REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CR CASE NO. 49 OF 2011

REPUBLIC……PROSECUTOR

-VRS-

DAVID MAWIRA KINOTI …….……..……. ACCUSED

JUDGEMENT

David Mawira Kinoti is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (PC). He is alleged to have murdered Joakim Kimathi on 27/8/2011 at Kaurone Village, Kinugu Sub-location, Kiria Location. The accused denied committing the offence and the prosecution called a total of 6 witnesses in support of its case. After the close of the prosecution case, the accused was called upon to enter his defence and he testified on oath. He did not call any other witness.

The prosecution evidence is that PW2, Charles Mutuma Mungeria, Julius Muthaura Jackson (PW3) and the deceased Joakim Kimathi, on 27/8/2012, about 7.30 p.m. went to PW1 Emily Ngugi's *kiosk* to take tea or coffee. PW1 told the court that he knew PW2, 3 and the deceased. He also knew the accused as her customer. PW1 said that she saw PW1, 2 and the deceased arrive at the window of her shop (*kiosk)* and that the accused, David Mawira also arrived and sat on the bench which is outside the *kiosk*. She served the deceased with coffee and he went to sit where Mawira, the accused was seated but he went back to the window and told her that he was dying and he fell down at the window. She told the court that she had a lantern on the *kiosk* counter and was able to see all the people who were outside the *kiosk* well. PW1 also stated that PW3, Julius also shouted that Mawira had stabbed him. PW1 went out of her shop and shouted that it was Mawira who stabs people and that Mawira then ran off. PW1 sent PW2 who went to call accused's brother, Mwiti who operates a *boda boda* motorcycle service, he came and took PW3 to hospital but the deceased was left at the scene. She denied having seen accused actually stabbing the two but that she was able to see them sit on her benches outside. In cross examination, she said that she saw the deceased actually being stabbed.

PW2, Charles Mutuma recalled that when they arrived at PW1's *kiosk*, he was served with tea first but he remained at the counter while Joakim (deceased) and Julius (PW3)went to sit at the bench where Mawira (accused) was seated. He then saw Julius coming back saying he had been stabbed by Mawira and Joakim did likewise; that Joakim fell near him and he lit the match to see where Joakim had fallen and noticed that he had died whereas accused had ran away.

According to PW2, when they went to the *kiosk*, they found Mawira seated on the bench. He denied that there was any commotion before deceased was stabbed. He identified Mawira from the light from the *kiosk*.

PW3 confirmed that he was with PW2 and deceased on the said evening; that after they were served with tea, they decided to sit on the nearby bench where accused was seated; that the accused stabbed the

deceased on the chest, then stabbed him on the right side of the chest and he avoided being stabbed a second time.

PW4, CPL Japhet Musyimi of Imenti Central was asked to investigate the murder. He went to the scene with PW6 PC Rono and others at about 8.30 p.m. of the same night and at the scene found PW1 and the body of Joakim outside the shop of PW1. He called scene of crime who took photographs (PEX 3.) Those he interrogated told him that it is David Mawira who committed the offence. He could not trace the said Mawira at his home and following information, arrested Mawira on 1/9/2011 at Embu. PW6 went to the mortuary with the relatives of the deceased where they identified the body before post mortem was done. The post mortem was conducted by Dr. Diana and the report was produced in court by Dr. Kigumba James of Meru Hospital. The Doctor found that the deceased sustained a deep cut on the chest, stab wound to the left lung with haemorrhage in the chest cavity and the great vessels had been shattered. The Doctor formed the opinion that the cause of death was massive haemorrhage, secondary to the deep laceration to the heart and the great vessels.

In his defence, the accused said that he sells fruits at Embu Market and on 27/8/2011 at 7.30 p.m. he was at Rukuriri in Embu Teachers College where he went to look for fruits for his business. Accused also said he lives in Embu where he was doing business. He denied knowing the deceased or being near PW1's *kiosk*. He also denied knowing the deceased, PW1 and 3.

