



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 28 OF 2009

REPUBLIC PROSECUTOR

V E R S U S

JAMES MWIRARIA ACCUSED

JUDGEMENT

James Mwiraria is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He is alleged to have murdered Patrick Kaibiria on the 9/3/2009 at Muringene Location, Igembe District. The accused pleaded not guilty to the charge and the prosecution called a total of four witnesses. The accused testified on oath but did not call any other witness.

Doris Makena (PW1) testified that she operates a kiosk at Muringene and that on 9/3/2009, about 2.00 a.m., she was in her house which is near Senator Bar when she heard screams of 'help'. On going out, she found the deceased by name Patrick, wrestling with Mwiraria, accused. Patrick fell down as Mwiraria ran off towards Muringene market. She went back to sleep but after a while she heard the deceased's brother and other people talking outside and she went out and told them what she had witnessed. PW1 said that there are electric lights outside the Senator Bar where the fight took place, and she was about 50 metres away; that there was nothing hindering her view. She said that there were more electric lights on the opposite buildings across the bar. She knew both accused and deceased; that accused used to bake cakes at Muringene while deceased was her neighbour. She said that there was nobody at the scene when the two were fighting.

PW2 Isaac Kamau Ntima testified that he used to own a club between 2007 to 2009 at Muringene Market. He said that on 9/2/2009, he left the club about 10.00 p.m. and at 2.00 a.m. a lady by name Makena who was his employee at the bar, went to inform him that Patrick had been murdered by Mwiraria. He knew both people as customers. He went to the bar, and outside, found blood on the veranda to the stairs but the body was not there. The next day, police went to his house and he informed them what Makena had informed him. They went together to Mwiraria's place of work but he was not found. They got information that he could be found in Mutuate and together with the Chief and Administration Police, (APs) proceeded to Mutuate where he was arrested. PW2 told the court that Makena was his employee and used to close the bar at 11.30 p.m. In cross-examination, he confirmed that there were two electric bulbs at the veranda of the bar. PW2 said that he had seen accused and deceased outside his bar at about 8.00 p.m. on that night; that they were quarreling and he told them to go away; that Mwiraria left about 10.00 p.m. and Patrick left soon after 10.00 p.m. He left his employees Jacob and Makena at work.

PW3 Japhet Meme is a brother to the deceased. He identified the deceased's body to the Doctor for purposes of post mortem on 17/3/2009.

The post mortem report was produced by PW4, Dr. Njeru Charles on behalf of Dr. Kariuki who conducted the post mortem on the deceased. The Doctor found several fresh wounds on the left side of the neck, 2 cm width and 8 cm deep, severed neck vessels on left side; cut on subscapular region – stab wound 2 cm width and 15 cm deep as if the whole blade went through; stab wound on right gluteal region (buttocks) with knife still lodged. Knife was 11 cm handle and the blade was 15 cm which was removed and had sharp blades on both sides. The Doctor found that in the respiratory system, there was left haemothorax with stab wounds on left lungs to cardiovascular system; the layers covering the heart were stabbed; and so was left part of the heart through to left ventricle and there was haemopericardium; neck vessels were severed; head and other systems were normal.

The Doctor formed an opinion that the cause of death was cardiac respiratory arrest due to haemothorax and haemopericardium in shock, lung collapse and cardiac tamponade all due to penetrating chest injuries and stab wounds from the knife.

The accused was called upon to enter his defence and he said that he used to sell cakes at Muringene Market; that he did not know Patrick well but used to see him in the bar; that he went to the bar about 8.00 p.m. and found people watching football; that he sat on the side of the bar that sold Keg; that Patrick went there and asked the waiter to play for him music but people told him they were watching football; that Patrick was drunk and started making noise; that the owner of the bar came and told Patrick to wait till football was over before they could play his music. He decided to leave about 8.00 p.m. Next day, he was selling cakes when the Chief of Murungene called him to the bar where they had been at night, when he was informed that somebody had been murdered. He was arrested and taken to the station where he found one Baimatu, the bar watchman and Erick, but both were released and he was charged. He denied having seen any commotion at the bar that night nor did he kill the deceased.

Ms Nelima, Counsel for the accused submitted that the circumstances and conditions did not favour identification and are not free from error as the murder took place at 2.00 a.m.; that PW1 saw the incident from about 50 metres away and the court was not told what the intensity of the night was; that the perpetrator ran away from PW1; that the description of the deceased's clothing between PW1 and 2 was conflicting; that the Investigating Officer's evidence was missing and the court cannot tell whether any description was given to the police; that the credibility of PW1 is in doubt because she gave conflicting dates as to when the incident occurred; that two people by name Makena were mentioned; PW1, Doris Makena and the Makena who worked for PW2 at the bar and it is not clear which one witnessed the incident. It was her submission that the prosecution case was full of inconsistencies and the doubts which should be resolved in favour of the accused. She relied on the decision in **MAITANYI V REPUBLIC (1986) KLR 198**. The State Counsel relied on the evidence on record and did not make any submissions.

