REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 81 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK GATHIRWA KIARIE .....ACCUSED

JUDGMENT

1. **Patrick Gathirwa Kiarie**, the Accused herein is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 3rd November, 2014 at Mukurwe village, Gatundu North Sub -County of Kiambu County, he murdered **Peter Kamenya Kiarie.** The Accused denied the charge and during the trial was represented by Mr. Njuguna. The prosecution called eight witnesses.

2. The prosecution case was as follows.The Accused, **Nicholas Njenga Kiarie (PW2)** , **Gabriel Waweru Kiarie (PW3)** and **Peter Kamenya Kiarie** (the deceased herein) are brothers. They all lived on the family land at Mukurwe village in the material period. Their mother **Veronica Wanjiku** also resided on the said piece of land.

3. The family occupied their respective houses erected on the land. The Accused and **PW3** apparently shared one of the houses. On the night of 2nd November, 2014, **PW3** retired for the night after arriving home at about 8.30pm. Before the witness could fall asleep, the Accused entered the room. He was armed with some object and uttered words to the effect: - ***"Do you know I can kill you? Do you want to die?*** When the witness questioned the Accused, the Accused proceeded to stab the witness in the abdomen. **PW3** raised an alarm and got up heading to his mother's house as the Accused vanished.

4. **PW2**, his wife **Esther Wangui Mungai (PW4)** came out of their houses to find **PW3** outside his mother's house. He was bleeding and clutching at his stomach. The family mobilized transport to take **PW3** to Gatundu District Hospital. He was accompanied by the deceased and was admitted. Early on the night of 3rd November 2014, **James Ndungu Wainaina (PW1)** a laborer at Mukurwe was walking home from the local centre. He knew the family of the deceased as they were neighbors of his employers at Mukurwe village where he also lived. A short distance from his employer's gate, he came across the Accused and the deceased. The two were conversing and calling each other *"Wa Ciku"*. It was not yet dark. As **PW1** opened the gate to his employer's compound he heard the sound of footsteps and saw the Accused running away from the spot where the deceased stood clutching himself and stating: "***He has stabbed me***"!

5. At about the same time, **PW2** and his wife PW4 were just returning home from visiting **PW3** in hospital when **PW1** rang to notify them of the happenings. They and others rushed to the scene where they found the deceased placed on a vehicle in preparation for being escorted to hospital. He bore a stab wound on his chest and appeared unconscious. He was pronounced dead on arrival at the Gatundu Level 5 Hospital.

6. On the same night, **Cpl. Buigut (PW8)** of **Mwea Police Post**, Gatundu received information from **Mutero Administration Police (AP) Post**, Gatundu that the Accused had surrendered to police officers there. **PW8** had earlier on visited the scene of stabbing having received a report from the area Chief at 11.00pm. **PW8** therefore proceeded to Mwea Police Post and re-arrested the Accused. He and other officers were led by the Accused to a stream located about 1km from the scene of stabbing, arriving at 2.00am. They retrieved a knife suspected to be the murder weapon **(exhibit 1).** The Accused was on 4/11/2014, handed over to Directorate of Criminal Investigations Officers including **PC Langat (PW6**) together with the weapon exhibit.

7. PW6 was among officers based at Gatundu Police Station who carried out investigations. A postmortem of the body of the deceased was carried out by **Dr. Ngugi (PW7)** on 10/11/2014. The body bore two chest stab wounds, one of them penetrating to the neck. He concluded that death was due to excessive bleeding due to the penetrating stab wound.

8. When the Accused was placed on his defence, he elected to make a sworn statement. To the effect that he was a resident of Mukurwe and was running a butchery at the material time. That on 3rd November, 2014 while at his butchery at about 7.30pm he was informed by persons he named as Kamau and Kimani that his deceased brother **Peter Kamenya Kiarie** had been stabbed. When he went home, he found a group of people and that the deceased's wife Accused him of stabbing the deceased. He denied and proceeded to the police station. He was arrested. He told police that he had been involved in a scuffle with the deceased who was armed with a knife but he overpowered him and he

fell. That there were no differences between the two and that he had last seen the deceased on 2nd November. He denied having stabbed the deceased.

9. Only the defence filed submissions at the close of their case.The court has considered the evidence on record and submissions. The relationship between the Accused, deceased , **PW2** and **PW3** is not in dispute, they were all brothers. There is no dispute that the bothers lived on the family land at Mukurwe village. The death of the deceased is not disputed and the fact that the Accused was arrested on the night of the 3rd November, 2014 when he presented himself at the **Mutero AP Post** and later rearrested by police from **Mwea Police Post** before eventually being handed over to Gatundu Police Station.

