



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 71 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JONATHAN LEMISO OLEKINI.....ACCUSED

JUDGMENT

1. **Jonathan Lemiso Olekini (the accused) is charged** with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 25th June 2013 at Maasai Village in Embakasi Area of Nairobi County murdered Simon Koli (the deceased.)
2. The accused was an employee of Kenya Wildlife Service. He was engaged as a game ranger and was assigned duties as personal driver to Mr. Morris Baraza Otunga(PW10), Assistant Director Kenya Wildlife Service in charge of Nakuru Water Towers Agency. By virtue of his duties the accused was authorized to carry a firearm and had been issued a Jericho pistol serial No. 32308727 by George Kasembere Wanyonyi (PW8) of Kenya Wildlife Society headquarters armoury in Nairobi on 13th January 2011.
3. Back at home, the accused owned a farm in Mai Mahiu in Narok where he lived with his family and kept livestock. He had engaged the deceased as a herdsboy and later entrusted him with the additional responsibility of being a caretaker of his home. Prior to the incident, the deceased was alleged to have broken into his employer's house and stolen various household items before fleeing to Maasai Village in Embakasi where he got employment in the home of Jemasa Ole Karu (PW1).
4. On the fateful evening, the accused sought leave from his superior (PW10) to attend to personal issues. After picking his children from school, he set out for Embakasi Village, Nairobi to look for the deceased whom he had learnt was in the home of Jemasa Ole Karu (PW1). He went to Ole Karu's house at about 11.30p.m. and woke him up and requested to see the deceased. Ole Karu, (PW1) escorted him to his mother's hut where the deceased had been given sleeping space. Ole Karu called out to his mother Moi Poi Ene Karu (PW2) and told her to tell the deceased to get out. She obliged. Immediately the deceased stepped out, there was a gun shot and the deceased fell at the door step. Shortly thereafter the accused signaled two persons who were in his car to pick up the deceased and put him in the car. They drove him to A.I.C. Kijabe Mission Hospital where he later died while undergoing treatment.
5. The accused denied the charge setting the stage for his trial. In the trial the prosecution called 14 witnesses and produced 15 exhibits. At the close of the prosecution case the accused was put on his defence. He elected to give a sworn statement. In his defence, the accused did not deny that he was at the scene on the material date. Neither did he deny that he carried a gun. The gist of his defence was that there was a scuffle between him and the deceased at the door step of Moi Poi Ene Karu (PW2) and that in the course of the struggle the accused pressed against the trigger causing the pistol to discharge accidentally. He said that when he realized that the deceased had accidentally been shot he rushed him to Kijabe Hospital for treatment.

6. This is a murder trial. As such the following three critical elements must be proved by the prosecution:
 - i. The death of the deceased and the cause of such death.
 - ii. That the accused committed the unlawful act which caused the death of the deceased; and
 - iii. That in committing such an unlawful act, the accused had malice aforethought.
7. The death of the deceased was easily proved by the prosecution. Indeed it was not disputed by the defence. The deceased suffered a bullet shot at the door step of Moi poi ene Karu (PW2). He had been woken up by his host (PW2) upon the request of her son Ole Karu (PW1). PW1 gave the court an account of how the accused had arrived at his home that night and asked to see the deceased and how the deceased was shot shortly after stepping out of PW2's hut. Ole Karu told the court that shortly after the shooting, the accused was assisted by two persons to put the deceased in the accused's yellow car and they drove off. He later learnt that the deceased had been admitted to Kijabe Mission Hospital. The accused told the court during the defence case that he indeed rushed the deceased to Kijabe Mission Hospital for treatment.
8. At the hospital, the deceased was attended by Dr. Irungu Juma a consultant surgeon at the hospital. Dr. Juma testified in court as PW5. He told the court that he was the duty surgeon on the night of 25th June 2013 when he was called to attend to a patient. He found the patient being resuscitated by a medical team at the emergency. He proceeded to take the patient to the theatre for emergency surgery. He opened him up and found his stomach, pancreas and abdomen torn off. The injuries appeared to him to have been caused by a high velocity missile as the damage to the internal organs namely large intestine, stomach, duodenum, right kidney and liver were extensive. The patient however passed on before the surgery was completed. Dr. Juma testified that with that he closed up the body and prepared a medical report. He produced the same as an Exhibit [Prosecution Exhibit No. 2]
9. The family of the deceased learnt of the shooting of the deceased from Ole Karu(PW1) who telephoned the deceased's brother Peter Ole Kanyare. Together with other family members Ole Kanyare went to Kijabe Mission Hospital where they found the deceased's body. The body was subsequently transferred to the City Mortuary. Ole Kanyare who testified as PW4 identified the body for purposes of post mortem on 2nd July, 2013.
10. Dr. Johansen Oduor (PW13) carried out the post mortem on the body of the deceased on 2nd July 2013 at the city mortuary. He found a gunshot wound on the left side of the trunk between the 11th & 12th ribs and an exit wound at the back of the auxiliary. He also found a re-entry of the bullet on the right elbow and exit on the outer side. Internally, he observed lacerations in the colon, stomach, duodenum, pancreas, kidney and liver. He noted that the laceration had been repaired in the theatre. Dr. Oduor made the finding that the cause of death was multiple injuries due to gun shot from a low velocity firearm. He produced the post mortem report as an exhibit [Prosecution Exhibit No.15]
11. From the witness accounts of PW1, PW2, the medical evidence presented by PW5 and the post mortem report presented by PW13, it is crystal clear and indeed there is no dispute that the deceased suffered an unlawful death.
12. Who then caused the unlawful death of the deceased? It was established by the prosecution that the accused was indeed at the scene of crime and was in possession of the firearm and ammunition that released the fatal shot on the deceased. As stated earlier, the accused was an employee of Kenya Wildlife Service. He was a ranger assigned driving duties. He was the official driver of the Assistant Director of Kenya Wildlife Service Mr. Baraza who testified as PW10.
13. Mr. Baraza told the court that the accused had worked with him for four to five years and was a diligent officer. Before their current station, they had worked at the Aberdare National Park from where they were transferred to Mau Narok in 2010. That both the accused and himself were by virtue of their duties entitled to carry firearms. He had requisitioned two firearms, one for himself and one for his driver. The said firearms were subsequently issued to them. He showed the court the requisition voucher against which two Jericho pistols bearing serial Nos. 36306690 and 37308727 were issued to himself and his driver (the accused) respectively.
14. The officer in charge of Kenya Wildlife Service Central Armoury, George Kasembere Wanyonyi (PW8) confirmed to the court that he issued the two Jericho pistols serial nos. 36306690 &

