REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 77 of 2006

ANTHONY NJUE NJERU …….. APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from a conviction & sentence of the High Court of Kenya at Nairobi (Justice Onyancha) dated 20th May, 2005

in

H.C.CR.C. NO. 69 OF 2002)

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JUDGMENT OF THE COURT

Antony Njue Njeru, the appellant herein, was tried by Onyancha, J sitting with assessors on an information which charged him with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of the charge were that on the *18th day of July, 2002* at Chiromo, Nairobi River, next to Nairobi University within Nairobi Area the appellant murdered ***David Sila Kimuyu***, herein called "the deceased". After a full trial, the learned Judge and the three assessors found the appellant not guilty of murder as charged but of the lesser offence of manslaughter. The appellant was consequently sentenced to three years imprisonment.

The appellant's trial commenced on *25th March, 2003.* From the prosecution evidence the appellant was a police constable who, on *18th July, 2002* was on duty and, as such, had been supplied with a firearm, a *Ceska Pistol Serial No. 6006*, with *15 rounds of ammunition*. Together with a colleague *PC Bernard Mikaye (PW3)* who was also armed, the two were instructed by their senior officers to proceed to University of Nairobi at the office of the Students Welfare Association where they would be given new assignment. The two police officers reached the office of *Peter Kingori Gichohi (PW1),* a security officer at the Nairobi University. *Gichohi (PW1)* briefed the two police officers as regards their assignment that day. Gichohi informed the two of a motor vehicle registration No. KAH 561K which he suspected to be driven by people who were drug traffickers. The two police officers were instructed to

monitor the movement of the said vehicle and establish whether or not the movement of the said vehicle was connected with the supply of drugs to University Students. As a result of the foregoing, the two police officers, led by a junior Security Officer from the University by the name of *John Musyimi Kamwanza (PW2)* proceeded to the various places where the suspect vehicle had been spotted. When the three reached the University Football field, they met two people – *Peter Mwendwa Kimwele (PW20)* and *Patrick Githuku Gichui (PW21)*. According to the appellant and his colleague *PC Mikaye (PW3)* the two people (Kimwele and Gichui) looked suspicious as they were walking from a thicket about 100 to 200 metres from the football pitch. The appellant and his colleague identified themselves as police officers, searched them and allegedly recovered rolls of bhang from each of the two *(PW20 and PW21)*. The two were immediately put under arrest, handcuffed and ordered to sit down. The appellant and his colleagues questioned the two suspects and from the information received from the two suspects that they had bought the rolls of bhang from some people inside the thicket the appellant and *Kamwanza (PW2)* proceeded to the thicket while *PC Mikaye (PW3)* was left guarding the two suspects. The appellant and Kamwanza entered the thicket to ascertain the information given by the two suspects. After walking for about 50 yards inside the thicket the appellant and Kamwanza heard voices and suddenly a group of about ten men appeared. The appellant introduced himself as a police officer and ordered the ten men to sit or lie down. Instead of obeying the order the ten men began to advance towards the appellant. Some of them had weapons – a panga, a rungu an axe and a knife. On seeing this, Kamwanza who was not a police officer and not being armed turned back and ran for his dear life leaving the appellant who was armed with a pistol to face the advancing group of ten people.

As Kamwanza ran out of the thicket he heard three gun shots behind him. He went back to see what was happening only to find the appellant standing there and one of the ten people who allegedly had a knife lying dead on the ground. *PC Mikaye (PW3)* also ran into the thicket and likewise found the appellant standing while the deceased was lying dead. This incident was reported to the police and as a result senior and junior police officers arrived at the scene to commence investigations. At the scene the police officers found a small steel axe (Exhibit 1) a pen knife (Exhibit 2) and a green polythene bag containing bhang (Exhibit 3). All these items were found next to the body of the deceased. *PC Mikaye* made a search of the deceased's pockets from which he recovered a mobile phone, a wallet containing the deceased's University identity card and his national identity card.

