



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA, OUKO, & M'INOTI, J.J.A.)**

**CRIMINAL APPEAL NO. 8 OF 2013**

**BETWEEN**

**JOSEPH KAMAU MWANGI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Mombasa*

*(Odero, J.) dated 14<sup>th</sup> June 2012 in H.C.CR.C. No. 16 of 2008)*

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**JUDGMENT OF THE COURT**

On 16<sup>th</sup> May 2008 at about 10 pm, ***Iqbal Ahmed Ayub (the deceased)***, who was described as a printer of passports, was with three others, namely ***Ashish Oza (PW1)***, ***Rahim*** and ***Murtaza***, in a motor vehicle heading for his house at Mackinon Market, Mombasa. On arrival, Murtaza, who was driving, parked the vehicle opposite the gate to the deceased's house and the deceased and PW1 alighted to get into the house. As the deceased made to open the door, two men dressed in black and wearing caps accosted them. One of them, who the prosecution maintains was ***the appellant, Joseph Kamau Mwangi***, drew a pistol and asked the deceased what he was doing. In an instant, the man kicked and fell PW1, and immediately fired four shots at the deceased.

Upon hearing the gunshots, PW1 fainted while the friends in the car drove off. When he came to shortly thereafter, PW1 found the deceased lying on the ground. He summoned help and the deceased was rushed to Mombasa Hospital where he was pronounced dead on arrival. Four expended cartridges (***Exb. B1-B4***) were recovered at the scene of the shooting by the investigating officer, ***Inspector Joel Kang'e (PW7)*** and were subsequently examined and analyzed by a ballistic expert, ***Chief Inspector Alex Mudindi (PW6)***. Also examined and analyzed by PW6 were two fired bullets that he had received, about which we shall say more later.

There was no doubt that the deceased died from gunshot wounds. According to the opinion of ***Dr. Mandalya (PW4)***, the pathologist who performed a postmortem examination of the deceased at Pandya Hospital the day after the shooting, the cause of death was hemorrhagic shock due to gun shot wounds to the head and chest. He noted four bullet entry wounds and two exit wounds. The affected areas were the chest, the upper jaw, the cheek, and the back of the head. A bullet fragment (***Exb. C1***) was recovered

from the brain, but PW6 was not able to determine its calibre or discern any rifling data on it, because he suspected that it had disintegrated from its parent bullet upon coming into contact with a hard surface during its flight.

Later the same night that the deceased was shot, three police officers, namely **PC Jotham Nyaroche (PW1)**, **PC Athanus Kivilu (PW2)** and **PC Odera** were on mobile patrol duty, when they spotted the appellant and another walking along Digo Road, Mombasa. When the police requested them to stop, they defied and instead started running away, prompting PW2 and PC Odera to give chase, while PW1 followed in the motor vehicle. PW2 pursued the appellant on foot along hospital road. As PW2 closed in on the appellant, the latter drew an item from his cloths and threw the same over the perimeter wall of the Public Health Department (PHD) in Mwembe Tayari. After a distance of about five meters from where the appellant had jettisoned the object, PW2 arrested him, with the assistance of members of the public.

Soon after the arrest of the appellant, PW1 went over the perimeter wall to search for the item that the appellant had thrown away. In the PHD compound, PW1 recovered a Ceska pistol serial No. GO251T (Exb. A) and 9 rounds of ammunition (Exb. D1-D9). According to PW6, the pistol, a 9 mm calibre firearm, was in good general and mechanical condition. It was complete in all its component parts and was capable of being fired. He also found the 9 rounds of ammunition suitable for use in the Ceska pistol. He test-fired 3 rounds of ammunition picked at random from the 9 that had been recovered together with the pistol and formed the opinion that the Ceska pistol was a firearm and the 9 rounds were ammunition within the meaning of the Firearms Act, cap 114.

Next PW6 compared the four spent cartridges that had been recovered at the scene of the shooting with the three that he had test-fired and formed the opinion that from the matching ejector markings, matching breech face markings and matching firing pin markings, all had been fired from the same firearm, namely the Ceska pistol serial No. GO251T. Lastly, under microscopic examination, PW6 compared the two fired bullets with the three that he had test-fired from the Ceska Pistol and found that they had sufficient matching land engraved areas, on the basis of which he formed the opinion that all the five bullets were fired from the Ceska pistol serial No. GO251T. PW6 testified that he received the two bullets together with the other exhibits, but the appellant disputes that fact. We shall say more on the two bullets shortly.

