



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL CASE NO. 78 OF 2010

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

DAVID MWITI NDATHO..... ACCUSED

JUDGMENT

1. The accused **DAVID MWITI NDATHO** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are:

“On the 15th day of December, 2010 at around 1300hours at Kanjoro Location, Gatue Division In Tharaka- Nithi District within Eastern Province murdered JOYCE KAANGAI NJERU.”

2. The prosecution called four witnesses in this case while the accused called one witness besides himself.
3. The facts of the prosecution case are that on the material day the accused started fencing off a toilet which belonged to the family of the deceased. The deceased was married to accused father. The deceased went upto where the accused was and suggested to him that he stopped fencing until his uncle, the deceased husband, returned.
4. PW1, the first child of the deceased and PW2 saw the accused lift his panga and cut the deceased indiscriminately and multiple times on the head, hands, stomach and legs. PW1 ran for help from neighbours. The husband of the deceased was called. He arrived home with police officers including PW4 the investigating officer. The deceased was already dead.
5. The cause of death was found to be trauma from multiple wounds deep and extensive resulting in bleeding. The post mortem form was P.exh.2.
6. The accused gave a sworn defence. His defence was that at 1.00 p.m., as he worked in his father’s shamba which neighboured his uncle, PW2’s land, he heard a person saying “stop cutting me”. He stated that he went to check and found the deceased on the ground with multiple wounds with PW1 standing by. He said he went to Gatuga police station where he reported the matter then returned to the scene with police officers.
7. DW2 was mother of the accused. Her testimony was that she was working in her home when she heard

screams. After some time she decided to go and check what was happening. She testified that she found the deceased with multiple cuts and her daughter PW1 standing nearby. DW2 testified that upon asking PW1 who cut the deceased, PW1 told her it was the accused. DW2 testified that the accused left for Gatuga police station and later returned with police.

8. The accused faces a charge of murder. **Section 203** of the **Penal Code** defines murder as follows:

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

9. Malice aforethought is an important ingredient of the offence of murder. 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) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

10. The burden lies with the prosecution to prove their case against the accused person beyond any reasonable doubt. The prosecution must adduce evidence to establish that the accused did an act which resulted in injuries to the deceased out of which injuries she died. In this case the accused is accused of cutting up the deceased multiple times on the head, hand, stomach and legs.

11. The doctor described the injuries inflicted on the deceased as deep extensive cut wounds on the head in the occipital, frontal parietal with fractured skull in several places; the doctor testified that the body had deep cut wounds on both hands and legs. Deep cut wounds to the left hand with dismemberment of the 3rd, 4th and 5th fingers and with the then a remembrance cut off; fracture of the femur and deep cut wounds on the left thigh and calf.

12. The prosecution should adduce evidence to establish that the accused was the one who cut the deceased severely and severally causing her death.

13. Mr. Kaumbi for the accused submitted that the prosecution fell short of proving the case against the accused as required. Counsel submitted that the evidence of the only eye witness to the incident was not consistent and was contradictory. Counsel urged that PW1 claimed that when she saw the accused attack and begun to cut the deceased several times, she ran into her home and locked herself. She then claimed she ran to her neighbours. Mr. Kavumbi urged it was a contradiction to claim she did both actions. Counsel wondered where the two infant children PW1 had left when she ran away.

14. Mr. Kaumbi urged that if the accused cut the deceased as alleged, there ought to have been blood spats on his clothes yet no witness said he saw any blood on his clothing. Counsel urged court to accept accused defence that he never touched the deceased nor did accused admit that the murder weapon was his.

15. Mr. Mungai was the prosecution counsel for the State. In his submissions learned counsel urged that

the evidence of the eye witness was corroborated by that of the investigating officer and doctor. Counsel urged that the prosecution had established that the accused was at the scene of crime. Mr. Mungai urged that the contradictions if any in the prosecution case were mere variations and were not fatal to the prosecution case.

16. Counsel urged the court to consider the state of mind of PW1 as a result of having seen the attack and the resultant injuries as they were inflicted on his mother.

17. I have carefully considered the evidence adduced by the prosecution and the defence together with the submissions by both counsels. The issues for determination are whether there was credible evidence against the accused and secondly whether the contradictions in the prosecution case, if any, discredits the prosecution case.

18. There is no dispute that the prosecution had only one eye witness of the incident, PW1, the daughter of the deceased. There is no dispute that the deceased died of multiple cuts inflicted all over her body during the incident in question.

19. The eye witness PW1 testified that the incident took place at 1.00 p.m. PW1 had come to visit her mother with her child. Her mother the deceased also had a young girl, her last child. It was in broad day light. The attack was near a pit latrine belonging to the deceased. According to PW1 the view was not obstructed and she had an unobstructed view of the scene of the attack when it occurred.

20. PW1 testified that the accused was the son of her father's eldest brother and was well known to her since childhood. According to PW1 not only did she witness the incident with her own eyes, she also heard the accused talking.

21. PW1 testified that the wife of the accused went to the scene when her mother, the deceased screamed upon being cut the first time. She found accused busy cutting the deceased. PW1 stated that she heard the wife pleading with the deceased to stop cutting the deceased. That instead of stopping, PW1 heard the accused threaten to cut his wife as well. PW1 testified that after cutting her mother, the accused threatened to return to finish her as he had done the deceased.

22. I have borne in mind the cautions I should invoke when considering the evidence of PW1, the single eye witness in this case. I am guided by the celebrated case **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.”

23. I have carefully tested the evidence of the single eye witness in this case and find that PW1 was the first cousin to the accused and was well known to her. The evidence of identification by PW1 is therefore that of recognition. Secondly the circumstances of identification were good as it was broad day light when the incident occurred and the witness had a clear and unobstructed view of the incident as it unfolded.

24. Mr. Kaumbi urged that there was contradiction in the evidence of PW1. I find no contradiction. What the witness stated was the sequence of her movements from the time her mother the deceased was attacked by the accused to the time she went and called for help. PW1 was clear that after seeing the attack on her mother just a few meters from the scene, she ran into her parents' house and locked herself together with the two children. After the accused left the scene saying he was going to Gatuga Police

Station, she came out of hiding and ran to the neighbours quite a distance from her home. She came back with one neighbor and from there her father was called. I see no inconsistency or contradiction in PW1's evidence.

25. The evidence of DW2, the mother of the accused, the accused himself both admit that when the accused left the scene after the attack he went to the Police Station. PW2, the husband of the deceased confirm this in his evidence when he testified that he saw the accused near the gate to the Gatuga Police Station and alerted the PW4, the Investigating Officer (I. O.) who stopped and carried him. The I. O. contradicted that evidence saying he found the accused in the cells of the Police Station. However, I considered that a mere variation in evidence due to memory loss and lapse of time. The same is not fatal to the prosecution case. That is more so given the fact that the accused does not dispute the evidence of PW1 and 2 that he returned to the scene of attack in the Police vehicle which went to visit the scene and collect the body.

26. The other evidence against the accused is the fact he took himself to the police together with the murder weapon. That act by the accused provides corroboration to the evidence of PW1 that it was the accused who attacked and fatally wounded the deceased. The accused defence that he did not know how the deceased met her death, and that he was innocent, was an afterthought, a bare denial and a lie. The evidence of his mother DW2 did not help either as she stated clearly that she did not witness the attack.

27. Two witnesses were not called. One was Charles who escorted PW1 back to the scene. He is however not a vital witness as he did not witness the attack. The other was the wife of the accused. She is not a competent or compellable witness under **Section 127** of the **Evidence Act**. Failure to call her was not fatal to the prosecution case.

28. Having carefully considered the evidence in this case, for the reasons I have given above, I find the evidence of PW1 strong, her demeanour impressed me as an honest witness who was worthy of belief. I have cautioned myself of the dangers of convicting on the evidence of a single identifying witness. Even after cautioning myself, I am satisfied that the evidence of PW1 was strong to found a conviction.

29. I find that the prosecution has proved the case against the accused beyond any reasonable doubt. I find the accused guilty of murder contrary to **Section 203** of the **Penal Code** and convict him under **Section 322** of the **Criminal Procedure Code**.

DATED AT MERU THIS 23RD DAY OF OCTOBER. 2014.

LESIIT, J.

JUDGE