REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO 27 OF 2014

LESIIT, J.

REPUBLIC ……...PROSECUTOR

VERSUS

JOHN KAGWE WACERE ALIAS JIRANI……..ACCUSED

JUDGEMENT.

1. The accused John Kagwe Wacere has been charged with the offence of **Murder** contrary to **section 203** as read with **section 204** of the **Penal Code**.

> **"The particulars of the offence are that on the night of 8th November, 2013 at Mathare North Area III Jangwani within Nairobi County murdered George Odhiambo Oringa."**

2. The entire prosecution case was heard by Ombija, J. as he then was. The learned retired judge also put the accused on his defence. I took over the case under **section 201(1)** as read with **section 200** of the **Criminal Procedure Code** and concluded the case.

3. The prosecution called a total of nine (9) witnesses. The brief facts of the prosecution case were that the accused and the deceased persons were living in the same plot in Jangwani Estate. On the night of 8th November 2013, the deceased and accused picked up a quarrel over the deceased banging the accused house everytime he opened the gate to their plot. A fight ensued and the accused stabbed the deceased with a kitchen knife several times as a result of which the deceased died.

4. The accused opted to give an unsworn statement. The accused stated that on the night of 8th November 2013, he was in his house sleeping when he heard people fighting and hitting his house. After the noises outside subsided, the accused decided to continue sleeping and was only awaken by the knocking of his door. On him opening the door, he saw a dead body holding a panga outside his house and people claiming it was him who had murdered the deceased. He denied any knowledge of what had transpired between the times he got home from work and when he was woken up by the heavy banging on his door.

5. The accused was represented by Mr. Opolo advocate. In his submissions Mr. Opolo urged that the court to note that the prosecution had produced two knives as the murder weapon and that in his evidence PW6 SP Muriuki testified that after he was given the knife P. Exh. 3, he learnt later it was not the murder weapon. He sent PW9 back to the scene where PW9 recovered P. Exh. 1. Counsel urged that PW6 did not disclose how he came to that conclusion.

6. Mr. Opolo further urged that PW5 found no injuries on the accused yet accused was said to have fought the deceased to death. Counsel urged that PW7 had concluded that the cause of death could include a fall on a sharp object which consequently left the potential cause of death to other factors other than foul play. Mr. Opolo submitted that the prosecution evidence especially that of PW5 and 7 casts doubt as to the flow of the prosecution narrative. Finally counsel urged that the mere fact that the accused and the deceased had a grudge could not form a basis for conviction.

7. The learned Prosecution Counsel, Ms. Onunga in her final submissions urged the court to find that the prosecution had proved its case as against the accused person beyond any reasonable doubt. Counsel urged that intention had been proved and it was the accused that had instigated the quarrel which led to the attack. Counsel urged that PW1 witnessed the accused stab the deceased and that PW9 corroborated the evidence of PW2 to the effect that the murder weapon was recovered from the sewerage.

8. Learned Prosecution Counsel further urged that the fact that the accused came armed with a knife was proof that he had made an intention to cause harm to the deceased.

9. I have carefully considered the evidence adduced by the prosecution and the defence, the learned counsels' submissions and the authorities cited in this case.

10. The accused person faces a charge of murder contrary to **section 203** of the **Penal Code**. This section creates the offence of murder and provides as follows:

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

11. Malice aforethought is an essential ingredient in the offence of murder. The circumstances that constitute malice aforethought are set out under **section 206** of the **Penal Code** as follows:

> **"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.**

12. The onus and evidential burden of proof in this case lies with the prosecution to prove its case against the accused person beyond any reasonable doubt. The prosecution must prove that it was the accused who caused the death of the deceased by inflicting serious injury on the deceased by an unlawful act. The prosecution must also equally prove that at the time the accused did the act causing death to the deceased, he had formed an intention to either cause death or grievous harm.

13. Having considered the entire evidence adduced by both sides and the submissions made herein I find that there are the issues which are not in dispute. It is not in dispute that the accused and deceased resided in the same plot and were therefore neighbors. It is not in dispute that the accused was apprehended inside his house by police officers.

14. Having considered the totality of the evidence, I find the following are the issues for determination:

i. Whether the prosecution established the cause of death of the deceased.

ii. Whether the prosecution evidence was credible and free from material contradiction.

iii. Whether the prosecution has established which of the two knives produced in evidence were the murder weapon and whether producing two knives weakened the prosecution case.

iv. Whether the prosecution established malice aforethought against the accused.

v. Whether the prosecution proved motive.

