



**Republic v Omondi (Criminal Case E029 of 2011)  
[2024] KEHC 421 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 421 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CRIMINAL CASE E029 OF 2011  
JR KARANJA, J  
JANUARY 25, 2024**

**BETWEEN**

**REPUBLIC ..... RESPONDENT**

**AND**

**PHILIP ESINGA OMONDI ..... ACCUSED**

**JUDGMENT**

1. This court and this case have a long history together in the sense that the initial hearing of the case started before this court in the year 2011 when five prosecution witnesses testified on 20<sup>th</sup> December 2011 before the matter was adjourned to 20<sup>th</sup> March 2023 to enable the calling of additional witnesses by the prosecution.
2. However, due to administrative changes, this court moved to another work station within the North Rift Region and thereafter other regions. This prompted the hearing of the case to start afresh before differently constituted courts from 13<sup>th</sup> July 2013 upto 26<sup>th</sup> January 2023 when the defence called its last witness and closed its case. Both the prosecution and the defence were thereafter required to present their final submissions prior to the court rendering its final judgment on the matter.
3. Twelve (12) years down the line the matter ironically found itself before this very court for purposes of hearing the parties on their final submissions and rendering a final judgment on the basis of the evidence received herein from the 13<sup>th</sup> July 2013. It is as if this court returned to this region to finish what it started.
4. Be that as it may, the Accused Philip Isinga Omondi, is charged with murder, Contrary to Section 203 as read with Section 204 of the *Penal Code*, in that on the 15<sup>th</sup> September 2011 at Lessos town within Nandi County, murdered Wilson Kipkoech Ruto.

The case for the prosecution was founded on the facts that on the material 15<sup>th</sup> September 2011 in the morning hours a team of three police officers attached to Lessos Police station consisting of the



Accused and his two colleagues, PC Pauline Lichuma (PW1) and PC Alfred Wambulwa (PW3) were assigned specific duties by their Commanding Officer, SSP Aron Moriasi Ombeyo (PW11), who was then the chief Inspector of Police in charge of the Station.

5. The three officers left the station on foot but along the way the Accused excused himself to go have a cup of tea at the local trading Centre. Each one of them had a firearm issued to them by CPL. Sebastian Mrima (PW10). These were two MP5 rifles and one AK 47 rifle. As they walked along the main road towards the direction of Lessos, the Accused's Colleagues spotted a motor cycle approaching them at high speed. They signaled its rider by hand to stop but he defied and moved on. Shortly thereafter, a gun shot sound rent the air followed by shouts and screams from members of the public to the effect that the Accused had killed somebody.
6. The Accused was at the time standing on his own beside the road. His two colleagues joined him and they returned to the police station even as the members of public became agitated and followed them to the police station where they caused mayhem. The Accused was disarmed by his superior officer and placed in the cells. The motor cycle taxi rider (boda-boda). Justus Kiplagat Bett (PW4), was at the material time riding his motor cycle Registration No. KMCA 676M towards Lessos carrying two pillion passengers whom he had given a lift when the Accused's colleagues stopped him but he defied signaling to them that he would be returning. He proceeded with his journey but about thirty to fifty metres away he spotted a third police officer who pointed a firearm at him.
7. The rider (PW4) slowed down his motor cycle which swayed slightly no sooner had a gunshot been heard, but he continued moving until a place near a petrol station when his pillion passenger friend named Wilson told him that he had been shot. He rode the motor cycle upto Lessos Market where he stopped and realized that Wilson was not responsive and appeared dead with blood oozing from his abdomen. He (PW4) reported the incident to his fellow boda-boda riders before proceeding to his home from where he was asked to return to the scene by his brother called Philemon.
8. On his return to the scene, the rider (PW4) found that many people had gathered there. The body of deceased pillion passenger was still there and it was at that juncture that he learnt from the other pillion passenger called Arap Rono or John Maiyo that the deceased had been shot by a policeman referred to us "Omosh" whom he did not know.

