



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

H.C. CRIMINAL CASE NO. 50 OF 2002

REPUBLIC .....PROSECUTOR

*V E R S U S*

JULIUS MUTEI MUTHAMA ALIAS BONNY..... ACCUSED

**J U D G M E N T**

Julius Mutei Muthama alias Bonny is charged before me with an offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that he murdered one Sophia Wakio Maina on 5th November, 2000 at Korogocho village within Nairobi.

The deceased resided at the aforesaid village and was earning her livelihood by selling chang'aa to willing customers. On the fateful night she was with her sister Susan Wanjiku Maina (P.W.1), her brother Duncan Kamau (P.W.2) and another brother. They were with two children presumably of the two sisters (i.e. deceased and P.W.1). It was around 9 p.m. and the four of them were playing cards. They had a Kerosene lamp to give them light in the room. Children were sleeping. They did not have any customers as per Susan and Duncan (P.W.1 & P.W.3). Then came the accused whom they knew as Bonny who demanded Chang'aa. The deceased went out and bought it and the Accused sat down and drank it. He gave Kshs.1,000/= to the deceased and as per P.W.1 she gave the change of Kshs.960/= to the Accused and as per P.W.2 she did not give any change as she did not have any and the Accused told her to give the change next day. The Accused walked out and before the lapse of five to ten minutes, there was a hard knock on their door which was closed after the Accused left. When asked, the person at the door responded that it was Bonny. The door was opened and the Accused came in with gun in his hands this time. He demanded from the deceased at gun point Kshs.10,500/= (as per P.W.1) and Kshs.10,000/= (as per P.W.2). The deceased did not have that kind of money. But all were asked and did look for money around the house. But then accused stopped them and started looking himself. He also looked under the mattress where the children were sleeping and by doing so hit the children against the wall. When deceased tried to intervene, the accused became angry and blew off the lamp and both witnesses heard a gun shot. They heard the deceased saying 'what do you want from me' but the accused was heard abusing her and calling her a dog and then they heard the second shot. Both witnesses have specifically stated that they both heard the accused responding that it was Bonny when he knocked at the door, that he was having gun and demanded the money at gun point, that the Accused blew off the lamp and that they heard two gun shots. Their mother (who was not called as witness) knocked at the door, presumably after hearing the gun shots. It has emerged from the evidence that the parents were living adjacent to the deceased, but they did not sleep in one house as they had some difference on that day. It is also on the record that when the lamp was blown off P.W.1 also shouted for a matchbox from their mother. P.W.2 and the other brother was asked to go under the bed after the Accused started looking for money and thus there were only deceased and P.W.1 (Susan) when the mother knocked and hearing the knock the Accused proceeded to go out. According to P.W.1 when the Accused started going out he was holding his gun at the back (obviously he did not want the person knocking to see him with a gun) but he was

unaware of P.W.1 following him and as per P.W.1 she put down the child she was holding and grabbed the gun. At that moment her father Josphat Maina Kariuki, (P.W.4) entered and she shouted and rebuked him to have come late when his daughter has been killed. Hearing this, P.W.4 tried to grab the accused and scuffle ensued. But in the meantime as per P.W.1 she went straight to chief's camp and handed over the gun to officers at the camp naming the accused as killer of her sister and returned in company of A.P. Officers. A.P. Constable Philips Simiyu (P.W.6) was one of them.

The father (P.W.4) testified that he was woken by shouts from her daughter's house and he got up and went there. When he entered the house P.W.1 (Sophia) was struggling with the Accused and he joined in and grabbed the gun. But in the struggle the Accused's shirt came off and he escaped. Then he also followed his daughter to the chief's camp and reported.

P.W.5 A.P. Constable Philips Simiyu said the same thing that the gun was handed over by P.W.1 & P.W.4 to Kirika Chief's Camp where he was on duty. He also confirmed that both gave the name 'Bonny' being the person who killed the deceased. He also said the gun had two used cartridges and four live rounds. He then accompanied them to the scene and found the deceased already dead. He sent the fire arms with all the used cartridges as well as live rounds to the Balistic expert. They all were produced as exhibits for the prosecution.

Ambogo Donald Mogo (P.W.7) who is attached to Forensic Balistic Laboratory at C.I.D Headquarters testified and produced the report made by his colleague whose handwriting and signature were known to him having worked with its maker for 23 years, who retired and was not available without undue delay. The Defence counsel did not object to its production. According to the report the murder weapon was a wembley revolver bearing Serial No. A 61620. Two spent cartridges and four live rounds were also sent to him and Two live rounds were test fired. In short his opinion was that the revolver was capable of being fired and that the two spent cartridges were fired from the said revolver. His testimony was not challenged at all.

