



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**HIGH COURT CRIMINAL CASE NO. 36 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**HENRY KIPSUGE TARUS.....ACCUSED**

**JUDGMENT**

1. Henry Kipsuge Tarus, the accused herein faces a charge of murder contrary to *Section 203* as read with *Section 204* of the Penal Code. It is alleged that on 14<sup>th</sup> April, 2012 at 2am at Ndungulu village in Uasin Gishu District of the Rift Valley Province, the accused murdered Sylvester Kipnetich Rono. He denied the charges.

2. In support of its case, the prosecution called a total of seven witnesses. The prosecution case centred around the evidence of PW1, *Mary Chepkoech Sum* who testified that on 14<sup>th</sup> April, 2012, at around 2am, she was in her house asleep when she was awoken by a bang on the door that separated her bedroom from the sitting room. A person whose voice she did not recognize warned her not to scream. He had a torch whose light was illuminating the sitting room.

3. PW1 recalled that despite her resistance, the man pushed the door slightly open and through the opening created thereby, she saw and recognized the intruder as *Rotuk*, a man she had seen passing near her compound severally in the year 2011. She identified *Rotuk* as the accused in this case. She recalled that using that opening, the accused stabbed her with a knife three times. She did not disclose where she was allegedly stabbed.

4. While she was continuing to push the door to prevent the accused from gaining entry, she heard screams from her daughter *Faith* (PW2) and the deceased. The deceased had been spending the night with her husband in a different house within the compound. She heard *Sylvester* (the deceased), shout "*he has stabbed me with a knife*". On proceeding to the place where the screams were coming from accompanied by her son (PW4), she found the deceased badly injured. He had a wound on his abdomen and his intestines were out. She tried to administer first aid on him but he succumbed to his injuries. She did not know how or who inflicted those injuries on the deceased.

5. All the other witnesses found the deceased already injured and they did not see his assailant. Like PW1, PW2 claimed that he heard the deceased say in *Nandi* language that he had been stabbed but he did not name the person who had stabbed him. According to PW2, the deceased had left the house in which they had both been sleeping in response to screams made by PW1. He expressed the view that the person who had attacked PW1 is the same person who had accosted and assaulted the deceased. He contradicted himself in his evidence when he claimed that he had seen the culprit stabbing the deceased with a knife though he did not identify him but he retracted this statement in his evidence under cross examination by stating that by the time he found the deceased, his assailant had already fled. He confirmed that he knew the accused previously and that he did not see him on or about the time the deceased was assaulted.

6. On 18<sup>th</sup> April 2012, an autopsy on the body of the deceased was performed by PW7, *Dr Walter Nalienya*. The body was identified by PW4 and PW6. The doctor testified that upon is examination, he found that the body had a stab wound on the left upper side of the abdomen measuring 5 centimeters. On dissection, he found a fracture in the deceased's seventh (7<sup>th</sup>) rib. The stab wound had pierced through the stomach and extended to the left lung. He opined that the cause of death was multiple injuries caused by the stab wound. He completed and signed the post mortem form which he produced as Exhibit 1.

7. The prosecution despite being given ample time and opportunity to call all its witnesses did not avail either the arresting or investigating officer to testify in this case. It is therefore not clear how the accused was arrested.

8. At the close of the prosecution case, I determined that the prosecution had established a *prima facie* case against the accused and that he had a case to answer. I consequently put him on his defence.

9. In his defence, the accused elected to give a sworn statement and did not call witnesses. In denying the offence, the accused swore that on the day and time the offence was allegedly committed, he was in Laikipia going about his business of trading in hides and skins. He denied that he ever went to PW1's house on 14<sup>th</sup> April, 2012 and that he used to live in Ndungulu village in the year 2011 as alleged by PW1.

10. I have evaluated all the evidence adduced in this case in its totality as well as the rival submissions made on behalf of the state and the accused both at the close of the prosecution and defence cases.

11. I wish to start by observing that the offence of murder is created by *Section 203* of the *Penal Code*. A look at this provision reveals that for the offence of murder to be established, the prosecution must prove beyond any reasonable doubt the following three essential ingredients. These are:

- i. The death of the deceased;
- ii. That the death was caused by the accused's unlawful act or omission; and
- iii. That in committing the unlawful act or omission, the accused had malice aforethought.

12. Malice aforethought refers to the *mens rea* or the intention to kill another person. The circumstances from which malice aforethought can be demonstrated are provided for in *section 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**  
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**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.”**

13. In this case, from my appraisal of the evidence, I have no doubt in my mind that the prosecution has proved beyond any doubt the death of the deceased. What arises for my determination is whether the prosecution has proved beyond reasonable doubt that the deceased's death was caused by the accused's unlawful act or omission with malice aforethought.

