**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL NO. 76 OF 2009**

**REPUBLIC……..PROSECUTOR**

**V E R S U S**

**EZEKIEL KIRIMI ALIAS KAMAU…….....…….....RESPONDENT**

## JUDGEMENT

1. The accused EZEKIEL KIRIMI alias KAMAU is charged with murder contrary to section 203 as read with section 204 of the Penal code it is alleged that on 18th December, 2007 at Bwetha Sub Location, Kilimanjaro Location in Igembe District within Eastern Province jointly with another not before the court murdered FREDRICK KIRIMI MAORE.
2. The prosecution called six witnesses.The facts of the prosecution case are that the deceased was walking with his son PW2 and Kanene PW1 from the shamba going home.The three of them met with the accused and one Baringo who were armed with a long sword and panga respectively. PW 1 heard accused tell deceased that the day either of them meet one would kill the other. The deceased is said to have run back towards where he had come from.At that point Baringo picked a stone and hit deceased on the head. The deceased fell down. The accused then walked to where he was and cut the deceased on the neck. The cause of death was in doctors opinion as a result of cardiovascular arrest secondly to shock due to excessive cut wounds.
3. The accused in his sworn defence stated that he was going home from his shamba when he met the deceased who was his in law, and one Mbaringo fighting. He said that he went to separate them and in the process Mbaringo cut him on both hands. He had 1 and ½ in healed wounds on hands respectively. He says that Mbaringo then cut deceased on the neck with a C-line. That he then went and informed PW3 wife of deceased.The accused stated that police arrested him after 2 years and charged him with this offence.
4. The evidence of the prosecution witnesses was taken by Apondi J. who heard all except one witness, the doctor who performed the post mortem on the deceased. I heard the doctor and the defence case.
5. I have carefully considered the entire evidence adduced by both the prosecution and defence case. I have also considered submissions by both counsel for the State, Mr. Mungai and the defence, Mr. Mugambi.
6. The accused faces a charge of murder. Under section 203 of the Penal Code, it is an offence for a person with malice aforethought. In **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR),** BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice

aforethought observed as follows:

> **"when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.**
>
> **In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."**

7. The burden lies with the prosecution to prove the case against the accused beyond any reasonable doubt.
8. There were two eye witnesses for this offence, PW1 and 2. PW1 was an independent person not related to either accused or deceased. He was going home from work walking along the deceased and his son when the attack occurred.This witness testified that he heard the accused declare to the deceased that if they even met, one would kill the other. PW1 testified he saw deceased beat an about turn and started running away but he did not go far before he was hit by Baringo. Upon taking him down the accused set upon him with his panga cutting his neck. PW1 ran away as attack went on.
9. PW2 was a son of the deceased. He was 13 years old when he testified in court. That means that in 2007 when incident occurred, he was 8 years old.
10. The evidence of PW2 was very much similar to that of PW1. His evidence was corroborated in every material particular by the evidence of PW1. PW2 described events leading to the attack. His evidence was consistent with that of PW1.
11. Mr. Mugambi submitted that the case against the accused was a fabrication by PW3, wife of deceased because of an earlier incident where accused fought with PW3's brother. Surprisingly PW3 was not subjected to cross examination by the defence. Besides the evidence of PW3 was to the effect that PW1 and 2, as they had said in their evidence ran home to give her the sad news of deceased attack.
12. I find that PW3's evidence was to the effect she did not witness the incident she only received the report of the attack. I find that PW3 did not implicate the accused with this offence and that there is no iota of evidence to suggest she was behind accused arrest.
13. Mr. Mugambi urged that the accused put forward an alibi as his defence. There are myriad of decisions which describe what an alibi defence is and how the court should meet such defence in **KIARIE V. REPUBLIC [1984]KLR 149** the court of Appeal made important operations and held as follows:

> "**An alibi raises a specific defence and an accused person who puts forward an alibi as an answered to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial magistrates finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.**
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> **The errors of law on the finding on identification and on the alibi were of such a nature that it was reasonably probable that without them the trial magistrate would not have convicted the Appellant."**

14. The Accused did not put forward an alibi as his defence. His defence was not just an admission he witnessed the entire incident but went further to say he was injured as he tried to separate the deceased from Mbaringo.
15. The accused has no burden to prove his defence. It is sufficient if his defence raises certain doubt in the prosecution case. In that case, the accused would be entitled to earn the benefit of the doubt.

16. The prosecution case was direct evidence by 2 witnesses, an adult and a child. I have considered the fact incident took place at 5.30 pm therefore during the day the attack was direct.The attackers made no attempt to disguise themselves or hide their faces. PW1 and 2 who saw them testified that they both knew the accused very well being a neighbor to PW2, the accused was even a relative since the accused mother had married from their home.They were not strangers.I find that there was no possibility of mistaken identity.
17. The evidence of PW1 and 2 was that the accused was armed with a long sword and was the one who set upon the deceased and cut his neck before PW1 and 2 ran from the scene.
18. The Doctor who performed post mortem found that the deceased had multiple cuts on the neck, extending to orbit measuring 28 cm long an amputated hand at elbow on left arm and two cuts with fractures on the left mandible and orbit and cut on left chest measuring 6 cm.These were severe injuries. The injuries found on the deceased were consistent with the evidence of PW1 and 2 in terms of the nature of the weapon used and the areas of the body they saw accused strike the deceased.
19. Mr. Mugambi submitted that the prosecution case in evidence of PW1 that accused had a slasher was not corroborated since the weapon was not recovered. The accused was arrested 2 years after the incident. Failure to recover the weapon is not of material importance as it does not go to the substance of the case especially due to lapse of time between date of murder and date of arrest of the accused.
20. Mr. Mugambi submitted that material witnesses were not called to testify in the person of the Investigating Officer. He submitted failure to call him/her was fatal to the prosecution case. Mr. Mungai in reply urged that failure to call the Investigating Officer was not fatal because the evidence against the accused was direct evidence and it needed no explanation.

In regard to witnesses and failure to call them, the case of **BUKENYA & OTHERS 1972 EA 349** gives good insight into this it was held in that case as follows:-

> **"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."**

21. The evidence adduced by the prosecution case was sufficient to establish the case against the accused. Besides, the only evidence not adduced was that of the Investigating and arresting Officer. The evidence before court cannot be described as barely sufficient to establish the case and failure to call the officer is not fatal in the circumstances.
22. I am not underrating the importance of the evidence of the Investigating Officer it would have been good to know why it took two years to arrest accused and charge him with this offence. Even without that evidence, I do not find that it affects the prosecution case in a material way it does not.
23. The prosecution has adduced sufficient evidence to show accused and another attacked and fatally wounded the deceased.The accused defence that he too was cut does not discredit this case against him. The eye witnesses were clear that deceased was first hit with a stone on the head and the moment he fell down, accused set upon him with a long sword, cutting him severely and severally. No one saw deceased fight back or cut anyone.

In regard to malice aforethought the court of Appeal observed that the nature of injuries can determine whether or not this has been proved. This was stated in the case of **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR),** BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

> **"when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are**

**therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.**

**In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."**

24. I find that malice aforethought has been proved against the accused. The accused set upon the deceased with a panga and cut him on the neck, jaws, chest, and head and even amputated his left arm from the elbow joint. By inflicting these injuries the accused is proved to have formed the necessary malice aforethought to either cause death or grievous harm to the deceased. It makes no difference that the accused was not alone at the time. It is clear that the motive of the accused and his accomplice was to cause death or grievous harm.
25. I have come to the conclusion that the prosecution has proved its case against the accused person beyond any reasonable doubt. I find accused defence is not merited and I reject it in its entirety. I find the accused guilty of the offence charged and convict him accordingly.

**DATED SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF OCTOBER, 2013.**

**J. LESIIT**

**JUDGE**