The news of the death of the deceased reached his relative, Richard Kibwambok Cheror (PW2), a retired commissioner with the teachers service Commission at about 9:00am on the material date. He proceeded to the scene and identified the deceased's body before being given permission by the police to take it for postmortem at Moi Teaching Referral Hospital Eldoret.

9. The body arrived at the said hospital at 4:00pm on the material date and was received by the deceased's first paternal cousin, Irene Cheptoo Murei (PW9), a nursing officer at the hospital. She organized for a postmortem to be carried out and this was done by a pathologist, DR. David Chumba (PW8), who thereafter compiled and signed the necessary postmortem report (P. Exhibit 3).

Daniel Kiptoo Sawe (PW5), an immunologist in the County of Uasin Gishu was at Lessos Trading Centre when the deceased whom he knew as a boda-boda rider was lying down besides tarmac road with an injury on the right thigh. He attempted to administer first aid on the deceased but all in vain as the deceased passed away.

10. A gazetted scene of crime officer, Isaiah Letich (PW7), arrived at the scene of the incident at about 1:00pm on the material date and found the body of the deceased covered with a grey blanket under a temporary timber structure. He also found a motor cycle Registration No. KMCK 676M make TVS blue in colour which the deceased was riding on. He observed the scene and took several photographs



including those of the body of the deceased and the motor cycle (P. Exhibit 1). He thereafter, prepared the necessary certificate (P. Exhibit 2).

11. A firearms examiner, SSP Lawrence Ndhiwa (PW 12), based at the Directorate of Criminal Investigations, (DCI) headquarters was on the 7<sup>th</sup> December 2011 handed over by the Criminal Investigation Department Nandi County an AK 47 rifle Serial No. 764664 together with its magazine and nineteen (19) rounds of ammunition for purposes of examination. He carried out the necessary examination and compiled the necessary report dated 8<sup>th</sup> December 2011 (P. Exhibit 3).
12. IP George Ligami Shamali (PW6), was at the material time stationed at the Nandi Hills Police Station and was one of those who carried out investigation of the case. He accompanied the OCPD Nandi and the Deputy DCIO Nandi to the scene of the offence on the material date at about 9:30am. They were joined by other police officers and a district officer (DO). At the scene they found a riotous crowd and learnt that a police officer (PC Isinga) based at Lessos Police Station had shot a person who died and his body was along the road.
13. The culprit police officer was not at the scene having been taken to the police station by the OCS (Officer Commanding Station). The Investigations Officer (PW6) observed and inspected the scene for any spent cartridge, but he did not find any. He gathered in the course of investigations that the fire arms movement register indicated that the Accused had been issued with a firearm and twenty rounds of ammunition. He noted that at the time of its recovery, the firearm had twenty rounds of ammunition.
14. It was from all the foregoing facts that the Accused was arraigned in court for the murder of the deceased. His defence was essentially a denial and contention that he was implicated with the offence for reasons he did not understand as he was not on patrol duty on the material date. He contended that he was linked with the fatal shooting incident by his boss, the OCS (PW 11) yet the Occurrence Book (OB) and the patrol register did not show that he was on duty. His colleagues (PW1 and PW3) alleged that he was on duty with them after they were intimidated to say so.
15. He (the Accused) indicated that the duty roster for the week ending 18<sup>th</sup> September 2011 and starting on 11<sup>th</sup> September 2011 was prepared by the OCS and showed that he was in the crime branch section while his colleagues, PC Pauline and PC Alfred (PW1 and PW3) were in the records and report offices respectively. The roster further showed that the officer who were on patrol included one PC Kahindi and one PC Hamisi Msafiri together with the Deputy OCS Sgt. David Mutambo.
16. The Accused indicated further that Justus (PW4), the motor cycle rider was known to him but he could not tell why he (PW4) said that he was told by one Arap Rono that he Accused was involved in the shooting incident. Arap Rono was also known to him (Accused) but not the deceased with whom he had no grudge.  
  
It was also indicated by the Accused that CPL. Mrima (PW10) was the officer incharge of the police line and armoury. He was responsible for the firearm movement register which is used by officers to make entry when assigned firearms. The Accused however, indicated that although CPL Mrima (PW10) was in charge of the armoury on 15<sup>th</sup> September 2011. He said that the OCS was in charge.  
  
