW3, PW4 and PW5 with whom the appellant was drinking in the Mwireri Club prior to being called out by the appellant were alerted of the incident by the scream of the deceased and were already outside and able to see the appellant and the deceased by the time the fatal shot was fired.

We consider that the evidence before the trial judge was correctly evaluated by him and his conclusion that the appellant called the deceased out from the bar immediately prior to the shooting cannot be faulted. The appellant's claim that he was being threatened by a group of four people of whom the deceased was the leader, contrary to the evidence of PW 1,2,3,4 and 5, was rejected by the superior court which had the benefit of seeing and hearing the evidence of these witnesses, and we have no reason to differ from that finding.

We do not consider that there is any credible evidence of the appellant being in imminent danger from the deceased when the appellant shot the deceased in the back of the head. We are satisfied on the evidence adduced before the superior court beyond reasonable doubt that the shot fired by the appellant police officer on duty, was in these circumstances, an unlawful act. There is no doubt that the shot fired caused the death of the deceased, and that the act amounts to manslaughter.

Section 202 of the Penal Code reads in relevant part: - (1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. The sentence of four years imprisonment was lawful and if anything lenient. For the above reasons the appeal of the appellant against his conviction and sentence is hereby dismissed. We would add that the drinking of alcoholic beverages in bars by police officers in possession of firearms while on duty is to be very strongly deprecated.

**Dated and delivered at Nairobi this 11th day of November, 2005.**

**R. S. C. OMOLO**

**JUDGE OF APPEAL**

**P. N. WAKI**

**JUDGE OF APPEAL**

**W. S. DEVERELL**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**