



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO. 11 OF 2013**

**LESIT, J.**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**ALI HASSAN *Alias* WAKO.....ACCUSED**

**JUDGEMENT**

1. The accused person **ALI HASSAN *Alias* WAKO** is charged with **Murder** contrary to **section 203** as read with **section 204** of the **Penal Code**.

**“The particulars of the offence are that on the 21<sup>st</sup> day of December, 2012 at Kiamaiko Area Munene Stage in Huruma Area within Nairobi County murdered ISAYA ERNEST ALUBE.”**

2. The prosecution called a total of six (6) witnesses.
3. The prosecution case was that at around 5 a.m. on the material morning the deceased was accompanied by two undercover police officers who included PW5. They had met earlier and planned how they will lay an ambush in order to arrest a group of five men who were robbing pedestrians within Kiamaiko area between 5 a.m. and day break. According to PW5, the three of them were walking around to see whether they could find the five men within that area. At about 5.30 a.m. according to PW5 the deceased excused himself saying he wanted to go to a back street to check whether the five suspects would emerge from there. No sooner had the deceased gone he made a call to PW5 and informed him that he had seen the suspects.
4. PW5 testified that while the deceased was still talking to him he heard a gunshot. PW5 and his colleague PC Ogoti ran to the scene of the incident which was round a corner five meters from where they were. They came face to face with the accused who PW5 knew by his nickname ‘Wako’ who was dressed in muslim kanzu and four other men. The accused fired at him and his colleagues and they fired back.
5. PW5 testified that the accused was with four others and they all ran in different directions. They gave chase but did not succeed to arrest them. They then went back to the scene where they found the deceased lying on the ground with a gunshot in his head. He was writhing in pain. PW5 said that he called the OCS Huruma Police Station who went to the scene and carried away the deceased to Kenyatta National hospital where he was pronounced dead on arrival.
6. There were two other eye witnesses of the incident. One of them was PW1 who said that she was

- going to the market to buy maize when she met with the deceased a few meters from her house. She said she stood and chatted with him briefly when three men arrived and called the deceased aside. They then told the deceased **“we have looked for you for a very long time”**. On hearing that PW1 said she walked away from them. PW1 also heard them telling the deceased that he had ruined their business because of involving the police. PW1 testified that she then heard a gunshot after which the three men fled. She then walked back to where the deceased was and saw him bleeding from the head.
7. PW2 was the other eye witness. His evidence was that he was walking within Huruma when he saw people walking towards him. He then heard one of them saying to another **“we have looked for you for a very long time”**. PW2 testified that he was attracted to stop and look and saw the three men dressed in Islamic kanzus place pistols on the man after they ordered him to sit down. On seeing that PW2 testified that he entered the nearby market stalls to hide. But as he peeped from those stalls about 5 meters from the four men he heard a gunshot. He then heard several other shots before the three men ran away.
  8. PW2 testified that he walked towards the man who was shot and recognized him as the deceased in this case, a man he knew very well. PW2 then went to call the sister of the deceased but on returning to the scene with her they found the deceased had been carried away by the police. PW2 said that of the three men he saw that morning he recognized two of them one of who is the accused in this case. He said that he knew the accused by name ‘Wako’. PW2 testified that he knew him for a period of six months because he met him every day within Kiamaiko, either in the morning as he went to work or in the evening when he returned from work. He said he saw the accused five meters from him and that it was at 6.15 a.m. and that it was bright enough for somebody to identify another. PW2 testified that he was also able to identify another one of the three men whom he also knew called Ali.
  9. The accused person was arrested by PW6 and other officers while on spive duties within Kiamaiko area. This was on 3<sup>rd</sup> January 2013. PW6 stated that the accused was identified to him and his colleagues by informers whom they met after the OCS called them on phone. PW6 testified that after arresting the accused person they visited his house and searched it but recovered nothing.
  10. The investigating officer of this case PW4 testified that after taking statements from witnesses the accused person was eventually arrested on 4<sup>th</sup> January 2013. They took the accused for mental assessment and was declared fit to stand trial. PW4 also produced the postmortem form of the examination carried out on the body of the deceased by Dr. Njeru. After the examination, Dr. Njeru formed the opinion that the deceased died of a head injury due to a single gunshot.
  11. The accused person was placed on his defence and he gave an unsworn statement. He said that in 2010 he was in a football team playing football when he got a stitch on the abdomen which caused him to go and sit down. He said that where he sat, he saw a note of 1000/= with which he bought fragrance which he then took to his grandmother together with the change. He stated that the grandmother gave him 300/=. He then went to the same shop where he had bought the fragrance and upon giving the shopkeeper the money he was accused of taking fake money and the shopkeeper took him to Huruma police station.
  12. The accused stated that at the police station PC Lwamba the investigating officer of this case put him under a table where he was beaten by the officer until he started bleeding. The accused stated that the officer then gave him a document to help him get treatment at a hospital. The accused stated that in 2012 PW4 arrested him and accused him of having stolen a stove. He was eventually released for lack of a complainant. He said that in 2013 PW4 arrested him again this time for murder which was the charge he was facing in this case. The accused also stated that he saw PW1 at the report office upon his arrest.
  13. I have carefully considered the evidence which was adduced in this case by both the prosecution and the defence. I have also considered the only submissions made in this case which were by the defence counsel after the close of the defence case. The issues raised by the defence counsel in his submissions are that there was only one identifying witness which was PW1 who ran away soon after the deceased was confronted and shot. Counsel submitted that the circumstances of identification did not favour a positive identification of the accused as he was a stranger to PW1.
  14. Regarding PW5 counsel submitted that he alleged that he exchanged fire with the thugs who were running away. However Mr. Nyachoti for the accused stated that PW5’s evidence was doubtful for

