



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO.50 OF 2002

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS MUTEI MUTHAMA ALIAS BONNY.....ACCUSED

JUDGMENT

The Accused was charged with **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 5th November 2000 at Korogocho Village in Nairobi, the Accused murdered Sophia Wakio Maina (hereinafter referred to as the deceased). The Accused was first tried before Rawal J (as she then was). After full trial, he was convicted of the charge and sentenced to death as is provided by the law. The Accused was aggrieved by his conviction and sentence. He appealed against the conviction and sentence to the Court of Appeal. The appeal was allowed on the grounds that the first trial had been vitiated because one of the assessors was absent during part of the trial. It was a mandatory requirement for assessors to be present during murder trials at the time. However, the Court of Appeal ordered the Accused to be retried. The Accused was presented before this court on 15th April 2011 where he took plea in the retrial. He pleaded not guilty to the charge. Trial commenced before Mwilu J (as she then was). She heard three (3) witnesses. This court took over the proceedings. Both the Accused and the prosecution expressed no reservation to this court taking over the proceedings. This court heard the remaining six (6) witnesses. After the close of the prosecution's case, this court put the Accused to his defence. The Accused opted not to give any evidence in his defence. This court heard the closing submission of both the prosecution and defence. The court shall refer to these submission in this judgment.

According to the prosecution, the facts of this case are as follows:

According to PW4 Susan Wanjiku, on 5th November 2000 at about 9.00 p.m., she was in her sister's house at Korogocho. The sister, Sophia Wakio Maina, is the deceased in this case. PW4 used to live in the house with the deceased and two of his brothers by the name John Kariuki and Duncan Kamau. PW4 testified that the deceased used to be a chang'aa trader. On the material night, the Accused came to their house in company of another man. The Accused requested to be sold chang'aa. The Accused was known to PW4 prior to the material night. The deceased told the accused that she did not have the traditional liquor at the time. However, she offered to fetch the drink from within the neighbourhood. PW4 recalled that the Accused removed the sum of Kshs.10,500/- from his wallet. He gave the deceased a note of Kshs.1,000/-. The deceased protested because she stated that she could not find change of the said sum at the material time. She requested the Accused to give her Kshs.500/-. The Accused declined. The deceased relented and took the Kshs.1,000/-. She fetched the chang'aa.

After drinking the chang'aa, the Accused and his friend left the house. PW4 recalled that after the Accused and his friend left, they locked the house and the pedestrian gate leading to their compound. After about five (5) minutes, the Accused returned. He kicked the pedestrian gate open and returned to the compound. The deceased wanted to know who had entered their compound. PW4 testified that before anyone could answer, the Accused person kicked in the door to their house. At that time, they were using a lamp to illuminate their house. PW4 saw the accused. The deceased asked the accused why he had kicked the door. The Accused demanded to be given his money. The Accused mentioned that he had left the said sum of Ksh.10,000/- in the house. He started searching the house. In course of searching the house, the lamp went off. PW4 saw a flash. She did not hear any sound. She screamed. She went to their mother's house which was about 10 metres away. She obtained a match box. PW4 recalled that at that time the gate had locked itself. The Accused and his friend were still in the house. When she returned from her mother's house, she saw the Accused and his friend leaving the house. She testified that the Accused was holding a pistol. She held on the pistol with both her hands. There was a commotion. In the commotion, PW3 Josephat Maina Kariuki, the father of the deceased and PW4 arrived at the scene.

PW3 testified that on the night of 5th November 2000, while he was in his father's house, a few metres from the house where the deceased used to live, he heard a sound. He described the sound as **"twa, twa, twa"**. He recalled the sound was emanating from the house where his children lived. He went to investigate. He tried to open the gate. At that time, PW4 was screaming. She was struggling with a man who was holding something in his hands. PW3 went to the aid of his daughter. He held onto the man. PW4 managed to wrest the thing from the man. That **"thing"** turned out to be a pistol. PW3 inquired from PW4 what the problem was. PW4 told him that **"Bonny"** had killed the deceased. PW3 recalled that he struggled with the man. The man however managed to make good his escape after wriggling out of the vest that he was wearing. He left PW3 holding the red vest in his hands. PW3 testified that he knew **"Bonny"** before the incident. He identified **"Bonny"** as the Accused in this case. He knew the Accused because they used to live together in the same village.

