



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 40 OF 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH LOKURET NABANYI.....ACCUSED**

**JUDGMENT**

Joseph Lokuret Nabanyi is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 25/1/08 at Arutani Village in Nakuru District, he murdered one Kezia Wangui Karanja. The accused denied the offence. The case proceeded to full trial by the prosecution calling a total of nine (9) witnesses. When called upon to enter his defence, the accused made an unsworn statement. He did not call any other witness.

Jane Ngina (PW1) a resident of Solai recalled that on 25/1/2008, about 9.00 p.m. she was at home. One Ken Idris rang her mother (the deceased) and informed her that Banita was on fire. A few minutes later there were screams from the neighbouring farm. They left the house went out and hid under a tree. There was moonlight. While there people came to their home armed with pangas. The people started to throw stones at them, a stone hit their mother on the leg and she went into the house and fell down. She was able to recognize one person by name David by the voice. He chased them and they ran to Solai Police Station where they found other people. Police went to her home at 4.00 a.m. and she later learnt that their mother had died. She denied seeing the person who threw the stone and that David whom she saw that night was not before the court.

PW2, Stephen Ngori, a child aged 14 years gave an unsworn evidence. The court after conducting a *voir dire* examination found, that PW2 did not understand the meaning of the oath. PW2 reiterated what PW1 told the court she recalled how the mother received a call and thereafter heard screams, went out of the house, saw many people who were armed. They threw stones at them. One hit the mother (deceased) on the leg. He ran and hid and was followed by two people one of who was Joseph whom he knew as a casual labourer in their home. He recognized him by his green/white T-shirt and black trousers which he used to wear. PW2 said there was moonlight on that night and from where he hid he saw about 100 people go to their house and break in. He said he heard the mother ask Joseph why he wanted to kill her and accused told him to finish his work. He then heard the mother scream once. He said that his mother mentioned the names of David and Joseph. He could see the attackers from about 20 metres away. Later that night he saw a vehicle go to their home. He went to police station in next morning where he found many people.

PW3, Veronica Wanja, recalled that on 25/1/2008, she was at home in Solai with her mother and siblings when at about 8.00 p.m. the mother told the children to go and sleep early as there were rumours of attacks. This was during the post election violence of 2007-2008. After a short while, they heard screams from the neighbour, and on going to the gate they saw a group of people. When near them, one person threw a stone at them and it hit the mother on the leg and the mother asked why they wanted to kill her. PW3 was not able to see any of the attackers as they ran off and left the mother and a child behind. She ran off with her sister Jane and they reported at Solai Police Station. On the next day, they got information that the mother had been murdered. PW3 denied seeing David or accused on the said night.

PW4, Francis Ngunjiri told the court that the deceased was the brother's wife and he identified the body to the Doctor before post mortem was done.

PW5, Sgt. Samwel Matheri, arrested the accused on 17/3/2008 at Solai Shopping Centre, after the Assistant Chief, Charles Kiragu informed him that accused was a murder suspect.

PC Moses Makau (PW6) testified that on 28/1/08, while in the office at Nakuru Police Station, he received a murder report from Francis Ngunjiri and Josephat Kinuthia. He took a post mortem form and together they went to the mortuary where Doctor Wainaina performed the post mortem on the deceased.

PC Charles Obade (PW7) was based at Solai Police Station in 2008 when on 26/1/08 members of public went there to report that houses were being burnt. He proceeded to the scene with Sgt. Kemboi. They found houses and stores had been put on fire by arsonists. The police officers divided themselves in two groups. He went to Sogotiat direction where they found the body of a dead woman who had a deep cut on the head. They found a boy of about 4-5 years on the body but he was still alive. They called the OCS and the body was taken to the Municipal Mortuary, Nakuru.

Doctor Titus Ndulungu a pathologist at Nakuru General Hospital (PW8) who had worked with Doctor Wainaina produced the post mortem report on behalf of Doctor Wainaina. Doctor Wainaina observed deep cuts on the left mandible region and communicated fracture, a cut through the upper neck of the jugular vein and severed carotid vein, injury to the larynx, severed left ear, fracture at base of the skull. The doctor opined that the cause of death was severe head injury attended by haemorrhage due to a sharp object trauma (Pex.1). The same Doctor Wainaina examined the accused and found him to be mentally fit to stand trial (PEx.2). Chief Inspector of police, Charity Muita was the OCS at Solai Police Station in 2008. She was the investigation officer in this case. She received information on 25/1/08 night, that Banita area was burning and people were being chased from their homes. She went to the area with other police officers. Based on information, they arrived at the home of the deceased where houses were burnt and the deceased body was lying near the gate with deep cuts on the head. At the station, they found the deceased's children who explained what had happened. She got information that Joseph the Turkana and David Wa Maina Kamau were some of the assailants. They knew them as neighbours. She continued to look for the suspects till the accused was arrested in Nyandurua in March 2008. The accused was charged with this offence but the other suspect, David was never arrested.

When called upon to defend himself, the accused made unsworn defence denying any involvement in the deceased's murder. He told the court that on 26/1/08 it was during the post election clashes. He went home from doing casual work and slept. Nothing extraordinary took place. He said that he heard screams in the night but that the deceased's home was far from his. He was arrested on 17/3/2008 and charged for an offence he did not commit.

The deceased met her death during the infamous post election violence of 2007-2008. This case turns on the evidence of a single identifying witness under unfavourable circumstances. In the case of **Karani v R (1985) KLR 290**, the Court of Appeal, while adopting the decision by its predecessor in the E.A. Court of Appeal in the case of **Roria v R (1967) EA 583 at pg 584** considered what weight such evidence should carry. The court said:-

**“Subject to certain well known exceptions it is trite law that a fact may be proved by the 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 **Rep. v Turnbull & Others (1976) 3 ALL ER 549**, the court said this of evidence of identification:-

**“...the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Finally, he should remind the jury of any specific weakness which had appeared in the 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 are sometimes made.”**

Guided by the above authority, the court needs to take great care when the only available evidence is that of one witness who does so under unfavourable circumstances.

The only witness who claims to have seen the accused is PW2, a boy aged 14 years who gave unsworn testimony. The court after conducting a *voir dire* examination came to the conclusion that PW2 did not understand the meaning of the oath. PW2 told the court that they were attacked about 9.00 p.m. They were outside the house. He saw the attackers by use of moonlight. He said that he recognized accused because he used to work at their home as a casual worker and he saw the white and green shirt and black trousers which accused used to wear. Neither PW1 nor PW3 told the court that accused used to work at their home as a casual labourer. PW2 said that when he saw the attackers they were not very near, they were about 20 metres away. PW2's sister PW1 said she was only able to see David and nobody else. PW3, the other sister denied seeing any of the assailants. These witnesses were together at the time of attack. They ran as a result of the attack. Although PW2 claims to have hidden in a bush and watched the people from his hiding place, the court was not told whether it was full moon or not. Besides of the fact that PW3 was not even able to see any of the attackers, I find that the circumstances were indeed unfavourable for any identification. I find it doubtful that PW2 would be able to differentiate colours in the moonlight as he purported to have seen the white/green T-Shirt and a black trouser that the accused wore. PW2's evidence being unsworn, it was required under **Section 124** of the **Evidence Act Cap 80** that the same be corroborated. Apart from that, having considered that the conditions under which identified the accused were unfavourable, there was need for corroboration of PW2's evidence by other evidence, either direct or circumstantial. There is, however, no other evidence on record. In the circumstances, I am convinced that even though PW2 may have known the accused well, yet under the circumstances there is a possibility of PW2 mistaking him for somebody else. The evidence is not watertight and it is unsafe to found a conviction.

The net result is that I find that there is not sufficient evidence on record to found a conviction against the accused. Because there may have been a mistake in his identify that doubt must be resolved in the accused's favour. He is hereby acquitted of the offence of murder as charged and set at liberty forthwith unless otherwise lawfully held.

**DATED and DELIVERED this 19<sup>th</sup> day of July, 2013.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

**Ms Ndeda holding brief for Mrs Ndeda for the accused**

**Ms Idagwa for the State**

**Kennedy – Court Clerk**