



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LESIT, J.

CRIMINAL CASE No. 115 OF 2013

REPUBLICPROSECUTOR

VERSUS

FELIX KANILA PULA.....ACCUSED

JUDGEMENT

1. The accused person, Felix Kanila Pula is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are:

“On 28th day of November 2013 at Kawangware stage 11 in Dagoreti Area within Nairobi County murdered Collins Sahani.”

2. The prosecution called a total of 5 witnesses.

3. The brief facts of the prosecution case are that the deceased person in company of five other people went to a house in Kawangware where illicit brew commonly known as *chang’aa* was sold. In that house they found PW1 and PW3 who informed them that the *chang’aa* had run out of stock. PW1 and PW2 advised one Peter or Pataa to go and check for *chang’aa* at a nearby plot which he did. Peter went back with the *chang’aa* which the group sat to partake. As they drank a fight arose amongst themselves. The six (6) people fought one another and eventually a knife was used to stab the deceased person. He died at the scene of attack.

4. PW1 stated that she was at home on the said 28th November 2013 in company of PW3. Six men came to their house in search of *chang’aa*. The mother used to sell the said *chang’aa* in that house. PW1 and her sister PW3 informed the men that the *chang’aa* was out of stock, and they informed Peter to go and check in the neighbouring plot whether he could get *chang’aa*. Peter left the deceased in company of the other four men and later came back with the brew.

5. PW1 stayed in the bedroom of their house but could hear the six people arguing over a phone. The argument became too loud and PW1 decided to go and check what was happening. She stated that she saw the six men fighting and upon trying to separate them, they were too strong for her. She thereafter saw five of the men flee the scene. One of the men fell near the gate of their home.

6. PW1 denied having stated in her statement made to the police that she saw the accused stab the

deceased. PW1 indicated that she could not read or write since she had dropped out of school at STD. 4 level. The learned Prosecution Counsel declared PW1 a hostile witness.

7. PW3 was a sister to the accused person. Her account of events tallied a lot with those given by PW1 the younger sister. She however stated that after she heard the six people who had come to their place argue loudly, she decided to go to the shop to buy credit so that she could call the mother and inform her of the troublesome customers. She called the accused person and informed him of the argumentative customers who had visited their home and the accused promised to visit later after he was done with his work. PW3 testified that on returning home, she found the body of the deceased outside the house.

8. PW2 stated that on 6th of December 2013, he went to City Mortuary where he identified the body of the deceased to the doctor for post-mortem.

9. PW4 the father of the deceased person also identified the body of the deceased at city mortuary during post mortem.

10. PW5 was the investigating officer of this case. He stated that on 28th November, 2013 he received information of a murder at Kawangware from the Area DCIO. He proceeded to the scene and found people gathered around a body. The body was outside some rental houses and blood was oozing from it. He followed the blood stains which led to a house where he was informed there had been a commotion. Inside the house, PW5 found Inspector Ng'ang'a having detained PW1 and 3 said to be the sisters to the accused person. He noticed the things in the house were in disarray which was evidence of a struggle inside the house. PW5 did not recover anything at the scene of crime.

11. PW5 produced the post mortem report by consent of all parties. It was P. Exhibit 2. He also took the accused for mental assessment. He produced the report as P. Exhibit 3.

12. The accused raised an alibi defence. He stated that on 28th November 2013, he was at his work station in Lavington where he worked as a carpenter the entire day. He stated that he received a call from his sister PW3 who informed him of a fight that had arisen between some customers who were partaking *chang'aa* in their house. He informed her that he would visit them after he closed his shop at around 10.00pm. The accused stated that he later proceeded to Hope Centre Police Post where he reported the said fight and was advised to go back the following day.

13. On 29th November 2013, he sought permission from his employer and proceeded to Hope Centre Police Post to follow up on his report. He was advised to proceed to Muthangari Police Station where his sisters had been confined. On arrival at Muthangari Police Station, the accused said that he was arrested and transferred to Kabete Police Station together with PW1 and PW3. He was later charged with the offence. He denied any knowledge of what transpired at the scene of incident on the material day.