After the close of the defence case, Mr. Omari, Counsel for accused submitted that the charge was not proved to the required standard because the offence occurred at night; it was not clear what light was available at the scene to enable the witnesses identify the perpetrator; that PW1 said accused came, sat away and deceased ran towards her saying he had been stabbed and fell; that PW2 said that deceased said he had been stabbed meaning he did not know who stabbed him; that because of the contradictions in the prosecution case, accused should be acquitted.

Mr. Mulochi, Learned Counsel for the State urged that the evidence is circumstantial, that this is a case of recognition and that there was a lantern in PW1's shop; that PW1's evidence is supported by that of PW2 and 3.

I have taken into account all the evidence on record and the submissions by Counsel. There is no doubt this offence occurred at night. The witnesses said it was about 7.00 p.m. to 7.30 p.m. This case therefore turns on identification or recognition.

Although the accused denies that he knew the deceased, PW1 or 3, PW1, 2 and 3 all testified that they knew him because he hails from the same locality. PW1 said that the deceased, PW2 and 3 and accused were all her customers. It is not until his defence that the accused raised for the first time that he did not know any of the prosecution witnesses, PW1 and 3. In my view, the denial of PW1 and 3 should have been raised earlier so that if possible, other evidence would have been adduced as to where accused comes from in relation to PW1 and 3. PW1 also said that accused's brother Mwiti was called to come and take the injured to hospital. It means not only was accused known to PW1 but his brother too. That evidence was not challenged. I find the defence to be an afterthought and not believable.

This case turns on circumstantial evidence. In **Abong'a alias Onyango V Rep CRA 32/1991 (UR)** the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**
>
> > **(i). the circumstances from which an inference of guilt is sought to be drawn, must be cogently and fully established;**
> >
> > **(ii). These circumstances should be of a definite tendency unenxingly pointing towards the guilt of the accused;**

(iii) the circumstances taken cumulatively should form a complete claim so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else."

According to PW1, she had a lantern on the counter of her shop and was able to see her customers who were on the bench. PW2 too said there was light from the shop. I believe PW1 must have light in her shop to enable her serve her customers. She had benches outside her shop where people sat to take tea. Photographs of the scene produced as PEX. 3 do show the setting of the scene. The bench was just outside the veranda of the shop or *kiosk* about 2-3 metres away. PW1 said that after serving the tea, she saw the deceased come back to the counter claiming to have been stabbed. Although PW1 later changed and said that she saw when the deceased was stabbed, that cannot be true. I believe what PW1 wrote in her statement that she did not witness the actual act of stabbing the deceased or PW3.

PW2 said he was standing at the counter taking his tea when he turned and saw somebody who claimed to have been stabbed and that PW3 likewise came back and claimed to have been stabbed. Although PW2 later claimed to have seen accused stab the two, it is evident from his evidence that he did not see accused stab the deceased and PW3. It is only PW3 who said he sat next to accused on the bench and he stabbed him. But again PW3 did not seem to have seen the deceased being stabbed. According to PW1, only 4 people were outside the said shop at the time, accused, deceased, PW2 and 3. PW1, 2 and 3 said they knew accused. PW3 said that when he was served with tea, he went and sat next to the accused and I am satisfied he saw him well. They were in close proximity. When PW4, the Investigating Officer visited the scene on the same evening and he was informed that it was Mawira who had committed the offence. The mention of accused as the perpetrator did not come as an afterthought. He was mentioned as the culprit to the police about an hour after the offence. The incident was still fresh in the minds of the witnesses and had not been tampered with. They were not in doubt that it was accused or person who all the 3 knew.

This was a first report. **In Kioko Kilonzo & Others V Rep CRA 82-85/2011**, the Court of Appeal considered the case of **Terekali V Rep 1952 EACA**, where the East African Court of Appeal stated thus:

"Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statements may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others …"

In this case, PW4 was informed by the witnesses that it is accused who had committed the offence within a short period of the occurrence of the offence and he went in search of accused. The testimonies of PW1, 2 and 3 had not been influenced and I believe they were the truth.