- reason no spent cartridges were produced as exhibits.
- 15.Regarding the defence Mr. Nyachoti for the accused submitted that according to the accused person PW1 was shown to the accused at the report desk and that the case was therefore a framework. The defence counsel also raised another issue that the age of the accused was not ascertained and that in the circumstances the case was a mistrial.
- 16.The accused faces a charge of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. Murder is defined under **section 203** as follows:

**“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

- 17.The prosecution has the burden of proof in this case and that burden is to prove the charge against the accused beyond any reasonable doubt. The prosecution must adduce evidence to show that the accused by some act or omission caused or inflicted injury on the deceased out of which injuries he died. The prosecution must adduce evidence to prove that at the time the accused did the act or omission which led to the injuries causing death to the deceased he had formed the necessary intention to either cause death or grievous harm to the deceased.
- 18.The intention to cause death or grievous harm is malice aforethought. Under **section 206** of the **Penal Code** the circumstances which constitute malice aforethought are set out as follows:

**“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -**

- 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.”**

- 19.Having considered the evidence adduced by both sides and the submissions by counsels the issues which arise in this case are:

- i. **What was the number of eye witnesses in this case?**
- ii. **Whether the condition of lighting in this case was conducive for a positive identification?**
- iii. **Whether failure to produce cartridges creates doubt in the veracity of the evidence of PW5?**
- iv. **Whether the lack of age assessment of the accused renders the trial a mistrial?**

- 20.Contrary to the submissions of Mr. Nyachoti, there were three witnesses who testified that they witnessed the incident of shooting against the deceased. These were PW1, 2 and 5. Going by their evidence, they witnessed the incident separately and from different positions. They were not together. The issue is whether the condition of lighting at the scene was conducive to a positive identification.

21. Regarding lighting 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:

**“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.**

**There is a second line of inquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid, or to the police."**

22. PW5 told the court that he, a colleague one PC Ogoti and the deceased were on a mission to arrest some people who were robbing people, especially traders going to buy their wares from 5 a.m. within Kiamaiko area. The deceased was a police informer and the others were police officers. The three set out to lay the ambush at about 5:15 am. According to PW5, the three of them moved around looking for the robbers until around 5:30 am when the deceased suggested he should go into an alley to check whether he could see the robbers. He said that three minutes later the deceased called him to report that he had seen the robbers. Going by his evidence the deceased was shot before 6 am.
23. PW1 had just met the deceased and they chatted briefly before three men emerged and shot him. According to PW1 it was just after 6 am. She described the accused as a short man, and the shortest in the group. I looked at the accused height. His apparent height is 5ft 2in. PW1's description of accused as short is correct.
24. I noted that the accused was a total stranger to PW1. There was a need for the police to carry out an ID parade for PW1 to identify him. This was not done. What PW1 said was a parade could not have been and in any event no police officer testified of carrying it out. I doubt any ID parade was conducted. I agree with the defence that the accused was merely exposed to PW1 and the subsequent identification in court is worthless.
25. I am guided by **Gabriel Njoroge vs. Republic (1982-88) 1 KAR** where it was held:

