



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CRIMINAL CASE (MURDER) NO. 57 OF 2015**  
**(FORMERLY NAKURU HC.CR.C. NO. 104 OF 2014)**

REPUBLIC.....PROSECUTOR

-VERSUS-

PETER KEREMONI ITUKAN.....ACCUSED

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

1. The Accused was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 5<sup>th</sup> day of October, 2014 at Kamere area in Naivasha Sub-County within Nakuru County, he murdered **Francis Elim Lokale**. He denied the charge and was represented by Mr. Owuor. The correct date of the offence is 30<sup>th</sup> September, 2014 and not 5<sup>th</sup> October 2014 the latter date being two days after the arrest of the Accused's arrest.

2. The prosecution case was that the Accused and the deceased shared a rented room at Kamere, Naivasha. On the night of 30<sup>th</sup> September 2014, **David Enkiror Lokamita (PW2)** and **David Karanja Mwangi (PW4)** were in their rented room which was close to the room occupied by the deceased and the Accused. They heard a commotion in the latter room as the deceased exclaimed to the effect:

***“Woi you are killing me”***

The Accused allegedly uttered words to effect that:

***“Today you will see” or “I will kill you”***

3. **PW2** was the first to rush outside and found the Accused dragging the injured deceased out of their shared room. The Accused fled just as **PW4** joined **PW2** at the scene. They were unable to get help for the deceased who had a head injury. The deceased remained in the plot until the next day.

4. On the next day, **Johana Amsen Ewan (PW5)** on learning about the incident proceeded to the deceased's home. He found the deceased lying down outside the house unable to move. He had him taken to hospital where he was admitted. He also informed the relatives of the deceased including **Ekiru Kongore (PW3)**.

5. A day later, the deceased succumbed to his injuries. **PW4** and an elder were dispatched to Suswa where they traced the Accused and brought him back to Kamere. He was placed in custody.

6. The post mortem examination revealed the cause of death to be severe head injury resulting in a

fracture of the skull epidural haematoma and raised intracranial pressure.

7. The Accused's unsworn defence statement was to the effect that he left his residence at Kamere on 9/9/2014 to make charcoal at a place called Lomayian. He said that although he knew the deceased he did not share his house with him but with one **Wafula**. That while the deceased resided at **Baba Toto's** the Accused lived in the church plot at Kamere. That **Baba Toto** approached him on 3/10/2014 and asked that he accompany him to Kamere. On arrival at Kamere he learned that he was required at Kongoni Police Station. He was placed in the cells.

8. There is no dispute that the Accused, deceased, **PW2** and **PW4** were known to each other as residents of Kamere. And that on or about the night of 30/9/2014 the deceased was found close to his home with a head injury and died two days later. And that the Accused was arrested at a location outside Kamere on 3/10/2014. There was no dispute regarding the cause of death. The court must determine whether the Accused with malice aforethought inflicted the fatal injuries on the deceased.

9. The key prosecution witnesses were the housemates **PW2** and **PW4** who claim to have been next door neighbours of the Accused and deceased, the latter who also allegedly shared a room. The incident described by **PW2** and **PW4** occurred at about midnight. The evidence by **PW2** and **PW4** is by and large circumstantial.

10. Firstly, that they heard deceased and Accused exchange words on the material night before a loud sound attracted them to go out and inquire. None of them witnessed the actual assault on the deceased but they asserted that they heard words spoken by the two men concerning the assault. In order to satisfy itself that the two witnesses indeed knew the Accused and deceased well enough to hear and recognize their voices, the court carefully looked at the evidence by **PW2** and **PW4**.

11. In **Choge -Vs- Republic [1955] 1 KLR** the Court of Appeal for Eastern Africa stated concerning voice identification:-

**“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused's voice, that the witness was familiar with it and recognised it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”**

12. **PW2** said that the Accused and deceased shared a timber room next door to himself and **PW4**. In cross-examination he stated:

**“I resided at Kamere in rented room.....Plot had wooden rooms and stone block apart from us. We occupied the two rooms made of timber. Stone house stood some 2 metres away..... occupied by other tenants..... When deceased cried out, I and Karanja (PW4) came out to inquire.....Church is far.....not true Accused resided in mabati house at church alone and next to pastor. I knew Accused well. We traded together.”**

13. During re-examination **PW2** said that the church (PAG) was far from his house but that he had lived for about 4 months as neighbours with Accused and deceased. **PW4** also stated that he lived in the same plot as the deceased and the Accused. He however described the houses they occupied as “single mabati rooms” and that “the Accused's room was 3 rooms from mine”.

14. Under cross-examination **PW4** stated:

**“The Accused and deceased lived in an open plot without fence which had 3 rooms. I lived in next plot beside their plot. We had fence. To go to their plot (deceased and Accused) I had to go via a gate of my plot.....when I reached scene fighting over but deceased lay injured. But I heard the exchange of words between the Accused and deceased..... Plot where Accused**

**and deceased lived owned by church. The Accused lived there as a caretaker in a small room.”**

15. Three questions arise from this testimony. Firstly, whether indeed **PW2** and **PW4** were co-tenants and living in the same plot with the Accused and deceased and therefore familiar with the voices of the latter two men; and if they were well placed to hear what happened between them on the material night. Thirdly, as **PW2** claimed the church compound was far from the plot where he claimed to reside while **PW4** admitted to live in a separate plot from the Accused and deceased, whether **PW2** and **PW4** knew the Accused well enough, or at all. In my considered view the evidence by **PW2** and **PW4** does not provide an affirmative answer to these questions.