15. Did the prosecution establish the cause of death of the deceased? PW7 was the doctor who conducted a post mortem on the body of the deceased on 14th December 2013 at city mortuary. PW7 stated that externally the deceased body had three penetrating stab wounds on the ulterior chest wall. One on the left pericardium, one on the right intraclavicular area and another stab wound on the right hypochodrium area. PW7 stated that the stab wound on the left had penetrated the heart, on the right atrium, while the pericardial sac had been perforated. This PW7 stated was because the stab on the left had entered the heart by penetrating the pericardial sac, stabbing the heart at the level of the right atrium. PW7 formed the opinion that the cause of death was exsanguination due to severe chest injury due to penetrating stab wound. In cross examination, PW7 stated that the type of injury that caused the death of the deceased may have resulted from a fall.

16. PW1 evidence was that she saw the accused grab and stab the deceased on four different parts of the body. She described those parts as being the chest, lower abdomen on both sides and the last one being at the belly button. PW2 on the other hand equally stated that he saw the accused stabbing the deceased but was not specific as to the number of stabs.

17. The finding at post mortem on the deceased body by PW7 confirms that the deceased had suffered three stab wounds. PW1's testimony therefore received corroboration from the pathologist's evidence. The issue however is whether the prosecution had proved the cause of death.

18. PW7 in his evidence in cross-examination stated that the kind of injuries the deceased had suffered could also have been caused by a fall on a sharp object like an iron sheet. The doctor described the wounds he saw on the deceased body as stab wounds. The evidence by PW7 did not rule out the possibility that the injuries were caused by stab wounds.

19. In regard to the issue of the weight to be given to the evidence of experts and doctors in particular, the Court of Appeal in the case of **DHALAY vs. REPUBLIC {1997} KLR 514** held**:**

> **'It is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.'**

20. The acid test set out in this case is that an expert's opinion can only be rejected if there is proper and cogent basis for rejecting it. The principle was fortified in an earlier case **NDOLO vs. NDOLO {1995} KLR 390**. The Court of Appeal held:

> **'The evidence of PW1 and the report of MUNGA were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held, the evidence of experts must be considered along with all other available evidence and it is the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision… of course where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected."'**

21. Mr. Opolo for the defence has argued that the evidence of PW7, the pathologist was not conclusive. I have looked at his testimony. What PW7 stated during cross-examination was **"The cause of death was internal haemorrhage due to chest injury of the heart. The heart bled. Such injury could also result from a fall. If one fell on mabati structure, he could get similar injuries.**"(emphasis mine).

22. The evidence of PW7 was very clear that the deceased had three penetrating stab wounds in the chest area. In answer to a question put to him by the defence he was candid that a fall on a mabati could result in similar injuries. There is however a distinction between opinion of a pathologist on the nature of an injury suffered by a deceased person and examples of how else such an injury can be caused and the doctor's opinion as to the possible cause of injury resulting in death. In this case the doctor gave both. He stated his opinion as to the cause of death and also what other object or instrument could result in similar injury. An opinion as to other instruments or objects which could cause similar injury as one seen on a deceased person should not be confused with the doctor's opinion as to how the injury was caused.

23. In this case, I have analyzed the doctor's opinion as to the cause of death against the evidence of the two eye witnesses of the incident. I find that the evidence of the doctor as to the cause of death is in tandem with the evidence of the two eye witnesses as to how the injuries the deceased suffered were caused. PW1 saw accused stab the deceased with a knife three times in chest either side of the abdomen and belly button. PW2 saw the accused stab the deceased with a knife but did not say how many times. PW7 found three stab wounds in chest area. That is consistent with the testimony of the eye witnesses. The cause of death was haemorrhage due to internal injuries.

24. In regard to whether the prosecution witnesses gave contradictory evidence and whether they were credible witnesses. Regarding variations in the evidence of the prosecution, in the case of **Willis Ochieng V Republic C.A. No. 80 of 2004**, the court stated:

> **"The mere fact that there are some variations in evidence does not ispo facto prove that the evidence is false or unreliable. Indeed variations must be expected in evidence. It is said that sometimes evidence without the slightest variation may be a good indicator of coached witnesses"**

25. In **Dickson Elia Nsamba Shapwata and Another V The Republic *C.A. No. 92 OF 2007***, the Court of Appeal of Tanzania stated:

> **"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the inconsistencies and contradictions are minor or whether they go to the root of the matter"**

26. Mr. Opolo for the defence urged that there was contradiction in the prosecution evidence regarding the murder weapon and that it was made worse by the fact the prosecution introduced two murder weapons into the case.

