



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HCCR NO 9 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MUTUMA NTARANGWI.....ACCUSED

JUDGMENT

By the information dated 25/1/2010, **John Mutuma Ntarangwi** was 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 28/3/2009, at Baikoria village, Kalingene Sub-location, Igembe East of Meru County, murdered **Ibrahim Muthui Ntaragwi (the deceased)**.

The prosecution was led by learned counsel **Mr. Mulochi**, who called four witnesses in support of the case. The defence was led by learned counsel **Ms. Nelima**. The accused testified on oath and called one other witness.

PW1 Rael Karangu is the wife of the deceased. PW1 told the court that she was in her house on 28/3/2009 about 9.00 pm while her husband, the deceased, was seated behind the house chewing miraa. PW1 then heard her husband screaming saying in Kimeru "*Mutuma do not kill me*". Accused (Mutuma) was younger brother to the deceased. PW1 took her torch of 2 batteries and went to see what was happening and on flashing her torch, saw Mutuma (accused) cutting the deceased. PW1 started to scream, neighbours came and helped her take the deceased to Maua Hospital but on arrival, he was pronounced dead. PW1 said that the accused had assaulted the deceased before and they had always been at loggerheads with accused always threatening to kill the deceased but she did not know the source of the conflict.

PW2 DK a minor aged 15 years is the daughter of PW1 and the deceased. She recalled that on 28/3/2009, she was in the house with her mother and younger siblings while the father was outside chewing miraa. PW2 heard her father screaming "*Mutuma stop killing me*". Her mother, PW1 picked a torch and they rushed outside and found Mutuma cutting the father. They started screaming and accused ran away. PW2 was able to see Mutuma when her mother flashed a torch at his face; that neighbours came on hearing the screams and helped take the deceased to hospital. PW2 also said that there before, she had seen the accused assault the deceased and they never lived at peace but she did not know the source of the conflict; that after the father died accused disappeared for a year.

PW3 Jane Kanana, a neighbour to PW1 heard screams from PW1 at about 9.30 pm on 28/3/2009 as PW1 called her out to go and assist her because Mutuma had killed Muthui. Armed with a torch, she headed to PW1's home but on the way, met Mutuma running and he threatened to kill her. She ran back home screaming. PW3 later went to PW1's home and observed the deceased who had injuries on the back, neck, head and fingers. PW3 was left with the children as others took the deceased to hospital but they reported back that he had died and they reported at the police station.

PW4 Dr. Kariuki Michael of Nyambene District Hospital produced the post mortem that was prepared by Dr. Okanga who has left the service but had worked with him. The doctor found that the deceased sustained 3 cuts with exposed white matter, (brain) cut through major vessels of the neck; linear cuts on the back which went through the spinal cord fracturing the ribs; amputation of right thumb. Internally, the doctor found haemothorax in the chest, skull fractures of the occiput with intra cranial haemorrhage. The doctor was of the opinion that the cause of death was cardio respiratory arrest secondary to hypovolemic shock (loss of blood) following multiple cuts.

When called upon to defend himself, the accused testified on oath, denying committing the offence. He recalled that on 28/12/2009, he was at Maua where he was trading in miraa and waited for payment till 1.00 am while in company of his brother Jotham Bariu and they went back to Bariu's house at Kathima where he slept; that next day, his mother Joyce Karungumi came there and informed them that their brother Ibrahim had been cut up and they went to their parents' home in Baikolia to find out if Ibrahim had been taken to hospital. On the way there, they learnt that he had died. They arranged for burial and he was present during the burial on 7/11/2009 and thereafter, went to the farm which is next to Ibrahim's. He denied ever having left home till January 2010 when he found deceased's wife putting up a fence together with Bariu, Mutitu and Kirimi; that they were moving the boundary and when he asked why they were doing that, PW1 cut him on the head and a fight ensued; that he came to when at Maua Methodist Hospital and was handicapped. He was taken to the police station where he learnt of the charges he faces. He denied having had any dispute with the deceased but that he was framed because of what PW1 and Bariu

did to him i.e. assaulted him.