PW3 testified that after the Accused and his friend made good their escape, she went to the nearby Administration Police Camp to make a report of the incident. The camp was about 500 metres from their house. She handed over the pistol to the police. The police arrived at their house with a motor vehicle. They came with a Scenes of Crime Officer. They took photographs of the scene. They removed the body of the deceased from the scene. PW3 recalled seeing the body of the deceased. She saw that the deceased had sustained three injuries, one on her chest and two in her abdomen. PW3 reiterated that the difference between the deceased and the Accused occurred when the Accused returned back to the house demanding to be given the sum of Kshs.10,000/- which the Accused claimed he had left in the house.

PW2 Sergeant Fredrick Simiyu Serengo was at the material time attached to CID Nairobi Area as a Scenes of Crime Officer. He recalled that on 6th November 2000 at about 2.40 a.m., he was requested to go to Korogocho slums to visit a scene of crime. At the scene, he met PW6 CIP Joel Rotich, who was then attached to Ruaraka Police Station. He was shown a mud-walled building with corrugated iron sheet roofing. In one of the rooms, there was a body of a female adult lying on its back on top of a bed. The feet were hanging on the side of the bed. PW2 took eight (8) photographs at the scene. He also prepared a report explaining the scenes in the photographs. He recalled that the deceased had two (2) bullet holes on the stomach and another below the left armpit. The eight (8) photographs and the report were produced as **Prosecution's Exhibit No.1 & 2.**

PW2 Josephat Maina Kariuki and PW4 Susan Wanjiku testified that after the incident, the Accused disappeared. PW1 Corporal Josphat Mutua, then based at Pangani Police Station testified that on 6th June 2001 while he was on patrol along Juja Road, in the company of two other police officers, he was informed by a member of the public that there were three men who were in a nearby video kiosk. The member of public claimed that the three (3) men were suspects in a spate of robberies that had been committed in the area. PW2 went to the video kiosk and arrested three men. He conducted a quick search on the three suspects. They did not have any weapons. He arrested the three suspects and took them to Pangani Police Station. They were detained. One of the suspects was the Accused in this case. The Accused was charged with a criminal offence at Makadara Law Courts.

PW3 received information of the Accused's arrest. He went to Makadara Law Courts and saw the Accused. He made a report to Ruaraka Police Station. The report was made to PW6 CIP Joel Rotich. He testified that on the morning of 12th September 2001, he received information from PW3 to the effect that the person who had shot the deceased had been arrested in relation to another criminal offence by police officer from Pangani Police Station. The Accused had been taken to Makadara Law Courts. PW6 instructed PC Wanandaba to go to Makadara Law Courts to confirm the information. PW6 was informed that indeed the Accused person was at Makadara Law Courts having been arrested and charged with another offence. He secured the arrest of the accused and charged him with the present offence. PW6 testified that PW3 referred to Accused person by the nickname "**Bonny**". PW6 recalled that upon his arrest, the Accused person denied the offence and categorically stated that he had no faith with the police.

After his arrest, the Accused was examined by PW7 Dr. Zephania Kamau based at the Police Surgery to determine whether he was mentally fit to stand trial. The accused was examined on 29th September 2009. He noted that the Accused had no physical injuries. He formed the opinion that the Accused was mentally fit to stand trial. He filled a P3 Form which he produced as **Prosecution's Exhibit No.4**. The pistol that was recovered from the Accused according to the testimony of PW3 and PW4 was taken to the CID Headquarters. It was examined by a Mr. William Lubanga, who was a ballistic expert at the time. The report that he prepared was produced on his behalf by PW9 SP Lawrence Ndhiwa. PW9 explained that the said William Lubanga retired from the police force. That was the reason he was not available to adduce evidence. He confirmed that he was familiar with his signature and handwriting.

