REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO.67 OF 2012

LESIIT, J.

REPUBLIC ……...……PROSECUTOR

VERSUS

CLIFF MACHARIA NJERI……...……ACCUSED

JUDGMENT.

1. The accused **CLIFF MACHARIA NJERI** faces one count of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are:

> ***"On the 11th day of August, 2012 at Majengo, Thika within Kiambu County, murdered JOSEPH GITHU WAITHERA."***

2. The prosecution called a total of six witnesses. These witnesses were heard by Korir, J. before she was transferred from this station. I took over the case under **Section 201(1)** and **Section 200** of the **Criminal Procedure Code** and heard the defence.

3. The case for the prosecution was that PW1 had taken a ride in a Tuktuk motor cycle in the company of the deceased from Thika Town to Majengo. It was around mid-night when they reached their destination. PW1 said that the deceased alighted first and that when she alighted, she saw the deceased engaged in a scuffle with another man. She heard the man say to the deceased *"wacha ujinga" "stop being foolish."* PW1 stated that she then saw the deceased fall down. Immediately thereafter she saw the same man advancing towards her holding a knife as a result of which she threw her hand bag at him and she fled.

4. Two days after the incident, PW1 was called to an identification parade where she identified the accused as the assailant who had attacked the deceased and herself. She described the accused before the parade and said that she had seen him clearly as there were lights coming from an Apartment near the incident. PW1 said that the incident took 5 minutes.

5. PW4 was the Community Policing official from Majengo. His evidence was that a Tuktuk driver arrived at the Thika Police Station as he left the station. He testified that he heard the driver report an attack on 2 passengers he had dropped at Majengo. PW4 stated that he accompanied the driver to the scene where they found PW1 and the deceased. They picked the deceased and took him to Thika Level 5 Hospital.

6. PW4 said that he got the description of the culprit from PW1 from which he concluded it was the accused who did it. He stated that the description fitted how accused was dressed that day as he had seen him earlier in the day. PW4 later led to the arrest of the accused.

7. The post mortem report on the deceased was produced by PW6, on behalf of Dr. Jalango who carried out the autopsy. According to the Report the cause of death was cardio-respiratory arrest due to chest injury.

8. The accused gave a sworn defence and put forward an alibi as his defence. He said that he worked in Practical Training College which was between Kenol and Kabati in Muranga. He said that on the 11th August 2012 after work at 5p.m. he proceeded to Thika, Starehe to see his mother. He saw her at 6p.m. He then left for Klub house but on the way met PW4 who threatened him with dire consequences if he continued living the way he was.

9. The accused stated that while at the club house enjoying a game of soccer, PW4 pulled him out with 2 other people he did not know. He was beaten by the 3 men before being taken to Thika Police Station. He said that at the O.B.(Report Office) he heard the officer ask PW4 who beat him. The accused said that it was only on 28th August 2012 that the charge of murder was read to him. He denied the charge.

10. Mr. Ndungu represented the accused in this case. In his submissions, counsel urged that the prosecution was relying on the evidence of a single witness, PW1. Counsel urged that the facts of the case indicate that the incident took place at mid-night and that the attack was by a man armed with a knife and therefore PW1 must have been shocked. Counsel urged court to find that the description PW1 gave of the attacker of a brown middle aged man, does not fit accused description who is young and very dark.

11. Counsel urged that the evidence of PW4 should be treated with caution as he was not present at the scene at the time of the attack. Counsel urged that PW4 moved to arrest the accused based on prior information and belief he had of the accused being a wanted criminal in that area. Counsel also raised issue with failure to call the Investigating Officer and the Parade Officer as witnesses.

12. Ms Njuguna, learned Prosecution Counsel prosecuted this case on behalf of the State. In her submissions, counsel urged that PW1 positively identified the accused as the man who stabbed the deceased. Counsel urged that PW1 gave a description of the attacker to PW4, the Community Policing member from the area who was able to know the person that fitted the description as the accused. Counsel urged that indeed PW1 was able to identify the accused in an ID parade conducted a day after the incident.

13. I have considered the evidence adduced by the prosecution and the accused defence. I have also considered submissions by both sides. Following the considerations of both the evidence and submissions, I find that the following are the issues not in dispute and the issues for determinations.

14. The issues which are not in dispute is the fact the deceased was stabbed by a man soon after he alighted from a Tuktuk in company of PW1, the key witness in this case. It is not in dispute that the deceased died same day from the injuries that he suffered in that attack. It is not in dispute that PW4 and the Tuktuk driver returned to the scene and found the deceased and PW1 still at the scene waiting for help.

15. The issues for determination are:

a) Whether the evidence of identification by PW1 was positive for a correct identification.

b) Whether the evidence of PW4 has any probative value.

c) Whether the prosecution failed to call crucial witnesses and whether the court should make an adverse inference against the prosecution for failing to call certain witnesses.

d) Whether the accused defence is reasonable and probable.

16. The accused is charged with murder which is an offence created under **section 203** of the **Penal Code** in the following terms:

> **"Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder"**

17. The offence has three ingredients:

a) That the accused committed an unlawful act or omission.

b) That the unlawful act or omission caused the death of the deceased.

c) That at the time the accused committed the unlawful act or omission he had formed the necessary intention to cause death or grievous harm.

18. The prosecution has to adduce evidence to prove that the accused unlawfully stabbed the deceased causing him injuries and that the said injuries led to the death of the deceased.

19. As to **whether the evidence of identification by PW1 was positive for a correct identification.** There was only one eye witness of the incident in this case. The prosecution has urged that the evidence of PW1 was reliable, and that it establishes the charge against the accused as required. The defence on the other hand urged the court to find that PW1 must have suffered shock and therefore her ability to identify the attacker cannot be ascertained.