14. The accused through his counsel Mrs. Gulenywa in final submissions urged the court to find that the prosecution witnesses had failed to place the accused person at the scene of crime. She urged that PW1 and PW3 stated in their evidence that the accused person was not at the scene on the 28th November 2013 when the incident took place. Counsel for the accused further urged the evidence of PW5 that accused recorded a statement was not corroborated and the statements that PW5 claimed to have recorded from PW1 and PW3 were disputed. Counsel finally urged that the prosecution had failed to call crucial witnesses and produce vital exhibits including a knife allegedly used to stab the deceased.

15. The accused has been charged with the offence of murder contrary to **Section 203 of the Penal Code**. **Section 203** of the **Penal Code** defines the offence as:

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

16. The prosecution must adduce evidence to prove beyond any reasonable doubt that the accused person

stabbed the deceased, and that at the time he did so he had formed the necessary malice aforethought required to either cause the death or grievous harm to the deceased person.

17. Malice aforethought has been defined under **section 206** of the **Penal Code** as:

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; or

(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.”

18. There are issues which are not in dispute in this case. It is not in dispute that the accused is the elder brother of PW1 and 3 in this case. There is no dispute that the incident occurred in the house belonging to the mother of the accused, PW1 and 3 and that at the time of the incident she was not at home. There is no dispute that the deceased was in the company of five other men, all not called as witnesses and that as they drunk *chang'aa* in the home of PW1 and 3 a fight broke out and in the process the deceased was stabbed to death.

19. Having considered the evidence adduced by the prosecution, the defence and the submissions of the defence counsel, I find the following to be the issues for consideration:

1. Whether P. Exhibit 1, the statement was made by PW1 to the police, and whether it has any probative value.

2. Whether the evidence of the prosecution is credible.

3. Whether the prosecution failed to call crucial witnesses to the case.

4. Whether the prosecution has proved that the accused was the one who stabbed the deceased.

20. In regard to the issue whether P. Exhibit 1 was of any probative value, the document was a witness statement taken from PW1. PW1 stated that she could neither read nor write, and that she was 13 years of age when the statement was recorded from her. The police officer who recorded her statement remained unknown. According to the prosecution Counsel, PW1's evidence in court was materially different from her statement to the police and therefore she applied to treat PW1 as a hostile witness and to cross examine her on the said statement.

21. The **Evidence Act** makes provision for instances where a witness may be cross examined on a statement previously made by them. Under **section 153** thereof, provision is made for cross examination as to previous statement made by them. It provides as follows:

“153. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict a witness by a previous written statement, his attention must, before the writing can be proved, be called to those parts of it

which are to be used for the purpose of contradicting him.”

22. Under **section 161** of the same **Act** provision is made for cross examination of own witness at court's discretion as follows:

“161. The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.”

23. And finally **section 163** provides for ways in which the evidence of a witness can be impeached as follows:

163. (1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him –

(a)...

(b)...

(c) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted;...

24. These are the provisions of the **Evidence Act** which provide for the cross examination of a witness by the party who called them. In this case PW1, a witness for the prosecution did not satisfy the Prosecution Counsel having contradicted the statement made by the witness to the police. PW1 retracted the statement and the prosecution applied to have the witness produce it. It was produced as P. Exhibit 1.

25. Having contradicted her statement to the police in material particulars, the evidence of PW1 in court became discredited and consequently unreliable. Even for the produced statement P. Exhibit 1, its credit worthiness is in doubt.