27. It is true that PW6, the lead investigator in this case brought two knives, P. Exh. 1 and 3. His evidence was that he received P. Exh. 3 from PW3 but that he later learned from person(s) he did not disclose that the said knife was not the one used to stab the deceased. PW6 testified that he sent PW9 to the scene to recover the murder weapon which he did. It was the evidence of PW9 that he recovered P. Exh. 1 from a sewer. Both PW1 and 2 identified the knife P. Exh. 1 as the weapon the accused used to stab the deceased.

28. The issue is how the weapon came to be in the sewer. From the evidence of the two eye witnesses PW2 un armed the accused of the knife, P. exh. 1 and then gave it to PW1 while he ran after and apprehended the accused. PW1 on her part stated that she gave the knife to a guard called ODO to keep it in safe custody. ODO was not called as a witness.

29. Mr. Opolo submitted that PW1 gave the knife PW2 gave to her after he snatched it from the accused

to PW3. PW3 did not give such evidence in court. In fact he did not mention receiving any knife from anyone at the scene. The contradiction alleged between the evidence of PW1, 2 and 3 does not exist in evidence adduced before court.

30. I do however agree that there is an apparent inconsistency in the evidence of PW6 regarding the murder weapon. PW6 testified that it was PW3 who gave him P. Exh. 3 as the murder weapon. PW3 said no such thing. PW6 then stated that he learned that P. Exh. 3 was not the murder weapon and so sent PW9 in search of it. PW6 does not come out clear either as to who gave him the knife, P. Exh. 3 and also as to who told him it was not the murder weapon.

31. As for P. Exh. 1 which PW9 recovered, it was identified by PW1 and 2 as the murder weapon. There evidence on that point is reliable and credible. The two were the sole eye witnesses. They have both identified the same knife as the murder weapon. In my considered view, the presence of the second knife had nothing to do with the evidence of PW1 and 2 and is therefore of no consequence to the prosecution case. I find that there was no material contradiction, variation or inconsistency in the prosecution case. I am also satisfied that the presence of two knives in this case did not weaken the prosecution case for the reasons I have given herein above.

32. As to whether the prosecution established that the accused caused the death of the deceased by an unlawful act. PW1 and PW2 both state that they saw the accused stab the deceased with a knife. The crime happened at night as both PW1 and PW2 stated that it was between 10.00pm and 11.00pm. The pertinent question that needs to be answered is whether the conditions of lighting at the scene were favorable to enable these two witnesses to see and positively identify by recognition the accused as the assailant.

33. 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."**

34. PW1 and PW2 both knew the accused as they were neighbors. They are in agreement that there was good lighting at the scene at the time of this incident and that they could see clearly.

35. PW1 said that as soon as the deceased got into their; house, she heard the accused abuse the deceased because of hitting his house with the gate. When the deceased got out of the house to brush his teeth, PW1 saw the accused confront and grab the deceased challenging him to a duel. PW1 stated that she could see the events because there was electricity. PW1 stated that though they had never spoken with the accused, she was well aware of his constant whining and abusive language each time PW1 and the deceased hit his house with the gate when opening the gate. I am satisfied that PW1 was not a stranger to the accused and therefore I am satisfied that she positively identified him as the one who stabbed the deceased.

36. As for PW2 his evidence is clear that when he came out of his house after hearing an argument between the accused and deceased, he found the accused holding a knife after which PW2 saw the accused use the knife to stab the deceased. PW2 witnessed the accused stab the deceased upon which he snatched the knife from him and then chased and apprehended him. From the evidence of PW2 he did not lose sight of the accused person from the time he disarmed him, chased him and eventually apprehended

him.

37. PW1 on the other hand corroborates PW2's evidence that PW2 chased and apprehended the accused before he could go far soon after he committed this act. PW2 testified that he locked the accused inside his house until police came to the scene.

38. The evidence of PW1 and PW2 places the accused at the scene of crime. PW6 who was the first officer to visit the scene stated that he met a crowd of people at the scene and that the accused was in his house locked up. The evidence of PW6 corroborates the evidence of PW1 and PW2 that the accused was locked up in his house after the incident.

39. From the totality of the evidence of PW1 and PW2, I find that they were able to identify the accused as the assailant who stabbed the deceased to death. PW1 and PW2's evidence was further corroborated by PW6 and PW8 who stated that when they went to the scene of crime, they found the accused locked up in his house. I find that the accused was the assailant who stabbed the deceased and was positively identified and apprehended by PW1 and PW2.

