



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL CASE NO. 40 OF 2018

BETWEEN

REPUBLIC.....PROSECUTOR

AND

SOLOMON MUCHUI MUTHUKU.....ACCUSED

JUDGMENT

1. The accused, **SOLOMON MUCHUI MUTHUKU** is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. It is alleged that on 14th November 2018 at Kibera Estate within Kilgoris Town of Transmara West-Sub County within Narok County, he murdered **EUNICE KERUBO THOMAS** (“the deceased”). The prosecution case is that the accused fatally injured the deceased, who was his wife, with a firearm. The prosecution marshalled 8 witnesses in support of its case while the accused gave an unsworn testimony in his defence.

2. The prosecution’s case is that on 14th November 2018, at around midday Eunice Kerubo Omwando, (PW 1) visited her friend Daisy Naserian Chieng’o (PW 2) in her neighborhood in Kibera Estate within Kilgoris. The accused and deceased also lived close by in the same neighbourhood. While PW 1 was still in PW 2’s house, the deceased came in and started crying and when PW 1 inquired from her why she beat her daughter, PW 3, she told her that she wanted the child to understand that she was the only parent. PW 1 and PW 2 recalled that they had heard the deceased beating her child prior to that. The deceased left and sent PW 3 for onions. According to PW 1, she later sent PW 3 to call her aunt. PW 1 and PW 2 then heard the deceased and the accused having an exchange of words and after a while they heard a gunshot. PW 3 came and informed them that the accused had shot the deceased. Police officers arrived at the scene, arrested the accused and took the deceased’s body away.

3. After a *voire dire*, PW 3 gave unsworn testimony. She recalled that the accused had once forbidden her throwing stones at street children. When she went home on the material day, her mother asked her where she had been and started beating her with a knife. The accused tried to stop the deceased from beating PW 3 but she would not listen. PW 3 further testified that the deceased sent her on errands several times that day and when she returned she heard the accused telling the deceased that he would kill her by removing the gas regulator. She testified that she heard the deceased asking the accused not to kill her. PW 3, who was peeping through the window, saw the deceased packing clothes into a bag. After hearing a loud noise, she went into the house and found her mother lying on the bed.

4. At about 3:00pm on the same day, Sergeant Stephen Moses Omaiyo (PW 5) and PC Juma Noah (PW 6) received a call from the Commanding Officer (“OCS”) requesting them to head to the scene where a gunshot had been heard. When they arrived, they found the accused’s house locked from inside. They broke down the door and immediately the accused, who was blood soaked, fell on the doorstep. He was immediately rushed to hospital. PW 5 and PW 6 stated that they found the deceased body and a Ceska pistol without a magazine in the house. PW 6 testified that he noticed a spent 9 mm cartridge near the deceased foot.

5. PW 5 also testified that on the material day, he was in charge of the Police Armoury and organizing the daily work for police officers. He had assigned the accused to work on a PSV Matatu crackdown with other officers and had issued him a CESKA F4002 pistol with 15 rounds of ammunition. When they recovered the magazine from a suit case at the scene, PW 5 noted that it only had 14 rounds of ammunition.

6. RIC Stanley Korir (PW 7) testified that he also heard the gunshot from his office and headed to the scene with other officers. When he entered the house and into the inner room, the deceased, who had injuries, was on the bed. PW 6 handed over to him the pistol they had recovered. PW 5 later confirmed from the Movement Register that it had been issued to the accused that day. He was also given 14 rounds of live ammunition and a spent cartridge. He forwarded the pistol, ammunition and spent cartridge together with an Exhibit Memo Form to the DCI Ballistics Headquarters in Nairobi for examination.

7. PW 7 organized a post mortem to be done on the deceased’s body at Lenmek Hospital Mortuary on 14th November 2018 by Dr. Ogando

Zoga (PW 4). PW 4 testified that when he examined the deceased's body, he observed a gunshot wound on the right jaw which was the entry point and an exit wound on the left side just below the left ear measuring about 4cm in diameter. Internal examination revealed bleeding into the air wave and a fracture of the right jaw. PW 4 concluded that the deceased died of a gunshot wound which had shattered the neck vessels and respiratory system. On cross examination, PW 4 clarified that the entry wound was on a right angle of the left jaw and that the bullet went downwards at an inclination of about 30⁰ meaning that the holder of the gun was a bit higher than the person who was shot.

8. The ballistics expert, Inspector Alfred Mbalani Kahi (PW 8), from the Forensic Department, Ballistics Division in the DCI headquarters, Nairobi, testified he received a Ceska Pistol No. F4002 marked as Exhibit A; 1 box magazine marked as Exhibit B; 1 fired cartridge case marked as Exhibit C and 14 rounds of ammunitions marked as Exhibit D-Q. According to the Exhibit Memo he was required to ascertain whether the pistol was capable of firing, whether the fired cartridge had been fired from the pistol and whether the 14 rounds of ammunition were compatible with the pistol. From his examination, he concluded that the pistol marked as Exhibit A and the 14 rounds of ammunition were capable of being fired and that they are firearm and ammunition respectively as defined under the **Firearms Act (Chapter 140 of the Laws of Kenya)**. He conducted a microscopic comparison of the fired cartridge case marked as Exhibit C with test cartridge cases he had fired at random from Exhibit D to Q and found that there was sufficient matching firing pin markings and bridge face markings to conclude that Exhibit C had been fired from the Ceska Pistol Serial No. F4002.

