



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CR CASE NO. 31 OF 2007**

**REPUBLIC.....PROSECUTOR**

**-VRS-**

**DAVID NTONGAI M'ITURU ..... ACCUSED**

**JUDGEMENT**

David Ntongai M'Ituru is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (PC). It is alleged that on 14/6/2007 at Muringene Location of Meru North, he murdered Jacob Meme Itirika. The accused denied the offence. In support of their case, the prosecution called a total of 8 witnesses. Accused testified on oath in his defence but did not call any witness.

The prosecution case is as follows: PW1, Meshack Mutuma Ntundu was at his home at Muringene at about 8.00 p.m. on 14/6/2007 when his mother called him and informed him that Jacob Meme (the deceased) had been stabbed by Ntongai and on his way to inform Jacob's wife, he met Jacob on the way. On asking Jacob why he was bleeding, he replied that he had been stabbed by Ntongai; that the deceased's father went to get a vehicle and he accompanied Jacob to hospital at Maua Methodist. He was asked to donate blood for Jacob which he did but next day he heard that Jacob had died. He knew Jacob as accused's brother-in-law; that accused and father-in-law of deceased are brothers.

PW2 , Rose Kaloki Muriuki testified that on 16/6/2007 about 7.30 a.m. she was coming from the grazing area where she had spent the night when she met 'Solo' (Ncolo), a lady whose husband is her brother-in-law, who informed her that Jacob had been stabbed by Ntongai using a spear. She went and found accused in her homestead and he told her that there were thieves in the *shamba* the night before and that it is the thieves who stabbed Jacob. PW2 said that she had employed accused to guard her *miraa* shamba and she informed accused what she had heard, that he had stabbed Jacob. PW2 convinced accused to accompany her to the hospital to visit Jacob. Jacob's mother informed them that he was admitted at Maua Hospital and on hearing that, accused declined to go. PW2 later learnt that accused had been arrested at the bus stage. She knew deceased as a neighbour and was not aware of any grudge between accused and deceased. She had employed accused 5 days earlier.

Shadrack Mario (PW3), recalled the 14/6/2007 about 8.30 p.m. he was at his home when he was called by PW1 and his mother 'Solo' (Ncolo PW4) and informed him that his brother, Jacob had been stabbed. He went to the scene with PW1 and 'Solo'. He flashed a torch on the brother and saw a stab wound on right side which was bleeding. Jacob informed him that he had been stabbed by David Ntongai. He took Jacob to Maua Hospital where he was admitted. Next day he found accused at the bus stage and took him to the police station. Later that day, Jacob died. Police took accused to the scene

which was the house of Kaloki (PW2) where the offence was allegedly committed and accused entered the house and came out with a spear which police took away. PW3 also said accused had a jacket which had blood stains which he was still wearing. He said that deceased was married to accused's sister and he was not aware of any dispute between accused and deceased or their families. He said that when he found deceased, he was able to talk but not walk.

PW4 Margaret Ncolo recalled that on 14/6/2007 she was outside her house between 7.00 p.m. to 8.00 p.m. when she heard a person calling from the shamba saying **"please do not let me die. I have been stabbed"**. When the voice called out the second time, she recognized the voice to be that of Jacob Meme, her neighbor. PW4 walked to where Jacob was. He had a stick and torch and using a torch, she noticed that he was not able to walk. She assisted him to walk to Jacob's home. After they reached his house she asked him where he was injured and he asked her to lift his jacket and saw a lot of blood, and she screamed. She sent her son Mutuma (PW1) to call for help. PW4 asked deceased who had stabbed him and he said he was stabbed by Ntongai at Muriuki's gate; that PW1 then went to call PW3 Shadrack, who arranged to take deceased to hospital where he died next day. She said a day after the attack, she saw accused come with police, enter Muriuki's (PW3) house and brought out 2 spears and police took one.

PW5 Elias Mugambi recalls the 14/6/2007 about 8.00 p.m., he was in the house of Rose Muriuki (PW2). He heard screams and went where they were emanating from. At Rose's gate, he met Ntongai running armed with 2 torches and a spear. He used a torch to see Ntongai. He asked him about the screams but Ntongai did not stop or talk to him. He continued to where the screams were emanating from and found Jacob stabbed and PW1 and 4 with him; and that PW1 went to get help.

