



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO.38 OF 2014**

**REPUBLIC.....PROSECUTOR**

**- V E R S U S -**

**1. SAMUEL MUTUMA MWENDA.....ACCUSED**

**2. SK**

**J U D G M E N T**

The accused persons, **Samuel Mutuma Mwenda** and **SK** are charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 21/5/2014 at Murathankari Location in Imenti North District, Meru County, murdered **Lydia Karamuta M'Ituruchu**.

In support of their case, the prosecution, led by learned counsel **Mr. Mulochi** called 13 witnesses.

In their defence, the accused gave sworn evidence and did not call any other witness.

**PW1 Japheth Munene** a resident of Thimangiri recalled the 21/5/2014, when he was in a hotel at Thimangiri about 8.00p.m. when he saw Joel and Kaguongo (accused 1) pass going towards where alcohol was sold. He later left to go home and left the two at the gate of Kariro; He was able to recognize them by their voices as they were talking. He went home and after about 10 minutes, he heard a commotion and screams; he switched on the electricity lights at the gate and went to the road from where the noises emanated. He called neighbours including Gituma (PW7) whom he met at the gate. He then heard Kinyua who was working as a watchman at a church, telling them to catch somebody who had ran away because he had killed somebody; that a person came running towards their direction, he tripped the person and they managed to arrest him and it turned out to be Joel; that people came, tied Joel up and started to beat him up and it is then Joel named Kaguongo (accused 1) and **K** as the people he was with when they killed Lydia; that the people beat up Joel and set him ablaze before the police came to the scene; that the people went in search of **K** and Kaguongo on the same night. He later saw Lydia's body in the grass next to the road but did not go to observe it. He did not know how accused 1 and 2 were arrested.

**PW2 Josphat Mugira**, a brother to Lydia, the deceased, was at his home in bed about 9.20 – 9.30 p.m. when he heard screams; that on going out, he found his mother outside and enquired if Lydia had arrived and hearing that she had not, he woke up Lydia's son and they went to the road from where screams emanated; that they found a large crowd and a person was being beaten by the mob. He found the person being beaten to be Joel. He was informed that Joel had beaten Lydia and was shown where Lydia was in the Napier grass. He touched Lydia, found her bikers were partially removed; her jacket and trouser were missing. He found a club besides the body and Lydia was injured on the left eye. PW2 got his car and put Lydia inside and they were joined by Rufus Mutua, the area chief PW5; that on the way to hospital, he asked Lydia who injured her and she said it was Joel, Mutuma and **K** and she stopped talking; that she was pronounced dead on arrival at the hospital. They reported to Nkubu Police Station and went back to the scene with police and found Joel had been burned by the mob; they went in search of the other suspects and arrested Mutuma (accused 1) about ½ km from his home in a home where he was doing some work while accused 2 was arrested next day.

**PW3 Alex Muriithi**, the son of the deceased also heard noises from the road and went to the road with PW2 where they found a mob assaulting Joel for allegedly beating somebody. He went to see who it is Joel had assaulted only to find it was his mother, whose body was by the road side. They took the deceased to hospital and on the way, PW2 asked the deceased who had injured her and she named Joel, Mutuma and **K**. The deceased was declared dead on arrival at hospital and they went with police to the scene where Joel had been burnt. PW3 admitted that there are many people known by the name Mutuma and **K** in their village.

**PW4 Julius Karagania**, a brother of the deceased was informed by PW2 that their sister had been attacked, they went to the scene outside his gate. He found the deceased in the napier grass; that she was still alive and breathing heavily, half naked and injured on the left eye; that they decided to take her to hospital in company of the chief and on the way, the deceased screamed the names of those who injured her as

Joel, **K** and Mutuma and that PW2 and him asked deceased who had injured her.

When police went to the scene with them, they recovered a club and deceased's clothes. He was one of those who went to arrest Mutuma from the house where he was working while accused 2 was arrested next day.

**PW5 Rufus Mutua**, the chief of Murathankari was called to the scene where Lydia had been assaulted at about 9.30p.m. On arrival he found a crowd and Joel had been assaulted and was dying; that the crowd told him that those who assaulted Lydia were Kaguongo and Joel. That on the way to hospital, PW4 asked if he could hear what Lydia was saying that Joel, **K** and Kaguongo injured her. According to PW5, he sat in the back seat with Lydia and PW3 but he did not hear what she said. That on Lydia being pronounced dead on arrival at the hospital, they reported to the police and found Joel had been burnt. He received information of where Mutuma was and they arrested him. He knew accused persons and Joel to be persons involved in crime in the area.