**"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade.**

**A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."**

26. PW2 said that he knew the accused person before for a period of six months. He said that during that period he met the accused once or twice a day either early morning as he went to work or late evening as he went back home. The accused was therefore not a stranger. There was no need of conducting an ID parade for him to identify the accused.
27. The incident took place at around 6.15 am according to PW2. PW2 described the conditions of lighting as bright enough to see and identify a person. PW2 testified that it was after daybreak as the sun had already risen. He also said that he was hiding inside a market stall 5 meters from where the accused and his accomplices were. He said he clearly saw and recognized the accused and one other called Ali whom he also knew before.
28. I considered that PW2 knew the accused before the incident for six months. I considered that he was only five meters from the accused and his accomplices. I find that the conditions of light at the scene were good for a positive identification. The incident took some time, long enough to enable identification. This is based on the fact PW2 heard the attackers beckon the deceased, then they told him they had been looking for him for a long time. PW2 then heard the group order the deceased to sit down as they told him that he had made their business difficult because of involving police.
29. All that time PW2 was looking at them. Considering that PW2 knew the accused very well before the incident, together with the short distance at which PW2 saw the accused, and fact the incident took long enough to enable identification I am satisfied that the quality of identification by PW2 was safe and reliable. I am satisfied that the evidence of PW2 was positive and watertight.
30. As for the conditions of lighting at the scene PW5 did not give any descriptions. All he said was

- that they came face to face with accused and four accomplices, within 5 meters from them. Then accused, the only one armed with a gun in the group fired at them. He and PC Ogoti fired back. PW5 testified that they even followed the accused and accomplices but they outran them. They however saw blood drops which was evident that he and his colleague succeeded in shooting some of them. Evidence of identification by PW5 needed to be corroborated as he gave no evidence as to lighting at the scene. I find the corroboration in the evidence of PW2. The two were at the same scene at the same time. The conditions described by PW2 were same in which PW5 was.
31. I considered inconsistencies that appeared in the evidence of the prosecution. While PW1 and 2 testified that those who confronted the deceased were three men dressed in Muslim attires or kanzus, PW5 said that he saw five men. On the other hand PW1 and PW5 testified that only the accused person of the others had a gun but PW2 stated that all three including the accused had guns. PW2 and 5 were however in agreement that it was the accused who fired the fatal shot, PW2 because he saw him shoot the deceased, and PW5 out of conjecture for fact only one accused was armed and because PW5 exchanged fire with the accused after the deceased was shot.
  32. I find the inconsistencies in the prosecution evidence was not material. I considered it mere variation which was explainable on account of the fact PW2 saw the accused and group from a squatting position from a hiding place. PW5 was running towards where the deceased had gone after hearing the shot. Further the moment he came into full view of the scene he did so suddenly, and at the same time he and his colleague engaged in a gun battle with the accused.
  33. Members of public were also walking to their business at the time. He was 8 meters from the accused when he saw him. Given all these circumstances I find that the inconsistencies in the prosecution case were not material and neither did they go to the core of the prosecution case.
  34. Having considered the evidence of identification by PW2 and 5, I am satisfied that the accused was positively identified as the one who shot the deceased on the head. He was in company of other accomplices. However the evidence is clear it is the accused that fired the fatal shot. Even if it was one of his accomplices who shot the deceased, the accused would still be liable for the offence on account of the principle of common purpose as provided under **section 21** of the **Penal Code**.
  35. The accused denied the offence raising an alibi as his defence. He said that the case was a fabrication of PW4, the investigating officer of this case. He said that PW4 kept arresting him for imaginary offences. He said that he was innocent of the offence.
  36. The accused defence was a bare denial and neither is it plausible or reasonable. PW4 who the accused claims fabricated the case against him was the investigating officer. I noted that despite lengthy cross-examination by the defence, no question was put to him to suggest he fabricated the case against the accused. That is quite telling. I find the evidence against the accused overwhelming and the accused defence neither shook nor raised doubt in the veracity of the prosecution case.
  37. Regarding empty cartridges, PW5 admitted that they were discharged at the scene of shooting. PW4 who investigated the case started his work after reading the OB entry on the incident. He made no mention of a scene visit. Failure to collect the cartridges is a serious flaw and was negligent on PW4's part. However, I do not find that failure material as it does not vitiate the prosecution case in light of the entire evidence adduced.
  38. Regarding the age of the accused that had been raised at the end of the case. I looked at the P3 form on the accused person and noted that the age was not assessed. I also looked at the proceedings and I noted that the issue of age was not raised during plea on 28<sup>th</sup> January 2013. That plea was taken before Muchemi, J. The honourable Judge ordered for the accused age to be assessed on 26<sup>th</sup> May 2014 when his counsel notified the court that he was 16 years of age when the offence is alleged to have been committed. No report was provided.
  39. When the matter came before me on 17<sup>th</sup> December 2014 the same order for age assessment was made and the same repeated on 18<sup>th</sup> December 2014. The same order was repeated thereafter but no report was filed.
  40. Does the failure to ascertain the age of the accused vitiate the trial as suggested by Mr. Nyachoti for the accused? First of all I must mention that if the accused was 16 years in 2012, when the offence took place, by the time the first witness for the prosecution testified, the accused was above 18 years. This is because the trial did not commence until 7th July, 2015. That was two years seven months after the fact.