10. The cause of the deceased's death is hardly disputed. According to witnesses such as **PW1**, **PW2** and **PW4** the deceased had a stab in the chest/abdomen and was bleeding when they observed him. The postmortem form **(Exhibit 3**) indicates that while the deceased's body bore two stabs, one of them a continuation of the deeper one was superficial and was on the chest wall. The deeper stab was in the left axilla (armpit) which penetrated towards the neck causing bleeding. Death was due to bleeding, secondary to the penetrating stab wound. The Accused himself admits that the deceased died after being stabbed.

11. The court must determine firstly, when the deceased was stabbed, and secondly whether the Accused is the person who, with malice aforethought inflicted the stab that led to the death of the deceased.On the first issue, all the key prosecution witnesses including **PW1, PW2, PW4** and **PW8 r**elated that the stabbing incident relating to the deceased occurred on 3/11/2014. Indeed, the Accused himself states that he learned of the stabbing on the evening of 3/11/2014. However, there may be some element of confusion because there were evidently two stabbing incidents.

12. The first incident occurred on 2nd November, 2014 and allegedly involved **PW3** and the Accused person at their shared house. Indeed, **PW3** was admitted in hospital on the date of the deceased's stabbing on 3/11/2014. In his evidence, in chief, the Accused stated:

> **"Yes, I admit that in my statement, I told police that I had been involve in a scuffle and the deceased had a knife, that I pushed him, and he fell. I had been with the deceased on the previous day (2/11/2014).**

13. During cross -examination by the prosecuting counsel he stated:

> **"On 2nd November, the deceased attacked me with a knife. I overpowered him. He fell. I did not stab him. I went to the police station by myself...not true it was because I had stabbed deceased."**

And during re-examination, he stated:

> **"Yes, I went to police station because the crowd gathered at home threatened to lynch me. I did not see deceased on material date. Our scuffle was the previous date".**

14. The prosecution witnesses residing in the same home with the Accused were consistent in stating that the incident on 2/11/2014 involved the Accused and the witness **PW3**. The defence never suggested to them that the said incident involved the deceased herein. Not even to **PW3** the alleged stabbing victim of 2nd November 2014 was this assertion put.

15. Moreover, all these witnesses including **PW1** testified that the deceased was stabbed on 3/11/2014 with **PW1** pointing an accusing finger at the Accused. It seems to me that the assertions of a knife incident with the deceased on 2nd November, 2014 is an afterthought and that any incident between the Accused and deceased could only have occurred on 3rd November 2014. And further that is the reason why the Accused went to the police post on 3/11/2014. The court therefore dismissed the Accused's assertion that his alleged scuffle with the deceased occurred on 2nd November, 2014.

16. Turning to the tragic event of 3rd November, 2014 itself, the key prosecution witness was **PW1**. He gave an account that he had come upon the Accused and deceased engaged in conversation, that having worked for their neighbor for 9 years he knew them well, that it was not yet dark, and he saw and heard them; that having passed them he heard the sound of running and saw the Accused running away from the scene, as the deceased clutched at his abdomen saying he had been stabbed. He was positive that he saw the two men clearly and saw the Accused escaping.

17. In cross examination, he admitted it was 7.10pm and the sun had set but he could not recall if there was moonlight. He however reiterated his evidence in chief as to what he saw and heard though he admitted he did not witness the actual stabbing. He denied that he or a third party stabbed the deceased, stating that at the material moment only he and the two brothers were at the scene of attack which was road or path. Under re-examination, he asserted that he was less than 30 metres away from the brothers when incident occurred and heard and saw the Accused escaping. The witness did not waver. **PW1** was the only eyewitness of the incident in which the deceased was injured even though he did not directly witness the actual attack.

18. In the case of **Abdalla bin Wendo v R [1953] 20EACA 166** the Court of Appeal for Eastern Africa held that: -

> **"Subject to well-known exceptions, it is trite law that a fact may be proved by testimony of a single witness, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it was known that the conditions favoring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury could reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely accepted as free**

from the possibility of error."

19. Similar exhortation is found in the decision of the Court of Appeal in **Cleophas Otieno Wamunga v R [1989] KLR 424** where the court observed that:

> **"The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.**
>
> **Whenever the case against the defendant rests wholly or to a great extent on the correctness of one or more identifications of he Accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the Accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."**

20. The witness **PW1** was no stranger to the Accused and deceased. He had lived in the village and knew the family of the deceased for 9 years. This is confirmed by the fact that he rang the deceased's relative **PW2** and **PW4** immediately on the same night informing them of what had transpired, albeit his manner of communicating the facts was less than accurate or prudent. He was consistent in his testimony that although it was early in the night, he saw clearly and heard the two men converse. If indeed he or a third party had stabbed the deceased, there is no apparent reason for him to implicate the Accused person. Besides he would have been foolish if he stabbed the deceased to call attention to himself by reporting the incident to the deceased's relatives as he did.