**PW6 Eliud Kiriinya** was at home when he heard noises and learnt that Lydia had been killed. He enquired from PW5 who said Baba Ng'ela and Kaguongo alias names for Joel and Mutuma, were the culprits. He learnt that Kaguongo had escaped and he offered to take people where Kaguongo was (accused 1), where he was found and was handed over to the police.

**PW7 Justus Gituma** was on 21/5/2014 called by Japheth (PW1) and informed that somebody was being assaulted near his gate. On reaching near his gate, he met PW1 who informed him that Lydia had been killed. He found a crowd of people and Joel was being beaten. He tried to intervene but failed and went to call his father but on returning to the scene, found Joel had been set ablaze. He did not go near Lydia's body.

**PW8 Zablon Mukaria** area manager at Murathankari received a call from Rufus, the chief (PW5) informing him that a lady had been killed along the road and he proceeded to the scene but found the lady had been taken to hospital. He went back to the scene next day, found police who recovered a stick and a blouse, sweater in the culvert.

**PW9 Dr. Nicholas Koome** performed post mortem on the deceased and found a stab wound on the nasal bridge with a fracture of the ethmoid (nasal bone), multiple contusions and bruises on the forehead and temporal region. He found a fracture of the temporal region and base of the skull. He formed the opinion that the cause of death was severe head injury secondary to multiple blunt force trauma to the head.

**PW10 Julius Kinoti** testified that on 21/5/2014, he was going home with PW1 when they saw a person flash a torch at the gate of Deliverance Church; that a person was being chased towards their direction. They were told to stop the person who was Joel, because he had killed somebody. They stopped the person, the people caught him and returned him where the dead lady was in napier grass; that the mob beat Joel asking him to name those he was with and that he named **K** and Gituma and he left the scene. He later heard that the two accused were arrested in respect of Lydia's death.

**PW11 Charity Mukiri Jacob** a sister of Lydia, identified her body to the doctor on 26/5/2014 before postmortem was done.

**PW12 Henry Kiptoo** a Government Analyst received a green sheet, a blue/red khanga, yellow T-shirt, blue underpants, black biker, mortuary drapes and a blood sample, vaginal swab, a brown jacket, blood in syringes with names, Samwel Mutuma and Stephen Kaumbuthu and a club. He found the clothing, the mortuary drapes, they club to be stained with human blood except the biker. He did a DNA analysis and from the profiles generated from the green sheet, khanga, T-shirt, mortuary drapes and matched the blood sample of Lydia Karamuta. He found no profiles matching the accused's blood.

**PW13 PC Justus Mosoti**, was the investigating officer in the case. He received a report that Lydia Karamuta had died and he was required at the scene. He found the chief and members of public at the station with the body of the deceased in the vehicle.

He went to the scene where he learnt that a person had been arrested but found Joel had already been burnt. He received the blood stained club at the scene and the other items that were forwarded to Government Analyst for further investigation.

PW13 received information that the deceased had mentioned SK and Samuel Mutuma. He learnt of the whereabouts of Samuel Mutuma in a house, where he was arrested about 1.00 a.m. on the same night. He arrested accused 2 in his parents' house the next day.

In his sworn defence **Samuel Mutuma (DW1)** denied murdering the deceased and stated that on 12/5/2014, he had been hired to make a Sofa set at George's home and he spent the day with George; that in the evening, he went to have a bath at his home about 4.00 p.m. and they went with George to Thimangiri found the workshop closed and they made wood in another workshop and left for George's home at 6.30 p.m. where they reached at 7.00 p.m. When busy chewing *miraa* is when they received information of Lydia's death and that him and accused 2 had been mentioned by Joel. He feared to go home for fear of being lynched by the public. However, the mob came and found him at George's home and the police arrested him, and took him where Joel's burnt body was. He knew both Lydia and Joel as neighbours and had never had a dispute with them and could not tell why either of them could mention him as one of the assailants.

**DW2 SK** is a younger brother to accused. He told the court that he is now 17 years and in 2014, he was in primary school at [ *Particulars Withheld*]; that he was at school on 21/5/2017, left at 3.00 p.m. for Kakoromone, and went back home at 5.00p.m. At 9.00p.m, he heard a knock and the people asked for Kaguongo (accused 1), they searched and left; that at 9.00 a.m., police came and told him to enter their vehicle. He denied having seen accused 1 on 21/5/2017 nor did he kill the deceased.