By an information dated 29<sup>th</sup> May 2008, the appellant was charged with and pleaded not guilty to the murder of the deceased. The prosecution's case was founded on the evidence of 8 witnesses whilst the appellant, upon being put on his defence, gave a sworn statement but called no witness. The essence of his defence was that he lived in Kayole Estate, Nairobi and was a secondhand clothes dealer. On the day the deceased was shot, the appellant had travelled from Nairobi to Mombasa to sell a bale of T-shirts. He alighted from a Chania Bus at Mwembe Tayari roundabout at about 8.30 pm and decided to book a lodging for the night.

On his way, three policemen accosted and ordered him to stop and identify himself. He duly complied and produced his identity card, explaining that he had just arrived from Nairobi. However he was taken to a police vehicle and asked to pay Kshs. 500/- for his freedom. As he paid the Kshs. 500/- from a wad of Kshs 26,000/-, one of the policemen asked him to explain how he had come by such amount of money, before demanding that the appellant should share it with the police. When he declined the suggestion, he was arrested and locked up at the police station, where the police confiscated his money and cellphone and declined to enter the same in their records. Subsequently he was put in an identification parade where a woman and a young man purported to identify him. He denied any involvement with the offence.

On 14<sup>th</sup> June 2014, **Odera, J.** convicted the appellant and sentenced him to 40 years imprisonment. The learned judge, properly in our view, rejected the evidence of identification of the appellant both at the scene of crime and in the subsequent identification parade because it was evidence of a single eyewitness, PW8. In addition, after considering the condition of the lighting at the scene, the court found it to have been poor and PW8 to have been in such a scared state, to the point of fainting and losing consciousness during the shooting. The court however found the circumstantial evidence relating to the recovery of the firearm, together with the ballistic evidence, which linked the Ceska pistol to the bullets that shot the deceased, to be enough to found the conviction of the appellant.

The appellant was aggrieved and preferred this first appeal. Before we heard the appeal we drew his attention and that of his learned counsel, **Ms. Otieno**, to the fact that the sentence of 40 years imprisonment for the offence of murder was on the face of it an illegal sentence and that if his appeal did not succeed, we would be obliged to impose the sentence prescribed by law, which is death. (See **Joseph Njuguna Mwaura & 2 Others v. Republic, Cr App. No 5 of 2008**). The appellant however elected to pursue the appeal.

The appellant's appeal was premised on 5 grounds in his supplementary grounds of appeal filed on 25<sup>th</sup> October 2016. At the hearing of the appeal he abandoned ground number 5 and argued the remaining 4 grounds globally. In those grounds the appellant contends that the trial judge erred by holding that the offence of murder was proved beyond reasonable doubt; by failing to find that the prosecution case was riddled by inconsistencies and contradictions; by holding that the appellant was in possession of the murder weapon; and by failing to find that the prosecution's failure to call vital witnesses was fatal to the conviction.

Learned counsel submitted that the offence of murder was not proved beyond reasonable doubt because the identification evidence of PW8 was discounted, leaving only weak and unreliable circumstantial evidence. Relying on the judgment of this Court in **Ali Salim Awadh alias Masjid v. Republic, Cr. App. No. 192 of 2012**, it was submitted that to draw an inference of guilt from circumstantial evidence, there must be no other co-existing circumstances, which would weaken or destroy the inference. To demonstrate co-existing circumstances undermining the inference of the appellant's guilt, it was contended that PW7 did not recover the two fired bullets at the scene, and that no other witness referred to them. Accordingly, it was submitted, the origin of those two bullets was unknown, raising doubts as to who had fired them.

It was also submitted that the circumstantial evidence was weakened by its inconsistencies and contradictions, among them the evidence of PW1 and PW2 that they arrested the appellant at about 9.30 pm, while PW8 stated that the deceased was shot at about 10.pm. According to the appellant, the prosecution evidence suggested that he was arrested before the deceased was shot dead. Again, it was contended, only PW2 saw the appellant throw an item over the PHD compound. Since it was at night and the state of lighting was not inquired into or established, it was urged the evidence of PW2 was not reliable. The appellant also assailed the finding that the appellant was in possession of the Ceska pistol, yet the same was not recovered in his person. On the contrary, it was recovered in a public place where it could have been placed by any member of the public. Relying on **Peter Kinyua Ileri v. Republic, Cr. App. No. 68 of 2014** where this Court held that a person who was merely accompanying another who had a gun, was not in possession of the gun, we were urged to find that the appellant was not in possession of the Ceska pistol. Lastly, it was argued that the trial court erred by failing to make adverse findings against the prosecution for failure to call crucial witnesses, among them the persons who were in the car with the deceased and PW8 shortly before the deceased was shot dead.

