REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 68 OF 2010

REPUBLIC

versus

MWANGANGI MWENDWA…….……..…….....ACCUSED

RULING

1. **Mwangangi Mwendwa,** hereinafter "the Accused" is charged with the Offence of **Murder** contrary to **Section 203** as read with **Section 204** of the Penal Code. Particulars of the offence are that:

   On the **2nd** day of **November, 2010** at Mumbuni Market of Mumbuni Location in Mwingi Central District within Kitui County murdered **Mwendwa Nyamu** (deceased).

2. The facts of the case are that on the **2nd** of **November, 2010** PW2 **Muimi Nyamu** a brother to the deceased was at Tee Barber Shop at Mumbuni Centre at 7.00 p.m. when he heard somebody saying he had been stabbed. He went outside to find his brother holding his chest. He had sustained a stab wound. The deceased told him that he was stabbed by **Mwangangi Mwendwa** (Accused). The matter was reported to PW4 **Lina Mwanzio Munyoki,** the Assistant Chief of the area who visited the scene and notified the police. The police visited the scene of the incident and removed the body which was taken to Mwingi District Hospital Mortuary. PW5 **Dr. Allan Balongo** conducted an autopsy on the body. He found it had a stab wound on the left shoulder with dry blood clots around the wound. The respiratory system also had a deep stab wound on the left shoulder at the level of the intercostol space between the ribs and haemothorax on the left side of the chest. He formed an opinion that the cause of death was cardiopulmonary arrest secondary to penetrating injury to the chest causing massive haemothorax.
3. At the close of the Prosecution's case the fact of death was proved beyond any reasonable doubt. However, none of the witnesses who testified saw the accused stabbing the deceased. PW2 said that he was told by the deceased that the accused stabbed him using a knife but he neither saw the accused nor the alleged murder weapon on the fateful night.
4. It has been submitted by counsel for the accused, **Mr. Muema,** that the statement made by PW2 is inadmissible and hearsay. And the Prosecution never sought to bring up the statement as a dying declaration, to bring it within the exceptions that can be admissible in evidence. The learned State Counsel, **Mrs. Abuga,** on the other hand submitted that the deceased was specific when he told PW2 that he had been stabbed by **Mwangangi Mwendwa** which amounts to a dying declaration whereby the deceased specified that he was attacked by **Mwangangi Mwendwa** to the exclusion of others.
5. **Section 33(a)** of the **Evidence Act** provides thus:

"Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) relating to cause of death

when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"

The statement alleged to have been made by the deceased was in respect of an assailant. It is stated that he named his assailant. There is no impression that he believed or exhibited the belief of his impending death but this is immaterial. What matters is whether he made an expression by word of what caused his death which makes it a dying declaration.

6. The question to be answered is whether such evidence is admissible. The Court of Appeal in the case of **Pius Jasunga s/o Akumu – V – R (1994) 21 EACA) 333** stated thus:

"The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval … It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R V Eligu s/o Odel & Another, (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused … But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration."

7. With the alluded to decision in mind the question of identification of the accused must be addressed. Were circumstances prevailing at that particular time favourable for correct identification? The incident happened at night – PW2 stated that the deceased named his assailant whom he did not see. He did not say anything else. Per his evidence he went to the trading centre, Mumbuni with his brother. He entered the shop leaving him outside with one Kyalo who used to work for them. **Mwangangi** was familiar to him as they used to meet. On cross examination he said that there was a blackout and there were many people present.
8. PW3 reached the scene at 8.00 p.m. It was dark as there was no power. She used a torch to view the body of the deceased.
9. **Kyalo** who was with the deceased was not treated as a witness therefore there is no evidence adduced to suggest that the **Mwangangi Mwendwa** that PW2 was familiar with was at the Mumbuni Market and at the scene of the incident on the fateful night. It can therefore not be stated with certainty whether the deceased referred to the accused person as his assailant or someone else. The issue of mistaken identity could not be ruled out. In the premises the evidence adduced by PW2 required corroboration that was lacking.
10. To put the accused person on his defence the Prosecution ought to have established a *prima facie* case against him. Such a case was explained in the case of **Ramanlal Trambaklal Bhatt V. R (1957) EA 322.** It is a case where:

"A reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

11. In this particular case evidence adduced is not cogent to establish that the perpetrator of the offence was the accused. I therefore find him not guilty and acquit him pursuant to the provisions of **Section 306(1)** of the **Criminal Procedure Code.**
12. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **23rd** day of **JUNE,** 20**15.**

L.N. MUTENDE

JUDGE