This being a murder charge, the prosecution bears the burden, to prove its case beyond reasonable doubt. It has to prove the following:

**(1) The death and cause of deceased's death;**

*(2) That accused caused the deceased's death through an unlawful act or omission;*

*(3) That accused had malice aforethought.*

The body of the deceased was examined by Dr. Nicholas Koome who found that the deceased to have a stab wound on the nasal bridge, with fracture of ethmoid (nasal bone), multiple contusions and bruises on the forehead and fracture of the temporal region and the base of the skull. The doctor formed the opinion that the cause of death was severe head injury secondary to multiple blunt force trauma. PW1, 2, 3, 4, 5 and 6 who were some of the first people to arrive at the scene soon after the attack on the deceased found her still alive and she was rushed to hospital. According to the witnesses' evidence, they were only able to see the injury on the forehead which was visible. There is no doubt that the deceased died as a result of an attack committed next to her home.

The deceased was attacked at night, 9.00 – 10.00 p.m. as per the evidence of the PW1, 2, 3 and 4. There were no lights at the scene of attack. Nobody witnessed the attack. The prosecution case therefore turns on circumstantial evidence; accomplice evidence and dying declaration. The question is whether there is sufficient evidence to connect the accused to the offence.

From the evidence on record and even DW2's testimony, it is apparent that accused 1 was also known by the nickname of Kaguongo. The police in charging accused 1 should have indicated his alias name.

PW2 told the court that while taking the deceased to hospital with PW3, PW4 and 5, he asked the deceased who injured her and she told them in a soft voice that it was Joel, Mutuma and K. PW3 also said that the deceased replied that it is Mutuma, K and Joel who had assaulted her. PW3 said that when the deceased first spoke she could not even hear her. He said that he did not ask the deceased which Mutuma or K because these are common names in the area. PW4, another brother to the deceased, contrary to what PW2, 3 & 4 said, said that the deceased screamed that the people who attacked her were Joel, Mutuma and K. PW5 who was in the same car and seated with deceased in rear seat denied hearing either the whisper by the deceased or the scream. He only heard PW2, 3 and 4 say that they heard the deceased name the two accused and Joel. The question is whether the deceased said anything to her two brothers and son (PW2, 3 & 4). PW4 further told the court that PW5 told him that he suspected the culprits to be criminals in the area and mentioned Joel, K and Kaguongo (Mutuma). PW4 said he was given this information while still at the scene before taking the deceased to hospital. It means that when the deceased is alleged to have named her assailants, Joel, Mutuma and K were already suspects. Besides, according to those at the scene, PW1, 5 & 6 Joel had already named accused 1 as one of the suspects. It remains questionable whether indeed the deceased mentioned the two accused to PW2, 3 & 4 before she demised.

The next question whether the deceased's utterance, if at all, amounts to a dying declaration.

Admissibility of dying declaration is allowed pursuant to **Section 33(a)** of the *Evidence Act*. The section reads as follows:

### **Section 33**

**“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases**

**(a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;”**

The above provision has been discussed in several decisions including *Pius Jasunga S/O Akumu Vs Republic (1954) 21 EACA 333* where the E.A. Court of Appeal said as follows:

**“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 7<sup>th</sup> Edition of Field on Evidence has repeatedly been cited with approval.... 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 & Another (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused..... 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 to cross-examination unless there is satisfactory corroboration.”**

In the same case, the court cautioned that courts should be cautious when receiving the evidence of dying declarations as to identification when the attack took place in darkness. As earlier observed, the attack took place at a place without any form of lighting. The deceased was alone. This court has no idea how the deceased would have seen her attackers. Besides, the deceased is said to have mentioned three people by one name each. The witnesses agreed that the said names K and Mutuma are common in that area and there should have been another form of identification to connect the accused persons to the offence.

Further to the above, having heard what PW4 told the court, that PW5 had already told them that Joel, Mutuma and K were suspects, it is doubtful whether the deceased spoke and mentioned the three suspects. The evidence of PW2, 3, 4 and 5 was contradictory as to how the dying declaration was uttered. This court could not therefore rely on the alleged dying declaration as evidence linking the two accused to the offence.

