



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL CASE NO. 44 OF 2009

STATE APPLICANT

V E R S U S

SAMUEL MUCHOMBA MUTHURI RESPONDENT

JUDGMENT

Samuel Muchomba Muthuri faces a charge of murder contrary to **section 203 as read with section 204 of the Penal Code**. He is alleged to have murdered **John Mati Nkurui** on 19/4/2009 at Gakurungu Location, Tharaka Central.

The prosecution called a total of 10 witnesses and the case was prosecuted by Learned Mr Mulochi. The accused testified on oath in his defence and was represented by Mr Riungu advocate.

PW1 James Kamakia Kirigia of Gakurungu market recalled that on 19/4/2009 about 10pm, he was with **Zachary Murithi Mutiga** (PW2) and Keigige when they heard woman screaming. They went to check where the noises were coming from only to find Tabitha and another woman quarreling and fighting over a man with each accusing the other of stealing her man. PW1 said he had a torch because there was no light at the scene.

PW1 said that a man came and stabbed the two women on the buttocks and ran away without talking to anyone. PW1 identified the person who stabbed the two women as Samuel Muchomba, the accused, who he knew before; that John Kugeria, a person involved in community policing tried to catch Samuel but he stabbed John on the lower abdomen and ran off. . PW1 went to help raise John Kugeria because the intestines were exposed. He did first aid on John and tied the wound with a lesa. That John and two women were taken to hospital; that the knife that was used in stabbing fell at the scene a young boy picked it a week later and PW1 took possession of it and later handed it to the police.

PW2 Zakaria Murithi testified that he was in his rented room at Gakurungu market when he heard screams. He went out and saw councilor James Kamakia PW1. It was about 10.00pm and it was dark. He said two women were fighting but were separated by John Kugeria and another. He heard each of the women say she had been stabbed; John Kugeria asked who had done it and the women pointed to the man. Pw2 was not able to see the man who stabbed the ladies because it was dark. John released the stabbed lady and PW2 then saw that John had been stabbed on the stomach. When he asked who stabbed

him, John said it was Samuel Muchomba (accused). PW2 denied having seen Samuel Muchomba that night. Later, when in his house he saw a torch light visible through the cracks in the door and saw Samuel Muchomba (accused) shielding from the rain after emerging from the bush. He knew accused before the incident.

PW3 Jeremiah Seme was the investigating officer in this matter. He said Marimanti police station received a report of assault on 19/4/2009 about 11.00pm and PW3 proceeded to Gatui Hospital next day where he found the deceased had already died on his way to hospital; the two ladies who had been stabbed were also taken there. He recorded statements from the two ladies and other witnesses including PW1 and PW2; that accused went to station on 22/4 /2012 and reported that he had been attacked by people he did not know. Before the report was booked, the deceased's brother arrived at the station and identified accused as the assailant.

Pw4 Joseph Mutugi Kamwara was asleep in his house when he heard screams and went to see what was happening, found Tabitha and her sister's daughter fighting; that they were separated but a person came and stabbed both ladies. He said he was able to see because three people had torches, PW1, the deceased and another. He identified accused as the person who stabbed the deceased; That when the ladies screamed that they had been stabbed the deceased chased the person who had stabbed the ladies for about 3-4 meters away and then he shouted that he had been stabbed PW1 and 2 went to his aid. PW4 said he saw accused stab the two ladies.

Pw5 John Machira Nkurui of Gakurungu received a call from his wife on 19/4/2009 that his brother John had been stabbed and taken to Matiri Hospital. He proceeded to the Mortuary, saw deceased's body and reported to Marimanti police station. He found accused at the police station but did not know him before.

PW6 Mary Gatiria Ndege stated that on 19/4/2009, she had visited her auntie Tabitha and was in Tabitha's house with her baby about 8.00pm when she heard her aunt, saying she had died. On going to check on her, found her at the door of her house, and her husband was in the bedroom. When trying to lift Tabitha up, she too was stabbed. She denied knowing who stabbed Tabitha or herself. She denied knowing the accused and denied seeing who attacked the deceased .