41. **Article 50(1)** of the **Constitution** provides for public hearings of criminal cases. Under **sub- Art (8)** it provides:

**“8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.”**

42. The law under the **Article 50** gives the court discretion to determine whether to hold criminal proceedings in camera, as well as having the power to exclude the press or other members of public. The discretion is not arbitrary but has to be exercised within the purview provided there under. That is where it is necessary to protect witnesses or vulnerable persons, morality, public order or national security. It is noteworthy that the Constitution does not make it a requirement for the proceedings against child offenders to be held in camera, but leaves it to the opinion of the court to do so if it is of the view that it is necessary to do so. However I am fully aware of the fact that in Kenya every court has the duty to treat all matters involving children with care giving the paramount consideration to what would be in the best interest of the child.

43. **Section 75** of the **Children Act** provides:

**“Where in any proceedings in relation to an offence against or by a child, or any conduct contrary to decency or morality, a person who, in the opinion of the court, is under eighteen years of age is called as a witness, the court may direct that all or any persons, not being members or officers of the court, or parties to the case or their advocates, shall be excluded from the court.”**

44. This provision of the law is permissive in nature and it gives the court the power to exercise its discretion and determine whether to hear the proceedings where a child is involved, whether as one in conflict with the law, or as a witness, in camera. The section preceding the one above, **section 74** of the **Children Act** provides for all proceedings against children conducted in the Children court should be heard in camera. The criminal jurisdiction of the Children’s Courts is clearly spelt out as, among others, excluding cases of murder against child offenders.

45. The interpretation section of the **Children Act, section 2** defines age as follows:

**“‘age’ where actual age is not known means apparent age;”**

46. It is trite law that a court has the discretion to hear a case against a child either in camera or open court. Under **section 2** of the **Children Act**, the court is given power to form an opinion as to the apparent age of a person before them, where the actual age is not known.

47. Before the first prosecution witness took the stand, I formed an opinion that the accused was above 18 years of age. Had the accused in my opinion been much younger than 18 years, I would still have had the power to decide whether to conduct the proceedings in camera or not. In this case I formed the opinion that the accused was above 18 years at the time of hearing the case, and conducted the proceedings throughout in camera. The issue of the accused age is in the circumstances of this case only important to the issue of sentence and not to the issue whether he is guilty or not. The matter of the age will still be investigated before sentence. I find that the accused person has not suffered any prejudice in the circumstances.

48. Having considered the entire case I find that the accused was positively identified by PW2 and 5. I find that the evidence of identification by PW1 was worthless having been that of dock identification of a stranger. Corroboration of her evidence would not cure that defect, but could be taken into account when considering, like in this case, sequence of events of the facts of the case.

49. I considered accused defence and found it a bare denial. The evidence against him was overwhelming and unshaken. I reject his defence in total.

50. I am satisfied that the prosecution has proved the case of murder contrary to **section 203** of the **Penal Code** against the accused beyond any reasonable doubt. I reject the accused defence, find the accused guilty of murder under **section 322** of the **Criminal Procedure Code** and convict him accordingly.

**SIGNED & DELIVERED AT NAIROBI THIS 21<sup>ST</sup> JULY, 2016.**

**LESIIT, J.**

**JUDGE**