Among the senior police officers who visited the scene were *Ag. SSP Solomon Mutua Makau (PW6)* the then Deputy OCPD Kilimani, *SSP Geoffrey Ndae Mwangi (PW14)* the then DCIO Kilimani Police Station, *SSP Julius Ndegwa (PW8)* and *Inspector John Mwaura (PW4)*. These senior police officers inquired from the appellant as to what had happened. The appellant narrated to them how he was confronted by ten people who were armed with knives and axes and that when he ordered them to surrender they instead advanced towards him. He had fired two shots in the air and the others ran away while the appellant who was armed with a knife advanced towards him and wanted to stab him with the knife. That is when the appellant shot the advancing man on the left chest. The man (the deceased) fell down and died.

The pistol that the appellant used in shooting the deceased was examined and the report produced by a firearm examiner *Emmanuel Kiptanui Langat (PW12)* indicated that the recovered pistol was in good working condition and capable of being fired. The police collected the other items from the scene including the body of the deceased. A postmortem examination was performed on the body of the deceased by *Dr Jane Wasike Simiyu (PW13)* who formed the opinion that the cause of death was gunshot wound to the chest.

There was evidence from *Peter Mwendwa Kimwele (PW20)* and *Patrick Githuku Gichui (PW21)* that on the material day (18th July, 2002) they were walking across the University field when they met the

appellant and two other people who ordered them to sit down on the allegation that they *(PW20 & PW21)* were drug peddlers. The two were then led near a bamboo forest where they were guarded by one of the three men while the two (the appellant and another) entered the bamboo forest. After a short while there were gun shots from the direction of the bamboo forest. The appellant emerged from the forest and talked to his colleagues saying that they had killed somebody. Later a police land rover arrived in which they were put and driven to the police station where they were charged with being in possession of bhang. After being tried for that offence, the two were acquitted.

When put to his defence, the appellant, in an unsworn statement, narrated how he, his colleague *PC Mikaye (PW3)* and a University officer one *Kamwanza (PW2)* were on an assignment to determine whether a suspicious vehicle registration No.KAH 561K might be involved in supplying drugs to University Students. The appellant and his colleague PC Mikaye were led by Kamwanza to various spots within the University of Nairobi and at about mid-day they saw two men emerge from a forest. The appellant and his team suspected the two men and they were ordered to stop. On being searched each of the two men was found in possession of rolls of bhang. The two men were immediately put under arrest. The two men told the appellant that they had bought the rolls of bhang from the bush. The appellant and Kamwanza entered the bush in pursuit of alleged drug peddlers. After walking into the forest for some distance, the appellant and his colleague were confronted by a group of 10 men who were armed with various weapons like a knife, an axe and a rungu. The ten people confronted the appellant who ordered them to surrender as he introduced himself as a police officer. The ten men did not heed the warning, but continued to advance towards the appellant. Sensing that he was in imminent danger the appellant fired two shots in the air. While the rest ran away one of them who was armed with a knife continued to advance towards the appellant. The man with a knife stabbed the appellant on his hand and at that stage the appellant shot the man who died instantly. The person who was shot dead was the deceased who turned out to be a University Student. In concluding his unsworn statement the appellant told the trial court:-

"I support my evidence and request the court to adopt all the evidence of the prosecution witnesses. I also request the court to adopt the evidence which is here with me in the Police Act concerning the use of a firearm at page 110 of the Police Manual 1980 in relation to the use of firearm."

At the close of the defence case, counsel for the appellant Mr. Githinji made his final submission in which he adopted his earlier submission on no case to answer, a matter that we shall revert to in a moment. In the course of his submission Mr. Githinji is recorded to have stated as follows:-

"I confess that this is the first case I have come across in which the accused adopts the evidence of the prosecution to defend himself. The Court must be guided only by the evidence before it. If the court does not believe the prosecution witnesses, it will have to acquit the accused. If it believes them, it will still have to acquit him. Reference is made to the police manual which describes the instances where a police officer is entitled to use a firearm. If a police officer is in danger he can use a firearm."

And in concluding his submission Mr. Githinji said:-

"Given the circumstances, any person would have used the Firearm. The court should find that the prosecution failed to prove their case. No proof of mens rea. No proof of intention to kill. Release the accused who is suffering in jail for nothing."

In her submission, on behalf of the State, Mrs. Murungi appear to have appreciated the fact that there

was no eye-witness to the shooting of the deceased by the appellant but went on to submit that prosecution case was based on circumstantial evidence. In the course of her submission Mrs. Murungi stated:-

"Accused had a firearm that discharge (sic) the fatal bullet. But at the time the accused fired, there was no eye-witness. PW2 ran away and heard the shoots (sic) behind him. All the witnesses merely narrated the story accused gave them. The evidence they gave was hearsay and the opinion they gave does not bind this Court since they were not there. We rely on circumstantial evidence. The ballistic expert proved that the firearm was a firearm within Cap.114."

Having so submitted Mrs. Murungi went on to show how the State had proved the case against the appellant. In a bid to prove the appellant's guilt Mrs. Murungi stated:-

"Accused is a trained officer. He must have known that bullet would cause death or grievous harm to the deceased. The accused at that stage must have known that the act of shooting and aiming at the left side of the chest would kill or cause grievous harm. ……. We submit that a life of an innocent person was wasted due to the conduct of the accused and he was there (sic) properly charged and has to answer sufficiently if he was to escape from the consequence. He was under obligation to give a reasonable explanation as to why he shot to kill or cause grievous harm. His defence is shallow merely because he was alone."

The learned Judge then summed up the evidence and the law to the assessors and asked each assessor to give his or her own opinion. Each of the assessors returned a finding of guilty on the lesser charge of manslaughter.

In a lengthy judgment, the learned Judge considered all the evidence adduced before the court, the submissions by learned counsel appearing for the State and for the appellant together with the relevant authorities and finally came to the conclusion that the appellant was guilty, not of murder, but manslaughter. The appellant was consequently sentenced to three years imprisonment.

Being aggrieved by his conviction and sentence the appellant, through his counsel, filed this appeal in which twelve grounds of appeal were set out. But all these twelve grounds could be reduced to one main ground in that the learned Judge erred in law in convicting the appellant on the evidence before him when the only person who testified as to how the deceased died was the appellant and that for that reason the appellant's version ought to have been accepted consequently leading to his acquittal. We were therefore not surprised when the appeal came up for hearing before us on *28th June, 2006,* Mr. Githinji, for the appellant, argued all the grounds of appeal together. Indeed Mr. Githinji submitted that the only question was whether the use of firearm by the appellant was justified.

Mr. Kaigai, the learned Senior State Counsel, asked us to uphold the appellant's conviction. He told us that there was sufficient evidence to sustain the conviction of the appellant on a charge of manslaughter as he (the appellant) used excessive force in the circumstances of the case. It was Mr. Kaigai's submission that the appellant was not in any grave danger. As regards the sentence of three years imprisonment, Mr. Kaigai was of the view that it was lenient. He however asked us to dismiss this appeal in its entirety.

As this is a first appeal, we are duty bound to examine and re-evaluate the evidence on record to reach our own conclusions in the matter, always bearing in mind, however, that we had no advantage,