The Accused contended that the OCS was normally incharge of the armoury but he could delegate the duty to the senior most officer in the station.
17. The Officer in Charge of petty crime at the Lessos Police Station and who at time stood for the OCS, IP Kirambu Kariuki (DW2), testified for the defence after being summoned by the court. He indicated that he did not have the duty roster for the week ending 18<sup>th</sup> September 2011 nor the patrol register



for 15<sup>th</sup> September 2011. He also did not have the original firearm movement register but said that it was handed to the Deputy DCIO Nandi South One Simiyu, on 19<sup>th</sup> September 2011 as per OB No. 14 of that date. He had the OB of the 15<sup>th</sup> September 2011 which showed on entry No. 10 made by PC Wambulwa (PW3) indicating that he was booked for foot patrol on that date along the Lessos – Lessos road within the township area together with PC Pauline (PW1) and PC. Philip (Accused).

18. The witnesses (DW2) indicated that the duty roster of 15<sup>th</sup> November 2011 (DMFI 1) was an accurate roster signed by the OCS. It showed that the Accused was assigned duty at the Crime Office while his colleagues (PW1 and PW3) were assigned duties at the records and report offices respectively. It was therefore not in agreement with entry No. 10 of the same date which showed that the three officers were on patrol duty. The witnesses (DW2) also indicated that the firearm’s register was taken by the deputy DCIO, Simiyu.
19. The DCIO Nandi East and South CIP. Wasilwa was also listed as DW2, hitherto erroneously. He had noting useful to say about the case as the records relevant to the case were not in his possession and were not handed over to him when he took over office in the year 2019. The current OCS Lessos Police Station, CIP Zaleka Kiptoo (DW3), indicated that he was called as a witness to produce the duty roster, the original firearms Register and some OB entries including patrol registers. He produced copies thereof and indicated that the original firearm movement register was taken away by the Deputy DCIO, Simiyu of Nandi South.
20. The word “Murder” denotes causing the death of another person with malice aforethought. Therefore, on a charge of murder both the act causing death and the guilty mind has to be proved. The definition of malice aforethought is contained in Section 206 of the [Penal Code](#) which provides: -

“ malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances.

- a. An intention to cause the death of or to do greivous 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;
- c. ....
- d. ....

21. Under Section 9(3) of the [Penal Code](#): -

“Unless otherwise expressionly declared the motive by which a person is induced to do or omit to do an act; or to form and intention, is immaterial so far as regards criminal responsibility.”

It is a principle of law that in all criminal cases the burden remains on the prosecution to prove its case against an Accused Person beyond any reasonable doubt. (See [Mkendeshwo Vs. Republic](#) (2002) 1KLR 461). The general rule of the thumb is that the Accused assumes no legal burden of establishing his innocence except in certain limited cases where the law places a burden on the Accused Person to



explain matter which are peculiarly within his personal knowledge as prescribed in Section 111 of the *Evidence Act*. (See *Chemagong Vs. Republic* (1984) KLR 611).

22. It was thus incumbent upon the prosecution to establish and prove beyond reasonable doubt that Accused was Criminally Responsible for the death of the deceased.

In its totality, the evidence herein did not raise any or substantial dispute with regard to the cause of death. The prosecution through the evidence of the pathologist (PW8) and the postmortem report (P. Exhibit 3) established that the deceased suffered gunshot injury leading to massive bleeding and ultimately his death.

23. The photographic evidence (P. Exhibit 1) produced by the scene of crime officer (PW7) was a testimony of how the deceased suffered an agonizing death only for being an innocent pillion passenger on a motor cycle and for which responsibility lay within the person who took upon himself to use a firearm against the deceased in a manner which was irresponsible, negligent, reckless and unlawful.

It emerged from the evidence that the basic issue for determination was whether it was the Accused who unlawfully used a firearm against the Accused and caused his death.

