REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL MURDER NO. 4 OF 2014

REPUBLIC...PROSECUTOR

-VERSUS-

STANLEY MUTHIKE TIIRE...................ACCUSED

JUDGMENT

1. The accused person **Stanley Muthike Tiire** is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that on 31st January, 2014 at Mukiinduri Village within Kirinyaga County the accused person unlawfully murdered **Eric Muteria Maingi**.

2. The accused person denied the charge.

3. The facts of the case are that on 31st January, 2014 at about 9.00 p.m. the deceased Erick Muteria Maingi was stabbed with a sharp object while on the road within Mukinduri Market. The deceased was rushed to Kerugoya Hospital where he was pronounced dead. A witness who was with the deceased when he was stabbed disclosed to the Police that it was the accused who stabbed him. The Police were led to the home of the accused the same night. The witness identified the accused to the Police and he was arrested. A postmortem was later conducted on the body of the deceased by Doctor Keneth Munyi. The doctor found that the deceased had a wound measuring 3 centimetres on the left side of the chest which had penetrated between the 1st and 2nd ribs lateral to stamin (middle bone of the chest) with a deep cut on the upper lobe of the left lung. The thoracic cavity was full of blood. Cause of death was collection of blood in the thoracic cavity. The accused was examined by Doctor Thuo, consultant Psychiatrist Embu General Hospital who concluded that he has no mental illness and is mentally fit to stand trial. The accused was then arraigned in Court and charged with this offence.

4. The accused gave a sworn defence and denied the charge.

5. The prosecution called a total of six witnesses. According to the investigating officer Robin Nzioki (P.W. 6) he received a report from one David Mitugo who reported that he was in the company of the deceased on their way home when the accused emerged and stabbed the deceased with a sharp object as a result of which he fell down and screamed for help. The deceased was rushed to hospital but died while undergoing treatment.

6. This eye witness David Mutuku did not testify. However, P.W. 2, and P.W. 6 met David Mutuku at the Police Station and he narrated how the accused stabbed the deceased and fatally wounded him. The P.W. 2 and P.W. 6 were led to the home of the accused and they arrested him. P.W. 1 Francis Wanjohi Muthii confirmed that indeed a witness who was with the deceased led them to the house of accused and identified him as the person who stabbed the deceased and he was arrested.

7. These two witnesses who were with the deceased, whose names are given as David Mutuku and Graffic Mwenda Nyamu were not called as witnesses. From the proceedings it is not clear why the two were not called and yet they were competent witnesses as provided under **Section 125 (1)** of the **Evidence Act** which states:

> **"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease (whether body or mind) or any similar cause."**

Section 128 of the **Act** provides:

> **"A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceedings………….."**

This deals with compellability of witnesses. The two named witnesses who were not called going by what P.W. 1, 2 and 6 testified

witnessed the stabbing and would have adduced direct evidence. The prosecution has failed to call the two witnesses and have not given any valid reason why they were not called. It is not clear whether it was disinterest or sheer laxity in availing key witnesses.

8. There are adverse consequences in a prosecution case where key witnesses are not called, the major one being that it will be herculean task to try to discharge the burden of proving the case beyond any reasonable doubts. Secondly no matter how many witnesses they will call to say what they were told by the witnesses the evidence remains hearsay evidence which is uncorroborated and inadmissible evidence. The evidence is worthless for the reason that their statements are not subjected to cross-examination to test its credibility as to how they witnessed and to rule out suspicion that they could themselves be accomplices whose evidence is worthless.

9. This issue of failing to call witnesses has been dealt with by the Court of Appeal and the High Court. In **Issa Jomo Sewedi -V- R (2016) eKLR** the Court held:

> **"The failure to call Mary I find did not prejudice the appellant as he did not state what he wanted her to come and tell the court. Furthermore failure to call all witnesses do not in my view prejudice the prosecution's case as prosecution has discretion to call the witnesses who they deem relevant to their case. It is not the number of witnesses which proves the prosecution's case but the quality of evidence. In the case of Michael Kinuthia Muturi V R CRA 51 of 2002 (NRI) Court of Appeal stated thus:-**
>
> **"Although no particular number of witnesses is required to prove a fact, the failure to call certain witnesses in the instances where the evidence on record is not sufficient to sustain a conviction will attract adverse inference. However, in the instant case, the evidence on record was sufficient and therefore the omission by the prosecution to call the elders and the investigating officer attracted no adverse inference."**
>
> **In this case I find there was sufficient evidence to sustain conviction and failure to call Mary sister to P.W. 4 do not in my view attract any adverse inference. There is sufficient evidence on record and the prosecution is never required to call particular number of witnesses to prove a fact but can decide on the witnesses to call and not to call in a matter."**

Therefore failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to establish the truth, and may contain gaps which could have been filled by a witness who was not called.