20. The principles applicable when dealing with evidence of visual identification are now well established. In the case of **Charles Maitanyi –vs- Republic [1985] 2 KAR 25** the Court of Appeal held at page 77:

> **"It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters helping to test if none of these matters are known because they were not inquired into."**

21. As I stated earlier this case was started by another judge. I therefore did not have the benefit of seeing the prosecution witnesses and to observe their demeanour. From the record the circumstance of identification is given. I have considered the circumstance given in order to ascertain kind of light that enabled the key witness, PW1 to identify the attacker in order to determine whether the conditions of lighting at the scene were good for a positive identification of the attacker.

22. I have considered the nature of the light, the sort of light, its size, and its position relative to the attacker. It was PW1's evidence that she was able to see the attacker with the help of lights which were coming from an Apartment near the place of incident. PW1 said that the incident took 5 minutes.

23. I have considered that PW1 was alighting from a Tuktuk behind the deceased when she first saw the deceased and a man scuffling. She then heard the man tell the deceased to stop being a fool or words to that effect. Then as the deceased fell, the attacker turned towards her holding a knife. PW1's reaction was swift which was to throw her bag at the man who then fled. From this evidence I find that the condition of lighting at the scene was not clearly described. More important however is the fact that the attack was both swift and sudden. I doubt that the attack could have taken the five minutes that PW1 claimed. It must

have taken few seconds.

24. The swiftness of the attack, and the lack of clarity as to the nature, strength and distance of the lighting from the attacker in relation to PW1, I find that the evidence of identification was not positive for a correct identification of the attacker. What is required is other material evidence to implicate the accused with this offence.

25. As to **whether the evidence of PW4 has any probative value.** PW4 described himself as Chairperson of the Community Policing in Majengo area, which covers the area where the incident occurred. PW4 was a member of public and should be treated as such. What PW4 stated in his evidence was that he heard PW1 give a description of the person who had attacked her and the deceased, and that from that description he was able to know that it was the accused who had committed the offence. The basis of his conclusion was based on the reputation he had of the accused, and that he was wanted at the time for similar offences. PW4 went ahead to look for and arrest the accused.

26. PW4 was not an eye witness. His evidence that the accused was wanted for similar offences is of no probative value. That evidence of character could only have been admitted if accused character had become an issue in the case. I have perused the record and find that the character of the accused was never an issue in this case. That evidence was in the circumstances inadmissible in evidence. Consequently I have disregarded it as such. PW4's evidence was not useful to the prosecution case. His effort to have the accused arrested is the only important part that PW4 played in this case.

27. As to **whether the prosecution failed to call crucial witnesses and whether the court should make an adverse inference against the prosecution for failing to call certain witnesses**. The prosecution did not call some witnesses in this case. These included the Investigating Officer, the ID Parade Officer and the Tuktuk driver who dropped the deceased and PW1 where they were attacked.

28. The issue for determination is whether the prosecution failed to call crucial witnesses because it is only on such basis that an adverse inference can be made against the prosecution case. The principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of **Bukenya and Others Vs. Uganda 1972 EA 549** LUTTA Ag. VICE PRESIDENT held:

> **"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
>
> **Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

29. The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. It is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not.

30. In this case the prosecution did not call the Tuktuk driver who had been hired by PW1 and the deceased to drop them at Starehe area where the two were attacked. This same man took PW4 and police officers to the scene where they still found PW1 and the deceased waiting for help. His evidence was critical as he was an eye witness of the incident. The deceased was attacked soon after stepping from his vehicle. He had not driven from the scene at the time. This person was a very important witness. His evidence may have provided the corroboration that the evidence of PW1 required.

31. The other witness left out was the ID Parade Officer. The prosecution was given so much time to avail this witness in vain. He carried out the ID Parade where PW1 claims that she was able to identify the accused as the one who attacked her and the deceased. The evidence of PW1 that she identified the accused needed to be substantiated by way of production of the ID Parade Form where the entire process was recorded. That was the only way to confirm that PW1 identified the accused, and also show whether the parade was mounted as required by law. The evidence of that witness was therefore important as

failing to call him leaves the evidence of ID Parade in PW1's testimony unsubstantiated.

32. The other witness not called was the Investigating Officer. No doubt this witness was important as he could have shed more light as to investigations carried out and would have explained on what basis the accused was charged.

33. Having considered the issue at hand I find that the prosecution failed to avail crucial witnesses in their case. I find that the prosecution failed to make available all witnesses necessary to establish the truth. The evidence adduced was barely adequate to establish the truth in this case. Consequently I find that this court is justified to make an adverse inference that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution and that was the reason it was not called.

34. As to **whether the accused defence is reasonable and probable.** The accused gave an alibi as his defence. The defence of alibi was considered in the Court of Appeal case of **KARANJA VS. REP 1983 KLR 501** where the court held as follows:

> **"The word "alibi" is a Latin verb meaning "elsewhere" or "at another place". Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, ie when he was initially charged.**
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> **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 prevent any suggestion that the defence was an afterthought."**

35. In the case of **UGANDA v. SEBYALA & OTHERS [1969] EA 204**, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

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

36. I am well guided. When an accused person raises a defence of alibi, he does not bear any burden to prove his innocence or to prove his defence. All he needs to do is raise doubt as to the strength of the prosecution case. In the prosecution case the evidence of identification was weak. There was need for corroboration of that evidence which was lacking. Having considered the entire evidence adduced in this case I find that the defence was not challenged.

37. The result is that the prosecution did not prove the case against the accused person beyond any reasonable doubt as required. I give the accused the benefit of doubt and acquit him of this offence under **section 322** of the **Criminal Procedure Code**.

DATED AND DELIVERED AT NAIROBI THIS 31st JULY, 2017.

LESIIT, J.

JUDGE