9. In his unsworn statement, the accused confirmed that he was handed a Ceska pistol and assigned to work along the Kisii- Kilgoris Highway. At about 1:00pm, the deceased called him for lunch. He got home and as he was resting on the sofa, the deceased hit him on the left side of his head. He went to the bedroom to get a towel to stem the bleeding but the deceased followed him and tried to grab his pistol. He felt the pistol uncork itself and pressed the knob of the magazine causing it to fall down. The accused testified that unfortunately, one bullet remained corked in the gun. Thereafter he lost consciousness only to regain it and find himself at Kisii Level 5 Hospital. A scan revealed that blood had entered his brain and he had to undergo physiotherapy before he could walk. He produced medical evidence which showed that he had suffered a head injury and had been admitted in hospital for 7 days.

10. The offence of murder is defined in **section 203** of the **Penal Code** as causing the death of another person by an unlawful act or omission with malice aforethought. The prosecution is required to establish the fact of death of the deceased and the cause of that death; that the accused committed the unlawful act or omission that led to the death and that the accused committed the unlawful act with malice aforethought.

11. It was not disputed that the deceased died and that she died from a gunshot wound inflicted by a firearm. This fact was confirmed by PW 4 who conducted the post mortem and who concluded that the deceased had died from a single gunshot wound which had shattered her neck vessels and respiratory system.

12. As to whether the accused killed the deceased by an unlawful act, the evidence is that when PW 1, PW 2 and PW 3 heard the gunshot, the accused and the deceased were alone in the house. The evidence of PW 6 is that he assigned the Ceska pistol to the accused and it is the same pistol that was recovered in the house where deceased was found dead from a gunshot wound. There was no suggestion that any other person would have committed the act of shooting the deceased and in fact the accused in his unsworn statement admitted that he was alone with the deceased in the house when he had the gun. In these circumstances, the accused had to explain how he discharged his firearm which resulted in the death of the deceased in accordance with **section 111(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)** which provides as follows:

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence. [Emphasis mine]

13. When the accused fails to offer a reasonable explanation, the court is entitled to presume what could have happened under **section 119** of the **Evidence Act** which states;

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

14. The accused did not deny that the deceased died as a result of a shot fired from his gun. His defence appeared to suggest that the deceased was killed accidentally. He stated that after the deceased hit him on the head, she tried reach for his gun and in the scuffle, he had felt his gun uncork. He pressed the knob to release the magazine which fell off but one bullet had remained in the gun.

15. As there were no independent eye witnesses at the scene, this court is required to interrogate the facts and weigh the prosecution's case against the defence taken by the accused bearing in mind that it is the duty of the prosecution to prove the case beyond reasonable doubt. PW 1 and PW 2 who were both in the vicinity the accused's house testified that the deceased and the accused had been arguing for some time before they heard the gunshot. PW 3 testified that she heard the accused threatening to kill the deceased and heard the deceased begging the accused not to kill her.

16. The evidence of PW 1, PW 2 and PW 3 is that the quarrel between the accused and deceased gradually escalated. It was not as spontaneous as the accused would have the court believe. The finding by PW 4 that the gun-shot wound was likely fired by a person in an

elevated position undermined the accused's defence that firing of the gun was accidental and as a result of one bullet remaining in the gun chamber after the magazine had fallen of. It is apparent that the deceased did not lose consciousness immediately the deceased attacked him hence the only logical conclusion I draw from the facts is that the accused shot the deceased in retaliation when she hit him. I therefore reject the accused defence that the death of the deceased was accidental and find that her death was caused by his unlawful act.

17. The final ingredient the prosecution had to prove was that the unlawful act was committed with malice aforethought. Malice aforethought may be established by considering the nature of the weapon used, the manner in which it was used, the part of the body injured and the conduct of the accused before, during or after committing the offence (see *Rex v Tubere s/o Ochen [1945]12 EACA 63*). In this case, the facts prove that the accused fired a single shot at the deceased a during a disagreement and in a fit of anger when the deceased hit him. The accused hospital discharge summary dated 21st November 2018 showed that accused had a moderate head injury with intracerebral haemorrhage and subdural haematoma confirming that he was hit on the head by the deceased. I am therefore unable to say that the accused intended to cause grievous harm or death. Consequently, I find **SOLOMON MUCHUI MUTHUKU** the accused, guilty of manslaughter for the unlawful killing of **EUNICE KERUBO THOMAS** and convict him accordingly.

DATED and DELIVERED at KISII this 28th day of MAY 2019.

D.S. MAJANJA

JUDGE

Mr Nyakundi, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.