



**Muthinja v Republic (Criminal Appeal 67 of 2016)
[2022] KECA 751 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 751 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 67 OF 2016
HM OKWENGU, S OLE KANTAI & A MBOGHOLI-MSAGHA, JJA
JUNE 24, 2022**

BETWEEN

STEPHEN MUTEMBEI MUTHINJA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Meru
(Wendoh, J.) dated 11th February, 2016 in HC. CR.C. No. 20 of 2008)*

JUDGMENT

1. This is a first appeal from the Judgment of the High Court of Kenya at Meru (Wendoh, J.) where the appellant, Stephen Mutembei Muthinja, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code particulars being that on 14th January, 2008 at Lanyiru sub location of the then Tigania District he murdered Mary Karambu Laalu. We are required in law to re-evaluate the evidence and reach our own conclusions of fact but always remembering that we do not have the advantage the trial Judge had of seeing and hearing witnesses and must give due allowance for that See the oft-cited case of *Okeno v Republic* [1972] EA 32 on the mandate of the court on a first appeal.
2. The prosecution called a total of 7 witnesses who testified to the following effect: George Laalu Limunya (Limunya – PW1) was on 13th January, 2008 at a market centre when he was attracted by the sound of a gunshot. He and others moved to the scene and he found the appellant and one Joseph Munyi there. There was a spent cartridge near where Munyi was standing. Limunya heard the appellant threaten Munyi that he was actually going to shoot him and he saw the appellant holding a gun. The appellant was claiming that his house had been broken into and a radio stolen and also that he would not return the 2 guns he had until his wages were paid and an identification card returned to him. All those who had gathered dispersed but the next morning (14th January, 2008) at 6.00 a.m. Limunya was



woken by a knock on the door and when he answered he found the appellant standing at the door and the appellant sent him to go to Joseph Munyi and require him to return the appellant's stolen radio. They engaged in a conversation and presently Munyi arrived. He was armed with a gun. The appellant challenged him to a fight. The appellant who wore a big coat dropped it and Limunya saw that the appellant had 2 guns. He could see both the appellant and Munyi clearly as they were standing not far from each other. The appellant fired first but missed – the shot hit Limunya's nearby timber house (6 metres away). A boy emerged from that house running and he claimed that his mother had been shot. Limunya ran to that house and found that the deceased had been shot and fallen from her bed. He noted a hole on the side of the head on the left side. He carried her to the sitting room and called for help but in the meantime the appellant and Munyi had left the scene. Police arrived and took the body of the deceased to a mortuary at Meru Hospital where it was later examined. In a post-mortem report prepared by Dr. Macharia and produced in evidence by Dr. Nicholas Koome Guantai (PW7), it was found that there was a penetrating injury on the left temporal region of the head (3 x 2cm), and a compound fracture of the left temporal bone base of skull fracture (several) and a bullet was recovered in the temporal region. Cause of death was indicated as cardio respiratory arrest secondary to penetrating injury caused by a single bullet.

3. David Kaberia (Kaberia – PW2) was at home on 14th January, 2008 when he heard a gunshot at about 6.00 a.m. followed by screams from Limunya's home. He rushed there and found that people had gathered at the home. He found the deceased who had been shot had died.
4. Hellen Kathiari (Kathiari – PW3), also a neighbor and sister of Limunya, also heard the sound of gunshot and rushed to the scene to find her sister in law shot. She went to the Chief (Assistant Chief Japhet Kubai M'mwenda – PW4) and reported the matter to him. They went back to the home and police took the body to the mortuary.
5. According to the Chief the previous day (13th January, 2008) two old men had approached him and reported to him that the appellant, who was working for them as a herds boy, had stolen their guns. As the discussion was going on the appellant arrived and hurled insults at the 2 men telling them that he would not return their guns until they paid him 3 months' wages and returned his identification card. After the quarrel the appellant left and the Chief saw that the appellant had a gun. The next day Kathiari reported to him that the deceased had been shot and when he visited the scene he found the body of the deceased. It is he who called Tigania Police Station and officers collected the body of the deceased.
6. Florence Karimi (PW5), a firearm examiner produced a report prepared by her colleague Johnson Mwangela who had examined a fired cartridge and a fired bullet. The fired cartridge case was of caliber 7.62 x 39mm which was a component part of a round of ammunition of caliber 2.62 x 39mm. It showed that it had been fired from a firearm. The bullet was a fired bullet in caliber 7.62mm and was part of a fired cartridge 7.62 x 38mm. The exhibits had markings consistent with those produced by an AK 47 firearm.
7. The next witness, PC Kipkemboi Langat was the investigations officer who, with his colleagues, upon receiving information, and visited the scene where they found the body of the deceased in a pool of blood. On searching the scene, they recovered a spent cartridge and he noted a bullet hole in the timber. They took the body to the mortuary and he later attended post mortem at Meru General Hospital. A week later, he rearrested the appellant who had been arrested by officers from Isiolo Police Station. The subject firearm was not recovered.
6. The trial court found that the prosecution had established a prima facie case and when the appellant was put on his defence, he stated in a sworn statement that on 13th January, 2008 he arrived home at



- 9.00 p.m. only to find that the home had been broken into and a radio stolen. On informing one David Kaberia of the stolen item the latter told him that he had seen Joseph Munyi with a radio. The next morning he visited his uncle (PW1 Limunya) but Munyi arrived armed with a gun. Munyi fired at him and he ran away to his farm. He was arrested on 28th January, 2008 on allegations that he had killed – he denied the offence claiming that he did not even know how to use a gun.
7. As we have seen the appellant was convicted and sentenced by the trial court.
 8. In homemade “Grounds of Appeal” the appellant states that he had pleaded not guilty; that the trial Judge erred by relying on contradictory insufficient evidence; that exhibits produced had not been analyzed; that the Judge failed to consider that the appellant had a dispute with PW1 and the Chief and that the Judge erred in rejecting the defence.
 9. When the appeal came up for hearing before us on a virtual platform on 14th March, 2022, the appellant was present from Embu Prison and was represented by learned counsel Miss Nelima while learned State Counsel Miss Kitoto appeared for the office of Director of Public Prosecutions. Learned counsel for the appellant relied on the homegrown grounds of appeal and submitted that the evidence by the prosecution was contradictory and inconsistent. According to counsel both the appellant and Munyi fired shots and it was not clear which shot killed the deceased. Further, that evidence by the ballistic expert was not of any assistance as it did not confirm which gun fired the fatal shot.
 10. In opposing the appeal Miss Kitoto relied on written submissions and in a highlight of those submissions it was counsel’s view that the prosecution evidence was straight forward and there were no contradictions as PW1 stated that he witnessed the appellant fire the fatal shot after a verbal exchange with Munyi and there was no exchange of fire. Further, that the appellant was well known to PW1 who was his relative and that the ballistic expert confirmed that the exhibit examined was a fired bullet.
 11. We have considered the whole record, submissions and the law.
 12. The issues raised by the appellant relate to the question whether the evidence was contradictory; whether ballistic evidence was good evidence; whether there was a dispute between the appellant on one hand and PW1 and the Chief on the other and whether the appellant’s defence was considered.
 13. Limunya (PW1) was present the day before the fatal shooting when he witnessed the appellant make threats demanding to be paid his wages and stating that he would not return stolen guns until those wages were paid. The appellant fired a gun stating that it was a warning shot, the next shot would kill someone. The next morning the appellant, who was Limunya’s relative, woke him up at 6.00 a.m. and as they were talking, who alleged the appellant had broken into his house and stolen a radio arrived and was ready for a fight. He was armed with a gun; Limunya saw that the appellant had two guns one of which he fired but the bullet missed Munyi, who escaped to the nearby timber house where the bullet hit and killed the deceased. Witnesses including Kaberia (PW2) Kathiari (PW3) and the Chief arrived at the scene soon thereafter and found the deceased fatally shot lying in a pool of blood.
 14. The trial Judge analyzed the evidence and found that there was overwhelming evidence that the appellant had the day before the fatal shooting threatened Munyi (his uncle) by firing a gun close to him. This was witnessed by Limunya and the Chief. The Judge found that Limunya could clearly see the appellant and he saw him fire at Munyi but the bullet missed. There was only one cartridge recovered at the scene and like the trial Judge we find that it was the appellant who fired the fatal shot. There was no inconsistency or contradiction in the prosecution evidence as Limunya testified on what he saw at the scene where the two people – the appellant and Munyi were well known to him and were his close relatives.



15. On the ballistic evidence the witness testified that the cartridge recovered at the scene and bullet found in the body of the deceased were consistent with those produced by AK 47 or Simonov rifle. Having found that it was only one bullet that was fired by the appellant there is nothing much that turns on the complaint regarding ballistic evidence.
16. On whether there was a dispute between the appellant, Munyi and the Chief the issue is irrelevant to the main question which is whether it is the appellant who killed the deceased.
17. We have looked at the Judgment of the trial Judge and we are satisfied that the Judge properly considered the defence offered by the appellant and dismissed it in the face of the prosecution evidence.
18. The appellant fired a shot from a gun which was meant to kill his uncle Munyi but it ended up killing the deceased.
19. To sustain a conviction on the charge of murder the prosecution was required to prove beyond reasonable doubt the fact and cause of death; that the said death was caused by unlawful act or omission or commission on the part of the appellant and that the appellant had malice aforethought. Malice aforethought is defined in Section 206 of the [Penal Code](#) to be:

“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.”
20. The facts of the case reveal a situation where there was transferred malice (this is contemplated by Section 206 of the [Penal Code](#)).
 21. The facts in the case of [David Mwangi Monica v Republic](#) [2020] eKLR were that the appellant had attacked his estranged wife by stabbing her several times and as she fled, the deceased tried to separate them but the appellant stabbed him to death. The High Court found transferred malice and convicted the appellant, a conviction which was upheld on appeal.
 22. In the case of [Zablon Shikunzi & 5 Others v Republic](#) [2013] eKLR the appellants had set fire to PW2’s house because they were unhappy that he had been appointed as area Chief. A child died in the ensuing fire and the appellants were convicted by the High Court for murder, it being found that there was transferred malice. That conviction was upheld on appeal, this Court stating:

“The allegation that there was no common intention cannot have any basis. The appellants surrounded the kitchen where PW2 and his family were resting after dinner and carried out an attack that consisted of causing grievous harm on PW2, blocking the door to prevent escape of the occupants and setting the room on fire using an explosive substance that led



to the burning to death of the deceased. Whether this substance was petrol or kerosene cannot be of any assistance to the appellants. The role played by each appellant in the whole unfortunate saga was explained by PW2 and we have repeated it in this judgement. The appellants intended to cause and did cause grievous harm leading to the deadly consequences in this case.

23. The appellants had planned their acts for a long time demonstrated by their speeches proved through the evidence of PW6, PW7 and PW8. The appellants held the view that PW2 was unfit for the job of Chief of their area and they demonstrated their dislike through representations to the district administration. When PW2 was not removed as Chief they threatened him. The events of the fateful night were a culmination of what the appellants had planned all along.”

24. The appellant fired the shot intended to kill his uncle Munyi but it killed the deceased instead. He was properly convicted for murder. There is no merit in this appeal which we dismiss in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

