



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CR 38 OF 2008**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**JOSEPH MICHUBU M'IMANENE.....ACCUSED**

**JUDGMENT**

1. The accused **JOSEPH MICHUBU M'IMANENE** is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 20<sup>th</sup> Day of December, 2007 at Kabuline location, in Igembe District jointly with others not before the court murdered **PATRICK KITHINJI**.
2. The prosecution called 4 witnesses. The facts of the prosecution case are that on 5<sup>th</sup> December, 2007 at 9 am, the parents of the deceased, PW1 the father and PW3 the mother, and his brother PW2 were woken up by one NKATHA at night. The parents were informed that their son, KITHINJI, the deceased in this case, was being beaten. PW3 went with Nkatha while the rest followed later.
3. PW3 testified that she found her son lying on the ground with both hands tied to his back, and so seriously injured that he could not talk. At the scene were Michubu M'Imanane and Michubu Mwitali. PW3 said on asking the two Michubu's what they had done to her son, Michubu M'Imanene the accused threatened PW3 to deal with her too, as the law was on their side, he then walked away.
4. By the time PW1 and 2 came to the scene, only the deceased, PW3, Nkatha and Michubu Mwitali were present. The deceased was carried home. The next day the family was able to get a vehicle to take him to hospital. He died on 20<sup>th</sup> December at Meru Hospital where he had been referred from Maua Hospital.
5. The accused put forward an alibi as his defence. He said that at 6pm on 5<sup>th</sup> December, he passed by his neighbour James, DW2 and asked him to visit him that night in order to reconcile him and his wife over some differences. Accused stated that James visited him as requested and spent 7pm to 10.30pm at his house and succeeded to reconcile him and his wife.
6. DW2, James confirmed the accused story that on the accused request on the 5<sup>th</sup> December, 2007 he visited him and his wife at 7pm. He ate supper there and that from 10pm to 11pm they discussed the issue which was bothering the accused and his wife in their relationship. He said that

they reached a compromise and he left them at home at 11pm.

7. I have carefully considered the evidence adduced in this case, together with the submissions by counsels, Mr. Mwanzia for accused and Mr. Murage for the State.
8. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The provision of section 203 of the Penal Code provides:

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

9. The prosecutor needs to establish just that the accused inflicted the injuries on the deceased in concert with others not before court that the injuries led to the deceased death and finally that at the time the accused inflicted the said injuries, he had formed malice aforethought to commit the offence. The circumstances which constitute malice aforethought are set out under section 206 of the Penal Code as follows:

**“206. 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) ...**

**(d) ...”**

10. The issues raised by Mr. Mwanzia are regarding the actual facts of the prosecution case and whether there was a contradiction regarding who was present at the scene of incident. He also urged the court to consider the accused alibi defence. Regarding the facts Mr. Mwanzia urged that there was a contradiction of who was found at the scene where deceased was found lying down seriously injured. Mr. Murage on the other hand submitted that there was no contradiction. Mr. Murage urged that PW1, the father of the deceased found accused at the scene and that accused told him he had been beaten by the deceased because he stole miraa.
11. The evidence adduced was that when Nkatha called PW3, mother of the deceased, the two of them went to the scene and arrived earlier than PW1 and 2. By the time PW1 and 2 arrived the accused had already left.
12. The scene of the incident was visited by PW3 at 9pm. It was therefore at night. PW3 did not say what lighting enabled her to see the two men she found at the scene with the deceased. PW3 said the two people she met spoke to her threatening her with dire consequences. The actual words spoken were not mentioned. Neither did she say the exact words spoken by the accused which enabled her to recognize his voice. PW3 stated she had known accused since 1993. I appreciate that is a period of time long enough to enable proper identification of a person by voice recognition.
13. Regarding voice identification the way to test such evidence was set out in the case of **Choge Vs REP 1985 KLR I** thus:

**Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. In the instant case, it was not safe to that Okumu's identification of the 1<sup>st</sup> appellant's voice was free from all possibility of error."**

14. The identifying witness, PW3 needed to say the exact words spoken by the accused. The court could then have been able to test whether the person this witness claims she identified was indeed the one. I am unable to subject the evidence of voice identification by PW3 to this test for lack of detail from her evidence.

15. There was no eye witness for this case. The prosecution failed to bring key witnesses, for instance one Nkatha who called out PW1 and 3 to go see what had happened to their son. Also not called were the investigating officer and the arresting officer of the accused. In **BUKENYA & OTHERS 1972 EA 549** LUTTA Ag. VICE PRESIDENT held:

**"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

16. I find that the prosecution witnesses failed to bring vital witnesses in this case. I find that an adverse inference should be made that why they were not brought is because their evidence may have been adverse to the prosecution case.

17. The accused on his part put forward an alibi as his defence. Mr. Mwanzia relied on **Kiame v Republic [1984] KLR 748** where the court of Appeal held.

**"An alibi raised a specific defence and an accused who puts forward an alibi as an answer to a charge does not on law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court doubt that is not unreasonable"**

18. The cited case is a leading authority on how to treat the defence of alibi and I do abide by it. The accused put forward an alibi defence showing that on the evening the deceased was attacked, he was at home with his wife and a neighbour, one James, discussing family difference between him and his wife. DW2 James corroborated the accused story.

19. The accused needed not prove that his alibi was correct or prove that he was innocent of the offence charged. That was not a burden placed upon him whether in law or otherwise.

20. The prosecution evidence against the accused was weak for reason of poor conditions under which the accused was allegedly identified. I find accused defence of alibi has created a doubt in my mind whether identification of the accused by PW3 is correct. The accused earns the benefit of doubt.

21. I have come to the conclusion that the prosecution case failed to prove the charge against the accused on the required standard of proof beyond a reasonable doubt. I therefore give the accused the benefit of doubt and acquit him of this offence under section 322 (1) of the Criminal Procedure Court.

**DATED, SIGNED AND DELIVERED AT MERU 31<sup>ST</sup> DAY OF JULY 2014**

**LESIT, J**

**JUDGE**