24. The issue invariably revolved around a firearm and its usage by the person in possession thereof. Police Officers Pauline and Alfred (PW1 and PW3) indicted that they were armed with official firearms and were at the general scene of the fatal shooting when it occurred immediately after they had attempted to stop a motor cycle under the control of Justus (PW4) and carrying two pillion passengers including the deceased. They however, disclaimed responsibility for the shooting and implied that their colleague, the Accused, who was in their patrol team but had briefly excused himself to take tea at the nearby centre was responsible for the shooting using his official firearm.

25. The Officers (PW1 and PW3) appeared to have suspected the Accused because they looked behind them immediately after the gunshot and saw the Accused standing alone on the road. They walked back towards him to find out what happened but members of the public gathered around shouting that the Accused had killed somebody. It was then that all the three of them walked backed to the police station where the Accused was disarmed and placed in the cells by their Commanding Officer (OCS).

The motor cycle rider (PW4) also suspected the Accused whom he said was the third Police Officer he met after failure to stop as signaled or beckoned by the first and second police officers, a male and female.

26. The witness (PW4) said that the Accused pointed a gun at him and he slowed down his motor cycle only for him to hear a gunshot. He kept on moving although his motor cycle swayed on the road slightly. It was when he reached near a petrol station that he learnt that the deceased had been shot. He was told by the surviving pillion passenger called Rono that the deceased was shot by a police officer called "Omosh".

27. The foregoing evidence by the police officer (PW1 and PW3) and the motor cycle rider (PW4) clearly indicated that the deceased was shot and fatally injured with a government issue official firearm. His death was as a result of police fire which came, without doubt, from any of the three official firearms at the scene of the shooting. These were the firearms issued to the three police officers at the scene (i.e. PW1, PW3 and the Accused) for the due performance of their official duties and one of them was the crucial "smoking gun".

28. Police Officers are undoubtedly entitled to firearms for due performance of their duty in accordance with the standing rules on the usage of firearms as may be contained in the Police Act and operational manuals. They are well trained at Kiganjo or any other police college on academy or how and when to



use firearms. They would in the circumstances know that firing a bullet at a person would cause death or grievous harm and that the act of shooting and aiming at a person or equipment such as a motor cycle on which the person is riding would kill or cause grievous harm.

29. The evidence in this case shows that the life of an innocent pillion passenger on a motor cycle or “boda-boda” was wasted due to the conduct of one of the three police officers on duty on the material date of the fatal shooting at the material place along the Kessos-Lessos Road within the County of Nandi.

The burden to prove that the firearm from which the fatal bullet was discharged was at the time in possession of the Accused for usage in the performance of his assigned duty fell squarely on the prosecution. Apart from being in possession of the firearm in the course of this duty, the prosecution was also required to prove that the Accused used the firearm recklessly and unlawfully against the deceased thereby causing his death.

30. The defence raised by the Accused was an indication that he was not on duty at the material scene of shooting on the material date and that the firearm alleged to have been used in the shooting was not issued to him nor was it in his possession at the material time. He implied that the fatal bullet was discharged from an unknown firearm which could have been in possession of any of his colleagues at the scene of the shooting or nearby. He contended that he was maliciously implicated by his commanding officer (OCS) most probably to cover up for his negligence in the performance of duty or to protect the culpable officer or officers.

31. However, there was credible evidence from the Accused’s colleagues (PW1 and PW3) as well as the Commanding Officer (PW4) placing him at the scene of the shooting on the material date and time. This was fortified by the Evidence of the Officer in charge of the petty crimes at Lessos Police Station, IP Kariuki (DW2) and the Succeeding Officer in charge of the station CIP Kiptoo (DW3).

32. The OCS (PW11) confirmed having assigned duties to the Accused and his colleagues (PW1 and PW3) on the material date and area. He said that after the trio left the station for the assigned duty he heard a gunshot from a rifle at a distance of less than one kilometer from the police station. He then went out of his office and shortly thereafter saw the Accused returning to the station in uniform and armed with a rifle. The Accused told him that he had accidentally discharged one round of ammunition from his firearm and was unsure of the damage the bullet could have caused. At that moment members of the public invaded the station and pelted it with stones shouting in Kiswahili “he has killed”. The scene became chaotic such that reinforcement of police officers from nearby police stations had to be sought.