**Mr. Ayodo**, learned Senior Principal Prosecution Counsel opposed, the appeal submitting that the case against the appellant was proved beyond reasonable doubt. While conceding that the prosecution case was circumstantial, nevertheless it was urged that the evidence was inconsistent with the innocence of the appellant and that there were no co-existing factors that could weaken the inference of guilt. On whether the appellant was arrested before the commission of the offence, we were urged to find the discrepancy in time was not material as the witnesses were testifying to approximate times. As regards the two fired bullets that were examined by PW6, it was the respondent's view that the pathologist recovered those bullets together with the fragment, from the body of the deceased. On possession of the firearm, it was contended that the appellant was in possession of it as he was seen by PW2 throwing it into the PHD compound. Lastly, counsel submitted that the prosecution had called all the necessary witnesses to prove its case and that there was no basis for drawing adverse inference for failure to call the other people in the car because it was only the deceased and PW8 who alighted from the car before being confronted by the assailants.

This being a first appeal where the appellant is entitled to raise both questions of law and of fact, this Court is obliged to rehear the case, to consider the material before the trial judge and to make up its own

mind, not disregarding the impugned judgment, but carefully weighing and considering it. If after full consideration the Court comes to the conclusion that the judgment is wrong, it is obliged to overturn the judgment. However, where the question is which witness is to be believed and the issue turns on manner and demeanor, this Court will defer to the impression made by the judge who saw and heard the witnesses. (See *Pandya v. Regina [1957] EA 337*).

It is common ground that the prosecution case against the appellant was purely circumstantial because the identification of the appellant by PW1 at the scene of the crime was disregarded after it was found to have been under difficult circumstances and therefore unsafe. That is not to suggest that a conviction cannot be founded upon circumstantial evidence only. As this Court stated in *Musili Tulo v. Republic, Cr. App. No 30 of 2014*:

***“circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”***

To found a conviction, circumstantial evidence must be incompatible with the innocence of the accused person; incapable of explanation upon any other hypothesis than that of guilt of the accused person; and there must be no other existing circumstances, which could weaken the chain of circumstances. (See *Sawe v. Republic, [2003] KLR 364*, and *Dhalay Singh v. Republic, Cr. App. No. 10 of 1997*).

There was overwhelming evidence linking the bullets that killed the deceased to the Ceska pistol serial No. GO251T. The four spent cartridges that PW7 collected at the scene of crime and the three cartridges that PW6 test-fired from the Ceska pistol, had similar ejector, breech face, and firing pin markings, leading PW6 to conclude that all were fired from the same gun. The fragment that PW4 removed from the deceased's brain was damaged to the point that no useful comparison could be made. Then there were the two fired bullets that PW6 received with the other exhibits, which he compared with the three bullets that he had test-fired from the Ceska pistol.

PW 7 testified that he did not recover the fired bullets and the appellant suggests that they were mysteriously introduced in the case. In our own evaluation of the evidence, there is really no mystery about those two bullets. In his evidence, PW4 testified to having removed from the body of the deceased bullet **fragments** (in plural), which he handed to the police. The Exhibit Memo Form refers to a fragment and the two bullets. We are satisfied that when PW4 stated that he recovered bullet fragments from the body of the deceased he was referring to what PW6, as a ballistic expert, classified differently as one fragment and two fired bullets. We are fortified in this conclusion by the fact that PW4 noted four bullet entry wounds on the deceased, but only two exit wounds, meaning that two of the four bullets did not exit the body of the deceased and were lodged therein. We are satisfied that those two bullets were among the recoveries from the body of the deceased that PW4 described as fragments. When the two fired bullets were compared to the three that PW6 had test-fired, all had matching land engraved areas.

On the value of the evidence of a ballistics expert, it may be apt to refer to what the experts say. **Robert Churchill** was a gun and ballistics expert of great renown in London for over 50 years. His biographer, **Macdonald Hastings**, in the book, *The Other Mr. Churchill: A lifetime of Shooting and Murder, Four Square Books, 1966* states as follows at page 118:

***“The term ‘forensic ballistics’ is in itself intimidating to a layman. It may be defined more simply as the science to determine in the pursuit of justice the relationship of the parts of a firearm with the bullets that come out of it. Just as under the microscope no two razor blades, no two blades of grass, no two matchsticks, are exactly alike, so the firearms expert endeavours to discover the completely individual characteristics of every weapon—even weapons of the same make, mark, and calibre, and off the same assembly line—and to connect the gun without doubt, with the bullet it spits out and the empty cartridge case which is left behind.”***

The later American ballistics expert, **Calvin H. Goddard** in his article, *“Scientific Identification of Firearms and Bullets”*, *17 Am. Inst. Crim. L. & Criminology 254 (1926-1927)* states as follows at page 258:

