IN THE COURT OF APPEAL
AT NAIROBI
CORAM: KWACH, BOSIRE & O'KUBASU JJ.A
CRIMINAL APPEAL NO. 78 OF 1997
BETWEEN

FRANCIS KIMTAI RONO ..... APPELLANT
VERSUS
REPUBLIC .....RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nairobi (Justice Juma) dated 14th November, 1997
in
H.C.CR.C. NO. 76 OF 1995)
****

JUDGMENT OF THE COURT

Francis Kimtai Rono (the appellant), a Police Sergeant, was charged, tried and convicted of murder contrary to Section 203 as read with Section 204 of the Penal Code and was thereafter sentenced to the mandatory death sentence. In the appeal before us, he has raised nine grounds in his memorandum of appeal, which, in a nutshell may be condensed into three broad grounds, namely:

> (1)That the learned trial judge erred in fact and in law in holding that the appellant killed the deceased with the necessary malice aforethought.
>
> (2)That the learned trial judge erred in fact and in law in holding that the shooting of the deceased was unjustified and therefore unlawful.
>
> (3)That the conviction was against the weight of evidence.

One of the essential ingredients of the offence of murder as set out in Section 203 of the Penal Code is malice aforethought. Section 206 of the same code sets out what constitutes malice aforethought, and as far as is material to the matter before us, paragraphs (a) and (b) of that section are important, and provide as follows:

> "(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:"

The facts of this matter are not generally in dispute. The deceased in this case is Henry Koome who, before his death, like the appellant was a police officer. On the night of 2nd and 3rd April, 1995, he was at Liban Bar at Eastleigh Nairobi, taking alcoholic drinks accompanied by among other people Isaac

Maore Mworia (PW11) and William Karuba Muithia (PW4). At about 1 a.m. police officers, who included Daniel Wachira (PW15), invaded the bar, ordered all the bar patrons to lie down, searched all of them and while PW15 was searching the last patron who happened to be the deceased in this case, the appellant entered the bar armed with a pistol, cocked it and fired twice aiming directly at the deceased. At that time the deceased was on his knees. He had already introduced himself as being a policeman and had produced his police notebook and gun to prove it.

According to Stephen Mureithi Kinyua (PW13), who then was the Manager of the bar and who said that he witnessed the incident, the appellant entered the bar and before he shot the deceased uttered the words "ndiyo huyu". and there and then, without first finding out why the deceased was kneeling down and notwithstanding that he found other police officers there, shot the deceased on the head at point blank range and thereby killed him instantly. In a charge and caution statement which the appellant made three or so days after the incident, he states that he entered the said bar with his gun drawn and without making any inquiry "... fired twice at the man whom I heard was one of the suspected robbers. I did not check to see where the two bullets hit the man but I suspect it must have been the chest or head as he collapsed and died almost immedIina tehliys. "defence the appellant, in an unsworn statement, stated that on the material night while on patrol duties in a police car with PC Kilei and PC Mwenda, he received communication through a radio call that a motor vehicle registration No. KRC 469, a Toyota Saloon with six occupants all wearing blue jeans jackets, was being chased by police officers from Buru Buru Police Station. The occupants of the said motor vehicle were suspected to be robbers. While the appellant with a crew of two officers were patrolling along Eastleigh, 9th Street, in a police car with the appellant as car commander, they saw the motor vehicle KRC 469 abandoned along the said street with its doors ajar. He was told by people he found nearby that some of its occupants wearing blue jeans jackets had escaped into Liban Bar, which was nearby. He drew his gun and proceeded into the said bar. There he found two police officers from Pangani Police Station, namely P.C. Ngacha and P.C. Warui, who pointed out the deceased as one of the suspected robbers who escaped into that bar. He then saw the deceased putting his hand inside his jacket pocket, and believing that the deceased by doing so wanted to draw out a gun, the appellant shot him twice. It is however, noteworthy that the appellant did not include that fact in his cautionary statement which we alluded to earlier. Besides, neither PC Warui who the appellant said was present then, nor PW15 who according to other evidence on record had searched the deceased, testified that the deceased posed any danger.

In his judgment, the learned trial Judge (Juma J) did not think the shooting of the deceased could be justified in any way and that the fact that the appellant shot him twice, showed that he possessed the necessary malice aforethought to make the killing murder. Miss Nyambu for the appellant submitted before us that the fact that the deceased tried to put his hand into his pocket created a reason for suspicion that he intended to draw out a gun to attack the appellant and justified the latter's action of shooting him. In her view the appellant was, at worst, careless in his handling of his gun and he could only be properly convicted of the lesser charge of manslaughter.

Mr. Bw'onwonga, the Assistant Deputy Public Prosecutor, submitted before us that there is ample and acceptable evidence that the appellant without any reason whatsoever, shot and killed the deceased. He, therefore, urged us to dismiss the appellant's appeal.

This is a first appeal. We are obliged to consider and analyse all the evidence on record, make our own findings without overlooking the findings of the trial court and bearing in mind that unlike the trial court, we did not have the advantage of seeing and hearing the witnesses testify. And as we stated earlier the facts generally are not in dispute. The appellant's behaviour when he entered Liban bar clearly falls within the circumstances outlined in paragraph (b) of **Section 206 of the Penal Code,** which we quoted earlier. He pointed a loaded gun at the deceased knowing very well that it was loaded and pulled the trigger twice aiming directly at the chest and head area of the deceased. Indeed in his cautionary statement the appellant states that he believed the two bullets he fired must have met the deceased either on the chest or head. By aiming his gun at the deceased, as aforesaid, the appellant must have known, either that death or grievous harm would result to the deceased. Miss Nyambu submitted further that the facts and circumstances of this case do not disclose malice aforethought. We do not lose sight of the fact that the ingredient of malice aforethought in murder cases has to be proved beyond any reasonable doubt by the

prosecution, and where the evidence falls short of that standard a conviction on the lesser charge of manslaughter may be entered. However, where, as here, the appellant shot the deceased at point-blank range a rebuttable presumption of fact is raised that by doing so he intended to kill him. The burden was on the appellant to offer a reasonable explanation justifying his behaviour. That was a matter within his own knowledge, and by dint of the provisions of **section 111 of the Evidence Act**, Cap 80 Laws of Kenya, a court will be perfectly entitled to infer malice aforethought from his unexplained conduct.

This appellant's explanation that the deceased put his hand into his jacket pocket is negated by eye witness account of what happened on the material night. At no time during the prosecution case was it suggested to any witness that the deceased tried to put his hand into his pocket. We accordingly, hold that the appellant's reason for shooting the deceased was given as an afterthought and does not raise any reasonable probability of absence of malice aforethought. The shooting of the deceased was clearly unprovoked and unjustified and in our view, the learned trial judge was perfectly entitled to come to the conclusion he did, that the appellant killed the deceased with the necessary malice aforethought.

The evidence against the appellant is not only overwhelming but it is also cogent. The appellant went to Liban Bar, ignored all protocol as police officers senior to him were present, and without inquiring as to what was going on there, shot the deceased on the head. Inspector of Police, Charles Owour (PW17), who was at the scene, clearly testified, and he was not challenged on that, that the circumstances at the bar did not warrant the use of a firearm. The assessors and the learned trial judge were therefore, justified in coming to the conclusion that the appellant was guilty of murder. In view of that conclusion we find no necessity of discussing the issue of sentence.

In the result the appellant's appeal has no merit and is therefore, dismissed in its entirety.

Dated and delivered at Nairobi this 3rd day of November, 2000.

R. O. KWACH

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR