



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HCR NO. 7 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL MUTALI MUNYANGE.....1ST ACCUSED

RUTH SAKWA MUTALI.....2ND ACCUSED

JOEL WETOSI KHAOYA.....3RD ACCUSED

J U D G M E N T

The accused **DANIEL MUTALI MUNYANGE** (accused 1) **RUTH SAKWA MUTALI** (accused 2) **JOEL WETOSI KHAOYA** (accused 3) are charged with the offence of murder contrary to Section 204 of the Penal Code. The particulars of the offence is that **DANIEL MUTALI MUNYANGE** (accused 1) **RUTH SAKWA MUTALI** (accused 2) **JOEL WETOSI KHAOYA** (accused 3) on the night of 3rd April, 2015 at Mikubha village, Mitukuyu sub-location, in Bungoma East within Bungoma County, murdered **MARY WANGUI MWANGI**.

The prosecution case is that on 3.4.2015 **PW1 Ronald Makaisi Sifuna** was asleep in his house at night when he received a telephone call from Racharo Kimokho the chairman of community policing where he is the secretary. Ronald informed him that there were robbers at the home of Mutali who is his neighbour, which is the home of accused 1 Daniel Mutali and accused 2 Ruth Sakwa Mutali. He woke up his brother Peter and Khaemba. Khaemba led them to the market and entered the homestead from behind. On arrival they found the deceased Mary Wangui lying down outside the house of accused 2 Ruth Sakwa. He observed and saw that she was dead and lying in a pool of blood. They called out accused 2 who came out from the house. They waited until police came.

On being cross-examined by Bwonchiri counsel for accused, he stated his group was the first to arrive at the scene. He also confirmed that although his house is about 500—600 meters away he did not hear any noise from deceased's home. He confirmed that the body was near a borehole about 15 meters from the deceased house which is in the same compound with that of accused 2. He stated that one Fred, also came out of the house of accused 2 when they called her.

PW2 Benson Sindani Chesoni who runs a bodaboda business owns motor cycle Reg. No. KMDE 979M make Star and red in colour and is based at Lugulu market. On 3.4.2015 accused 3 went to him and requested to hire his motor cycle from 8 a.m. to 4 p.m. He agreed to hire it out to him at Kshs 800 and accused 3 gave him a deposit of Kshs 400. The accused left and informed him to get his (accused's) telephone contact from Mary Musumba who gave him the telephone No. 0713118497. The accused 3 did not return his motor cycle as a greed. On 4.4.2015 accused 3 brought him the motor cycle.

PW7 No. 100600 PC Winfred Munyoki attached to Webuye Police station accompanied Segt Simba to the Scene where it had been reported there were gun shots. On arrival they found many people present. They saw a brick and the deceased house was open. They observed the scene and recovered one live 7.622mm ammunition and 2 spent cartridges. The spent cartridges were a few centimeters from the body, which was lying under a tree. They collected the cartridges. He observed the body had injuries on the head, left hand and on the side of the body. They arrested accused 2 who was alleged to be inside her house in the compound.

PW9 No. 231492 Senior Supt Douglas Chikanda was instructed by the OCPD to proceed to the scene of murder at Mkuba rea. He proceeded to the scene where he found other officers IP Ngetich, Senior Segt Simba and P.C Winnie Muriuki already at the scene. He was handed over 2 spent cartridges and one live round of 7.62mm ammunition. He observed the scene and drew sketch plan. According to the sketch plan, the incident occurred in a homestead where the deceased's house is on extreme right as you enter the gate and accused 2's house is in front and the deceased body was under a tree on the right side of accused's house.

He commenced investigation and recorded witness statements. He arrested 4 suspects. He found that accused 1 was brother in law of the deceased. He was an AP officer attached to Mumias AP camp and had a dispute in Succ Cause NO. 46/2014 that related to that estate of William Mutali Itoli. The deceased had objected to the succession for being left out as a widow of Tom Mutungwa who was brother of

accused 1 and son of accused 2 Ruth.

In the cause of his investigation he recovered a G3 rifle S/No. G3 FMV391643 with a magazine. He forwarded the rifle together with the spent cartridges to the Ballistic expert for analysis. He received the report. He then charged accused 1 Daniel Mutali Munyange as the principal offender, accused 2 because she was mother of accused 1 and mother in law of deceased and accused 3 as the person who ferried accused 1 from Mumias and back on motor cycle KMDE 979M Exh.2.

On being cross-examined by Bwonchiri for the accused, the witness confirmed that he was the investigating officer and visited the scene on 4.4.2015. He observed the body of deceased and noticed it had gunshot wounds one on the head and others on the body.

PW4 No. 231845 Ass Supt of Police Florence Karimi attached to Directorate of Criminal Investigation Headquarters and a fire-arm examiner received exhibit from Copl Omari of DCI Bungoma together with exhibit Memo. She examined the same and prepared her report Exh. 3. The report dated 7.4.2015 and produced as exhibit 3 states as follows:

“The following exhibits were received in the Ballistic laboratory from No. 71295 CPL Kodheck Omari on 7th April 2015.

EXHIBITS

1. *One G3 rifle marked exhibit A1)*
2. *One round of ammunition marked exhibit (B1)*
3. *Two fired cartridge cases marked exhibit (B2-B3)*

EXAMINATION

I have examined the exhibits referred to above.

Exhibits (A1) is a German heckler and Koch G3 rifle S/No. 391043 designed to chamber rounds of ammunition in caliber 7.62x51mm. The exhibit rifle is in fair physical condition and fair mechanical condition as it was successfully testified by use of three rounds of ammunition picked from exhibit (B1) and two from our laboratory. The test cartridge cases were recovered and marked as (TC1-TC3).

Exhibits (B1) is one round of ammunition in caliber 7.62x51mm. It is in good working order as it was fired in exhibit (A1) above.

Exhibit (B2-B3) are two fired cartridge cases in caliber 7.62x51mm. comparative microscopic examination of the exhibits cartridge cases revealed that they were fired in the same firearm.

Further comparative microscopic examination of exhibits (B2-B3) in conjunction with (TC1-TC3) revealed sufficient matching ejector markings and sufficient matching breech face markings enabling me to form the opinion that, exhibits (B2-B3) were fired in exhibit (A1) above.

Basing on the above examination I formed the opinion that exhibit (A1) and (B1) are capable of being fired and that they are a firearm and ammunition respectively as defined under the Firearm Act Chapter 114 Laws of Kenya.”

PW12 No. 217854 Segt Silas Wanjala was attached to Ekama Divisional Headquarters Mumias as in charge of the Armory. On 3.4.2015 he issued accused 1 who was an officer under him with a G3 rifle S/No. 391043 (Exh.1) at 6 p.m. He gave him 20 rounds of ammunition. On 4.4.2015 at 6 a.m. he returned the rifle with 20 rounds of ammunition. He produced a copy of the arms movement register Exh. 7. He received information from Inspector Odhiambo that accused 1 had been suspected to have committed an offence of murder. At 10 a.m. police officers from Webuye came and arrested accused 1.

On being cross examined by Mr. Bwonchiri he stated that accused 1 called him at night and informed him that robbers had gone to his family home at Webuye and killed his relative. He stated that accused 1 returned the rifle at 6 a.m. with all the 20 rounds of ammunition issued.

PW8 No. 239155 APC Paul Mwaura then attached to Ekama AP Post was at the station on 3.4.2015 the accused 1 came to the camp on a motor cycle where he was a pillion passenger. At 9.30 p.m. he and accused 1 were assigned to work at Education office. He was issued with AK 47 and accused 1 with a G3 rifle. On arrival at the Education office, he went to the boardroom while accused 1 remained outside. He slept that night. He again saw accused 1 at 5 a.m. on 4.4.2015 when they went back to the station. Later on same day police officers from Webuye took their rifles on suspicion that it had been used in a murder. At an ID parade at Webuye he identified the motor cycle Reg. No. KMDE 979M Exh.1 and their rider accused 3.

On being cross-examined by counsel for accused, he stated that there was an incident on 9.3.2015 when accused 1 had shot in the air when there was an attempt to burn the station by a mob. He confirmed he did not see accused 1 from the time he went to the board room and slept until next day at 5 a.m.

PW5 Dr. Nicholas Inwani performed a post mortem on the body of deceased. His findings were as that on external examination he saw there were gunshot wounds on left ear measuring 5 cm, with entry on left ear and exit on the right leaving the left ear shuttered. There was

gunshot wound on neck measuring 2 cm and exited at the abdomen. The right hand was crushed by a fracture burns caused by bullet. Upon opening the body, he observed that the right lung was shattered, fracture on 3rd rib, fracture of left and right temporal bone and there was blood in the chest cavity. From the examination he formed opinion that cause of death was due to cardio-pulmonary arrest due to gunshot wounds.

Upon being placed on their defence the accused gave sworn evidence.

Accused 1 Daniel Munyange Mutali testified that the deceased Mary Wangui Mwangi was the wife of his elder brother the late Tom Mutali. Accused 2 Ruth Sakwa is his mother. He is an Administration Police officer attached to Mumias West Division. On the night of 1-2nd April 2015 he was at his place of work. On the night of 3-4th April he was at the station where he was assigned by the Segt to go to Frankmart supermarket together with one Bridgit where they guarded the premises from 6-9 p.m. On that day he had been issued with a G3 rifle No. S/No. 391043 with 20 rounds of ammunition. He signed for the same in the arms register. (Exh.7) He then was assigned with APC Paul Mwaura to go and guard the Education offices. They went there at 9.30 p.m. and he stayed there up to 5.55 a.m. on 4.4.2015 when he left. He returned the rifle to the armoury with the 20 rounds of ammunition. The same was recorded in the arms register. He confirmed he was with APC Mwaura all the time and that Mwaura was not sick. He testified that while on duty at the Education offices he received a telephone call from Fred Khaemba who was staying with the mother (accused 2) who informed him that they had been attacked and deceased had been killed. He called his step brother called John. He also called Segt Wanjala and informed him. Segt Wanjala told him he will be released the next day to go home. At 8 a.m. he allowed him to go home for 3 days. He went and stayed there for 2 days and was called back to duty. On 7.4.2015 3 days after the incident, he was arrested.

On being cross examined by M/s Nyakibia for state, he confirmed he was issued with G3 rifle which was subjected to the ballistic examination and report which shows the cartridges were discharged from that rifle.

DW2 Joel Wetosi Khaoya (accused 3) testified that he did not know accused 1 before and only knew him in court. He denied that PW2 gave him a motor cycle and he denied ever ferrying accused 1 on a motor cycle. He was arrested on 5.4.2015 and later subjected to an identification parade and alter charged with present offence. He stated on 3.4.2015 he was at his home and at night and slept there until the next day.

Accused 2 Ruth Sakwa Mutali having died during the pending of the hearing, the charge against her was withdrawn.

Mr. Bwonchiri for the accused filed written submission. Counsel submitted that the prosecution in a charge of murder must prove:

- (a) The death of the deceased and cause of death.*
- (b) That the Accused committed the unlawful act which caused the death of the deceased.*
- (c) That the Accused had malice afterthought.*

On the fact and cause of death counsel submits that the testimony of the doctor PW5 is contradictory hence raising the question about the real cause of death.

On whether it is accused who committed the unlawful act that lead to the death of deceased counsel submits that the prosecution did not prove the accused 1 travelled from Mumias to Webuye where the murder occurred. He submitted that there was no eye witness who saw the accused commit the offence and that the prosecution was relying on circumstantial evidence which they failed to establish. The counsel referred the court to the decision in **Sawe –vrs- Republic (2003) eKLR** to buttress his submission.

Finally, counsel submits that the prosecution has failed to prove the charge of murder against the accused persons. The accused 1 has clearly demonstrated that at the time of the alleged offence he was on duty at the Education office within Mumias. Accused 2 who is now deceased did not participate in the said murder. The prosecution failed to link her to the case. The investigating officer failed to produce any pleadings in the said succession cause hence the allegation that she was the principle offender under Section 20 of the penal code has to fail. In his own words the investigating officer said that the pleadings in Succession Cause No. 46 of 2014 were not necessary. The prosecution too failed to prove their case against the accused.

The accused 1 and 3 are charged with the offence of murder contrary to Section 203 of the Penal Code. Section 203 provides:

203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

The elements of the offence which the prosecution must prove beyond reasonable doubt on a charge of murder are:

- (d) The death of the deceased and cause of death.*
- (e) That the Accused committed the unlawful act which caused the death of the deceased.*
- (f) That the Accused had malice afterthought.*

On the fact and death of deceased, even accused in his defence admits that deceased died. This is not in dispute. PW5 Dr. Nicholas Inwani who performed the post-mortem testified that the deceased had several gunshot wounds which shattered the right lung, and on the head leading to fractures. He formed opinion that the cause of death was due to cardio-pulmonary arrest due to gunshot wounds. It is not

therefore true the cause of death is not known as counsel for accused submits.

None of the prosecution witnesses testified as to having seen either accused 1 or 3 commit the offence. The prosecution therefore sought to rely on circumstantial evidence to prove the charge. The circumstances the prosecution sought to prove are that accused 1 Daniel Mutali Munyange is a brother in law of the deceased Mary who was the wife of his late brother Tom. That there was in existence Succession Cause High Court Succession Cause No. 46/2014 touching on the estate of William Mutali Itoli (deceased) the husband of accused 2 and father of accused 1 and the husband of the deceased. The deceased in the succession cause had protested her being left out of the estate and filed an application in court. The prosecution further sought to establish that accused 1 was armed with a G3 rifle with ammunition, that the deceased was shot and spent cartridges recovered showed that the shots were fired from the G3 rifle accused 1 was assigned to that day.

In respect to accused 3 Joel Wetosi Khaoya prosecution sought to show that he carried accused 1 on a motor cycle and may have carried him from his place of work at Mumias to the scene where he committed the murder and back and was therefore an accomplice.

Circumstantial evidence which the prosecution is relying on is one of the accepted ways a charge can be proved. This is evidence which enables the court to deduce a particular fact from a set of circumstances or facts which have been proved.

In **Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR**, the Court of Appeal had this to say on this point:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

In **Musili Tulo v Republic Cr. App. No. 30 of 2013**.

The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:-

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.

(see also **Sawe v Republic (2003) e KLR** and **GMI v R Cr. App. No. 38 of 2011**).

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.

(see **Teper v R [1952] ALLER 480** and **Musoke V R [1958] E.A 715**). In **Dhalay Singh v Republic, Cr. App. No. 10 of 1997**, this court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”

In **Neema Mwandoro Nduzya v R [2008] e KLR** the Court of Appeal reiterating the probative value of circumstantial evidence and the attendant duty of the trial court, stated that:

“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R v Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20. But circumstantial evidence should be very closely examined before basis of a conviction on it.

In its earlier decision in **Mwangi and Another v Republic (2004) 2 KLR 32**, the Court of Appeal exhorted that:

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable

of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge”

The prosecution called PW12 No. 217854 Segt Silas Wanjala the incharge of the Armory at Ekama Divisional Headquarters. He testified that on 3.4.2015 at 6 p.m. he issued a rifle to accused 1 G3 Serial No. 391043 (Exh A) with 20 rounds of ammunition. Accused went with the rifle on duty at Frankmart supermarket and later same night proceeded to Education offices. He returned the same on 4.4.2015 at 6 a.m. The accused 1 signed in the Arms movement Register Exh. 7 when he was issued and when he returned the rifle. On the same day the DCIO IP Odhiambo received a telephone call that the accused 1 may have committed an offence. At 10 a.m. police came and arrested accused 1 and took away the rifle issued to accused 1 and P.C Mwaura. P.C Mwaura had been issued with an AK 47 E/No/2324. He showed the rifle to the DCIO Webuye.

The accused in his defence on the issue of being issued with the G3 rifle said:

“I had been instructed that from Frankmart, I would go to the Education offices. That day I was issued with G3 rifle S/No. 391043 with 20 rounds of ammunition. I signed the Arms movement book. It was produced as prosecution Exh 7. I went to the education office with same rifle. It was on 3.4.2015. I went with APC Paul Mwaura. It is Brigit Majavu who was supposed to go. I and Mwaura left at 9.30 p.m. to go on the chores outside the offices and patrolled. We left at 5.55 a.m. on 4.4.2015. I reached the camp at 6 a.m. and I returned the rifle to the armory. I returned he G3 rifle with 20 rounds of ammunition. The amour confirmed that I returned the rifle and ammunition. It is recorded in the arms register as Rever S/No 16 in Exh 7.”

From the evidence of PW12 segt Silas Wanjala and the admission by accused 1, it is established that the accused 1 was on that material day was issued with the G3 rifle S/No. 391043 and remained with it from the time it was issued on 3.4.2015 and returned on 4.4.2015 at 6 a.m. This chain of custody is therefore established that accused was issued with the rifle, it remained and was in possession of it, it was not given to anybody else other than the accused 1 until it was returned the next day. It therefore shows that the G3 rifle S/No. 391043 was in exclusive possession of the accused on that day.

PW7 No. 100600 PC Winfred Munyoki was at the Webuye Police station on 3.4.2015 when she and Segt Simba received a shooting incident report. She and Segt Simba proceeded to the scene where they found the body of the deceased lying under a tree. The body had injuries. They followed a trace and recovered 1 live round of 7.62mm and 2 spent cartridges of 7.62mm caliba. They handed over the ammunition and spent cartridges to Senior Segt Shikanda (PW2)

She confirmed on being cross examined by Bwonchiri for the accused that they reached the scene at around 11.30 p.m. and the live ammunition and spent cartridges were recovered near where the body lay.

PW9 Senior Segt Shikanda was informed by OCPD of the shooting incident. He and other officers visited the scene. They found other officers at the scene. He observed the body which had gun-shot wounds. He was handed over 2 spent cartridges and one live ammunition. He commenced investigation and accused 1 was alleged to be a suspect and was an AP working at Mumias. PW6 Segt Kodhek Omari was sent to Mumias to confirm if accused worked there. He went there on 4.4.2015, confirmed accused was on duty and had been issued with G3 rifle and his colleague P.C Mwaura an AK 47 rifle. He collected the 2 rifles and came with accused 1 who had requested for a lift to Webuye. On 7.4.2015 Segt Omari prepared examination Memo and forwarded the G3 rifle which had been issued to accused 1, the 2 spent cartridges and 1 misfired ammunition which had been retrieved from the scene by PW7 Winfred Munyoki said and P.C Simba now deceased.

The G3 rifle and 2 spent cartridges were examined by the Ballistic expert Ass. Supt of police Florence Karimi (PW4) and filed her report Exh.3. The Ballistic report Exh 3 is in following terms:

“The following exhibits were received in the Ballistic laboratory from No. 71295 CPL Kodheck Omari on 7th April 2015.

EXHIBITS

- 4. One G3 rifle marked exhibit A1)***
- 5. One round of ammunition marked exhibit (B1)***
- 6. Two fired cartridge cases marked exhibit (B2-B3)***

EXAMINATION

I have examined the exhibits referred to above.

Exhibits (A1) is a German heckler and Koch G3 rifle S/No. 391043 designed to chamber rounds of ammunition in caliber 7.62x51mm. The exhibit rifle is in fair physical condition and fair mechanical condition as it was successfully testified by use of three rounds of ammunition picked from exhibit (B1) and two form our laboratory. The test cartridge cases were recovered and marked as (TC1-TC3).

Exhibits (B1) is one round of ammunition in caliber 7.62x51mm. It is in good working order as it was fired in exhibit (A1) above.

Exhibit (B2-B3) are two fired cartridge cases in caliber 7.62x51mm. comparative microscopic examination of the exhibits cartridge cases revealed that they were fired in the same firearm.

Further comparative microscopic examination of exhibits (B2-B3) in conjunction with (TC1-TC3) revealed sufficient matching ejector markings and sufficient matching breech face markings enabling me to form the opinion that, exhibits (B2-B3) were fired in exhibit (A1) above.

Basing on the above examination I formed the opinion that exhibit (A1) and (B1) are capable of being fired and that they are a firearm and ammunition respectively as defined under the Firearm Act Chapter 114 Laws of Kenya.”

Mr. Bwonchiri for the accused submits that it is not clear which fire-arm and spent cartridges were handed over to the ballistic expert. From the evidence of the witnesses, the chain of custody of both the G3 rifle and the spent cartridges and misfired ammunition has been adequately explained and there is no doubt about the items examined by the ballistic expert.

The theory behind fire-arm identification is that microscopic striations and impressions left on bullets and cartridge cases are unique, reproducible and therefore are like ballistic fingerprints that can be used to identify a gun.

The court of appeal in Peter Mole Obiero & Another –vs- Republic 2011 eKLR, Omollo JJA reviewed the accuracy of fired cartridges giving information leading to identification of the particular gun used. The learned judges stated:-

“ The second ground of appeal related to the connection of the gun with the killer bullet. Mr. Sangoro strongly attacked the ballistics expert’s report which purported to make a positive assertion that the killer bullet was fired from the gun found in possession of the appellants. In his submissions, no ballistics expert or firearms examiner can give positive opinion on cartridges or where they were fired from. In support of that submission, Mr. Sangoro cited the Tanzanian case of RAJAB V REPUBLIC (1970) E.A. 395 which was decided by the predecessor of this court. In that case, a spent cartridge was found at the scene of robbery in October, 1968. One month later a man was killed by a gunshot during a robbery and a spent cartridge was found at the scene. Three months later the appellant was found in possession of a shotgun. At the trial of the appellant on a charge of murder, a police officer gave evidence identifying with absolute accuracy the cartridges having been fired from the shotgun found in the appellant’s possession. No other evidence connected the appellant with the murder. At the hearing of the appeal text books were produced before the court and relevant passages in such books were reproduced in the judgment. It was held in the end that:-

i. The positive identification of the shotgun was wholly unjustified;

ii. Possession or an article directly connected with a crime may lead to the irresistible inference that the possessor participated in the crime;

iii. In the circumstances, and in particular the length of the time which had elapsed between the crime and the possession, no irresistible inference could be drawn.”

In summarizing the text books placed before it, the court stated:-

“Thus, these very experienced officers state that police officers with years of experience in firearms identification and all the facilities of the most modern laboratory equipment and the advantage of discussion with similar experienced officers are not prepared to identify positively the pin impressions of a cartridge fired from a rifle and are not even prepared to identify the make and model of the weapon which fired a shotgun cartridge.”