DW2 Jotham Bariu, told the court that he used to sell miraa with accused. He said that he was with accused when the mother came and informed accused that his brother had been murdered; that accused was present when the deceased was buried; that accused was arrested for fighting with his brother called Bariu and that the fight between accused and Bariu had no bearing on the case before the court. He however said that he had been with accused from 7.00 pm and they slept together and were still together when accused's mother informed them of deceased's death next day.

The accused faces a charge of **Murder under Section 203 of the Penal Code**. It is the duty of the prosecution to prove beyond reasonable doubt, the following ingredients:-

- 1) *The death and cause of death of the deceased;*
- 2) *That the accused caused the death through an unlawful act or omission;*
- 3) *That accused had malice aforethought as defined under section 206 of the Penal code.*

The injuries that the deceased sustained are contained in the post mortem (EXW1) report prepared by Dr. Okanga i.e. multiple cuts on the body; 3 cuts on the head that exposed brain matter, cut on the neck transecting the major blood vessels of the neck, cuts on the back and hands. PW1 and PW2 corroborated the findings of the doctor as to what they saw on the deceased. The fact of death is not in issue and the manner in which the deceased met his death is in no doubt, injuries were inflicted on him.

According to the testimony of PW1, PW2 and PW3, the deceased was attacked at night about 9.00 pm. There were no lights outside his house where the deceased was attacked. PW1 and PW2 told the court that the deceased screamed mentioning Mutuma as the person killing him and secondly that, PW1 had a torch.

Two issues that arise are, whether what PW1 and PW2 heard is a dying declaration and whether PW1 and PW2 were able to identify the accused as the perpetrator.

The attack on the deceased having taken place at night where there were no lights, the conditions were not favourable to proper identification and the court has to take great care in relying on such evidence before convicting an accused. In the case of ***Republic Vs. Turnbull (1973) 3 ALL ER***, the court give guidelines on what should be considered before convicting an accused based on such evidence. The court said

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

The courts have made further pronouncements on evidence of identification under difficult conditions. In ***Roria v Republic (1967) EA 583 (P584)***.

"A conviction resting entirely on identity invariably causes a degree of uneasiness as LORD GARDNER L.C. said recently in the House of Lords in the course of debate on S.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts.

There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity."

In the instant case, PW1 said she ran behind her house where she found the deceased under attack. PW2 followed her out of the house. Both confirmed that PW1 had a torch which she flashed at the accused's face and saw him well. They were in close contact because PW1 and PW2 said the house was one roomed. They just went to the back side where the deceased was attacked. Accused was not a stranger to both PW1 and PW2, as he is a brother of the deceased. In addition, PW3 who came to the scene in response to the screams said she met accused running away. She too had a torch and flashed at his face and he threatened to cut her and she had to run back home. PW3 later came back to the scene and indeed saw PW1 with a torch. Again, accused is a person who was known to PW3 as her neighbour. In the case of ***Cleophas Otieno Wamunga Vs Republic (1989) KLR 424***, the court said:-

"Whenever the case against a defendant depends or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on correctness of the identification".

The point was also addressed in ***Karanja and another Vs. Republic (2004) 2 KLR*** where the court citing the above case said:-

"Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize

someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made”.

In the instant case, it is not only PW1 who saw the accused but PW2 was with her. PW3 also saw accused as he fled from the scene. I am satisfied that the two witnesses who were closely related to accused recognized him using torch light. As for PW3, accused even spoke to her and threatened her. I am guided by the decision in Reuben Taabu Anjononi and 2 others Vs Republic (1980) where the court of appeal said

“Recognition of assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.”