Pw7 John Barugah, who described himself as the husband to Tabitha, recalled that he was in his house on 19/4/2009 when he heard a man shouting that he would stab and kill somebody; that at the time, his wife Tabitha and niece Mary were outside and after a short while, heard Tabitha asking why she had been stabbed. He went out only to find Tabitha had fallen. He went back to get a torch and found Mary had been stabbed too and fell where Tabitha lay. PW7 said he flashed the torch at the person who had stabbed the two ladies and saw it was the accused as he ran towards the bush. Pw7 said that the deceased told him that the person who has stabbed the two ladies had stabbed him. He went to hospital with the two injured ladies but John died along the way. He did not see the two ladies and deceased being stabbed.

PW8 and 9 did not testify fully but were stepped down and did not complete their testimonies after defence counsel objected to their testimonies as they did not know the author of the post mortem report.

Dr Isaac Macharia (PW10) produced the post mortem report which was authored by Dr Ogombe who conducted the post mortem on the deceased. Pw10 had worked with Dr Ogombe. Dr Ogombe examined the deceased and found a large wound on the back, below the rib cage on left side with evisceration of the gut. He was of the opinion that the cause of death was penetrating abdominal injury caused by a sharp object.

When called upon to defend himself, the accused in his unsworn testimony told the court that on 19/4/2009, he was at Kaguru, working as a mason and on 21/4/2009, someone called and informed him that his wife had packed her things; that he asked for permission to go home. He found the wife had left with one James Kamakia Kirigia (PW1) though he had warned her about her association with him. He went to report at Marimanti Police Station on 22/4/2009. He did not get the OCS. It is then James Kamakia PW1 went there and alleged that it is accused who had killed somebody at their home. The

police refused to listen to him; that to date his wife is with the said James. He said that PW1 and 2 framed him.

In his closing submissions, accused's Counsel Mr Riungu submitted that malice aforethought has not been proved; That the man over whom the two women fought was not disclosed; that there was no source of light at the scene, that it was night and not possible to identify anybody; that nobody saw the deceased being stabbed; that the murder weapon was not recovered on same day and what was produced in court cannot be confirmed to be the murder weapon. That accused raised an alibi which defence has not been disputed by the prosecution.

In reply, Mr Mulochi urged that the prosecution case had been proved to the required standard; that PW1 saw accused stab deceased because he was well known to him.

This offence was committed in the night at about 10pm according to PW1 and 2. The other witnesses PW4, 6, 7 all confirmed that the attack on the deceased took place in the night at a place where there were no lights. The incident having taken place at night, this case therefore turned on identification of the assailant.

Identification was under unfavourable condition and it is the law that the court has to warn itself of the importance of executing evidence on identification carefully so that it does not cause injustice. The courts have over the years considered the purpose which the court has to consider before being convicted on evidence. In ***Cloephas Otieno Warunge Vs Rep. 1989 KLR 424***. The court of appeal on the purpose that the court will not consider in identification under difficult circumstances. The court said thus:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendants in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J., in the well known case of Rep Vs Turnbull (1976) 3 all E.R 549 at page 552 where he said:

“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”

Dr Ogambo performed post mortem on the body of the deceased on 23/4/2009 and found the cause of death to have been a penetrating abdominal injury caused by a sharp object. The findings of the doctor were corroborated by the evidence of PW1, 2, 4 and 7 who saw the deceased after he had been injured.

According to PW1, PW2 and 4, they were in their houses at Gakurungu market when they were attracted by noises from outside. They went out only to find two women fighting. They all identified the women who were fighting as Tabitha and her niece, Mary Gatiria PW6. The two ladies were alleged to have been fighting over a man, whereby Tabitha claimed that Mary had snatched her man. PW1 testified that the man whom the 2 ladies fought over was then staying at Marimanti and had rented a house there. He also said the man was working with Ministry of Water. PW7 claimed to be her husband of the said Tabitha and claimed to have been in her house that night.