Having considered the evidence on record and submissions by Counsel, there is no doubt in my mind that the deceased did not die a natural death. He was murdered. This is supported by the evidence found in the post mortem report on the findings of the Doctor. There were not only multiple stab wounds found, but the murder weapon being a knife, was still lodged in the deceased's body.

The offence was committed in the night, about 2.00 a.m. So far, there is only one identifying witness. In such a case, the court has to proceed with caution and warn itself of the dangers of relying on evidence of one identifying witness because the circumstances did not favour identification. In **MAITANYI (SUPRA)**, the court set out how the court could proceed in both cases. The court said:

“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness, a careful inquiry ought to be made into the

nature of the light available, conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision; it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”

Both PW1 and 2 told the court that they knew both accused and deceased. Accused was identified as having been selling cakes in Muringene. Accused admitted to the fact that Patrick was known to him.

PW2 further told the court that deceased and accused were friends and used to hang out together eating ‘*miraa*’. Though the accused denied knowing the deceased well, he did admit that both of them had been at PW2’s bar on that fateful night and that accused and deceased disagreed. PW2 denied knowing why they quarreled but accused said that it was because the deceased wanted to play music whereas the other people in the bar were watching football.

PW2 also told the court that he was woken up on the said night about 2.00 a.m. by his employee by name Makena who informed him that the deceased had been murdered by the accused outside his bar. PW2 did not disclose both names of his employee, Makena who informed him of the death. This court has no idea whether Makena, PW2’s employee is PW1 Doris Makena who claims to have witnessed the murder. PW1 told the court that she owns a *kiosk* in the neighbourhood but never said that she was employed by PW2. Secondly, PW1 never told the court that she went to inform PW2 of the murder on the same night. The Makena, employee of PW2 was an important witness to inform the court how she knew of the murder.

PW1 told the court that she saw the accused and deceased wrestling outside the Senator Club at about 2.00 a.m. She said that it is when the deceased fell that Mwiraria ran off. PW1 did not disclose for how long she observed the two who were wrestling before one fell. PW1 also said that this incident took place about 50 metres away from where she was. According to her, there are electric lights on the verandah to the bar and there were electric lights from buildings across the bar. PW2 did confirm that there were indeed electric lights at the veranda to his bar and that there were more electric lights on the same building. Even though there were lights at the verandah, the court was not told the intensity of the said lights. In my view 50 metres is too far for somebody who had just woken up from sleep, to see a person and recognize them easily from a distance of 50 metres. To compound it all, the person who ran, went away from the scene to the opposite direction but not towards where PW1 was. I believe there should have been some independent evidence to corroborate that of PW1. PW1 had said that she informed the deceased’s brother about what she had seen soon thereafter. The said brother of the deceased was not called as a witness to confirm that fact.

During the cross examination of PW1, it transpired that in her statement to the police, she had indicated that she was informed of the murder of the deceased by one Jacob. The question is whether PW1 witnessed the murder or she was informed of it. That discrepancy between PW1’s testimony in court and her statement to the police needed to be reconciled. PW2 said that Jacob was his employee and in my view, the said Jacob should have been called to tell the court how he came to know of the deceased’s death. The investigating officer did not testify. He would have been of assistance to explain what he uncovered from his investigations. Otherwise the evidence on record has many gaps and inconsistencies.

To prove a charge of murder, the prosecution has to demonstrate that:

1. That the accused committed the act(*actus reus*).
2. That the accused person has the necessary intention i.e. malice aforethought (*mens rea*).

Section 206 of Penal Code defines malice aforethought as intention to kill or cause grievous harm.

In my view, the accused is a prime suspect in the murder of the deceased because they had had a disagreement on that same evening and soon after the incident, he left the area where he normally did business and was arrested in Mutuate. However, PW1's evidence cannot be said to have been free from error because of the circumstances under which the offence was committed and the prosecution failed to call very material witnesses who may have corroborated PW1's evidence. Suspicion, however strong, cannot sustain a conviction. I find that the charge of murder was not proved to the required standard i.e. beyond any doubt. There are lots of doubts in the prosecution evidence and those doubts must be resolved in favour of the accused. Accused is hereby acquitted of the offence of murder under Section 322 of the Criminal Procedure Code and set at liberty forthwith.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JUNE, 2015.

R.P.V. WENDOH

JUDGE

PRESENT

Mr. Mulochi for State

Mr. Mwanzia Holding Brief for Melime for Accused

Faith, Court Assistant

Accused, Present