PW6 Christine Karamana Muriuki, a daughter to PW2 recalled the 14/6/2007 about 8.00 p.m. when at her mother's home (PW2), Jacob took to her money for banana leaves (*Miraa*) which she had sold to him earlier; that Jacob went out through the gate and after about 5 minutes she heard screams for help. She went out with a torch and on flashing it, saw Ntongai (accused) near their gate where he was guarding *miraa*. She asked him about the screams and he did not answer. She said Ntongai had a spear and torch. She went and found Jacob had fallen in front of their gate while Ntongai was standing in the homestead near the gate; that Jacob said Ntongai had stabbed him. She said Jacob was conscious and aware of himself; That Ntongai then went to PW2's home and kept the spear in PW2's house and where he kept. It is here police found it.

Dr. Benjamin Kalikia Kanake (PW7) performed the post mortem on the deceased on 27/6/2007 and he formed the opinion that the cause of death was severe haemorrhage due to a traumatic penetrating stab wound to the right kidney (PEX NO.1).

PW8, CPL Enfrey Muriithi is the Investigating Officer in this case. He recalled that on 15/6/2007 about 10.25 p.m., the accused was taken to the Maua Police Station by the members of public from Muringene who alleged that he had stabbed one Jacob Meme with a spear. PW8 went to the scene in company of accused where they recovered a blood stained spear head from the house of PW2 Rose Kaloki, and a trouser, jacket, *leso* from deceased's body. He prepared an exhibit memo and forwarded the items to the Government Analyst. The Government Analyst found that the jacket and spear were slightly stained with human blood of Group 'O'.

When called upon to defend himself, the accused testified on oath and stated that as of 13/6/2007 he was employed by Mugambi Kinya as a *Miraa* driver and on that day, he left Muringene for Isiolo. He delivered *miraa* and arrived back at Muringene at 7.30 p.m. and another driver Koome, took him home. He went to sleep. Next day he passed by his hired farm; that he had hired Jadiel Muriuki and before he left, Teresia, Jadiel's sister told him that somebody had been stabbed. Rose Kaloki PW2 told him that they go to see Jacob.

After the close of the defence case, Mr. Kiogora, Counsel for accused submitted that the prosecution case had not been proved beyond any doubt as required because there was no eye witness to the murder and that there had been contradiction in the testimonies of PW 2, 4, 6 and 8 as to where deceased was

murdered and that they were never reconciled; that the murder weapon and the exhibits which PW8 collected from the scene and taken to the Government Chemist were not produced in court.

Mr. Musyoka, learned Counsel for the State relied on the evidence on record saying it was a water tight case. There is no doubt that nobody witnessed the attack on the deceased. All the witnesses PW1-6 found him already injured. The incident occurred between 7.00 p.m. to 8.00 p.m. Nobody was at the scene nor did any of the witnesses claim to have seen the attacker. This case is solely dependent on circumstantial evidence. The law is well settled and there is a host of authorities on when the court can rely on circumstantial evidence to found a conviction.

In the case of **Abang'a alias Onyango V Rep CRA 32/1990 (UR)**, the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out as follows:

**“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 unerringly 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.”**

In this case there is no doubt that accused was known to the deceased. Infact they were related. In his defence, accused admitted that indeed the deceased was his in law because deceased had married his brother's daughter.

In cross-examination by the Learned Counsel for the State, accused admitted to knowing all the witnesses who testified. Apart from PW6 Christine, he had no dispute with any other. There is no reason at all for them to frame the accused. I will revert to the alleged grudge between accused and PW6 later on in this judgment.

The other issue I need to determine is where the accused was working before this incident. PW2 Rose Kaloki, who is the mother of PW6 specifically, said that accused had been employed to guard her *miraa*. All the other witnesses PW1, 3, 4 and 5 knew that accused was an employee of PW2, guarding her *miraa* and according to PW2, 3 and 6, he was at his place of work on the night of 14/6/2007 and 15/6/2007. The accused's defence is an alibi that he worked as a driver for somebody else and was not at the scene as alleged. As a general rule, the burden of proof in criminal cases always rests on the prosecution and never shifts even when the defence set up is one of alibi. It follows that the burden of proving an alibi does not lie on the accused who has raised it. In **Uganda V Sebyala & Others (1969) EA 204** the Learned Judge quoted George, CJ Tanzania in **CRA 12D 6R of 1969** who observed that:

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

I wish to note that the accused raised this alibi defence for the first time in his defence when he testified. At no time during the prosecution case did he contest the allegation that he was an employee of PW2. After testifying, he asked for an adjournment to call a witness by name Koome, who he alleged was with him on 14/6/2007, but he abandoned the application. It means that the prosecution would not have invoked Section 309 CPC which affords the prosecution an opportunity to call a witness to call evidence to rebut the said alibi. The section provides:

**“if the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence, have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.”**

PW6 who was the last to see the deceased before he was injured said that on the material day, the accused was on duty at their home guarding *miraa*. He was near the gate where the deceased went out through as he left PW6's home and soon thereafter PW6 heard the deceased's screams. She found the accused standing at the gate in the compound with a spear and torch, whereas the deceased had fallen outside the gate. PW5 also told the Court that he was at PW2's house when he heard screams and on going out in response to the screams, he met accused running near the gate and he had 2 torches and a spear. PW2 had a torch too which he flashed at accused. Both PW5 and 6, on asking accused what happened, he neither answered nor spoke to them. PW2 also told the court that when she arrived at her home on 15/6/2007 at 7.30 a.m., accused was there and he told her of their having been thieves in the *miraa* at night. From the evidence of these three witnesses, I find that there is overwhelming evidence that accused was an employee of PW2, guarding her *miraa* and the evidence of PW2, 5 and 6 placed accused at the scene on the said night and the evidence was not dislodged by the alibi.

The accused had alleged that PW6 had a grudge against him because he had hired land which she wanted to hire but I find that line of defence to be a total after thought. That allegation of a grudge was raised when the accused was cross examined by the State Counsel. No question to that effect was put to PW6 when she testified or to the other witnesses. I find that accused was an employee of PW2 and was at work on the night of 14/6/2007. Accused's alibi was totally dislodged.

It was the submission of Mr. Kiogora that there were contradictions on where the offence took place but I find that there was none. PW5 and 6 heard screams emanating from the direction of PW2's gate soon after the deceased left PW2's home. That is where deceased was found lying by PW5 and PW6.

PW4 who was one of the first persons to reach the deceased said the deceased told him that he was stabbed at PW2's (Muriuki) gate. She said:

**“He told me it was (Jacob must have meant David) Ntongai who stabbed him at Muriuki's gate. Muriuki is a brother to my husband and his home is in the lower side of my *shamba*.”**

PW6 said she found deceased in front of the gate on a path that leads to other homes. She further said that deceased got up and started walking towards Ncolo's place (Ncolo is PW4). PW6'S evidence therefore corroborates PW4's evidence as to where each of them found the deceased. Deceased actually moved from the actual scene at PW2's gate and by the time PW4 heard his screams, deceased was in her *shamba*. Their evidence is very consistent and unshaken.

PW6 who was the first to see the deceased said that when she found the deceased, he was still conscious and was talking and told her that Ntongai had stabbed him. PW1, 3, 4 and 5 all said that deceased actually talked and he told them that it was Ntongai who stabbed him. According to PW1, 2, 4 and 6, apart from talking, they (PW4 and 6) also saw the deceased walking. PW4 said she actually helped him walk after finding him in her *shamba*. The question is whether what the deceased told them amounts to a dying declaration. In the case of **Choge V Rep (1985) KLR 1**, the Court of Appeal discussed the Principles on which a dying declaration can be admitted in evidence, when it observed as follows:

**“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of dying declaration need not depend upon the declarant being at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration**

**as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”**

Caution is necessary in relying on a dying declaration because the maker is not available and the said declaration cannot be tested on cross examination of the maker.