In **Abdullah Bin Wendo V Rep 20 EACA 166,** the Court of Appeal of East Arica emphasized the need for careful scrutiny of the evidence of identification especially by a single witness before basing a conviction on it. The Court said:

"**Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule 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. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."**

In the instant, we do not have one witness but three people who knew the accused. Even though the circumstances may have been difficult for identification, the three of them could not have made a

mistake. I have seen the photographs taken of the scene and the bench on which the deceased, PW3 and accused sat and it is quite close to the shop where PW1 and there was light. In **Kiarie V Rep (1984) KLR 739,** the Court of Appeal said:

> **"It is possible for a witness to be honest but mistaken and for a number of witnesses to be all mistaken. Where evidence relied on to implicate an accused person is entirely of identification, that evidence should be water light to justify a conviction".**

In the instant case, it is not a case of identification but recognition because I have no doubt that the three witnesses knew accused very well. I am further guided by the decision in **R V Turnball (1976) 3 ALL AR 549**, a case cited severally with approval and adopted by the Court of Appeal. Lord Widge CJ pointed out as follows:

> **"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made…"**

In the instant case, it is a case of recognition by three people who knew accused very well and I am satisfied that they did recognize the accused as the perpetrator.

The accused raised the defence of an alibi, that he was in Embu where he lives, carrying on business of selling fruits. No doubt PW4 told the court that after being informed that the accused was the perpetrator, he visited his home but did not find him. Acting on information, he arrested accused in Embu on 1/9/2011. Even when an accused raises an alibi, the onus to prove the case beyond any doubt still rests on the prosecution to prove its case and at no stage does the burden shift to the accused.

In the case of **Uganda V Sebyala & Others (1969) EA 204**, the Learned Judge quoted a statement by his Lordship CJ of Tanzania in CRA 12D 6R/1969 where the CJ observed:

> **"the accused does not have to establish that his alibi is reasonably true. All he has to do is create doubt as to the strength of the case for the prosecution. Where the prosecution case is thin, an alibi which is not particularly strong may very well raise doubts."**

In this case, the court already dismissed accused's assertion that he did not know PW1 and PW3. The witnesses even mentioned having asked accused's own brother, Mwiti to take PW2 and the deceased to hospital after the injury. That evidence was never contested. I also find that accused's alibi comes as an afterthought.

I am guided by the above cited authority. The principle of testing alibi defence is analyzing the entire evidence adduced by both sides and satisfying oneself whether the story given by an accused person creates doubt in the veracity of the prosecution case. I have tested the alibi defence by the accused person and find that it has not created any doubt in the credibility of the prosecution case. If there are any contradictions they do not go the root of the case.

To prove the offence of murder, the prosecution has to prove the two ingredients:

1. **The accused committed the act, *actus reus.***

2. **That accused possesses the *mens rea* or the intention.**

The intention is defined as malice aforethought. Section 206 of PC defines malice aforethought as an intention to cause death or cause grievous harm. In this case, PW2 and 3 did not know the reason for the attack. It was sudden. On that evening there was no dispute between accused and deceased or with PW3. The accused, however, aimed at very vital organs of the deceased. The Doctor found a deep stab

wound passing through the right lung and the heart and the great vessels were shattered. In my view the stab was meant to do grievous harm or cause death, which it did. Malice aforethought flows from that act. I am satisfied beyond any doubt that it is the accused who caused the death of the deceased and escaped. I find him guilty of the offence as charged and convict him under Section 322 of CPC.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF JULY, 2015.

R.P.V. WENDOH

JUDGE

IN THE PRESENCE OF:

Mr. Musyoka for State

Mr. Igweta Holding Brief for Mr. Omari for Accused

Faith, Court Assistant

Accused, Present