33. The Officer (PW11) did not produce any records to show the assignment of duty to the Accused and his colleagues on the material date at the material area. These were produced in photocopies by the defence through the Accused and referred to by his Police Witness who were summoned by the court to give evidence i.e. IP Kariuki (DW2) and CIP Kiptoo (DW3).

34. The records (D. Exhibit 1) were however, not properly generated nor compiled as to be treated as being accurate and credible evidence of disproving the prosecution evidence of the Accuseds presence at the scene of the shooting on the material date and time.

At most, the documents are a pointer to performance of duty in a careless and negligent manner and without due diligence on the part of the responsible officers.

35. Having established that the Accused was at the scene of the shooting on the material date and time together with his fellow police officers (PW1 and PW3), the prosecution was next required to prove that he was the officer who was allegedly in possession of the firearm from which the fatal bullet was fired. In other words, the prosecution was required to prove beyond reasonable doubt that the “smoking gun” was in the possession of the Accused when the fatal bullet was fired or discharged. This would imply



that it was the Accused who pulled the trigger, hitherto recklessly and unlawfully thereby ending the life of an innocent soul.

36. The Accused's defence in that regard was an absolute denial. He gave a brief highlight of how firearms are handed over to an officer and recovered. He indicated that the officer in charge of the armoury on the material date was CPL. Mrima (PW10) under delegation from the overall officer in charge i.e. the station Commanding Officer. These were the Officer responsible for making entries in the register known as the firearm movement register. The Accused indicated that the firearms movement register was the official record on the movement and issuance of a firearm to an officer. This fact was confirmed by IP Kariuki (DW2) who said that the relevant original firearm movement register was untraceable although it was handed over to the then Deputy DCIO, Simiyu of Nandi South on the 19<sup>th</sup> September 2011 as per the relevant OB entry No. 14 of that date.

37. In essence, the Accused defence was a contention that the firearm alleged to have been used in discharging the fatal bullet was not in his possession and was never issued to him for performance of his duties on the material date.

However, the prosecution through the Accused's colleagues (PW1 and PW3) indicated that the impugned firearm an Avlomat Kalashnikova (AK 47) rifle was in possession of the Accused on the material date. Both of them said that they had been issued with MP5 Rifles. The officers in charge of the armoury at the material time was CPL Mrima (PW10), but he indicated that the person in charge of the armoury on the material date was the OCS (PW11). He could not tell whether the Accused was issued with the impugned firearm on the material date.

38. The OCS (PW11) could also not tell whether the Accused was issued with the impugned firearm. He indicated that as the overall officer in charge of the station he delegated to other officer the function of monitoring the movements of firearms. Such officer included on CPL. Cheruiyot and CPL. Mrima (PW10). He (PW11) indicated that it was CPL Mrima (PW10) who was in charge of the armoury on the material date and was therefore responsible for issuing firearms to the officers on duty.

39. CPL. Mrima (PW10) vehemently denied what was stated by the OCS (PW11) about his role on the material date and indicated that it was the OCS who issued firearms on the material date and was required to make necessary entries in the relevant firearms movement register. It was this denial that prompted him (PW10) to be declared a hostile witness on application by the prosecution.

These two officers (PW10 and PW11) could not corroborate and confirm the evidence by fellow officers, PC Pauline (PW1) and PC Alfred (PW3) that the impugned AK 47 rifle was issued and was in possession of the Accused on the material date.

40. The all important firearms movement register was most crucial in providing the paper trail or the movement of the impugned firearm and establishing that the firearm was in possession of and had been issued to the Accused on the material date, thereby leaving no doubt that it was the "smoking gun" for which the Accused pulled the trigger and caused the death of the deceased pillion passenger.