as the superior court did, of seeing and hearing the witnesses – ***See OKENO V. R. [1972] E.A. 32.*** The trial court was, indeed, in a comparatively better position to assess the significance of what was said, how it was said and equally important, what was not said. It is also an established principle that a Court on Appeal will not normally interfere with a finding of fact by the trial Court, whether in a civil or criminal case, unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see ***CHEMAGONG V. REPUBLIC [1984] KLR 611.*** It is for these reasons that we set out in some detail the evidence that was before the trial court. What emerges from the evidence on record is that what started as a normal and simple assignment given to the appellant and his colleague to establish movements of a suspicious vehicle so as to determine whether the said vehicle was connected with the supply of drugs to University Students ended tragically in the death of a student ***David Sila Kimuyu***. Evidence was adduced how the appellant and his colleague being guided by Kamwanza (PW2) proceeded to several spots where the suspicious vehicle used to be parked. In the course of their assignment, the appellant and his group stumbled on what was a hide out for suspicious characters who were ready and willing to confront armed police officers. The prosecution evidence relating to the instructions to go to University and establish the reasons why the suspicious car used to come to University remained unchallenged up to the time of confrontation. As to what happened in the bush/thicket it was only the appellant who could tell the court. When senior police officers reached the scene of shooting the appellant was asked to explain what had happened. He gave an explanation to his superiors which explanation he maintained in his statement to the police and in his unsworn statement when he was put to his defence. Indeed, *SSP Geoffrey Ndae Mwangi (PW14)* who was the then DCIO at Kilimani Police Station was one of the senior police officers who visited the scene and carried out investigations into this shooting incident. On being cross-examined SSP Mwangi is recorded to have stated, inter alia:-

"No one has volunteered information about what happened apart from the accused and Kamwanza. It is my view that accused did not use his firearm recklessly. I could have behaved the same. I inquired from the accused about the inquiry and he told me he was injured by the deceased with the knife. The accused was charged with the offence because we wanted an independent conclusion. I say the shooting was justified."

In view of the foregoing it can be said that the shooting of the deceased occurred in the manner explained by the appellant since, as correctly pointed out by Mrs. Murungi in her submission in the superior court, there was no eye-witness to the shooting except the appellant. It has not been shown that the appellant's version was incorrect or a deliberate lie. Hence, the issue then was whether the appellant was justified to kill the deceased in the circumstances of this case. A number of senior police officers were asked about this issue of shooting and they all thought the appellant was justified in behaving in the manner he did bearing in mind the prevailing conditions.

A killing of a person can only be justified and excusable where the accused's action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack. In the present case, it is not in dispute that the appellant being a police officer on duty who was lawfully armed with a pistol shot the deceased and that the deceased died as a result of that shooting. It was therefore upon the appellant to show that at the time of the shooting he was in the course of averting a felonious attack and that no greater force than necessary was applied. The appellant was bound to show that he was in immediate danger or peril arising from a sudden and serious attack by the deceased. In his defence, the appellant explained how he was confronted by ten people some of them armed with

dangerous weapons and that these people would not surrender even when ordered to do so by the appellant after he had introduced himself as a police officer. The appellant further explained that when he fired two shots in the air, nine of the ten men ran away while the deceased who had a knife advanced towards the appellant and indeed inflicted some injury on the appellant's hand.

In ***PALMER V. REGINAM [1971] 1 ALL E.R. 1077*** a case cited to the learned Judge the Privy Council said at p.1088C:-

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances ……. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessaries of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction."

The above is relevant to the Kenyan situation in view of ***section 17*** of the Penal Code which provides:-

"Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law".

In this appeal, we are not dealing with an ordinary person using force but a police officer who was on duty and lawfully armed with a pistol. ***Section 28*** of the ***Police Act (Cap. 84 Laws of Kenya)*** provides:-

"A police officer may use arms against -

(a) any person in lawful custody and charged with or convicted of a felony, when such person is escaping or attempting to escape;

(b) any person who by force rescues or attempts to rescue another from lawful custody;

(c) any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person:

Provided that arms shall not be used –

(i) as authorized in paragraph (a), unless the officer has reasonable ground to believe that he cannot otherwise prevent the escape, and unless he gives warning to such person that he is about to use arms against him and the warning is unheeded;

(ii) as authorized in paragraph (b) or paragraph (c), unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise prevent the rescue or, as the case may be, effect the arrest."

The above provision sets out the circumstances in which a police officer may use a firearm.

There is yet a further elaboration which gives even greater details on use of arms by police officers in the ***Kenya Police Manual of 1980*** in which it is provided under ***Chapter 11*** – use of Force and Firearms by Police. In that chapter we find the following:-

"3. What is the effect of a police officer's decision to use a firearm"

The decision to use a firearm against any person or persons, places a serious legal, as well as moral, responsibility on a police officer. Therefore, there should be no doubt in his mind of the circumstances in which he is justified in using a firearm.