***"Every pistol barrel, even when fresh from the factory (and much more so after undergoing wear and tear) contains minute irregularities which are peculiar to it alone, and which will never be reproduced in any other. These irregularities leave their marks, the same ones each time, in the form of fine and coarse linear striations parallel to the deep incisures cut by the groove edges, on every bullet fired from this barrel, and they constitute, to all intents and purposes, a fingerprint of that particular barrel. It can never be exactly reproduced, any more than can the fingerprint of a human being."***

As regards marking on cartridges, **Prof. Keith Simpson**, who was an Emeritus Professor of Forensic Medicine to the University of London at Guy's Hospital and the Home Office Pathologist, observes in his book, ***Forensic Medicine, 8<sup>th</sup> Edition, ELBS, 1982*** at page 76 that:

***"The empty cartridge may be extracted from the chamber by a bolt action, ejected by a cam mechanism on 'breaking' the weapon or, in automatic pistols, thrown out mechanically by an extractor operated by discharge gases. Such empty cases bear marks individual to the weapon, which has fired them-from the chamber, hammer, breech-face and ejector. The expert can, by comparing a 'crime' shell-case with trial cases fired from a suspect weapon, say whether that weapon fired the 'crime' shell, for the innumerable scores and scratches imprinted on it are repeated every time a round is fired from the weapon."***

Having settled the identity of the murder weapon, the next question is whether there was any evidence to link the appellant with it and the shooting of the deceased. The evidence of PW1 and PW2 was that they saw the appellant and another walking along Digo Road. When asked to stop, they started running away, prompting PW2 to give chase. While the appellant's partner managed to escape, PW2 followed the appellant, whom he saw remove from his clothing an item, which he threw over the perimeter wall of the PHD. Five meters from where the appellant had jettisoned the item, PW2 caught up with him. After arresting the appellant, PW1 climbed over the perimeter fence and recovered the Ceska pistol and the rounds of ammunition.

PW2 testified that the street was "full of street lights" and was able to see clearly. If PW2 caught up with the appellant a mere five meters from the point where he had thrown away an item, it suggests that the two were fairly close and PW2 could clearly see the appellant. In addition the chase was continuous and at no time did PW2 lose sight of the appellant after he had thrown away the item. The chain of events from when the appellant threw away the item to when he was arrested was not broken. (See ***Ali Ramadhan v. Republic, Cr. App. No. 79 of 1985***).

The trial judge, who had the advantage of seeing and hearing the witnesses as they testified was satisfied that PW1 and PW2 were credible witnesses and that the item that the appellant threw over the perimeter fence was the Ceska pistol. On our part, we have not seen anything on record that would make us differ with the conclusion of the learned judge. The act of the appellant and his partner running away when requested by the police to stop is a relevant consideration in this regard. (See ***Alex Wafula v. Republic, Cr. App, No 7 of 2008***). It is also instructive that according to PW8, the deceased and himself were accosted by two people before the deceased was shot dead. It would have to be a very unusual coincidence that the police were also chasing two people, one of whom threw an item at a place from which was found the Ceska pistol that had fired the bullets that killed the deceased.

We do not think there is any substance in the argument that in the circumstances of this case the appellant was not found in possession of the Ceska pistol. Both **section 3** of the **Penal Code** and **section 2** of the Firearms Act define possession to include not only actual possession, but also knowingly having anything in any place, whether or not belonging to or occupied by the person, for the use or benefit of himself or another person. In our view it would also be an artificial and absurd interpretation of the statute to hold that a person who has been in actual possession of an item and has been perceived discarding it to avoid arrest, is not in possession of that item.

Lastly, we do not think that the case before the learned judge was the kind that would justify an adverse inference that if witnesses who were not called had testified, they would have given evidence adverse to

the prosecution. The proposition in ***Bukenya v. Uganda [1972] EA 549*** regarding the drawing of adverse inference from failure by the prosecution to call important and available witnesses arises in cases where the evidence called by the prosecution is barely adequate. In ***Donald Majiwa Achilwa & 2 Others v. Republic, Cr. App. No 34 of 2006***, this Court explained the position thus:

***“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case.”***

Ultimately we have come to the conclusion that this appeal lacks merit and the same is hereby dismissed. As the sentence of 40 years imprisonment imposed by the trial court for the offence of murder was an illegal sentence, and the appellant was duly warned, we hereby set it aside and substitute therefor the sentence of death as prescribed by law. It is so ordered.

**Dated and delivered at Mombasa this 17<sup>th</sup> day of February, 2017**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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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**