10. The accused is charged with the murder of Eric Muteria Maingi. The whole case is based on the evidence of the eye witness David Mutuku who unfortunately did not testify and no reasons have been given for this failure. He was the one who shouted for help when the deceased was stabbed whereupon members of the public came and he was the one who informed the Police that the accused was the culprit. They went to the accused's home and David Mutuku identified the accused as the one who stabbed the deceased. In addition, P.W. 3 stated that one Graffic Mwenda Nyamu was also with the deceased at the time of the attack. He was also not called to testify and no reasons given by the prosecution. Therefore failure by the prosecution to call the two eye witnesses was fatal in this instance as proof of the case or otherwise hinged on their evidence.

11. In his submission, **Mr. Omayo**, prosecution counsel stated that the witnesses pointed to who committed the offence and the Police managed to arrest the accused after he was identified. That the evidence shows that the Police were led to the home of accused and found blood-stains (there is no evidence by a Police officer that they found bloodstains) and arrested the accused. Indeed he has submitted that the Police were told but the prosecutor failed to call these witnesses who pointed out the person who committed the offence. What Police were told was hearsay which was not corroborated. P.W. 1 said, they found blood stains. P.W. 2, 3 and 4 did not corroborate P.W. 1 that they saw bloodstains anywhere. In any case if P.W. 1 saw blood it was not confirmed to have been the blood of the deceased.

12. The prosecution submits that the defence was a mere denial and the accused did not exonerate himself. It is trite law that the burden of proof in criminal cases rests on the prosecution and the burden never shifts. The accused has no burden to prove his innocence. He is presumed innocent until proved guilty. Whether the defence was a mere denial or that the offence is very serious does not and can never shift the burden on him. The prosecution simply failed to call their key witnesses for reasons only known to themselves. Failure to call them was fatal and also leads to a negative inference that if they were called they could have adduced evidence which is adverse to the prosecution. This regrettably is the inevitable inference since the prosecution failed to call the witness whose names they had and appeared to be the key witnesses. The case by the prosecution is weak as it is based on hearsay and though no particular number of witnesses are required to prove a case, in this case it was necessary to call the two alleged eye witnesses who had direct evidence on the person who stabbed the deceased. Failure to call the witnesses is fatal. The evidence on record is insufficient and falls short of the threshold required in criminal cases, that is proof beyond any reasonable doubts.

13. The second issue is circumstantial evidence. This issue was dealt with by the Court of Appeal in the case of **Republic -V- Michael Muriuki (2014) eKLR** where it was held:-

> **"In Sawe -V- Rep [2003] KLR 364 the Court of Appeal held:**
>
> > **"1. 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 hypotheses than that of his guilt.**
> >
> > **2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**
> >
> > **3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other**

reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. ………

5. ………

6. ………

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

In <u>ABANGA alias ONYANGO V. REP CR. A NO. 32 OF 1990 (ur)</u> the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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 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 none else."

There is no circumstantial evidence which has been adduced in this case. No bad blood has been shown to exist between the deceased and the accused and no weapon was discovered at the accused's home.

14. Furthermore, this being a murder charge the prosecution must prove *mensrea* and *actus rea*. The prosecution has not attempted to prove any of these ingredients. If we go by what P.W. 7 testified that witnesses said accused emerged and stabbed the deceased then ran away. Evidence has been adduced by P.W. 5 Doctor Thuo a Psychiatrist who examined the accused. His testimony was that the accused had no mental abnormality and was mentally fit to stand trial. The accused could not have committed the offence owing to mental illness. There is no proof that the accused had a pre-meditation to commit the murder of the deceased. The accused is said to have stabbed the deceased with the sharp end of an umbrella. This umbrella was not recovered. There was no eye witness to prove that the accused stabbed the deceased. **<u>Section 203</u>** of the **<u>Penal Code</u>** states:-

"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

<u>Section 204</u> of the **<u>Penal Code</u>** states:-

"Any person convicted of murder shall be sentenced to death."