*Both PW1 and PW2 said that they heard accused shouting telling Mutuma not to kill him. The question is whether that utterance amounts to a dying declaration. Dying declarations are admissible in evidence by virtue of **Section 33 (a)** of the **Evidence Act**. The relevant section provides:*

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 provisions were considered in the case cited by counsel Pius Jasunga S/O Akumu Vs Republic (1954) 21 EACA 333 where the East African Court of Appeal said

“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..... 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 above cited case, the court observed that the courts should exercise caution in receiving the said evidence of dying declaration as to identification when the attack took place in darkness. It was dark at the place where the deceased was attacked. PW1 and PW2 arrived at the scene when the attack had begun and it cannot be ascertained how the deceased knew who the assailant was. If the two had a conversation, it will never be known. However, despite the darkness, PW1 and PW2 arrived and with use of a torch, confirmed that indeed the assailant was the accused as he continued to assault the deceased. The assault took some time considering the multiple injuries that the deceased sustained.

I find that the utterance by the deceased amounted to a dying declaration as he died soon thereafter and the same was corroborated by the testimonies of PW1, PW2 and PW3.

In his defence, accused denied having murdered the deceased. Accused raised an alibi defence claiming to have been with DW2 on 28/3/2009 and that they slept together till they learnt of the attack on the deceased next day. The accused told the court that he was with his brother Jotham Bariu (DW2). However DW2 denied being a brother to accused and the deceased but that they just traded in miraa together. In addition, DW2 contradicted accused’s evidence in that whereas accused said he had been with DW2 from morning of 28/3/2009 till the next day, DW2 said he was with accused from the evening of 28/3/2009. I believe these contradictions are not for nothing. It is unlikely that the two, DW1 and DW2 were together. Besides, the accused who had counsel in this case never raised this alibi during the prosecution case to avail the prosecution an opportunity to rebut it. It is trite that when one raises an alibi defence, the onus still rests on the prosecution to prove its case to the required standard of beyond reasonable doubt. It is sufficient if the alibi raises some doubt in the prosecution case. In this case, the alibi is an afterthought, contradictory and not believable and has not dislodged the prosecution evidence in any way.

Accused also claimed to have been framed by PW2 and PW3 after they allegedly assaulted him in January, 2010, long after deceased had died.

Again this is not an allegation that was ever put to PW1 and PW3 when they testified. The allegation was raised in the defence when PW1 and PW3 could not respond to it. Further to the above, DW2 said that accused was assaulted by his brother Bariu over an issue not related to this case. DW2 never said it is PW1, PW2 or PW3 who assaulted accused or that PW2 was accused’s sister in law. The defence was not convincing at all.

PW1 and PW2 told the court that accused disappeared for nearly one year before he was arrested. Accused has said that he never left his home meaning that he was never a suspect. However, it is clear that PW1 and PW2 recorded their statements in 2009 when the incident occurred mentioning accused as the suspect. It is unfortunate that the investigating officer or arresting officer were

never called as witnesses to explain the lapse of time. The fact is that the accused was mentioned by the witnesses when the incident was still fresh in their minds and accuseds belated allegation that he was arrested in 2010 because he had been assaulted does not hold any water. Failure by the investigating officer or arresting officer to testify does not weaken the prosecution case. In Alfred Bumbo and others Vs Uganda CRA/1994 the supreme court of Uganda said.

“ While it is desirable that evidence of a police investigating officer and or arrest of an accused person by the police, should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not as a rule be fatal to the conviction of the accused. All must depend on the circumstances of each case whether police evidence is essential, in addition to prove the charge”.

This is the same position taken by the Kenyan Courts.

On malice aforethought, the injuries inflicted on the deceased speak for themselves. The deceased sustained multiple cuts on the head which exposed the brain, the neck vessels were severed and the back had injuries fracturing the spine. The accused meant to end the life of his brother. Malice aforethought flows from those injuries.

I am satisfied beyond any doubt that the charge of murder was proved against accused beyond any doubt. Accused is found guilty as charged and convicted accordingly.

Dated and Signed at NYAHURURU this 8th day of February, 2018.

.....

R.P.V. Wendoh

JUDGE

Delivered by A. MABEYA (J) at MERU this 20th day of March, 2018.