PW1 and PW10 told the court that after Joel was caught, he named Kaguongo and K as his accomplices. Section 20 of the Penal Code allows the reception of accomplice evidence. In the case of Antony Kinyanjui Kimani v Rep 2011 KLR (CRA 5/2007) the Court attempted to define who an accomplice is when it stated:

***“What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes any person who counsels or procures or aids or abets the commission of an offence is a principal offender. Section 396 of the PC also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda (2000) 2 EA 559, the Supreme Court held that:***

***“In a criminal trial, a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial.”***

Generally, the rule of procedure is that accomplice evidence requires corroboration. This kind of evidence was considered in Kinyua v Republic (2002) 1 KLR 257 where the Court of Appeal said:

***“7. The firm rule of practice is that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the court duly warning itself... on the dangers of doing so.***

***8. Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail; if the court decides that the witness though an accomplice witness is credible, then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.***

***9. If the court decides that the accomplice witness’ evidence, though credible, requires corroboration, the court must look for, find and identify the corroborative evidence.”***

In the case of Rep v Ndara S/o Kariuki & Others 1945 12 EACA 84, the East African Court of Appeal considered how the Court should approach accomplice evidence. At page 86, the Court stated:-

***“A point which is sometimes lost sight of in considering accomplice evidence is, that the first duty of the court is to decide whether the accomplice is a credible witness. If the Court, after hearing all the evidence feels that it cannot believe the accomplice, it must reject his evidence and unless the independent evidence is of itself sufficient to justify a conviction, the prosecution must fail. If however, the Court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending not to connect him with the crime. It need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the Court should record in the judgment whether or not it regards the accomplice as worthy of belief.”***

My understanding of the above decision is that in some appropriate cases, the court may rely on accomplice evidence even without corroboration if satisfied that the accomplice is telling the truth after the court has duly warned itself on the charges of relying on such evidence.

It is PW1 and 10 who testified that Joel said he was with accused 1 & 2 when they attacked the deceased. The said Joel was killed by the mob. The said accomplice having been lynched by the mob after the murder, this court did not have the benefit of seeing or hearing the accomplice. So far, there is no other independent evidence that can corroborate the testimonies of PW1 and 10 on the accomplice evidence.

Accused 1 raised an alibi defence that on the material day, he spent it working at the home of George and that even when he left, therefore, he left with George and returned with him by 7.00 p.m. It is at this home where accused 1 was arrested by the members of public who included PW2, 3, 5, 6 and PW13, the arresting officer. By raising an alibi, the accused was denying having been at the scene of crime. Even as accused 1 raised an alibi defence, the burden of proof still remained with the prosecution to prove that accused 1 was one of the people who murdered the deceased.

In the case of Kiarie v Rep (1984) KLR the Court of Appeal considered the alibi defence and said as follows:

***“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate’s findings on the alibi because the finding was not supported by any reasons.”***

In the instant case, the accused 1 told the court that he had been with George at his home on the material day and even when he left they were together and returned home by 7.00 p.m. It was the duty of the prosecution to call the said George to confirm whether or not what the accused 1 told the court was true. It was not the duty of the accused 1 to prove the truth of his alibi.

The prosecution was aware of the existence of one George from whose house accused 1 was arrested. For unknown reason, the said George was never called as a witness. Of course, the prosecution has the discretion to call the witnesses that are relevant to their case but if they withhold any evidence that may be relevant to the case, then the court may draw an inference that the evidence may have been adverse to the prosecution case.

In Bukenya and others v Republic (1972) EA 549, the Court of Appeal of East Africa said:

***“While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under general law of evidence to draw an inference that the evidence of these witnesses, if called, would have tended to be adverse to the prosecution.”***

The failure to call George as a witness makes one believe that it was for an oblique motive. In the end, I find that accused’s alibi has raised a doubt in the prosecution evidence, that he may not have been at the scene of crime because he was with George.

The prosecution collected clothing from the scene where the deceased was injured which were taken to the Government Analyst. PW12 analyzed the said clothing produced his report (Ex.No.2) which contains his findings, that the DNA profile generated from the blood stains on the clothing matched that of the deceased. That evidence did not link any of the accused to the deceased’s death.

From all the foregoing, I find no direct or circumstantial evidence linking the two accused to the deceased’s death. The accused 1 and 2 are key suspects because they were known criminals in the area and were allegedly mentioned by Joel who was lynched by mob.

Suspicion however strong cannot form a basis for a conviction. For the above reasons, I find that the prosecution has not discharged its burden to prove its case beyond reasonable doubt. As a result, the accused are acquitted of the charge of murder and are set at liberty forthwith unless otherwise lawfully held.

**Dated and Signed at NYAHURURU this 19<sup>th</sup> day of March, 2018.**

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**R.P.V. Wendoh**

**JUDGE**

**Delivered by A. MABEYA (J) at MERU this 21<sup>st</sup> day of March, 2018.**