21. This was a case of recognition and in the circumstances described, it does seem to the court that the witness had occasion and circumstances allowed him to see clearly and hear what occurred and that his recognition of the two men appears free from error. In the case of **Anjononi & Another v R. [1976 -1980] 1 KLR 1566** at page 1568 the court held 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 one form or other."**

22. The Accused's defence appears to be one of alibi, to the effect that he was not at the scene of attack but in his butchery on the material evening. In setting up an alibi defence, the Accused did not assume the burden of proving it, as was held in **Sentale v Uganda [1968]** EA 3. The burden of establishing the falsity of the Accused's alibi and proving the Accused's guilt lies with the prosecution. See **Wang'ombe v R** [**1976 – 80] I KLR 1683.** Be that as it may, such alibi defence ought to be raised at the earliest opportunity in order to give the prosecution an opportunity to investigate the truth thereof. The Court of Appeal for Eastern Africa held in **R. V Sukha Singh s/o Wazir Singh & Others [1939] 6 EACA 145** that;

> **"If a person is Accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied to its genuineness proceedings will be stopped."**

23. The Accused herein offered in his defence that he had recorded a statement to police explaining that he had a scuffle with the deceased who was armed but he overpowered him. Nevertheless, he did not state to police or suggest to any of the prosecution witnesses his alibi, or call the alleged Kimani and Kamau who allegedly came to his butchery on the material date, as witnesses. Thus, his alibi defence sounds doubtful in light of consistent evidence by **PW1** as supported by his reports on the same night immediately after the incident, to **PW2** and **PW4**. He specifically reported to the former that the Accused had stabbed the deceased.

24. Moreover, according to the family witnesses, on the previous night there was an incident in which **PW3** was stabbed by the Accused. Even though no Occurrence Book abstract or medical records were tendered in respect of the attack on **PW3**, **PW6** stated during cross-examination that the incident had been reported at Gatundu Police Station and **PW3** testified that he was admitted in hospital with injuries on 2/11/2014. It is the evidence of **PW2** concerning the said incident of 2/11/2014 that he heard the Accused declaring that he would kill the deceased, moments before the stabbing of **PW3**.

25. Additionally, there is evidence that the Accused upon presenting himself to **Mutero AP Post** was handed over to **PW8** and on the same night (3/11/2014) he led to the recovery of the knife **(exhibit 1)** in a stream not far from the scene of murder. **PW8** stated during cross examination that the recovery was made at 2.00am. It is true that the knife was not subjected to forensic examination as **PW6** explained that it had been in water. However, given the circumstances of recovery, its proximity to the offence scene and the Accused's appearance at Mutero AP post, it seems more likely than not that indeed the **exhibit 1** was the actual murder weapon. This recovery also strengthens the evidence by **PW1** among the material witnesses and lends credence to his conclusion that though he did not witness the actual stabbing, he had concluded that the Accused ran away leaving the injured deceased because he had indeed stabbed him as the victim declared.

26. The conduct of the Accused on the material night as described by **PW1** and **PW8** and obtaining circumstances at scene of stabbing augment the deceased's dying declaration. The Court of Appeal in **Choge v Republic [1985] KLR 1,** citing the case of **Pius Jasanga s/o Akumu v R [1954] 21 EACA 331** discussed the admissibility ad weight to be attached to a dying declaration received pursuant under section 33(a) of the Evidence Act. The Court stated that:

> **"In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as**

creating an obligation equivalent to that imposed by the taking of an oath.

In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian Evidence Act. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (R v Muyovya bin Msuma [1939] 6 EACA 128. See also R v Premanda [1925] 52 Cal 987).

The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:

The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and… the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed … The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (Ramazani bin Mirandu [1934] 1 EACA 107; R v Okulu s/o Eloku [1938] 5 EACA 39; R v Muyovya bin Msuma (supra). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).

It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (R v Eligu s/o Odel and another [1943] 10 EACA 9; Re Guruswami [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in R v Eligu s/o Odel and Epongu s/o Ewunyu [1943] 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (R v Said Abdulla [1945] 12 EACA 67; R v Mgundulwa s/o Jalo [1946] 13 EACA 169, 171)".