PW.9 testified that on 7th November 2000, a Webby Revolver Serial No.A61620, four (4) rounds of ammunition and two (2) fired cartridges were received by the said William Lubanga from Corporal Mutua of CID Kasarani. Mr. Lubanga examined the Revolver and formed the opinion that the pistol was in good general condition and was capable of being fired. To test this fact, Mr. Lubanga successfully fired two rounds picked from the four (4) rounds of ammunition that had been handed over to him together with the pistol. He also examined the two (2) fired cartridges which were recovered from the scene of crime. After microscopically comparing the cartridges that he had test-fired with the said recovered cartridges, he formed the opinion that the two cartridges had been fired from the same pistol which was given to him to examine together with the rounds of ammunition (*i.e.* the Webby Revolver Serial No.A61620). The report prepared by Mr. Lubanga was produced in evidence as **Prosecution's Exhibit No.6**.

PW5 DCP Levin Kyule Mwandu testified that he was the Chief Licencing Officer at the Central Firearm Bureau in Nairobi. He testified that a pistol, Taurus 9mm pistol Serial No.61620 was forwarded to the Firearm Bureau on 24th June 2009. The said pistol was destroyed in a destruction exercise carried out on 24th March 2010. It was among 2,500 illicit and surrendered pistols that were destroyed on the material day. A destruction certificate was issued. It was produced as **Prosecution's Exhibit No.3**. PW5 confirmed that the pistol was recovered from Nairobi and was marked as an illegal firearm. He was not aware in which case the pistol was used. He was present when the said pistol was destroyed. He was not certain whether the police were negligent when they sent the said pistol for destruction when there was still a pending case before court.

PW8 Dr. Perminus Okemwa testified that he was a Pathologist based at Kenyatta National Hospital. He testified that the postmortem on the body of the deceased was performed by Dr. Kirasi Olumbe. He has since immigrated to Australia. He was therefore producing the postmortem report on behalf of Dr. Olumbe. He testified that postmortem was performed on the body of the deceased on 17th November 2000 at City Mortuary. On external examination, he observed that the deceased had an entry gunshot wound on the left breast in the upper lateral region which had exited near the left nipple on the same breast. She also had a bullet wound on the left chest wall 7cm below the lower rib. It had blackened around it with a corresponding exit wound in the right loin. The spleen was lacerated with marked bleeding to the abdomen. He formed the opinion that the cause of death of the deceased was gunshot wound to the abdomen. He further observed that there was near contact wound because of the blackening. The pistol used was low velocity. PW8 was familiar with the handwriting and signature of Dr. Olumbe. The postmortem report was produced as **Prosecution's Exhibit No.5**. The investigating officer did not

testify in this case because Miss Ikol told the court that the witness had been operated and was not available to testify when the court scheduled the case for hearing. After several adjournments at the instance of the prosecution, it became apparent to the court that the said witness would not be available to testify even if more time was granted to the prosecution. The court ordered the prosecution to close its case.

After the close of the prosecution's case, the Accused was put on his defence. The Accused opted to adduce no evidence in his defence. After the close of both prosecution's and the defence's respective cases, this court heard closing submission by Mr. Muoki on behalf of the Accused and by Miss Ikol on behalf of the prosecution. This court has considered the said submission in this judgment. Reference shall be made to the said submission at the latter part of this judgment.

This being a criminal case, it is the duty of the prosecution to establish the guilt of the Accused person to the required of proof beyond any reasonable doubt. The prosecution has the burden of adducing evidence to establish the guilt of the Accused. The Accused is under no obligation to prove his innocence. Where reasonable doubt is raised, the court is under legal obligation to reach a finding that the charge has not been proved to the required standard of the law. In such event, the court will have no option but to acquit the Accused.

In the present case, the prosecution adduced direct evidence in its bid to establish the charge of **Murder** that was facing the Accused. The direct evidence was in nature of eye-witness account. PW4 Susan Wanjiku, the sister of the deceased, testified that on 5th November 2000 at about 9.00 p.m., she was with the deceased at her house in Korogocho. PW4 testified that at the material time she used to live with the deceased and their two brothers, John Kariuki and Duncan Kamau. She testified that at that time two men came to the house. One of the men was the Accused. PW4 referred to the Accused as "**Julius**". She testified that she had known the Accused prior to the material night. The deceased was a chang'aa dealer. The Accused requested to be served with chang'aa (traditional liquor). The deceased told the Accused that she did not have the drink at the time but she knew where to find it. She asked the deceased and his friend to wait for her in her house as she went to fetch the liquor. PW4 testified that the deceased removed the sum of Kshs.10,500/- from his wallet. He gave the deceased Kshs.1,000/- note. The deceased requested the accused to give him Kshs.500/- because she was not in a position at the time to get change for the higher denomination note. The Accused insisted that the deceased takes the Kshs.1,000/-. After discussion, the deceased relented and took the Kshs.1,000/-. She fetched the chang'aa and returned with it to her house. The Accused and his friend drunk the chang'aa after which they left. PW4 testified that she locked the door to the house and the outer pedestrian gate leading to their compound.

