IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), NAMBUYE & MUSINGA, JJ.A.)

CRIMINAL APPEAL NO. 189 OF 2016

BETWEEN

JULIUS MUTEI MUTHAMA...APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal from the judgment and order of the High Court of Kenya at Nairobi (Kimaru, J.) dated 19th June, 2014

in

H.C. Cr. A. No. 50 of 2002)

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JUDGMENT OF THE COURT

1. This is a first appeal from the decision of **Kimaru, J.** where the appellant, **Julius Mutei Muthama alias Bonny** was convicted of the murder of **Sophia Wakio Maina (the deceased)** and sentenced to death. The particulars of the offence were that on 5th November, 2000 at Korogocho Village in Nairobi, the appellant with malice aforethought caused the death of the deceased.

2. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to this Court.

3. This being the first appellate court in a such a trial, we are obliged to re-evaluate the evidence that was tendered before the trial court, weigh any conflicting evidence and reach our own conclusion, but bearing in mind that we neither saw nor heard the witnesses who testified before the trial court. **See Kiilu & Another v Republic [2005] KLR 174.**

4. The brief facts of the matter before the trial court were that **Susan Wanjiku, PW4,** was living with the deceased, her sister, at Korogocho. The deceased was a dealer in an illegal brew known as **"chang'aa".** On 5th November, 2000 at about 9 p.m. PW4 and the deceased were in the deceased's house when the appellant and his friend came to the house and ordered some chang'aa. The deceased did not have any stock of the illicit drink at the material time, so she offered to fetch some from a neighbour. The appellant removed a sum of Kshs.10,500/= from his wallet and gave the deceased a note of Kshs.1,000/= to go and buy him the illicit drink. The deceased protested because it was not easy to get change at that time. She therefore asked the appellant to give her a Kshs.500/= note. The appellant refused and the deceased took the Kshs.1,000/= and fetched the chang'aa for the appellant.

5. After drinking the chang'aa, the appellant and his friend left. The deceased and PW4 locked the door to the house. After about 5 minutes the appellant returned and angrily kicked the door open and ordered the deceased to give him back his Kshs.10,000/= which he had allegedly left in the house. The appellant started searching for the money in the deceased's house. In the course of the search and due to the commotion therein, a tin lamp that had been on and was the sole source of light went off. The appellant was armed with a pistol and a struggle ensued between him and the deceased. PW4 called her mother, whose house was about 10 metres away and asked her to bring a matchbox, which she did. In the ensuing struggle, the deceased was shot.

6. Meanwhile, the deceased's father, **Josphat Maina Kariuki, PW3** whose house was near that of the deceased, heard the sound of gunshots emanating from the deceased's house. He rushed there to find out what was happening. Reaching there, PW4 was screaming and struggling with the appellant, who was holding a gun in his hands. PW3 held the appellant and PW4 managed to wrest the pistol from the appellant's hands. The appellant managed to escape. PW4 told his father that the appellant had killed the deceased. Both PW3 and PW4 testified that they knew the appellant as he was their neighbour. PW4 added that the appellant used to partake chang'aa in the deceased's

house.

7. The incident was reported to a nearby Administration Police Camp where the pistol was also surrendered. According to **Police Superintendent Lawrence Ndhiwa, PW9,** the pistol as well as four rounds of ammunition that were in and two spent cartridges that were recovered from the deceased's house were examined by a ballistic expert. It was ascertained that the pistol was a firearm in terms of **Section 4(2) (a)** of the **Firearms Act** and the four ammunitions were also found to be live. It was further established that the two spent cartridges had been fired from the same pistol. Subsequently, the pistol together with other illegal arms were lawfully destroyed.

8. **Corporal Josphat Mutua, PW1**, testified as to how the appellant was arrested after his disappearance. The witness said that on 6th June, 2001 while 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 the public told PW1 that the three men were suspects in a spate of robberies that had been committed in the area.

9. PW1 and his colleagues arrested the three men and took them to Pangani Police Station for interrogation. When PW3 learned about the appellant's arrest he went there and told the police that the appellant was indeed the very person who had killed the deceased.

10. A postmortem on the deceased's body was conducted by **Dr. Kirasi Olumbe** on 17th November, 2000. Shortly thereafter Dr. Olumbe migrated to Australia and was therefore not able to testify during the trial. Consequently, **Dr. Perminus Okemwa, PW8,** a pathologist who was familiar with the handwriting and signature of Dr. Olumbe produced the postmortem report. The report showed that the deceased had a gunshot wound on the left breast in the upper lateral region which had exited near the left nipple of the same breast. The deceased also had a bullet wound on the left chest wall below the lower ribs. Dr. Olumbe formed the opinion that the cause of the death was gunshot wounds to the abdomen.

11. After the close of the prosecution's case the learned judge put the appellant on his defence. However, the appellant opted not to adduce any evidence in his defence.

12. In his judgment, the learned judge held that the prosecution had established that it was the appellant who, with malice aforethought, killed the deceased. The trial court proceeded to convict the appellant of murder and sentenced him to death as earlier stated.

13. In his memorandum of appeal before this Court the appellant, through **Ratemo Oira and Company Advocates**, contended that the learned judge erred in law and fact: by convicting him when there was no proper identification parade; for failing to consider the circumstances under which the offence was committed; for relying on the evidence of prosecution witnesses that was not free from error; and for upholding the prosecution's evidence when the murder weapon had not been produced in court.