41. CPL Mrima (PW10) indicated that he made entries on the relevant firearms movement register from the 31<sup>st</sup> May 2011 to 18<sup>th</sup> September 2011, which period covered the material date of 15<sup>th</sup> September 2011 but that he did so under duress. He said that he was forced to backdate entries by the OCS (PW11) and the then OCPD, one Madam Rachel Waithera Kipsoi. He attributed this to the fact that the OCS issued rifles without recording on the movement register which rifles were issued and to which officers.

42. IP George Shamali (PW6) was among the officer who were tasked with investigating this case. He was made to understand that the deceased was shot dead by the Accused while in the course of his duty.



He (PW8) was shown the firearm allegedly used in the fatal shooting and embarked on investigations by firstly searching the same for any spent cartridge which they did not recover.

43. The investigating team then perused the relevant firearms movement register and found that the impugned firearm was issued to the Accused as per entry No. 319 in the register. The entry indicated that the Accused was issued with twenty (20) rounds of ammunitions.

The firearms examiner, SSP Lawrence Ndiwa (PW12), indicated that the impugned AK 47 rifle Serial No. 764664 together with a magazine and nineteen (19) rounds of ammunition were handed to him by CIP David Simiyu of the CID Nandi County for Examination. He carried all the necessary examination and compiled a report confirming that the firearm and ammunition were firearms in accordance with the [firearms Act](#) and were capable of being fired.

44. The witness (PW12) also indicated that no spent cartridge was provided to him for examination and could not tell whether the impugned firearm was the gun which was used in the material fatal shooting incident. As it were, the witness could not tell whether the impugned firearm was the “smoking gun”.

The fatal bullet and/or the spent cartridge could not be provided to the ballistic expert for examination because it was never recovered at the scene as indicated by the investigations officer (PW6). The bullet itself was not recovered from the body of the deceased as indicated by the pathologist (PW8).

45. What all the foregoing facts mean is that the alleged killer or murder weapon, so-called smoking gun, was not traceable to the Accused in any manner. Nobody saw him in the act of shooting and killing the deceased with the alleged murder weapon. His colleagues PW1 and PW3 only saw him standing alone on the road after they heard a gunshot.

Apart from hearing the gunshot while riding away the motor cycle rider (PW4) did not see the Accused commit the unlawful act. His testimony that he was told by the surviving pillion passenger one Arap Rono or Rono or John Maiyo that the deceased had been shot by a policeman called “Omosh” amounted to hearsay as the said Arap Rono was not called to testify on behalf of the prosecution.

46. There was no direct evidence availed by the prosecution against the Accused. This meant that the prosecution had to rely on circumstantial or indirect evidence in order to “nail” the Accused. However, the failure by the prosecution to tender in evidence the actual firearms movement register clearly indicated that there was no evidence to show that the impugned firearm was issued to the Accused and was in his possession on the material date of the fatal shooting.

47. Even if the Accused had been issued with and was in possession of the impugned firearm on the material date, the absence of the fatal bullet and/or spent cartridge militated against the allegation by the prosecution that the killer bullet was fired or discharged from the impugned firearm especially given the fact that firstly, there were several other government issue firearms at the scene of the fatal shooting including those issued to the Accused’s colleagues (PW1 and PW3). Secondly, the ballistic expert (PW12) did not link the impugned firearm with the shooting incident.

48. Most unfortunately and sad, the deceased was killed with a firearm issued to a government agency charged with the duty of maintaining law and order i.e. the police, but due to lackluster and shoddy investigation carried out in this case, the culprit police officer remained “unidentified”.

49. Without doubt, this case was to cover up for dereliction of duty on the part of the Investigators and officers under whom they worked. This explains why the Accused found himself in the Criminal dock as the “fall” guy” or “sacrificial lamb” yet there was neither direct nor indirect evidence against him. The evidence adduced herein against him was insufficient, weak and incapable of proving the charge beyond any reasonable doubt.



50. Consequently, the Accused is hereby found not guilty as charged and is accordingly acquitted.

**DELIVERED AND DATED THIS 25<sup>TH</sup> DAY OF JANUARY 2024**

**J. R. KARANJAH,**

**JUDGE**