- 32308727 to Mr. Baraza (Senior Assistant Warden) and Mr. Lemiso (the accused) respectively with 15 rounds of ammunition each on 13th January, 2011. Mr. Wanyonyi produced the original requisition and issue voucher BLA B (revised) serial No. 304505 originating from Community Wildlife Service (CWS) Cost Centre Narok Station- [Exhibit No. 7] and the quarterly arms returns for October, November, December 2012 [Exhibit No. 7] which showed that the two firearms were as at the date of the incident still in use in Nakuru. PW8 clarified to the court that a lay person would easily confuse a Ceska and a Jericho pistol because they look alike.
15. The Jericho pistol S/No.32308727 was recovered from the accused by No. 70799 PC. James Bondo of Mai Mahiu Police Station. PC Bondo testified as PW6. He told the court that, the accused went to Mai Mahiu on 25th June, 2013 at around 7.30p.m. and introduced himself as a Kenya Wildlife Service Warden working at Nakuru National park as a driver. He reported that his houseboy called Koli had broken into his home at Kemcha Mai Mahiu area and stolen everything and fled to Embakasi Village. He wanted the boy arrested. PC Bondo gave him a note to take to the OCS Embakasi who would effect the arrest.
16. PC Bondo further testified that the accused went back to the Mai Mahiu station the following day and reported that he had arrested the boy and taken him to Namcha to show him the stolen property and that while at Namcha they quarreled and the firearm fired accidentally shooting the deceased. At that point PC Bondo called the OCS Chief Inspector Chelimo and the two recovered a Ceska Pistol from the accused and placed him in the cells. The pistol had serial No.32308727 and had 14 rounds of ammunition.
17. PC Bondo stated in his testimony that the firearm which he recovered from the accused was a Ceska pistol. However, the issuing officer (PW8) later clarified in his testimony that it was not a Ceska but a Jericho pistol. The ballistics expert (PW9) also confirmed that it was a Jericho pistol. Further there was no dispute from the accused that he was armed with a Jericho pistol making the discrepancy in description a non-issue in this trial.
18. No. 9607935 AP Fredrick Leliman of AP Post Mlolongo testified as PW3. He had been called to the scene by Ole Karu (PW1) immediately after the shooting. He was known to Ole Karu personally. He rushed there and on arrival Ole Karu explained to him what had happened. On looking around he saw blood on the ground at the entrance to PW2's hut. He also saw a rungu and a spent cartridge which he picked up. He called the D.C.I.O. who sent 3 officers to the scene. AP Leliman handed over the spent cartridge to one of the police officers named Oganda. The spent cartridge (Prosecution Exhibit No.12) and the recovered firearm and rounds of ammunition were later taken by PC Geoffrey Mwangi of Embakasi Police Station to the CID for forensic examination.
19. A ballistic expert No. 231710 Chief Inspector Alex Chirchir received a pistol (Exhibit A), 14 rounds of ammunition (Exhibit B1-B14) one fired cartridge case (Exhibit C); and 1 pistol magazine (Exh. D). The accompanying exhibit memo requested for confirmation whether exhibit A can fire; whether B1-B14 can be fired from Exhibit A; whether Exhibit C was fired from Exhibit A; and whether Exhibit D can be used by Exhibit A. After due examination Chief Inspector Chirchir found:-
- i. That Exhibit A was a 9mm. Jericho pistol manufactured in Israel and bore serial No. 32308727 and was in good general and mechanical condition.
 - ii. That Exhibit B1 – B14 can be fired from Exhibit A. This was after testing with 3 rounds of ammunition selected randomly from Exhibit B1 – B14.
 - iii. That Exhibit C was fired from Exhibit A Jericho pistol serial No. 32308727.
 - iv. That Exhibit D was a pistol magazine with carrying capacity of 15 rounds when fully loaded and was suitable for use in Exhibit A.
20. From the ballistic expert's findings, it is clear to the court that the spent cartridge recovered from the scene of crime by AP Fredrick Leliman (PW3) and which he immediately handed over to Mr. Oganda of Embakasi Police Station was fired from Jericho pistol serial No. 32308727 issued to the accused by George Kasembere Wanyonyi (PW8). The said pistol was all the while in the custody of the accused and was recovered from him by PC James Obondo of Mai Mahiu Police Station on 26th June, 2013.
21. The court found sufficient evidence to put the accused on his defence. He elected to give sworn

testimony and did not call witnesses. He gave the court an account of the events of the fateful night which largely agrees with the testimony of the prosecution witnesses save for how the shooting occurred. The accused admitted that he knew the deceased. He had known him since the deceased's childhood. He had taken him into his home as a herdsboy at the age of 12 and stayed on until just two weeks prior to the incident. By then he was 25. The accused also admitted that he knew Ole Karu (PW1) having previously lived together in Masai village in Embakasi. He agreed with PW1's account that he visited PW1 that night and asked to see the deceased and that PW1 took him to PW2's hut where the deceased was sleeping. The accused further admitted that after the shooting, he took the deceased away. He added the detail that he asked his driver Jacob and his brother James, who had accompanied him to assist the deceased into his motor vehicle and rushed him to Kijabe Mission Hospital for treatment.

22. The accused's account that he took the deceased to Kijabe Mission Hospital accords with testimony of PW7 who carried out a DNA analysis of the deceased's blood sample and a blood swab collected from the accused's motor vehicle Registration No. KBA 709W. His finding was that the swab matched the DNA of the deceased and that the source of the blood in the motor vehicle was the deceased.

23. The accused in his defence while admitting that he was armed with a pistol on the material night denied that he shot the deceased. He told the court that Ole Karu asked his mother (PW2) to tell the deceased that he was wanted outside. He narrated the incident in his own words thus:

"He came out with his rungu. As soon as he saw me he lifted his rungu to hit me. I evaded the rungu and Mzee Karu got hold of him. He held me by the waist and felt my pistol. He grabbed it and pushed his hand but because he had turned, he pushed the trigger and it fired. The bullet hit him on the ribs...."

