REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 18 OF 2008

LESIIT, J.

REPUBLIC……….…...………....…………………….............PROSECUTOR

-VERSUS -

ZAKARIA MUGAMBI MWAMBA……………..….........................ACCUSED

JUDGMENT

1. The accused **ZACHARIA MUGAMBI MWAMBIA** is charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are:

> **"On the 18th day of November 2007 at Kiriga sub-location in Imenti South District within Eastern Province, murdered JAMES MAWIRA KIAMBI."**

2. The prosecution called a total of five witnesses. The facts of the prosecution case are that on the material evening, between 7.30 and 8 p.m.; the accused went knocking at PW1's rented house cum kiosk. PW1 was alone. She told the accused to leave as they were no longer married. The accused was banging the door almost breaking it and he was also drunk.

3. PW1 heard the accused speak to someone and she opened to look. She saw it was the deceased, a brother of her landlord. The deceased asked the accused what he was demanding. Then she heard the accused reply that the deceased was disturbing him. He told the deceased that he was looking for a person like him.

4. The accused and deceased started wrestling. PW1 told the accused to leave the deceased alone. That is when she saw the accused stab the deceased on the left side and he fell down. PW1 then ran 100 meters to deceased home where he reported the attack. Deceased was taken to hospital but died few days later as he underwent treatment. The cause of death was cardio pulmonary arrest due to penetrating chest injury.

5. The accused gave a sworn defence. He denied the charge and put forward an alibi as his defence. The accused stated that on the 18th November 2007 at about 8.30 p.m. he was at a shamba with one Domiciano where they spent the night.

6. The accused stated that he had married PW1 but said she fabricated the evidence against him because he never went to her house drunk as she claimed. He also said that he did not know the deceased. The accused said he married PW1 in 2004 but in 2005 he fell ill and was away for treatment. That when he returned to his wife, he found her pregnant by another man.

7. I have carefully considered the evidence by the prosecution and accused defence. I have also taken into account the submissions by Mr. Omari for the accused and Mr. Mulochi prosecution counsel for the State.

8. The accused faces a charge of murder contrary to **Section 203** of the **Penal Code**. The offence is committed when a person by some unlawful act or omission causes the death of another with malice aforethought. The prosecution must establish that the act or omission causing death was committed by the accused and that at the time he committed same, the accused had formed the necessary malice aforethought or intention to cause death or grievous harm to the deceased or even another.

9. In this case there was one eye witness to the incident, PW1. It is the submission of the defence that her evidence was fabricated and that due to a broken marriage between her and the accused, her evidence could not be believed as she was not reliable. The State has opposed that fact and has urged the court to accept her evidence as reliable and watertight.

10. PW1's evidence was that she had just separated with the accused three and a half months earlier when he went banging at her door. He wanted her to open the door and was saying he would kill her and the baby she had. The incident took place at 7.30 p.m. or 8 p.m. It was after dusk.

11. It is trite law that the evidence of a single identifying witness is sufficient to find a conviction if the court is satisfied that the witness made a positive identification of the accused.

12. In the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

> "***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."***

13. In this case, identification is that of both physical and voice identification. As for the voice identification the test applicable was explained in the case of **Karani vs. Republic 1985 KLR 290** where it was held:

> ***"Identification by voice nearly always amounts to identification by recognition. However care must be taken to ensure that the voice is that of the Appellant, that the Complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."***

14. The Court of Appeal in **ANJONONI VS. REPUBLIC [1980] KLR 59** held: -

> ***"Recognition of an assailant is more satisfactorily, more assuring and more reliable that identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

15. I carefully considered the demeanour of PW1. I found PW1 of good demeanour and she impressed me as an honest witness worthy of belief. Regarding her evidence I am satisfied that she had a good and ample opportunity to see and identify the accused person both by physical appearance and by voice I find that PW1 spoke to the accused while inside her house. The accused

identified himself to her I find that PW1 had an opportunity to see the accused when she opened the door to her house. She witnessed the accused exchange with the deceased then wrestle before the accused stabbed the deceased. There was a whole conversation between the accused and PW1 and later between accused and the deceased. The accused and PW1 were married and had lived together for at least one year. The accused does not dispute that PW1 was his wife for several years before this incident. PW1 therefore knew the voice of the accused quite well and could recognize it.

16. I find that the witness, PW1 had an opportunity to see the accused. However, it is the fact the accused identified himself to her and demanded that she opened the door to her house that gives an assurance that PW1 had sufficient opportunity and time to see and hear the accused voice to positively identify the accused.

17. The other matter for consideration is whether the prosecution has established malice aforethought. The evidence of PW1 was that the accused stabbed the deceased in the chest, chased PW1 briefly before changing his mind and escaping from the scene. There is no doubt that it was the stab the accused inflicted on the deceased that caused his death. I have no doubt in my mind that the accused was the one who stabbed the deceased causing his death.

18. The issue is whether malice aforethought has been established. **Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought as follows:

> ***"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)…"***

19. PW1's evidence is clear that when the accused went to her house, he demanded she opens the door for her and stated that he would kill her and her baby. The accused was already armed with a knife when he arrived at PW1's door. That is clear evidence that when the accused showed up at PW1's door, he had already formed the intention to cause grievous harm or death to PW1. The only problem was that when PW1 did not open the door, and the deceased who was on his way to the local market showed up and tried to intervene, the accused turned against him and stabbed him instead. This was a case of transferred malice.

20. **Section 206** of the **Penal Code** is clear that even where the person killed is not the one against whom an accused had formed the intention to cause death to malice aforethought will be considered to have been proved. Even though the accused struck the deceased only once, the fact he went to the scene already armed with the murder weapon and threatening PW1 with death he had already formed an intention to cause death or grievous harm. The attack on the deceased was wholly unprovoked, unwarranted, unreasonable, unjustifiable and without any cause. The accused act to stab the deceased was pure malice. I find that malice aforethought was proved against the accused beyond any reasonable doubt.

21. The accused put forward an alibi as his defence. Regarding an alibi defence the Court of

Appeal in **KARANJA VS. REP 1983 KLR 501** held as follows:

> ***"The word "alibi" is a Latin verb meaning "elsewhere" or "at another place". Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, i.e. when he was initially charged.***
>
> ***In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought."***

22. I have considered the accused alibi defence and have weighed it against the entire prosecution evidence. I find that the alibi defence by the accused does not raise any doubts in the veracity of the prosecution case. I find that the prosecution case was overwhelming against the accused. I find that the accused caused the deceased death and that at the time he inflicted the injuries causing death, he had formed the necessary intention to cause death or grievous. I find that in the totality of the prosecution case the charge against the accused was proved beyond any reasonable doubt.

23. I have come to the conclusion that the charged against the accused has been proved beyond any reasonable doubt. Accordingly I reject accused defence, find accused guilty of the offence charge and I convict the accused accordingly.

DATED AT MERU THIS 30TH DAY OF OCTOBER 2014.

LESIIT, J

JUDGE