Justifiable Instances

4. In which circumstances may a police officer be justified in using a firearm"

A police officer may, in certain circumstances, be justified in using his firearm i.e. –

(a) to protect human life;

(b) to suppress or disperse a riotous mob committing or attempting to commit serious offences against life or property;

(c) to prevent the escape of a person in lawful custody, convicted or charged with felony;

(d) to prevent a rescue by force from lawful custody;

(e) to effect a lawful arrest if the police officer is in danger because the person to be arrested is in possession of and is intending to use a dangerous weapon against him;

(f) if the person to be arrested has been seen to commit a serious crime of violence or is known to have committed a serious crime of violence and he is trying to escape and there are no other means of preventing his escape.

The important point is that the police officer must have seen the wanted person committing a serious crime of violence or have very good reason to believe that he has done so.

It would be unlawful to shoot at a person escaping, who has committed a petty offence only; he may only shoot if the person is wanted for a very serious crime of violence, who cannot be arrested by other means.

If a policeman shoots at a person whom he really believes committed a crime of violence, although he did not actually see the offence he may be required to satisfy a Court, and certainly his superior officer, that he acted properly in firing.

A policeman may have to use his firearm if he cannot by any other means which are available to him carry out his duty of protecting life, suppressing rioters or effecting the arrests, or preventing the rescue of escapees described above, but however well justified a police officer may consider himself to be in resorting to the use of a firearm, the act, whether or not it results in loss of life or injury, will become the subject of legal investigation. He must, therefore, be prepared to prove that he acted with humanity, caution and prudence, and that he was compelled by necessity alone to have recourse to firearms."

From the foregoing, it is hoped that we have set out the circumstances in which a police officer is justified to use a firearm.

We have now considered the evidence on record and the relevant law on this matter, and what has caused us some anxiety is what the learned Judge said in his ruling on no case to answer submission by Mr. Githinji. In that ruling delivered on *7th March, 2005* the learned Judge expressed himself thus:-

"I have considered the evidence before me. The evidence shows that the accused shot the deceased David Sila Kimuyu on 18th July, 2002 at Chiromo University Campus within Nairobi area. There is no eye-witness evidence as to how this happened. All witnesses who gave evidence arrived at the scene of crime after the deceased had been shot and had died. This includes the evidence of John Musyimi Kamwanza, PW2 who testified that he was with the accused but ran away before the accused shot the deceased dead. The relevant evidence on record which attempts to explain the circumstances under which the shooting took place are (sic) on the level of hearsay evidence. *(underlining supplied)*

Having expressed himself so conclusively, we find it difficult to understand why the learned Judge found it necessary to put the appellant on his defence. Was there a prima facie case to warrant the trial court to call upon the appellant to defend himself" It is a cardinal principle of our law that the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of prosecution the case is merely one "*which on full consideration might possibly be thought sufficient to sustain a conviction"*. The issue of what is a prima facie case in criminal trials was clearly explained in ***RAMANLAL TRAMBAKLAL BHATT V R [1957] E.A. 332 at p. 334-335*** where it was said:-

"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one:-

"Which on full consideration might possibly be thought sufficient to sustain a conviction."

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is:-

"some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence."

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a "prima facie case," but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

Taking into account the evidence on record, what the learned Judge said in his ruling on no case to

answer, the meaning of a prima facie case as stated in ***Bhatt's*** case (supra), we are of the view that the appellant should not have been called upon to defend himself as all the evidence was on record. It seems as if the appellant was required to fill in the gaps in the prosecution case. We wish to point out here that it is undesirable to give a reasoned ruling at the close of the prosecution case, as the learned Judge did here unless the Court concerned is acquitting the accused person.

We have said enough in this matter. Having considered the evidence, the submission by learned counsel for the State and for the appellant, we are of the view that the appellant's conviction was not safe. It cannot be allowed to stand. Accordingly, the appeal is allowed, the conviction quashed and the sentence set aside. The appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 14th day of July, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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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