IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), MUSINGA & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 51 OF 2016

BETWEEN

JONATHAN LEMISO OLE KINI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (R. Korir, J.) dated 13th *May, 2015* **in H.C. CR.C. No. 71 of 2013)**

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JUDGMENT OF THE COURT

INTRODUCTION

1. This is a first appeal from the decision of **R. Korir, J.** convicting the appellant for murder of **Simon Koli (deceased)** and sentencing him to death. The offence was said to have been committed on 25th June, 2013 at Maasai Village in Embakasi area, Nairobi County.

In his opening remarks before this Court, **Mr. Mwesigwa**, the appellant's learned counsel, stated that from the record it was clear that the death of the deceased was caused by the appellant. However, it was not proved that the appellant had *mens rea*, he contended.

2. It is a basic principle of criminal law that for one to be convicted of the offence of murder both *mens rea* and *actus reus* must be proved. See **JOSEPH KIMANI NJAU v REPUBLIC [2014] eKLR**. We must therefore examine the evidence that was tendered before the trial judge to see whether this principle was satisfied.

SUMMARY OF THE PROSECUTION EVIDENCE

3. The appellant, a game ranger, was an employee of the Kenya Wildlife Service and was the official driver to one **Mr. Morris Baraza Otunga, PW 10**, an **Assistant Director of the Kenya Wildlife Service**. By virtue of his duties, the appellant was authorized to carry a firearm and had been issued with a pistol **Serial No. 32308727**.

4. The appellant had engaged the deceased as a herdsboy who also doubled up as a caretaker of the appellant's rural home at Narok. Prior to the incident that gave rise to the appellant's arrest and arraignment in court for the aforesaid charge, the deceased was alleged to have broken into the appellant's house at Narok before fleeing to Maasai Village – Embakasi, where he was employed by **Jemasa ole Karu, PW1**.

5. On the evening of 25th June, 2013 the appellant sought and was granted leave to attend to some personal issues. He set off from his place of work and headed to Embakasi Village to look for the deceased, having learnt that he was at the home of PW1. He arrived at PW1's home at about 11.30 p.m., woke him up and requested to see the deceased.

6. PW1 escorted the appellant to his mother's hut where the deceased was sleeping. PW1 called out his mother, **Moipoi Ene Karu (PW2)** and asked her to wake up the deceased.

7. Immediately the deceased stepped out, the appellant, without uttering any word, shot the deceased; that is what PW1 told the trial court. PW2, having woken up the deceased, remained in her bed. She testified that just as the deceased was walking out she heard a gunshot and quickly got up. She ran out and found PW1 and the appellant outside; the deceased was lying down with his legs protruding outside the

doorway but part of his upper body was on the doorway.

8. Shortly thereafter the appellant called two people who were in his car to pick up deceased, who was still alive, and put him in his car. The appellant took the deceased to Kijabe Mission Hospital. They got there at around 2 a.m. **Doctor Irungu Juma, PW5**, the surgeon on duty, told the trial court that when he got to the emergency department he found the deceased, who was drenched in blood, being resuscitated. As PW5 was struggling to stop the bleeding the deceased passed away. PW5 testified that the deceased's stomach, pancreas and abdomen had been blown off. The injuries appeared to him to have been caused by a high velocity missile.

9. Doctor J. Oduor, PW 13, who conducted a postmortem on the deceased's body, testified that there was a gunshot wound on the left side trunk between the 11th and 12th ribs and an exit wound at the back of the auxilliar. He also found a re-entry of the bullet on the right elbow and the exit point was on the outer side. The witness established that the cause of death was multiple injuries due to a gunshot from a low velocity firearm.

THE APPELLANT'S DEFENCE

10. In his defence, the appellant said that the deceased, who had been working for him, had left his employment two weeks before the fateful night. On 25th June, 2013 the appellant's wife telephoned him to report that some things had been stolen from their house in Suswa. Two bulls had also been stolen. They suspected that it was the deceased who had stolen his property. The appellant made enquiries as to the whereabouts of the deceased and established that he was residing at Maasai Village, Embakasi, in the home of PW1.