26. PW1 was a child of 13 years of age. That being the case, she was clearly a child as provided under **section 2** of the **Children Act**. Being a child, it was imperative for the police officer who recorded her statement to have been cautious. He should have ascertained that the child understood first and foremost the language used to communicate to her at the time the statement was being made. Secondly, the police officer should have taken time to explain to the child, in a language she understood the meaning and nature of the statutory declaration upon which basis the statement was being made. No question was put to PW1 by the prosecution to ascertain whether these cautions were taken before the statement was taken from the witness. Page 1 of the statement, P. Exhibit 1, provides the statutory declaration as follows:

“STATUTORY DECLARATION’

“I am 13 yrs of sound mind. This statement is in English language which I am able to read and understand. I make it knowingly that I will be liable for prosecution if I make in it anything that might be untrue or false”

27. From the wording of statutory declaration, it is evident that whoever recorded the statement of PW1, treated her as a person capable of understanding the duty to speak the truth and understand the consequences of not telling the truth as stipulated under **section 19 Oath and Statutory Declaration Act**. It also shows that the statement was recorded in the English language but is silent as to the language the maker used.

28. In court PW1 stated that she did not know how to write or read. The English language was definitely not one she spoke or understood. PW1's alleged that she did not understand the language in which the statement attributed to her, and which she retracted was made. That fact remained uncontroverted by the prosecution.

29. There was therefore a wrong assumption on the part of the police officer that the language used was understood, and that the oath was also comprehended.

30. Secondly, PW1 was aged 13 years when she recorded the statement. Being a child PW1 should have been considered a vulnerable witness, and as such a guardian or an adult of the child's choice should have been present at the time the police officer recorded the statement. No other person is mentioned either in the statement itself or by PW1 as having been present when PW1 was recording the statement.

31. The statement P.EXHIBIT 1 was made on 29th November 2013, a day after the incident had occurred. PW1 had been held in police custody from the night of 28th November 2013 and only recorded the statement at 1505 hrs on 29th November 2013.

32. **Article 53** of the **Constitution** provides for *Specific Application of the Rights of children* stipulates as follows:

“53. Children

(1) Every child has the right—

(a) ...;

(b) ...;

(c) ...;

(d) ...;

(e) ...;

(f) not to be detained, except as a measure of last resort, and when detained, to be held —

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child's sex and age.

(2) A child's best interests are of paramount importance in every matter concerning the child.”

33. The **Constitution of Kenya 2010** is clear that when any action is taken which affects a child, the best interests of the child should be esteemed as being of paramount importance. What was the best interest of the child, PW1 in this case?

34. PW1 was aged 13 years then. The investigating officer held PW1 in custody for two days. The Constitution says that detaining a child should not be done except as a measure of last resort, and even then for the shortest time possible. Was it necessary to detain PW1 in this case?

35. The incarceration of PW1 was illegal because she was not at any one time a suspect in this case but a witness and secondly, because she was a minor and being a child she ought not to have been detained.

36. Yet the police being fully aware that PW1 was a witness not a suspect of the crime chose to detain her. The fact she was never a suspect is also the reason the police chose to take a statement from her as opposed to a statement under inquiry or even a charge and caution statement.

37. The police did not act in the best interest of PW1, a child. Their actions to arrest and detain her amounted to child harassment and intimidation. That was flagrant abuse of the law and ought to be condemned in the strongest terms possible. The police were insensitive to the rights and well-being of the child and was a means of intimidating the child knowing very well that she was a child.

38. Having spent the entire night in the police cells, I can only imagine how terrified and fearful PW1 was. I find that PW1 made the statement under undue influence, duress and great intimidation. That was traumatic to PW1. The statement was not voluntary in all the circumstances of the case. For that reason she cannot be regarded to have perjured herself. Secondly the statement having been retracted was of no probative value to the case.

39. Having analyzed all these factors surrounding the taking of the statement P. Exhibit 1 from PW1 I find that the statement P. Exhibit 1 is a worthless piece of paper.

40. The second issue for determination as stated earlier was whether the evidence of the prosecution was credible. PW1 and PW3 were declared hostile witnesses after the Prosecution Counsel applied to the court to declare them hostile witnesses. The Prosecution Counsel then cross-examined PW1 and 3, and using the statements the two wrote with the police demonstrated that what they had testified before court was materially different from the content of their statements to the police. The statement of PW1 was produced in evidence as P. Exhibit 1. That of PW3 was not produced.