And on identification of firearms, the text books state:-

“Firing pin impressions are quite often specifically identifiable with the weapon in which firing took place....while most firearm examiners have made a study of the shapes and styles of rim fire (particularly the 22 caliber) firing pin marks with a view to determining the probable weapon used, it seems less consideration has been given to centre fire marks.”

.....

“Similarly the marking produced on the head of a fired cartridge (shell) often can give valuable information as to the type and make of gun used and often can identify the particular gun when located.”

That evidence supports the text book proposition in the Rajabu case that “marking produced on the head of a fired cartridge (shell) often can give valuable information as to the type and make of the gun used, and often can identify the particular gun when located.” The special features of this gun were examined within a short period and it is our finding that Mugo could, in the circumstances of this case, express a highly positive opinion that the killer bullet was fired by that particular gun. It would nevertheless rank with all other expert opinions which a court of law can reject. But such rejection cannot be capricious or whimsical. As stated in the Dhalay case, there must be a “proper and cogent basis’ for its rejection. We have re-examined the firearms examiner’s report and the testimony relating to the firearm and ammunition submitted to him for examination and we can find no reasonable basis for rejecting his opinion. We reject the second ground of appeal also.

Having accepted the evidence that the gun was in possession of the appellants and that it fired the killer bullet, it is incumbent on us to consider whether the only possible reasonable inference to be drawn from those facts was that the appellants or either of them, with common unlawful purpose fired the weapon which killed the deceased. It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the essence of circumstantial evidence that, in order to justify an accused and

incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – TEPER V R [1952]AC 480. With those safeguards in place, circumstantial evidence is as good as any direct evidence which is tendered and accepted to prove a fact. In R V. TAYLOR, WEAVER AND DONOVAN [1928] 21 Cr. App. 20CA, the court stated: -

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

Possession of an article which is proved to be connected directly with a crime after commission of the crime may, in certain circumstances, lead to the irresistible inference that the possessor of the article participated in the crime. The predecessor of this court made and applied that proposition in ANDREA OBONYO & OTHERS V.R [1962] EA 542.

The prosecution line of evidence connecting the accused 1 with the offence is that they have adduced evidence to show that accused 1 was in exclusive possession of the G3 rifle S/No. 391042, that the cartridges found near the body of the deceased was confirmed to have been fired from the said rifle by the ballistic expert and therefore it is accused 1 and no other who shot the deceased.

The accused defence is an alibi defence. He contends that he was at his place of work with APC Mwaura, never left the place, returned the fire-arm with all rounds of ammunition and therefore would not have been the one who shot deceased as he would not be in two places at the same time.

Where it is established that an article used or connected directly to a crime can lead to the inference that the person in possession of the article participated in the crime (See *Andrea Abonyo & Others –vs- Republic) (1962) EA 542*. In this case it has been proved that accused 1 was in possession of the G3 rifle which fired the shots that killed the deceased. The length of time from commission of offence and recovery of the rifle was a few hours and at a distance from Mumias where accused was stationed to Webuye where the killing took place is not a far distance.

The accused's defence that he would not have been at the scene has been displaced by evidence placing him at the scene. Indeed, even PC Mwaura disowned accused's assertion that accused was with Mwaura at the same place the whole night having stated he went to sleep in another room and left accused outside.

From the evidence I find that the prosecution had proved facts and circumstances which lead this court to the irresistible inference that it is accused 1 and no other who murdered the deceased.

As for accused 3 Joel Wetosi Khaoya, I do not find any sufficient evidence to connect him with the killing of the deceased. I therefore find him not guilty of the offence of murder contrary to Section 203 of the Penal Code and acquit him under Section 215 C.P.C. Accused 3 Joel Wetosi Khaoya to be released forthwith unless otherwise lawfully detained.

In the result, I find accused 1 Daniel Mutali Munyange guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

DELIVERED, DATED AND SIGNED AT BUNGOMA THIS 18TH DAY OF NOVEMBER, 2021.

S.N RIECHI

JUDGE