The accused further explained that he informed Mzee Karu that he would rush the deceased to Kijabe because doctors were on strike at Kenyatta National Hospital and that Mzee Karu said he would follow in his car.

24. On cross-examination, the accused stated thus:-

"Yes I had cocked my weapon earlier in the day when I was on duty. I did not uncock it but I had put it on safe. Yes there was a scuffle between me and Simon. When Simon's rungu fell Ole Karu (PW1) picked it. When we struggled the deceased took the pistol. He held it near the trigger. It was in that struggle that the deceased pressed the trigger. He shot himself." When referred to his statement to the police, the accused denied that he had stated that he was the one who shot the deceased. He responded - "It was not like that. I am not the one who shot him. When I pushed him he held onto the trigger. I tried to grab the gun from him and he pressed the trigger." In his statement to the police, he had stated: "We woke him up and when he saw me and as he was armed with a club he confronted me as he was aware what he had done at my home and I was looking for him. He knew I was usually armed and he started wrestling me trying to disarm me and in the course of the struggle, I tried to secure my pistol and I had cocked the firearm I then centrally released the trigger and he was accidentally shot on the left hand chest which entered on the right side.

I requested my companions to rush the victim to hospital for treatment as I did not intend to shoot him but had been shot through misadventure" (emphasis added).

25. The accused's account advances two theories. First that there was a scuffle between him and the deceased whereby the deceased tried to wrest the gun from him and in the process the trigger went off with the bullet hitting the deceased. Secondly, that the deceased pulled the trigger accidentally and the gun discharged with the bullet hitting the deceased. The third scenario which appears from the accused's statement to the police but which the accused chose to abandon during his defence is that he (the accused) accidentally pulled the trigger.

26. Following the above, the question the court must ask itself is whether the accused's account casts doubt on the prosecution's evidence that it was the accused who shot the deceased; and, whether it

- is possible that the shooting was not only accidental but that it was the deceased who pulled the trigger. In advancing his defence the accused testified that immediately the deceased saw him, he (the deceased) raised his rungu to hit him and would indeed have hit him had he not bent to evade the rungu. That immediately they engaged in a scuffle and when the deceased held him by the waist he felt the pistol and decided to reach for it. That it was in the process of the deceased trying to grab the pistol and the accused trying to secure the weapon that the fatal bullet was discharged hitting the deceased on the rib.
27. The accused's evidence contradicts the eye witness account of PW1; the evidence of PW3 who picked the spent cartridge; and the medical evidence as presented by PW13 and PW14 on the injuries sustained by the accused. PW1's testimony was that the accused whipped out his gun from under his jacket and shot at the deceased without any conversation or scuffle. PW1 graphically demonstrated to the court how the accused on seeing the deceased step out of PW2's hut reached into his jacket, pulled out the gun and shot at the deceased. The deceased fell near the door. According to PW1, there was no struggle. I believe the evidence of PW1 which I found candid and unshaken in cross-examination. I also observed his demeanor and I was convinced that he was a truthful witness. He had no reason to lie. He knew both the deceased and the accused well and no evidence of any ill motive on his part was demonstrated to the court. I also believe the evidence of PW3 who testified to having collected the spent cartridge near the door to PW2's house.
28. PW13 who conducted the post-mortem on the body of the deceased testified that the fatal bullet entered the deceased's body from the left side of the trunk between the 11th and 12th ribs exited through the right trunk and re-entered the right elbow area medial aspect and exited through the right elbow area lateral aspect (outer side). He explained that the bullet wound was 2cm in diameter and there was blackening around the wound. He drew the conclusion that the shot was fired at close range because in his expert opinion, the blackening demonstrates the presence of gun powder. I find this evidence to be consistent with PW1's account that they were standing just outside PW2's house when the deceased emerged from the door and was shot right there.
29. The pathologist's evidence that the bullet entered the deceased's body from the left side of the trunk, exited through the right and re-entered the right elbow makes it difficult for the court to believe the accused's account that the deceased pulled the trigger or that the shot was not targeted at the deceased. If there was a struggle for the gun between the accused and the deceased how did the deceased, using either his left or right hand, shoot himself from the left? Even if one were to stretch their imagination that both the accused and the deceased were holding the gun at the same time in the scuffle, who positioned the gun to point at the deceased? It cannot be the accused himself.
30. In addition, there is the evidence of extensive internal injuries suffered by the deceased and which Dr. Juma (PW5) tried in vain to repair: the stomach, the pancreas, the large intestine, the right kidney and liver were all ruptured which all point to a gunshot aimed at its object.
31. It is my finding from the analysis of the evidence that the accused person shot the deceased. I find the suggestion by the accused that the deceased pulled the trigger incredible. I am also not convinced that the firearm accidentally discharged during the scuffle. Indeed there is no evidence that there was a scuffle between the accused and the deceased. I am of the view that his testimony that there was a struggle leading to an accidental pressure on the trigger was made up to suit the defense. I dismiss it as being without merit. It does not cast doubt on the prosecution evidence which I find overwhelming.
32. Having found that the accused fired the fatal shot, did he commit the unlawful act with malice aforethought? Under Section 206 of the Penal Code, 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 of or 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.*

