



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 45 OF 2010

LESIT, J.

REPUBLIC.....PROSECUTION

VERSUS

PETER KARANJA Alias WANIJUANY.....ACCUSED

RULING

1. The accused **PETER KARANJA** alias **WANIJUANY** is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**.
2. The particulars of the offence are:

“On 22nd day of September 2007, at Ndunyu Market in Dagoretti Langata Division within Nairobi Province murdered GEORGE KIARIE GICHURU.”

3. The prosecution called 4 witnesses.
4. The facts of the prosecution case are that the deceased was sleeping on shop corridors near the Dagoretti Market with 2 other youths, PW2 and 4. While there, at about midnight of the material night another youth attacked them with a thorny stick. When the youth was asked why he was beating them, he answered that he wanted money from them.
5. The prosecution case is that the aggressor chased the deceased into the market place where they fought by punching each other. By the time the deceased fell down, PW2 saw that he was bleeding and he screamed for help. That is when the aggressor ran away from the scene.
6. The accused was arrested on 19th June 2010, two years and nine months after the incident and charged with the offence.
7. Mr. Masara, the defence counsel submitted that there was no eye witness in this case. He urged that since the investigating officer was not called as a witness, the prosecution case did not meet the required threshold and therefore the accused ought to be acquitted.
8. Ms. Tumaini Wafula the Prosecution Counsel in this case urged that PW2 and other witnesses recognized the accused at the scene as he was someone they had known for a long time. Counsel urged that PW2 testified had that the aggressor was called by his nickname “Wanijuany” and asked why he was meeting them, which was a demonstration that he was well known.
9. Ms. Wafula urged that the time the accused took to beat the deceased was sufficient time to enable the eye witnesses to identify the accused.
10. Ms. Wafula urged that the deceased informed PW4 who found him lying on the ground with stab

wounds that it was “*Wanijuany*” who stabbed him. Counsel urged that in spite of failure to call the investigating officer the evidence adduced by the prosecution was sufficient to sustain a conviction.

11. I have considered the evidence adduced by the prosecution in this case and the submission by both counsels. From the submissions by counsel the issues which arise in this case are:

- a. **Whether there was an eye witness account of the events of the incident in issue?**
- b. **Whether the conditions of lighting at the scene were conducive for a positive identification of the aggressor/assailant?**
- c. **Whether there was a dying declaration?**

12. The prosecution called 2 witnesses who were at the scene of incident around the time of the incident. These were PW2 and 4. Considering PW2’s evidence, he was clear that the incident involved two scenes. The first one was where PW2, the deceased and one Evans Mwaura were sleeping when the assailant attacked them. The second one was where the assailant and the deceased exchanged punches and where the deceased fell down.

13. According to PW2 when the assailant came he started beating all 3 of them. PW2 testified that he heard PW4 ask the assailant by his nickname “*Wanijuany*” why he was beating them. PW2 testified that when the deceased sought to find out from the assailant why he was beating them, PW2 saw the assailant chase the deceased from that scene to the market place where the two fought. By the time PW2 reached them, the deceased was lying on the ground with 3 stab wounds.

14. Regarding the conditions of lighting, PW2 described the area where he, PW4 and deceased were sleeping as dark with the only source of light being 40 meters away. PW2 specifically stated that the lighting in that area was not sufficient to enable the identification of any person.

15. PW2 was also clear that in addition to not being seen by the assailant sufficiently to identify him, he did not know the person that PW4 referred to as “*Wanijuany*” before that day. PW2 was also clear that the market area where the deceased fought with the attacker was dark and that the only source of lighting was when the Police vehicle came to collect the deceased’s body. More importantly, PW2 did not see the deceased being stabbed.

16. PW4’s evidence was in conflict with that of PW2. PW4 testified that he was only passing by the market place from where he was performing casual labour when he came across the deceased lying down. He said he was lying down within the market area. According to PW4, he was not present in the shops area where PW2 and the deceased were sleeping and therefore was not there when they were attacked.

17. PW4’s evidence was to the effect that he did not witness the attack on PW2 and deceased and also that he did not witness the fight in which the deceased was stabbed. PW4’s evidence was inconsistent to that of PW2. The inconsistency was so glaring that it was not possible to reconcile the evidence of these two witnesses.

18. In the court of appeal case of **NDUNGU KIMANYI V REPUBLIC (1979) KLR 282** the court considered the weight to be given to the evidence of a witness or witnesses whose credibility appeared to be questionable and came to the following conclusion :-

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

19. Ms. Wafula the Prosecution Counsel introduced another aspect of the prosecution case in her submissions. It was the prosecution counsel’s submission that the deceased informed PW4 who had

stabbed him. The issue is whether there was such information given by the deceased to PW4 and secondly, if so whether it amounts to a dying declaration?

20. The evidence by PW4 was short. His evidence was that he was passing by when he came across the deceased lying on the ground and a large crowd surrounding him. PW4, did not state anywhere that the deceased was alive when he saw him. In fact his evidence was to the effect that it was the body of a person he knew as George. According to PW2, no one held any conversation with the deceased, neither did the deceased talk at all. According to PW2 the deceased was already dead when he reached where he was and he was the first person to arrive at the scene after the attack. I find that PW4 was not a credible witness and his evidence was not dependable. I also find that there was no dying declaration in this case.

21. Having considered the entire evidence adduced in this case I find that the deceased was attacked on the night in question by a man who chased him from the area where shops are lined up and where he had been sleeping, to the market area where he was injured. Even though PW2 did not witness the actual stabbing of the deceased, it is clear from his evidence that in between the time the deceased was chased to the place where he exchanged punches with his assailant no one else went near the deceased.

22. The deceased had stab wounds which PW2 saw as he lay on the ground. At the same time only the assailant was present at the scene before he ran away. From that evidence it is the assailant alone who had the time and opportunity to attack and stab the deceased.

23. The Prosecution did not call any evidence of the doctor and neither was the post mortem form adduced in evidence. Even though I have no doubt that the deceased died of injuries inflicted on him by a single assailant, the real cause of his death was not proved.

24. I find also that there was no evidence of identification to create a nexus between the accused and the deceased death. PW2 who said he saw the assailant was clear that he was a total stranger to him and secondly that the conditions of lighting were too poor to enable any identification of the assailant.

25. PW4 in his evidence said he came to the scene after the fact and therefore he did not witness anything.

26. In conclusion I find that the prosecution has not established a prima facie case to justify the court to place the accused on his defence for the offence charged. In the circumstances, the accused person is given the benefit of doubt and acquitted at this stage under **Section 306** of the **Criminal Procedure Code**.

READ, DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST APRIL, 2016.

LESIIT, J.

JUDGE