In regard to whether the statement implicating accused was made when the deceased's death was imminent and therefore at a time it could be regarded to have been made truthfully and without malice, the statement was made to the 5 witnesses; PW1, 3, 4, 5 and 6 on 14/6/2007 soon after the attack and deceased died next day 15/6/2015. The attack took place at night between 7.00 p.m. and 8.00 p.m. That time being night, the question is how the deceased knew that it is accused who had attacked him. Otherwise as it is, it is unknown how the deceased knew the perpetrator to have been the accused. Since the conditions were not conducive to identification, the said dying declaration requires corroboration.

Firstly, I have found above that the evidence of PW5 and 6 placed the accused at the scene of crime i.e. at the gate of PW2's home as the place where the deceased was assaulted. PW5 and 6 alluded to the accused's conduct after the attack. Even when they enquired from him, why the screams, he did not tell them what had just happened to the deceased. The deceased was screaming for help just outside PW2's gate and accused was standing near the same gate inside the compound, why did he not respond to assist the deceased? Further, PW6 told the court that soon after that, the accused returned the spear which he normally used at work, to PW2's house. PW2, 4 and 6 saw the spear when it was recovered by PW8 when accused led PW8 to PW2's home. Accused's conduct of returning the spear to PW2'S house soon thereafter was also telling. Accused also led to the recovery of a blood stained spear.

The said spear head that was recovered and the clothes taken from deceased were taken to Government Analyst for analysis. However, no blood was drawn from deceased and accused for comparison with the said specimens. I must strongly fault the police for their laxity in handling this matter. One cannot tell whether the omission was intentional or accidental. As per the Analyst report, the spear head was found to be stained with blood. I believe PW2, 5 and 6 that it is the accused who had the said spear. Even if it was not produced in court as an exhibit, (for unknown reasons), the Government Analyst's Report and exhibit memo form were produced in court confirming that the exhibits were taken to Government Analyst and tests were conducted. Having confirmed that there was blood on the spear head, the accused whom I have found had this spear on the night of 14/6/2007 had a duty to give a plausible explanation as to the origins of the blood on the spear. Under Section 111 (1) of the Evidence Act, a burden is placed on the accused to explain facts which are exclusively within his knowledge and it does not mean that the burden of proof has shifted to him. He did not discharge that burden. The blood on the spear and the deceased's clothes was found to be human blood of blood Group O. The prosecution witnesses who saw the deceased saw that he was bleeding from the injury he had sustained and it is obvious that the clothes were stained with his blood and I will find the blood on the deceased's jacket and his trouser to have been his blood which matched the blood on the spear head. Despite the fact that no blood was drawn from deceased for analysis, I am satisfied beyond any doubt; that the blood on the exhibits belonged to the deceased and therefore, the spear that accused had on that fateful night is what caused the fatal injuries found on the deceased. I find that there was sufficient corroboration of the dying declaration that it was the accused who caused the deceased's death.

To prove a murder charge, one has to prove the two ingredients:

- 1. The accused committed the act (*actus reus*).**
- 2. That he had the necessary intention (*mens rea*)**

In this case, I am satisfied that it is accused who stabbed the deceased using a spear. The use of a spear that caused a penetrating wound to the kidney was meant to cause death or do grievous harm and malice aforethought flows from that act. The accused's conduct is also a demonstration of malice aforethought. The deceased was calling for help when accused was just standing nearby. If accused had stabbed the deceased by mistake, once the deceased called for help, being a person he knew and a relative, he should

have sought to assist him get to a hospital for treatment but he just stood nearby and did nothing. Instead accused tried to blame it on thieves.

As earlier pointed out, the evidence herein is all circumstantial but it does not make it of less value. In **Rep V. Taylor Weaver & Donovan (1928) 21 Criminal Revision 20**, it was said:

**“Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified examination is capable of proving the proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”**

I have put all the evidence adduced herein together and I do find that it forms a complete chain pointing to none other than the accused as the person who stabbed the deceased with a spear as the (deceased) left PW2's house, which accused was guarding on the said night. I find that the prosecution has proved its case beyond any reasonable doubt. The accused is found guilty of murder under Section 322, CPC and he is accordingly convicted.

**DATED, SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF JULY, 2015.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT**

Mr. Mulochi for State

Mr. Kibiti Holding Brief for Mr. Kiogora for Accused

Faith, Court Assistant

Accused, Present