PW4 recalled that after a short while, she heard someone kick the pedestrian gate leading to their compound. The gate was made of used metal drums. The Accused then entered their compound and kicked the door to their house. He entered the house with his friend. At that time, the room was being illuminated by a lamp (Koroboi). The Accused demanded that the deceased gives him his money. The Accused demanded the sum of Kshs.10,000/- from the deceased. They all started searching the house for the money. The lamp went off. PW4 saw a flash. She shouted. Her mother who lived nearby, came. Meanwhile, their father PW3 heard a sound which he described as "**twa, twa, twa**". The father was at the time in a nearby house talking to his father (the grandfather of PW4 and the deceased). He realized that the sound was emanating from the direction of the house that his children lived. He rushed to the scene. Meanwhile, according to PW4, the Accused and his friend attempted to leave the house. A struggle ensued between PW4 and the Accused. PW4 testified that she realized that the Accused was holding something in his hand. She struggled with him until PW3 came to the scene. PW3 held onto the Accused. PW4 managed to wrest the "**thing**" from the Accused. It was then that PW4 realized that it was a pistol.

According to PW3, the Accused managed to wriggle out of the vest that he was wearing (which at the time PW3 was holding onto) and managed to make good his escape. PW4 testified that after the Accused had escaped, she went to the nearby Administration Police Camp where she reported the incident. She also surrendered the pistol and the ammunition to the police. PW6 CIP Joel Rotich testified that at the material time he was on duty at Ruaraka Police Station. He visited the scene of crime after the report was made to the police. PW4 told him that a man by the name "**Bonny**" had shot the deceased. The pistol that

was wrested from the Accused was handed over to PW6. PW6 noted that the pistol was a Revolver. It had four (4) live ammunition. He also collected two (2) empty cartridges at the scene. The pistol together with the ammunition was taken for examination by a Ballistic expert based at the CID Headquarters. According to PW9, the pistol was established to be a Webby Revolver Serial No.A61620 by William Lubanga. William Lubanga was not able to testify because at the time of the hearing of the case, he had retired from the police force. Upon test-firing the pistol, William Lubanga formed an opinion that the pistol was in good general and mechanical condition and was capable of being successfully fired. The two (2) cartridges recovered at the scene crime were established to have been fired from the specific pistol. The report prepared by Mr. Lubanga was produced into evidence as **Prosecution Exhibit No.6**. The Revolver was however not produced into evidence because, according to PW5 DCP Levin Kyule Mwandu, the same was destroyed. The destruction certificate was produced into evidence by the prosecution. However, the said destruction certificate, while quoting the correct serial number A61620, referred to the pistol as a Taurus Pistol. The postmortem report produced by PW8 was categorical that the cause of death of the deceased was gunshot wounds to the abdomen. The postmortem confirmed that the deceased was shot at short range. This was explained by the blackening around the contact wound.