40. The other issue is whether the prosecution established malice aforethought and the motive for the attack against the accused. **Section 206** of the **Penal Code** gives the circumstances which constitute malice aforethought. I have already quoted the section herein above. In the case of **Nzuki V Rep 1993 KLR 171** the learned judges of Appeal set out the principles of determining whether intention to commit murder is proved as follows:

> " 1. **Malice aforethought is a term of art and is either an express intention to kill or implied where by a voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as the result.**
>
> **2. Before an act can be murder, it must be aimed at someone and must be an act committed with one of the following intentions**
>
> **a. To cause death;**
>
> **b. Cause grievous bodily harm; and**
>
> **c. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from his acts, and commits these acts deliberately.**
>
> **3. Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder.**
>
> **4. …**
>
> **5. The offence with which the appellant was charged and convicted was committed in an environment of beer drinking and dancing, and except for the appellants bare statement in his unsworn testimony, there was absolutely nothing on the record of the superior court from which it could be implied that the appellant had any of the intentions when he unlawfully assaulted the deceased**."

41. In the cited case of **Nzuki,** supra, the Court of Appeal held that even though the appellant's conduct was done with the knowledge that the action is likely or highly likely to cause death or grievous harm, that in itself is not enough if there is no evidence to establish that the accused had formed an intention to cause death or to cause grievous harm, or knew his conduct may cause serious harm or death but committed the act deliberately any way.

42. I will quote from other cases, some persuasive and some binding to demonstrate how the issue of

provocation has been handled by different courts, both locally and abroad. In **Thithio Vs. Republic [1988] KLR 796 the court observed as follows:**

> **"It is not every provocation that will reduce murder to manslaughter. To have that effect, the provocation must be such as temporarily to deprive the person provoked of the power of self-control, as the result of which he commits the act which causes death. An unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did."**

43. In an English case of ***Rep – V- Humphreys (1954) 4 All ER 1008,*** it was held:

> **"A case where the provocative circumstances comprised a complex history with several distinct and cumulative strands of potentially provocative conduct which had built up over time until the final encounter, the judge ought to give consideration for this and appreciate its potential significance."**

44. The English case suggests that there can be provocation resulting from several distinct and cumulative strands of potentially provocative conduct which can build up over time until the final encounter. The court held that where such cumulative strands of provocative conduct occurs the judge ought to give them consideration and also appreciate the potential significance for the same.

45. In the Kenyan case of ***Cheboi Vs Republic – C. A. No. 50 of 1991*** *the brief facts of the case were that* the appellant had been subjected to insults and maltreatment by his wife over a period of time. The appellant killed his wife with a knife after an argument. What was to be determined was whether the appellant was in a subjective state of mind due to the history of the disagreements with his wife; and whether such history amounted to cumulative provocation sufficient to reduce his offence from murder to manslaughter. The trial judge had convicted on the basis that the appellant had packed his knife in a bag and that therefore he must have had the intention of injuring the deceased. On appeal the Court of Appeal held:

> ***"It was probable that if the trial judge and assessors had given sufficient consideration to the appellant's subjective state of mind when the deceased finally told him to get out of her life, they would have come to the conclusion that the appellant had been provoked enough as to render the crime to be manslaughter rather than murder.***
>
> ***The history of disagreements between the appellant and deceased, as narrated by the appellant amounted to what could be termed as cumulative provocation. The whole scenario had been looked at from the point of view of the ordinary person and not necessarily the reasonable person".***

46. From the above cited cases it is clear that there is a principle of cumulative provocation which arises where there is a history of provocation.

47. In the instant case, the evidence before court was that the accused was constantly whining and chiding at the deceased over the manner in which the deceased hit the accused house with the main gate every time the deceased opened the main gate to enter or leave the plot where both live. According to PW1, this had gone on for a long time. PW1 was of the view that the accused was picking on them unfailing as, to her, all other tenants equally hit the accused house every time they too opened the gate.

48. The accused has not mentioned this in his defence. However I do believe that PW1 was telling the truth when she said that the cause of the confrontation that night was over the gate hitting the house of the accused. We do not have the accused side of the story. However there is sufficient evidence to show that the accused came out of his house after the deceased hit his house with the gate. It is noted that it was 10 pm and that the accused was already at home and in bed. The cause of action by the accused on the night in question was clearly as a result of cumulative provocation caused by irritation and annoyance out of a prolonged conduct by the deceased to hit the accused house with the main gate.

49. I have come to the conclusion that in this case the doctrine of cumulative provocation applies. I find further that the effect of the doctrine was to reduce the offence charged from murder contrary to **section 203** of the **Penal Code** to manslaughter contrary to **section 202** of the **Penal Code**.

50. Accordingly I substitute the offence against the accused from murder contrary to **section 203** to manslaughter contrary to **section 202** of the **Penal Code**. I find the accused guilty of the substituted charge of manslaughter and convict him under **section 322** of the **Criminal Procedure Code**.

DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2016.

LESIIT, J.

JUDGE