41. PW1 and 3 retracted their statements to the police. The retraction of the statements and the introduction of other contradictory evidence by PW1 and 3 in their testimony in court rendered their evidence of little probative value as stated above. The creditworthiness of the evidence of these two witnesses was questionable. Having mishandled the two witnesses, I find it difficult to discern which of their statements the truth was, the retracted statements to the police or their materially different testimony in court. In any event, whatever the case may be, the prosecution required to adduce other evidence to implicate the accused, whether direct or circumstantial.

42. The evidence of PW2, PW4 and PW5 does not place the accused at the scene of crime, nor does it point at the accused as the person who stabbed the deceased. These witnesses visited the scene of incident long after the fact. They could not assist the court in determining how the deceased met his death. Their evidence was therefore not of much importance in determining who the culprit of this murder was.

43. The third issue for determination is whether the prosecution failed to call crucial witnesses. 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.”

44. 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.

45. From the evidence of PW1 and PW3, it is clear that they refer to a group of six men who came to their home to buy *chang’aa*. From the six men, PW1 and PW3 recognized one by the name PETER/PITAA. This was a well-known person not just as a customer who frequents their house but also as an uncle to PW1 and PW3. The prosecution was at liberty to avail him as a witness because he was amongst the people who were in company of the deceased before he was stabbed.

46. The mother of PW1 and PW3 was equally not called as a witness in this case. I find it weird that the

owner of the house where such a serious offence occurred was not called as a witness yet her small child of 13 years PW1 was not only called to testify but had in fact been arrested and detained by the police.

47. The other crucial witnesses that ought to have been called were the other four men who were in company of the deceased and Peter whom I have referred to earlier. The four went to the home of PW1 and 3 to buy *chang'aa* together with the deceased. They were present from the very start of the fight, and were in fact part of the group that fought inside the home of PW1 and 3. These four men were crucial witnesses who ought to have been treated as witnesses. Their evidence was important as it could have helped demystify the events of the day in question and could have helped the court come up with a clear picture as to who stabbed the deceased and why.

48. The prosecution opted not to avail these crucial witnesses. I find that the circumstances of this case are fitting for the court to make an adverse inference against the prosecution that the reason why these crucial witnesses were not called as witnesses was because their evidence if tended would have been adverse to the prosecution case.

49. As to whether the prosecution proved that accused was the one who stabbed the deceased person and caused his death. The evidence given by all the prosecution witnesses did not place the accused at the scene of crime.

50. The accused in his defence put forward an alibi as his defence and stated that he was not at the scene or in the vicinity of the scene where the deceased was stabbed to death on that fateful day.

51. The weight to be given to a defence of alibi was set in the persuasive case of UGANDA v. SEBYALA & OTHERS [1969] EA 204, where the learned Judge stated:

“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.”

52. The burden is upon the prosecution to prove its case against the accused person beyond any reasonable doubt. The accused has no burden to prove that his defence is true. All his alibi defence needs do is to create a doubt as to the veracity of the prosecution case. The accused stated that he was not at the scene at the time of incident. The accused was only apprehended when he went to the Muthangari Police station to check on his sisters, PW1 and 3. From the totality of the evidence adduced by the prosecution, I find that the prosecution proved to place the accused at the scene of crime, and further that the accused defence has shaken the prosecution case and has created doubt as to the strength of the case for the prosecution.

53. Having come to the conclusions I have of this case, I find that the prosecution has failed to prove the case against the accused person. Accordingly I give the accused person the benefit and acquit him of the charge of murder contrary to **section 203** of the **Penal Code** under **section 322** of the **Criminal Procedure Code**.

DATED AT NAIROBI THIS 13TH DAY OF OCTOBER, 2016.

LESIIT, J.

JUDGE