This court has carefully evaluated the facts of this case. The prosecution adduced essentially two pieces of evidence in its bid to establish the guilt of the accused on the charge of **Murder**. The first piece of evidence was the eye-witness account of PW3 and PW4. The prosecution established that the Accused was known to PW3 and PW4 prior to the incident. PW3 explained that the Accused lived within the neighbourhood and was known by the nickname **"Bonny"**. This court formed the view that indeed the said two witnesses knew the Accused prior to the shooting incident. Although the incident occurred at night, there was sufficient light illuminating the room where the deceased was shot. The Accused, the deceased and PW4 interacted for some time before the fatal shooting. It was clear from the evidence adduced by PW4 that the reason why the Accused shot the deceased was because the Accused thought that the deceased had stolen his money. The Accused came back to the deceased's house in a belligerent mood. He kicked the door to the pedestrian gate leading to the compound where the house of the deceased was situated. He then kicked the door said house. He demanded to be given back the sum of Kshs.10,000/-. A frantic search of the house was conducted. It was obvious from the evidence of PW4 that the deceased became impatient. That is when he shot the deceased. According to the evidence of the doctor the deceased was shot twice in the abdomen. It was that shooting that caused the death of the deceased. PW4 managed to wrest the pistol from the Accused. The two cartridges recovered next to the body of the deceased were established by the Ballistic expert to have been fired from the pistol that was recovered from the Accused. Upon evaluating this evidence, this court holds that the said evidence was cogent and consistent. It gave a credible sequential chain of events that led to the death of the deceased.

The second piece of evidence that was adduced by the prosecution is that of the Ballistic expert as contained in the ballistic report which was produced into evidence by the prosecution. As stated earlier in this judgment, the Ballistic expert who examined the pistol that was recovered from the Accused established that it was Webby Revolver Serial No.A61620. The pistol was however not produced into evidence because according to PW5, the pistol was mistakenly destroyed during a destruction exercise of illegal firearms organized by the government. The destruction certificate however noted that the pistol a 9mm Taurus Serial No.A61620. In his submission, the Accused pointed out this contradiction. In the Accused's view, the prosecution was not able to establish what type of pistol was used to shot the deceased. It was further his case that the Taurus pistol was not connected with him in the evidence adduced by the prosecution witnesses.

Upon evaluation of this evidence, it was clear to this court that the pistol recorded in the destruction certificate was in actual fact the same pistol which was recovered from the Accused and which was examined by Mr. William Lubanga, the ballistic expert. It was evident to this court that the pistol was mistakenly recorded as a Taurus in the destruction certificate. The serial number used was however the same. This court is of the view that the chances that two pistols manufactured by two different manufacturers would have the same serial number A61620 is remote. This court makes a finding that the pistol that was destroyed is the same pistol that was recovered from the Accused. The non-production of the pistol by the prosecution does not in any way render the case against the Accused person not proved. The explanation given by the prosecution for the failure to produce the actual pistol satisfied this court. In

any event, this court took judicial notice of the fact that the said pistol had been produced by the prosecution during the earlier trial where the Accused was able to cross-examine the ballistic expert on the same. This court therefore holds that the prosecution proved, to the required standard of proof beyond any reasonable doubt, that the Accused shot dead the deceased using a pistol which is a firearm within the meaning ascribed to it by the **Firearm Act**.

Taking into account the totality of the evidence adduced by the prosecution witnesses, it was clear to this court that the prosecution did establish to the required standard of proof beyond any reasonable doubt that it was the Accused who killed the deceased by shooting her with the pistol which was subsequently wrested from him by PW4. The Accused chose not to adduce any evidence in his defence. That is his constitutional right. This court therefore holds that the prosecution did establish *actus reus*. Regarding *mens rea*, the question that remains for this court to determine is whether the prosecution established malice aforethought. Malice aforethought is defined under **Section 206** of the **Penal Code** thus:

“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 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 or a 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. *an intent to commit a felony;*
- d. *an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”*

It was clear from the evidence adduced that the Accused shot the deceased in the abdomen with the clear intention of causing the deceased grievous bodily harm. The fact that the deceased died from gunshot wounds was therefore not an expected in the circumstances of this case. It was the natural consequence of the Accused’s action. The Accused had the intention to harm the deceased because he thought the deceased had stolen money from him. This court therefore holds that the prosecution did prove malice aforethought because the accused killed the deceased using the pistol whose consequences could well be predicted. **Section 206(b)** of the **Penal Code** was therefore established. The Accused therefore intentionally caused the death of the deceased. His motive was to harm the deceased because he thought the deceased had stolen his money. The Accused is therefore convicted of the charge brought against him of **Murder** contrary to **Section 203** as read with **Section 204** of the Penal Code.

DATED AT NAIROBI THIS DAY OF 19TH JUNE, 2014.

L. KIMARU

JUDGE