PW6, however denied having fought with Tabitha and that she was stabbed when trying to attend to Tabitha who had been stabbed outside her house. Tabitha refused to come and testify. Having heard PW6 and 7, they were not truthful witnesses. They tried to isolate themselves from the fight between Mary and Tabitha but in my view they were part and parcel of it. I prefer the testimony of PW1, 2 and 4 as a true version of what transpired before the deceased was stabbed. I also find that PW7 must be the man, over whom the two women fought. Following the description given by PW1 that the man was living at

Marimanti and was working with Ministry of Water in 2011. PW7 admitted to having been working with Ministry of Water in 2011.

PW1,2 and 4 all told the court that after the two ladies were separated, it is then that they were suddenly stabbed. PW4 said he actually took part in separating the ladies for fighting. Although PW2 denied that there was any light at the scene, I find that PW1, 3 and 7 evidence was consistent that there were people with torch including PW1.

PW2 even denied ever seeing the accused at the scene and that he could only see shadows. However, he went ahead to say he was able to recognize the deceased as one of the people who separated the ladies who were fighting but that later he saw accused sheltering from the rain when he was in his house. Contrary to what PW2 told the court, PW1 was also categorical that he left his house with a torch and saw Tabitha and Mary fighting, saw the deceased arrive and saw the accused stab the deceased. PW4 also told the court that three people had torches at the scene i.e PW1, the deceased and another person and that is how he was able to see accused emerge, stab the two ladies who had been fighting then the deceased when he tried to get hold of the accused as he was getting away. PW4 specifically said that after the accused stabbed the two ladies and started to leave, he was one of those who followed accused together with deceased. Both PW1 and 4 said the that deceased was stabbed about 5-7 meters from where the ladies were stabbed. It means that accused had not gone for when he stabbed deceased. Even for PW2 who did not see who stabbed the deceased, he said that deceased said it is Muchomba (accused) who had stabbed him. After careful evaluation of the evidence on record, I am satisfied that PW1 and 4 were at the scene of crime; that there was more than one torch at the scene that enabled people see what took place.

Accused has raised two limbs in his defence an alibi and allegation of a grudge.

He alleges that his wife had an affair with PW1 James Kamakia and that he was called home by the son that the wife was leaving only to go there and be informed that she left with James Kamakia and that when he went to report at the police station, that is when the same James Kamakia arrived at the police station and reported that somebody had been killed. The accused was represented by counsel and James Kamakia (PW1) testified before the court. At no time did the defence put to PW1 that he had an affair with the accused wife or that he took accused's the wife a way or that PW1 is the one who made an allegation of murder against him. The investigating officer (PW3) was not aware of such allegation.

In my considered view, the allegations made by accused against PW1 are a total afterthought and unbelievable I believe and find that it is accused who surrendered himself to the police because he feared for his life. Accused also raised an alibi that he had been away from home working in Mitunguu. When one rises an alibi in his defence, that does not in any way lighten the burden placed on the prosecution to prove its case beyond any reasonable doubt. All that the prosecution has to demonstrate is that the alibi has dislodged the persecution evidence. In this case, there is overwhelming evidence from PW1 and PW4 that accused was at the scene.

The accused also alleged that the OCS asked him for Kshs 20,000/= in order to release him but again, that is an afterthought. Had it been raised earlier, the OCS would have been called as a witness. The defence is not convincing and I find it a mere sham.

Accused for no reason at all, stabbed 2 ladies and turned on deceased when he tried to stop accused from getting away. The accused had not been provoked in any way. His intentions flow from his actions. He stabbed the deceased on the abdomen resulting in exposure of the intestines. The serious injury inflicted on the deceased is evidence that accused intended to cause grievous harm to the deceased.

In the end, I find that the prosecution has proved beyond any doubt that it is accused who, with intention to do grievous harm, stabbed and caused the death of the deceased.

I find him guilty as charged and convict him of the offence of murder as charged-.

DATED, SIGNED AND DELIVERED THIS 30th DAY OF JUNE 2016.

R.P.V. WENDOH

JUDGE

Before:

Mr Mulochi for state

M/s Riungu for accused

Accused present

C.A Penina/Ibrahim