16. As regards the alleged identification of the Accused on the material night by **PW2**, it was surprising that his companion **PW4** did not see the Accused yet both allegedly went to the Accused’s house at the same time. More or less. In his evidence-in-chief, **PW2** claimed to have seen the Accused dragging the deceased out of the house and that he saw an injury on the deceased’s head. He said that the “*area was illuminated by lights from next plot*” and that upon seeing them (witness and **PW4**) the Accused ran away.

17. Despite asserting that there was light emanating from a “*neighbouring plot across our place*” **PW4** for his part did not state that he saw the Accused on getting to the scene. Thus only **PW2** in the circumstances saw the Accused on the material night.

18. Concerning the identification of an assailant by a single witness at night in difficult circumstances the Court of Appeal stated in **Joseph Muchangi Nyaga & Another -Vs- Republic (2013) eKLR** that:-

**“Evidence of visual identification should always be approached with great care and caution (See Waithaka Chege versus Republic (1979) (KLR 217). Greater care should be exercised where the conditions for favourable identification are poor. (Gikonyo Karume and Another Versus Republic (1980) KLR 23) .....before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of and the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him.....”**

19. In the case of **Abdalla Bin Wendo & Another -Vs- Republic [1953] 20 EACA 166**, the Court of Appeal for Eastern Africa stated that:-

**“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but his 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 testimony of a single witness, can safely be accepted as free from possibility of error.” (Emphasis added).**

20. The proximity of the light, presumably electric, referred to by the witnesses and their closeness to Accused, period of observing him is not clear from the testimony by **PW2** and **PW4**. If indeed, as **PW4** admitted, the scene of assault was the Accused’s home at the church, described by **PW2** as being far from the witnesses’ home, reference to a neighbouring plot is confusing and does not help to establish the proximity of the source of light.

21. What in my considered view makes the testimony of the two witnesses more confounding is the fact that despite allegedly “witnessing” a fight in which the deceased was seriously injured, they allegedly took no action. **PW2** claimed that they put back the deceased in his room, while **PW4** said they left him outside overnight. They did not alert the police or even try to get him to hospital. The deceased was found by **PW5** lying outside his room on 1/10/2014. **PW5** was notified of the matter on 1/10/2014 by

**PW4.**

22. Could it be that though deceased lived at Kamere, **PW2** and **PW4** did not know exactly where he lived, and that they did not witness what they claim to have seen, save that they came upon the wounded deceased on the material night or early on the next day?

23. It may well be that contrary to the Accused's denials he had shared a room with the deceased at Kamere at some time. However, the evidence by **PW2** and **PW4** does not convincingly place him at the scene of murder on the material date. It is not clear why the landlord to the Accused was not called to testify.

24. The Accused has raised an *alibi* which, though not suggested to **PW2** and **PW4** in cross-examination is not disturbed by the identification evidence led by **PW2** and **PW4**. In **Karanja -Vs- Republic (1983) KLR 501** that:-

**“in a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence or his alibi, if it amounts thereto at an early stage in the case, and so that it can be tested by those responsible for investigation and preventory suggestions that the defence was an afterthought.”**

25. Besides, an Accused person who raises an *alibi* defence has no duty to prove the same. In considering the defence of alibi, the court has always to bear in mind that the burden always remains with the prosecution to prove the allegations made against the Accused beyond reasonable doubt. In the case of **Kiarie -Vs- Republic (1984) KLR 73**, the learned Judges of the Court of Appeal held 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 proving 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 finding an alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.”**

26. In another case, **Wangombe -Vs- Republic (1976 – 80) 1 KLR 1683**, the Court of Appeal observed that:

**“even where the Accused raised an alibi and does not call witnesses, it is the duty of the court to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the Accused.”**

27. The standard required where the defence of *alibi* is raised was stated in the case of **Uganda -Vs- Sabyala & Others (1969) EA 204**. The Learned Judge quoting a statement by His Lordship the **CJ of Tanzania** to the effect that:

**“the accused does not have to establish that his alibi is reasonably true. All he has to do is create doubt as to the strength of the case for the prosecution. Where the prosecution case is thin, an alibi which is not particularly strong may very well raise doubt.”**

It behoves this court to analyse the entire evidence adduced by both sides and satisfy itself whether or not creates doubt of the prosecution case.

28. Reviewing all the available evidence, I am not satisfied that the prosecution evidence meets the standard of proof beyond reasonable doubt. I will therefore acquit the Accused under Section 322 of the Criminal Procedure Code and order that he be set at liberty unless otherwise unlawfully held.

**Delivered and signed in Naivasha this 30<sup>th</sup> day of June, 2017.**

In the presence of:-

Miss Kavindu for the DPP

Mr. Mburu holding brief for Mr. Owuor for the Accused

Accused – present

CC - Barasa

**C. MEOLI**

**JUGDE**