11. The appellant, in the company of his driver, James, and his brother, Jacob, drove to the home of PW1. The appellant asked PW1 where the deceased was and he responded that he was asleep in the house of PW2. The appellant and PW2 went there and PW1 called his mother, PW2, who in turn woke up the deceased.

12. The appellant further testified that the deceased came out with a rungu (stick) and as soon as he saw him, the deceased lifted up his rungu to hit the appellant but he evaded; that PW1 got hold of the deceased; that the deceased held the appellant by his waist, grabbed the pistol the appellant carried; that the appellant held the deceased's hand but the deceased pushed the trigger and the pistol fired, hitting the deceased on his ribs.

13. Thereafter the appellant said that he decided to take the deceased to Kijabe Mission Hospital since doctors at Kenyatta National Hospital were on strike. Having left the deceased at Kijabe Mission Hospital, the appellant went to Mai Mahiu Police Station and reported the incident.

14. The appellant said that he had no intention to kill the deceased, adding that if he had so intended he would not have bothered to take him to hospital. He summed it up as follows:

> **"I can just say that what killed the accused (sic) was the weapon I had but he is the one who pressed the trigger."**

15. The learned trial judge, after a careful analysis of all the evidence, came to the conclusion that the appellant, with malice aforethought, fatally shot the deceased. She convicted the appellant; considered his mitigating submissions and proceeded to sentence the appellant to suffer death.

APPEAL TO THIS COURT

16. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to this Court. Although the memorandum of appeal filed by the appellant's advocates, **Tito & Associates,** contains 8 grounds of appeal, the gravamen of the appeal is that the learned trial judge erred in law in convicting the appellant for the offence of murder because the totality of the evidence indicated that the appellant had no malice aforethought. The appellant further faulted the learned trial judge for failing to evaluate and/or apply the mitigating submissions to pass a commensurate sentence.

17. Arguing the appeal, **Mr. Mwesigwa**, learned counsel for the appellant, conceded that there was no dispute that the deceased's death was caused by the appellant, but as earlier stated, he contended, it was not demonstrated that the appellant had any malice aforethought. Counsel cited various authorities that affirm the legal position that both *mens rea* and *actus reus* have to be proved before an accused person can be convicted of murder.

18. Counsel further submitted that the fact that a rungu was found at the scene of crime was an indicator that there was a scuffle between the appellant and the deceased; that there was no evidence as to whether it was the appellant who pulled the trigger; and that the learned trial judge did not give due consideration to the appellant's statement of defence.

19. Lastly, the appellant's counsel faulted the learned trial judge for failing to consider the appellant's mitigating submissions, and especially his good character prior to the commission of the said offence. In that regard he cited the Supreme Court decision in **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR** where the Court held that a trial court ought to consider and evaluate mitigating submissions for purposes of determining an appropriate sentence.

20. Counsel submitted that the death sentence that was passed by the trial court is unconstitutional. He urged this Court to allow the appeal.

21. In response, **Mr. Wanyonyi, Senior Assistant Director of Public Prosecutions,** opposed the appeal. He submitted that the learned trial

judge carefully considered the issue of malice aforethought and rightly concluded that the appellant, having shot the deceased at close range, it must be inferred that he intended to cause his death or inflict serious bodily harm.

22. Mr. Wanyonyi further submitted that the evidence of PW1 and PW2 showed that there was no scuffle between the appellant and the deceased. And as regards the rungu that was recovered at the scene of crime, there was no evidence that the deceased tried to use it against the appellant before the shooting.

23. Regarding the appellant's defence and the mitigating submissions, Mr. Wanyonyi submitted that the learned judge considered them before she convicted and sentenced the appellant. He urged the Court to dismiss the appeal.

ANALYSIS OF THE SUBMISSIONS AND DETERMINATION

24. In this appeal, the main issue for determination is whether, in causing the death of the deceased the appellant had malice aforethought. **Section** 206 of the **Penal Code** states as follows:

> **"206. 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."**

25. It is therefore imperative that we closely examine the evidence on record to see whether it disclosed any intent on the part of the appellant to cause death or grievous harm to the deceased, or whether the appellant ought to have known that his act was likely to cause the death of the deceased.