14. In his brief submissions, Mr. Oira, learned counsel for the appellant, stated that there was no sufficient light at the scene as would have enabled PW3 and PW4 recognize the appellant. Counsel further submitted that the memories of PW3 and PW4 had faded at the time they testified before Kimaru, J. where the appellant was retried. The appellant had earlier been tried before Rawal, J. (as she then was), who convicted and sentenced him to death. The appellant appealed against the conviction and sentence. This Court allowed the appeal on the ground that the trial was vitiated by the absence of one of the assessors and ordered a retrial.

15. Mr. Oira further submitted that the pistol that was allegedly used to shoot the deceased was not dusted for fingerprints with a view to establishing whether the appellant had handled it. Counsel faulted the learned judge for failing to find that it was necessary to produce before the trial court the alleged murder weapon.

16. Opposing the appeal, **Mr. Gitonga Muriuki, Senior Principal Prosecution Counsel**, submitted that the appellant was well known to both PW3 and PW4 prior to the date of commission of the offence. This was therefore a case of recognition as opposed to identification of an assailant. He added that there was sufficient light in the room at the time when the appellant and his friend forcefully entered the deceased's house.

17. Regarding the murder weapon, counsel submitted that both PW3 and PW4 testified that they saw the appellant holding a pistol, which, after they disarmed him of, they handed it over to the police. The police collected two spent cartridges from the deceased's room and it was established that they had been fired from the pistol in issue.

18. Mr. Gitonga further submitted that the non production of the firearm was sufficiently explained because a destruction certificate was produced before the trial court. He urged the court to find that the appellant had been properly convicted and sentenced to death.

19. We have carefully considered the record of appeal and submissions by counsel. There is no doubt that the appellant's conviction was largely based on direct evidence adduced by PW3 and PW4 regarding their recognition of the appellant on the material night. The two witnesses testified that the appellant was their neighbour. PW4 told the trial court that the appellant was a regular customer of the deceased.

20. On the material night the appellant and his friend went to the deceased's house and bought chang'aa in the presence of PW4. When they returned after about five minutes, PW4 saw the appellant yet again. All along there was a tin lamp that was on. PW4 said that the tin lamp illuminated sufficient light to enable her see the appellant.

21. When PW3 and PW4 went to report the incident to the police after the disappearance of the appellant, they told the police that they knew the assailant and they identified him by his name. After the arrest of the appellant PW3 saw him at the police station and ascertained that he was indeed the person who had shot the deceased. In the circumstances, it was unnecessary to conduct an identification parade since both PW3 and PW4 knew the appellant. (See **AJODE v REPUBLIC [2004] 2 KLR 81 and GITHINJI v REPUBLIC [1970] EA, 231.**

22. As was held by this Court in **ANJONONI & OTHERS v REPUBLIC** **[1980] KLR 59,** this was a case of recognition, not identification of an assailant, that **"recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."** We find that the appellant was properly recognized by both PW3 and PW4.

23. As regards the murder weapon, we have already stated that both PW3 and PW4 testified that they saw the appellant holding a pistol. There is no doubt that it is the same pistol that was used to shoot the deceased. The police established that the two spent cartridges that were recovered from the deceased's house were fired from the pistol. The pistol had live ammunition when it was forcefully taken from the appellant and handed over to the police. The prosecution satisfactorily explained the circumstances that occasioned the non- production of the pistol before the trial court. A certificate of destruction of the pistol together with many other illegal arms was produced. We agree with Mr. Gitonga that nothing much turned on the issue of non production and that in itself cannot vitiate the appellant's conviction. In **EKAI v REPUBLIC** **[1981] KLR, 569**, this Court held that failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the postmortem report had established the cause of death. See also **KARANI v REPUBLIC** **[2010] 1 KLR 73**. We adopt the same holding here and reject that ground of appeal.

24. Lastly, having satisfied ourselves that the appellant was properly convicted of murder, we must consider the issue of sentence, even though we were not addressed on the same by both Mr. Oira and Mr. Gitonga.

25. We are well aware that the judgment by the trial court was delivered long before the Supreme Court pronounced itself on the constitutionality of death sentence in **Francis Karioko Muruatetu & Anor v Republic** **[2017] eKLR.** In that matter, the Supreme Court held, *inter alia*:

> ***"The mandatory nature of the death sentence as provided for under section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence contemplated under Article 26(3) of the Constitution."***

26. The Supreme Court further held that in a murder trial the mitigating submissions of an accused person must be taken into consideration before sentence is pronounced. The court, having found that the appellant had not been given an opportunity by the trial court to make mitigating submissions, remitted the matter to the High Court for re-hearing on sentence only.

27. In the record of appeal before us it is not clear whether the appellant made any mitigation submissions before the trial court because the record does not contain any. Indeed, the page that carries the sentence that was pronounced by the trial court is also missing. We are therefore unable to either affirm the sentence or vary it.

28. In the circumstances, of this appeal, having found that the appellant's conviction was proper in law, the order that commends itself to us regarding sentence is to remit the matter to the High Court for consideration of any mitigating submissions that the appellant may wish to make. Thereafter the High Court shall pass an appropriate sentence.

29. In conclusion, we dismiss this appeal against conviction but allow it as against sentence in the terms as stated hereinabove.

Dated and Delivered at Nairobi this 18th day of May, 2018.

W. OUKO (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR