REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT CRIMINAL CASE NO. 4 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

WESLEY CHIRCHIR MULWA.....ACCUSED

JUDGMENT

1. The accused, *Wesley Chirchir Mulwa Alias Chain/Giant* faces a charge of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*.

The particulars of the offence allege that on 20th October 2006 at Taisi Trading Centre in Baringo District in the Rift Valley Province, he murdered *James Barkwany Cheboiwo*. He denied the charges.

2. In support of its case, the prosecution called a total of eight witnesses. The court record shows that the case was handled by three (3) different judges before I took it over on 13th July 2015. The trial opened before *Hon Ibrahim, J (*as he then was*)* on 3rd December, 2008. He heard four witnesses. It was taken over by *Hon Mshila, J* on 21st May, 2012 who heard the remaining four prosecution witnesses and placed the accused on his defence before she was transferred to another station. When I took over the trial, the accused elected under *Section 200 (3)* as read with *Section 201 (2)* of the *Criminal Procedure Code* to have the trial continue from where my predecessors had stopped but applied to have PW7 recalled for further cross examination. I allowed the application. This in effect re-opened the prosecution case. I proceeded to take the evidence of PW7 on further cross examination and subsequently heard the defence case.

3. Briefly, the case for the prosecution is that the deceased, PW1, PW7 and the accused are neighbours. On 20th October 2006, the deceased who was unwell, requested his son, *Gideon Barkwang* (PW1) to take him to hospital for treatment. PW1 went to PW7's shop at Taisi Trading Centre and requested him to avail his vehicle to take the deceased to hospital. By then PW1 had left the deceased on the road. As PW7 had left his vehicle in his home, he closed the shop and started walking with PW1 towards his home to get the vehicle.

4. PW7 recalled in his evidence that as he branched towards his home to get his vehicle, he left PW1 at the junction. He saw the deceased and the accused talking. They were on the road about 15 metres from the junction. He claimed that he saw and identified them since there was moonlight. Shortly thereafter, he heard PW1 screaming saying his father had been attacked. PW7 rushed back to the road and saw PW1 chasing the accused. He went to where the deceased lay and the deceased told him *"chain"* had stabbed him. He joined PW1 in chasing the accused but he disappeared into Katmwock forest.

5. PW1 on his part testified that at the material time, he was standing on the road 30 metres behind his father when he saw the accused approach the deceased. He thought the accused wanted to help his father but instead, he stabbed him. He stated that though it was around 9.30pm, he was able to see and recognize the accused through moonlight. He even saw that the accused was wearing a black jacket.

6. After witnessing the assault on his father, he screamed and *Zephania* (PW7) went to the scene. This is when he heard the deceased declare that "giant" had stabbed him. He was aware that his father had a torch since he shone it on the accused before he disappeared into a nearby forest. He did not see the torch again till it was shown to him at Kabarnet Police Station after the accused was arrested. The torch's model was "KAIDA" and his father had marked it with his initials of "JBC". He identified the torch in court in the course of his evidence. The torch had been recovered together with a knife (Exhibit 2) by PW4 when he arrested the accused on 10th November 2006 aboard a Nakuru bound motor vehicle registration number KAU 036K.

7. In his evidence under cross examination, PW1 stated that before the attack, he heard the accused ask the deceased why he had shone a torch on him. He maintained that the night was lit by a full moon. He saw that the accused used a black sword to stab the deceased on the left side. The deceased died at the scene. His body remained there till it was collected by police officers who included PW6 Superintendent *Joshua Aseto,* the investigating officer in this case. It was taken to Kabarnet District Hospital.

8. On 27th October 2006, a post mortem examination was conducted on the deceased's body by PW5, *Dr Ambrose Rotich*. The body was identified by PW3. The doctor noted that the body had a deep linear cut wound measuring 4cms on the left lumbar region. The wound extended into the abdominal cavity; the 12th left rib was also fractured. He opined that the cause of death was hemorrhagic shock caused by a stab wound. He completed and signed the post mortem report which he produced as Exhibit 3.

9. At the close of the prosecution case, I determined that the accused had a case to answer and I accordingly put him on his defence. In his defence, the accused chose to make an unsworn statement and called two witnesses.

10. In his unsworn statement, the accused denied having murdered the deceased as alleged. He claimed that the prosecution witnesses gave false evidence against him; that PW7 had a reason to lie having at one time accused him of having stolen his property. He however admitted PW1 and PW7's claim that he used to be a resident of Tanyilal village and that he used to operate a pool business. He stated that he closed the business in September 2006 and migrated to Marigat where he was employed by *Nancy* (DW2) in her hotel. He left that employment on 5th October 2006 after his sister (DW1) got him another job in a big hotel in Nakuru. On 10th October 2006, he was travelling to Nakuru in a *matatu* together with his family to take up his new job when he was arrested. He admitted that upon his arrest, his luggage was searched by the arresting officer (obviously referring to PW4) and that a kitchen knife was recovered. The luggage according to him only contained household items. He did not mention anything to do with the alleged recovery of a torch.

11. On her part, DW1 supported the accused's claim that he was not running away from home when he was arrested but that he was proceeding to Nakuru to take up a job she had found for him. She admitted on cross examination that she was not at Talai on 20th October 2006. DW2 testified that she had employed the accused in her hotel at Marigat and that he was on duty in the hotel on 20th October 2006.

12. At the close of both the prosecution and the defence case, learned counsel for the accused, *Mr Chepkwony* filed written submissions which he briefly highlighted in court. The state through learned prosecuting counsel *Ms Oduor* made oral submissions at the close of the prosecution case but elected not to make final submissions.

13. I have carefully evaluated all the evidence adduced by both parties in its entirety. I have also considered the rival submissions.

14. The offence of murder is created by *Section 203* of the *Penal Code*. There are three key elements of the offence which the prosecution must prove beyond any doubt before it can sustain a conviction. They are the following:

i. The death of the deceased;

ii. That the death was caused by the accused's unlawful act or omission; and

iii. That in causing the death, the accused had malice aforethought.

15. Malice aforethought is the legal terminology used to refer to the intention to kill another person. The circumstances from which malice aforethought can be determined are provided in S*ection 206* of the *Penal Code* as follows:

> ***"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."***

16. From the above provision, it is clear that malice aforethought takes various forms. It can be express where an intention to kill is established. It can also be constructive or implied from a set of circumstances. The existence of malice aforethought can be tested in three main ways. The first test is whether there is an intention to cause death; secondly, whether there is an intention to cause grievous bodily harm and thirdly, whether there is evidence that the accused knew that there was a serious risk that death or grievous bodily harm would result from his conduct but he proceeds to engage in such conduct without lawful excuse. See: ***Nzuki V Republic, [1953] KLR 171***. Though proof of motive in murder cases strengthens the prosecution's case, failure to prove it is not fatal to the prosecution's case.

17. Turning to the instant case, I find that the prosecution has proved beyond any doubt the death of the deceased. The key issue that emerges for my determination is whether the prosecution has adduced sufficient evidence to prove that indeed the accused attacked the deceased as alleged causing him the injuries that caused his death.

18. From my appraisal of the evidence on record, I find that this case mostly turns on the alleged identification of the accused as the deceased's assailant. In ***Wamunga V Republic, [1989] KLR 424***, the Court of Appeal stated as follows:

> ***"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."***

In ***Kiarie V Republic, [1984] KLR 739***, the Court of Appeal reiterated the need for a trial court to properly assess and weigh the evidence of identification before making it a basis of a conviction. The court expressed itself as follows:

> ***"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be water tight to justify a conviction."***

19. PW1 and PW7 placed the accused at the *locus in qou*. They swore that they saw and identified the accused at the scene through moonlight. PW1 emphasized that there was a full moon that night implying that the moonlight was bright. He claimed that he saw the accused at a distance of about 30 metres as he engaged the deceased in a short conversation before he stabbed him with a sword. When he (PW1) screamed, PW7 rushed to the scene and saw the accused disappearing from the scene being chased by PW1. He had earlier seen him talking to the deceased. He saw them from a distance of about 15 metres. He too testified that there was moonlight. He saw the deceased lying on the ground with a stab wound as the accused was running away from the scene being chased by PW1.

20. Given the foregoing evidence, I am satisfied that the accused was properly and positively identified as the culprit who assaulted the deceased on the night in question. There is no doubt that the witnesses knew the accused very well prior to the date the offence was committed. They knew the accused even by his nicknames of "giant" or "chain" since he was their neighbour. The accused admitted in his defence that he used to operate a pool table business confirming what PW1 and PW7's had said in their evidence when describing how well they knew him prior to the material date.

21. It is important to note that though the alleged assault happened at night, there is evidence confirming that there was sufficient moonlight. The fact that it is alleged that the deceased shone his torchlight on the accused just before he was attacked does not by itself mean that it was dark or that there was no moonlight as suggested by the accused's defence counsel. The fact that the torch which disappeared after the deceased was attacked was recovered from the accused after he was arrested by PW4 further strengthens the prosecution's case on identification. The torch produced as Exhibit 1 no doubt belonged to the deceased since it bore his initials of "JBC". I am thus satisfied that the circumstances in this case were conducive to a positive and reliable identification of the deceased's assailant. This was a case of recognition which is always more reassuring and reliable than the identification of a mere stranger – See: ***Anjononi & Others V Republic, [1976-80] I KLR 1566***. Given the evidence on record, I am convinced that there was no room for mistaken identity.

22. Having found as I have above, I find that the defence offered by the accused must be false and amounted to a mere denial. The accused attempted to mount an alibi but he testified about dates which were irrelevant to this case. He testified about events which allegedly occurred on 5th and 10th October, 2006. His material witness, DW2 claimed that he was on duty in her hotel at Marigat on 20th October, 2006 but she did not state what time the accused reported off duty. The deceased was attacked at 9.30pm at night. There is no evidence to prove that the accused was still on duty at that time. The defence case did not reveal an accurate account of the accused's whereabouts at the time the offence was committed. I therefore find that the accused's alibi is not well founded and it is hereby rejected.

23. From the doctor's findings as documented in the post mortem report, it is clear that the deceased died from the stab wound occasioned by the assault perpetrated by the accused and not from the ailment he had been suffering from. The question that I must now answer is whether in assaulting the deceased, the accused had the requisite malice aforethought.

24. As noted earlier, malice aforethought takes various forms. Evidence that an accused person intended to cause grievous harm either to the deceased or to another person is sufficient proof of malice aforethought. In this case, the very nature of the injuries sustained by the deceased leave no doubt that the assault was deliberate and brutal. It is evident that in attacking the deceased in the manner that he did, the accused must have intended either to kill the deceased or cause him grievous bodily harm. It is therefore my finding that in attacking the deceased, the accused had malice aforethought.

25. In view of the foregoing reasons and findings, even without considering the probative value or otherwise of the alleged dying declaration made by the deceased, I have come to the conclusion that the prosecution has proved its case against the accused person beyond any reasonable doubt. I thus enter a finding of guilty and accordingly convict the accused of the offence of murder as charged.

It is so ordered.

DATED and SIGNED at NAIROBI this 7th day of June, 2018.

C. W. GITHUA

JUDGE

DATED and DELIVERED at ELDORET this 27th day of June, 2018.

S. M. GITHINJI

JUDGE

In the presence of:

Mr Chepkwony: Advocate for the accused

Ms Oduor: Advocate for the State

Mr Joseph: Court Clerk