<u>Section 206</u> of the **<u>Penal Code</u>** states:-

"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."

In the case of **<u>John Mutuma Gatobu V Republic [2015] eKLR</u>** the Court of Appeal stated:

"Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal…………

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, its it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought."

In the case of **<u>Joseph Kimani Njau V Republic [2014] eKLR</u>** the Court of Appeal stated:-

> **"In all criminal trials, both the** *actus reus* ***and the*** *mens rea* ***are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the*** *actus reus* **and** *mens rea* ***have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific*** *mens rea* ***required for murder had been proved by the prosecution………***
>
> **In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that** *mens rea* ***for murder was not proved. Failure to prove*** mens rea ***for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.***

In the case of **Dickson Mwangi Munene & another V Republic [2014] eKLR** the Court of Appeal stated:

> **"As stated, either of these acts, intentional or reckless, constitutes malice aforethought under Section 206 of the Penal Code which is the** *mens rea* ***of the crime of murder."***

In a charge of murder it must be shown that the accused's conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The *mens rea* of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthy on the part of the accused person. In the absence of malice aforethought the unlawful killing is termed as manslaughter.

15. The accused person is facing a charge of murder. The burden of proof lies squarely with the prosecution to prove the charge against the accused person on the required standard of proof beyond any reasonable doubt. The prosecution needed to adduce evidence to establish the ingredients of the offence; which are that the accused person is the one who inflicted the injuries on the deceased and that the injuries led to his death, and further that at the time he inflicted the injuries on the deceased he had formed the necessary intention to either cause death or grievous harm on the deceased.

16. The prosecution did not prove these ingredients of murder beyond any reasonable doubts.

17. The last issue is whether this Court can reduce the charge to manslaughter due to the absence of *mens rea*.

In the case of **Peter Kiambi Muriuki V Republic [2013] eKLR** the Court of Appeal in reducing charge of murder to manslaughter since the evidence did not prove *mens rea* stated:-

> **"In Nzuki -V- Republic (1993) KLR 171, the Court in substituting Nzuki's charge of murder with manslaughter observed:**
>
> > **"there was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."**
>
> **………….**
>
> **Their evidence did not prove mens rea and did not establish malice aforethought. We find that** *mens rea* ***for murder was not adequately established and proved to the required standard and we agree with the state that the charge of murder should be reduced to manslaughter. The upshot is that we quash the conviction for murder and set aside the death sentence and substitute in its place a conviction for manslaughter".***

In the case of **Republic V Andrew Mueche Omwenga [2009] eKLR** the Court reduced the charge of Murder to manslaughter and stated:

> **"Adequate provocation, especially when coupled with self defence, can reduce a murder charge to manslaughter – Mbugua Kariuki Vs Republic, [1976-80] 1KLR 1085 and Republic Vs Gachanja, [2001] KLR 428. This is also legislated in Section 207 of the Penal Code in the following words:-**
>
> > **"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."……….**
>
> **For these reasons and on the principles set out herein above, I reduce the charge of murder to manslaughter. I accordingly acquit the Accused of the charge of murder but convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code."**

The evidence on record has a gap as the prosecution has failed to adduce direct evidence to prove that the accused is the one who inflicted the injury. There is no doubt that the death of the deceased was caused by the injury on the neck, that is deep cut to the upper lobe of the left lung, thoracic cavity was full of blood which led to the cause of death. The testimony of P.W. 4 Doctor Munyi who performed the postmortem and produced the postmortem form exhibit 1 proved this. This injury was clearly caused on the deceased. However, the prosecution has failed to adduce cogent and reliable evidence to prove that it is the accused and no other person who caused this injury which led to death. The accused denied the charge and gave a defence on oath. The prosecution has failed to prove the charge against the accused beyond any reasonable doubts. It is very unfortunate that a life was lost and the prosecution though showing all indications that this is a charge which could have been proved, prosecuted the case very casually by failing to call key witnesses. The accused is entitled to an acquittal. I acquit the accused and order that he be set at liberty unless otherwise lawfully held.

Dated and delivered at Kerugoya this 9th day of February, 2018.

L. W. GITARI

JUDGE

Read out in open Court. Mr. Sitati prosecution counsel for State. Accused present, Mr. Miano for him court assistant Naomi Murage this 9th day of February, 2018.

L. W. GITARI

JUDGE

9.02.2018