The Post Mortem Report produced in evidence showed that the Doctor who performed the Post Mortem formed an opinion that the cause of death was the gunshot wound to Abdomen. It also confirmed that there were two bullet wounds on the body.

Now I shall move to the evidence as to how the accused was arrested. According to the father (P.W.4) he was informed by a friend that he had seen Bonny at Muthaiga Police Station and that he would be taken to Makadara court No. 1. He went and found him at the said Law Courts. He went to Ruaraka Police Station and reported. The Accused was arrested at the next appearance, before the court.

According to Investigating officer, Inspector Joel Rotich (P.W.8) on 12th September, 2001 he received information that the accused was arrested for another offence and that he was to appear on the same date before Makadara Law Courts for a mention. The deceased's father (P.W.4) was sent with one of his officers who identified the accused. The accused was brought to Ruaraka Police Station after an application and was so brought on 24th September, 2001. The Accused was thus then charged with the offence of murder.

The Accused gave unsworn statement wherein he denied the committal of offence. He stated he stays at Emali and that he was a businessman before his arrest, and that is what made him come to Nairobi on 6th June, 2001. He reached Nairobi at 6 p.m. and the person who was to buy his goods had closed his business. After keeping his goods in a safe place he boarded matatu no. 30 to sleep with a friend staying around Mobil along Juja Road. When he alighted to his stage he saw a crowd of 20 people and while he was diverting them, he heard voice 'Lala chini' . He did what he was told, and when the police knew he was from Gikomba selling Mitumba (used clothes), they remarked Gikomba people had money and then he was tied and led away with many others. At a distance of about 80 meters from Pangani Police Station, they demanded Kshs.500/= to be freed but he did not. He was taken to Pangani Police Station and there he heard others were paying Kshs.1,000/= to be released. He did not have the money and was kept there for 13 days. Then he was charged with offence of robbery with violence and was taken before Makadara Law courts on 20th June, 2001. After that on 18th September he was rearrested and was charged with this

offence. He also denied that Bonny was his name. I must note that neither before the committal magistrate nor before the Judge at the time when plea was taken, he disputed his name which was read over to him. To be specific, his name as appeared in charge-sheet and information reads Julius Mutei Muthama alia Bonny.

This in short is the evidence led by Prosecution and Defence.

It was contended before me that identification by recognition is not very credible as none of the witnesses have given all the names of the Accused and they have named him as only 'Bonny'. It is true that all the three witnesses have given the name of the accused as Bonny and that name is also included in the charge-sheet. Before this court the identify of the accused is sought to be proved both by voice recognition and visual recognition. All the eye witnesses (P.W.1, P.W.2 & P.W.4) have consistently testified that they knew the accused being one of the customers of the deceased and of the neighbourhood. They knew him as Bonny and they also gave the same name being a known person to the police right from the beginning. His arrest was also made after he was specifically identified by P.W.4 from the persons who appeared before Makandara Law Courts.

I also have no doubt that P.W.1 and P.W.2 had sufficient opportunity and circumstances to identify the accused that night. The room was lighted by a lamp and he came twice into the room. Second time he came and demanded the money with menace which did not belong to him and when he failed to get, he mercilessly shot at the deceased, after placing the room in dark. Despite brave efforts by the defence counsel to suggest that there were many customers at that time, the answer was persistent. There is no denial that the gun and ammunitions were handed over to the authorities the same night when the deceased was killed, along with the name of the accused.

I have three witnesses who have seen the accused person at that night with gun and two witnesses who had seen him asking for money at gun point and who have then heard two gun-shots.

At the risk of repeating, I state that all the witnesses were familiar with the accused as well as his voice and there is sufficient identification by recognition and if so, identification parade was not required or necessary. There was no possibility of error or mistake in identification of the Accused as per the facts of this case.

I thus find that it was the Accused who visited the deceased at that fateful night. After satisfying himself with a drink he came back armed with a lethal weapon and used it when his unlawful demand was not met with.

He committed the act of killing with malice which makes him culpable of the offence of murder. I need not go much into details of other evidence (which I have specified hereinbefore) which only confirm and strengthen totally the unlawful act of the accused person.

I therefore agree with the assessors and find him guilty of offence of murder as charged.

As I have no other discretion in the matter of punishment, I shall have to direct that he be sentenced to death as per law.

Right of appeal within 14 days.

Dated and delivered at Nairobi this 17th day of March, 2004.

**K. H. RAWAL**

**JUDGE.**