27. The Accused claimed to have gone to the police station because a crowd including family members at the home had threatened to lynch him. Looking at the evidence by **PW1**, **2** and **4**, it is quite unlikely that at 8.15pm the deceased's family was at home, because that is about the very the time, they were busy at J. K. Centre organizing for the transfer of the deceased to hospital. Indeed, it appears to me plausible, given the evidence by key prosecution witnesses such as **PW1**, **PW2**, **PW4** and **PW8** that the report the Accused admits having made to police related, not to the incident of 2/11/2014 but to the incident of 3/11/2014 as it concerned his alleged scuffle with the deceased and not **PW3**.

28. He had reiterated the said report in cross -examination albeit claiming it was on the 2nd November 2014 by stating:

"On 2nd November, [2014] the deceased attacked me with a knife. I overpowered him. He fell. I did not stab him. I went to police station by myself. Not true it was because I had stabbed deceased".

29. That this incident refers to a knife and a fight in which the deceased was "***overpowered***" echoes the incident of 3rd November, 2014. In view of the evidence by **PW1**, **PW2**, **PW3**, **PW8** and the Accused himself, the claims that the Accused did not encounter the deceased on the day he was killed must, like his last-minute alibi, be false. Equally, claims that he scuffled with the deceased who had a knife but that he did not stab the deceased though he allegedly "***overpowered***" him must be false.

30. On the evidence of **PW2**, **3** and **4**, the Accused was since 2nd November, 2014 on the warpath, attacking **PW3** (whether stabbing him or not) and threatening the deceased's life. He also likely waylaid, deceived by an ostensibly friendly conversation and stabbed the deceased so severely that he died within hours. The stab was deep, penetrating through the arm pit and into the chest in circumstances that clearly evidence malice aforethought on the part of the Accused as defined in section 206 (a) and (b) of the Penal Code.

31. The prosecution case is based on circumstantial evidence, by PW1 and others. The principles applicable in dealing with a case where the prosecution case rests primarily on circumstantial evidence are settled. In **Joan Chebichii Sawe -Vs- Republic (2003) e KLR** the Court of Appeal restated the principles applicable in considering circumstantial evidence. The Court observed that: -

"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the Accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the claim of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party Accused."

32. This passage captures the principles pronounced in the timeless decisions on circumstantial evidence, namely **Republic - vs Kipkering Arap Koske [1949]16 EACA 135** and **Simoni Musoke -Vs- Uganda (1958) EA 715**. In **Musili Tulo -Vs- Republic [2014] eKLR** the Court of Appeal reiterated the need to closely examine circumstantial evidence before making an inference of guilt, the object being to ascertain whether such evidence satisfies the principles in the case of Kipkering Arap Koske and in Musoke's case. In Tulo's case, the court restated the principles as follows: -

"i) The circumstances from which an inference of guilt is sought to ?be drawn, must be cogently and firmly established;

ii)Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused;

iii)The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and no one else."

33. The Court went on to state that:

" In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the Accused and incapable of any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke -Vs- Republic [1958] EA 715 citing with approval Teper -Vs- Republic [1952] A.C. 480 thus:

"It is also necessary before drawing the inference of the Accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which weaken or destroy the inference."

34. The court having carefully reviewed the circumstantial evidence in this case alongside other pieces of direct evidence tendered, it points consistently to the Accused as the culprit. It appears to admit no other hypothesis other than his culpability and there are no co-existing factors to weaken this inference. Regarding motive, it seems that all was not well between the Accused and his brothers as evidenced by the stabbing or attack on **PW3** on 2/11/2014. The Accused himself admitted that there was animosity between him and the deceased concerning a piece of land owned by their mother to which the deceased laid a claim.

35. In **Choge v R [1985] KLR 1** the Court of Appeal stated that:

"Under Section 9(3) of the Penal Code (Cap 63), the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration, but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not."

36. And in **Libambula V Republic (2003) KLR 683**the Court reiterated this principle as follows**:**

"We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person (see Section 8 of the Evidence Act). Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime." (Emphasis added). See section 9(3) of the Penal Code and Choge v Republic (1985) KLR 1 .

37. In view of the total evidence led by the prosecution, the Accused's alibi defence is completely displaced. The court is satisfied that the prosecution has proved the charge against the Accused beyond any reasonable doubt. Accordingly, the court enters a conviction against him for the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

Dated and signed electronically on this 16th day of March 2021.

C. MEOLI

JUDGE

Delivered and Signed at Kiambu on this 23rd day of March 2021.

M. KASANGO

JUDGE

In the Presence of:

…….. for prosecution

…….. for Accused

Accused present

Court assistant…….