14. It is important to note that in this case, the prosecution did not adduce direct evidence linking the accused to the commission of the offence. I say so because it is clear from the evidence that none of the witnesses saw the accused stab the deceased. The prosecution relied on circumstantial evidence which was founded on the alleged identification of the accused as the intruder who attempted to force his way into PW1's house on the night the offence was committed. The prosecution case is that this was the same man who stabbed the deceased as he fled from PW1's house.

15. The law is that for circumstantial evidence to form the basis of a conviction, it must point exclusively to the guilt of the accused person as charged. The inculpatory facts must be incompatible with the accused's innocence and incapable of explanation upon any other reasonable hypothesis other than the accused's guilt – See: ***Republic V Kipkering Arap Koskei And Another, 16 EACA 135.***

16. The Court of Appeal in ***Sawe V Republic, [2003] KLR 364*** reinforced the above position and pronounced itself as follows:

**“...In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused.... There must be no other co-existing circumstances weakening the chain 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.”**

17. In order to apply the above principles to the instant case, I must first determine whether the accused was positively identified as the person who intruded into PW1's house at the material time since this is what forms the foundation of the prosecution's claim that it is the accused who murdered the deceased.

18. In this case, only PW1 claimed to have identified the accused as the man who allegedly stabbed her that night with a knife. Shortly thereafter, the deceased who was in the same compound was assaulted. PW1 said that she was accosted by the accused at around 2am. Her evidence therefore amounts to identification by a single witness at night.

19. As a general rule, the evidence of a single identifying witness must be taken with great care. The Court of Appeal emphasized this point in ***Maitanyi V Republic, (1986) KLR 198*** when it stated as follows:

**“Subject to well-known exceptions, it is trite law that a fact may be proved by the 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 is known that the conditions favouring 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 can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error....”**

20. In *Obwana & 4 Others V Uganda*, [2009] EA 333, the Court of Appeal of Uganda held that:

**“It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night such evidence should not ordinarily be acted upon to convict the accused in absence of other evidence to corroborate it. The rationale for this is that a witness may be honest and prepared to tell the truth but he might as well be mistaken. This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of a conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence.”**

21. Back home in *Kiarie V Republic*, [1984] KLR 739, the Court of Appeal gave the rationale for the requirement of the exercise of caution before basing a conviction on identification evidence alone. It had this to say:

**“It is possible for a witness to be honest but mistaken and for a number of witness 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 position.”**

See also *Wamunga V Republic*, [1989] KLR 424.

In other words, such evidence must not leave any possibility of error.

22. Turning to the facts of this case, PW1 claimed that she saw and identified the accused through a narrow opening on her bedroom door. She did not say how big or small that opening was. It was 2am at night but she claimed that she saw the accused through torchlight. The torchlight was facing upwards meaning it was not directed at the intruder. The intensity of the said light was not described. She claimed that she identified the intruder as *Rotuk* who she physically identified in court as the accused. The accused in his defence denied that he was known by such a name. A look at the charge sheet shows that no such name was used as the accused’s alias name. In addition, PW3 who was PW1’s husband did not say in his evidence that the accused was also known as *Rotuk*. He knew the accused only as *Kipsuge*.

23. Even assuming that the court was to accept PW1’s claim that she knew the accused previously by his alias name of *Rotuk*, If she indeed identified him as her assailant that night, one wonders why she did not give out his name to her husband and son immediately she discovered that he had fled the scene and was suspected to be the same person who had stabbed *Sylvester*. Had she been certain about the identity of her assailant, she would have given out his name or description to the other witnesses who were at the scene of the attack at the earliest opportunity.

24. Given the circumstances prevailing at the time of the alleged identification including the fact that PW1 had just been awoken from sleep, I am not persuaded that the circumstances were conducive to a positive and correct identification of the culprit. The possibility of error cannot be overruled. And though PW1 purported to identify the accused in court as her assailant that night, this piece of evidence amounts to dock identification which is entirely worthless. See: *Ajode V Republic*, [2004] 2 KLR 81.

25. The accused denied having murdered the deceased. This being a criminal case, it was the duty of the prosecution to prove his guilt beyond any reasonable doubt. There was no obligation on his part to prove his innocence. Having found that the accused was not positively identified as the man who accosted PW1 at the material time, it must follow as a corollary that the prosecution has failed to establish evidence which irresistibly points to the guilt of the accused as charged.

26. In the premises, I have come to the conclusion that the prosecution has totally failed to prove the charges against the accused beyond any reasonable doubt. I consequently enter a finding of not guilty. The accused is hereby acquitted. He shall be set free unless otherwise lawfully held.

It is so ordered.

**DATED** and **SIGNED** at **NAIROBI** this 7<sup>th</sup> day of June, 2018.

**C. W. GITHUA**

**JUDGE**

**DATED** and **DELIVERED** at **ELDORET** this 26<sup>th</sup> day of June, 2018.

**S. M. GITHINJI**

**JUDGE**

**In the presence of:**

Ms Kiplagat: Advocate for the accused

Ms Oduor: Advocate for the State

.....Court Clerk