33. In ***Nzuki v Republic* [1993] KLR 171**, the Court of Appeal stated that malice aforethought can be inferred from the acts of an accused person. The Court elaborated as follows:

“...”Malice aforethought” is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, [1950] 2 KB 237.”

Further, the Court of Appeal has held that in arriving at a conclusion as to whether malice aforethought has been established, *the court must consider the weapon used, the manner in which it is used and the part of the body injured.* (See ***R vs. Tubere s/o Ochen* (1945) EACA 63**).

34. In this case, the prosecution led evidence to establish a chain of actions on the part of the accused to demonstrate malicious intent. When the accused learnt that some of his property was missing, he suspected Simon, his herdsman of many years whom he had come to entrust the responsibility of his home. He made inquiries and established that the said Simon had secured employment in the home of Ole Karu at Masai Village in Embakasi Nairobi. He sought permission from his boss to be away that day to attend to his personal matters. His boss Mr. Baraza (PW10) granted him permission. After dropping his boss at about 3pm, he picked his children from school, dropped them at home; and, in the company of his brother and driver set off on a trip to Masai village in Embakasi, Nairobi to find the deceased. Thy rode in his personal car Registration KBA 709W. All the while he was armed with his Jericho pistol which in one account he says he had uncocked while on duty and in another he says he uncocked it due to insecurity on the road to Nairobi. Nonetheless he was conscious that the firearm was uncocked.

35. Further, according to Ole Karu's (PW1) testimony which I found credible, the accused did not converse with the deceased. He pulled out his gun and immediately shot him. This demonstrates that he all along was prepared to harm him and he executed his plan soon after finding the deceased.

36. It was submitted on behalf of the accused that his action of quickly rushing the deceased to hospital demonstrated an attempt to save the deceased's life and therefore displaces the notion of malicious intent. It was explained by the accused in his testimony, and in submissions by his counsel that he decided to rush the deceased to Kijabe Mission Hospital and not Kenyatta National Hospital because the doctors were on strike in Kenyatta and because the accused had contacts in Kijabe who would quickly assist the deceased. I do not find the explanation credible considering as it were that the deceased was already bleeding and driving him about 100km away would, in my view, amount to denying him emergency treatment in nearby medical facilities thereby jeopardizing his survival chances. While it may be true that doctors may have been on strike at Kenyatta National Hospital, no evidence was led to show that no other medical facility could administer first-aid on the deceased before being subjected to a long journey to a hospital in Kijabe.

37. In the premises, and for the foregoing reasons, I find that the prosecution has proved the offence of murder beyond all reasonable doubt. This is a case which demonstrates misuse of a firearm and ammunition by a uniformed officer on a defenseless unarmed civilian. I find the accused guilty of the offence of murder contrary to section 203 as read with section 204 and convict him accordingly.

Judgment delivered, dated and signed at Nairobi this 6th day of May, 2015

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: Accused/Applicant

.....: For State

.....: For Accused/Applicant