26. The appellant left his home with a single mission in his mind, that is, to trace the deceased's whereabouts, believing in his heart that it was the deceased who had stolen his property. The appellant had a firearm that he had uncorked. According to the evidence of PW1, who was described by the learned trial judge as a credible witness, the appellant intentionally shot at the deceased. This is what PW1 stated in his evidence in chief:

> **"When Simon came out, Lemiso removed his gun and shot him. There was no conversation between Simon and Lemiso before Lemiso shot him.**
>
> **1. I saw the pistol used to shoot the deceased. Lemiso shot the deceased."**

27. In cross examination by the appellant's advocate, PW1 said:

> **"The pistol was under the accused's jacket. I only saw it after the accused removed it. I saw the accused fire the pistol. I did not do anything when I saw the pistol. There was no fight between the accused and the deceased. The accused and the deceased were just about a metre or two apart."**

28. PW2, who woke up the deceased, testified that the deceased was shot at just as he walked out of her house. She did not hear any commotion before the gunshot.

29. As regards the rungu that was found at the scene, PW2 said that it is normal for a Maasai man to get out of a house with a rungu. The rungu belonged to the deceased but there is no evidence that he used it to attack the appellant.

30. In our view, the chain of events or actions by the appellant clearly demonstrate that he intended to kill the deceased or inflict upon him grievous harm. In **BONAYA TUTU IPU & ANOTHER v REPUBLIC [2015] eKLR,** this Court stated that **"malice aforethought"** is the *mens rea* for the offence of murder and it is the presence or absence of malice aforethought that is decisive in determining whether an unlawful killing amounts to murder or manslaughter. The Court went on to state that whether or not malice aforethought is proved depends on the peculiar facts of each case.

31. In this appeal, considering the nature of the weapon used, a pistol; the distance between the appellant and the deceased at the time of the shooting; the fact that the deceased had not attacked the appellant; and the part of the deceased's body that was shot; we are satisfied that the learned judge was right in holding that the appellant had malice aforethought and therefore the charge of murder had been well proved.

32. Turning to the appellant's mitigating submissions through his learned counsel and the sentence that was passed against him, the learned judge took the mitigating factors into consideration but still went ahead to sentence the appellant to suffer death. Before this Court, the appellant's learned counsel submitted that in light of the Supreme Court's decision in **FRANCIS KARIOKO MURUATETU v REPUBLIC (supra),** death sentence is now unconstitutional. He urged this Court to set aside the sentence pronounced by the trial court and substitute it with any other appropriate one.

33. In the aforesaid 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."**

The Supreme Court, having so held, remitted the matter to the High Court for re-hearing on sentence only.

34. This Court is bound by decisions made by the Supreme Court. The judgment that gave rise to this appeal was delivered on 6th May, 2015, long before the Supreme Court pronounced itself in **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC (supra)** on 14th December, 2017.

35. In the circumstances, we must interfere with the sentence that was passed by the trial court. In so doing, we have to take into consideration the fact that the appellant committed cold blooded murder against a defenceless person and the appellant's mitigating submissions, which were as follows:

> **"He is a husband and father to 4 minor children. The wife and children depend on him. He was sole breadwinner in his family. He also has aged parents who depend on him. He has no criminal record and we pray that this court treats him as a first offender. He is remorseful and continues to be remorseful. He has good relationship with his community and family. We pray for leniency."**

36. In view of the foregoing, and considering the gravity of the offence that was committed by the appellant, we hereby set aside the death sentence that was pronounced against the appellant by the trial court and substitute therefor a jail term of thirty (30) years from 13th May, 2015 when the initial sentence was passed.

337. This judgment is signed and given by two judges under **rule 32(2)** of the **Court of Appeal Rules**, the Hon. Mr. Justice P.K. Kariuki having ceased to hold office as judge of this Court, following his appointment to the office of Attorney-General of the Republic of Kenya before its date of delivery.

Dated and delivered at Nairobi this 11th day of May, 2018.

D.K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR