



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 19 OF 2009

LESIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

BERNARD KINOTI M'ARACHI.....ACCUSED

JUDGMENT

1. The accused **BERNARD KINOTI M'ARACHI** 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 20th day of September, 2003 at Kiruai Village, Chugu Sub-Location Imenti North District within the Eastern Province murdered Pacrass Mutua Mbugi.
2. The accused was arraigned in court on 23rd April 2009 for a retrial ordered by the court of appeal.
3. The prosecution called six witnesses. PW1, 2 and 3 were heard by Hon. Apondi, Judge. I then took over the case and finalized the case.
4. The facts of the prosecution case are that the deceased went home from work on the evening of the material day. He changed his clothes and then took a panga and torch and left for his shop where he had a bar and a canteen. He left behind his two wives PW1 and 2. It was around 8 pm. According to the 2 wives immediately after the husband left their home they heard screams both of them went to the scene and found their husband the deceased lying on the ground unconscious. PW3 the son of the deceased stated that he was at his father's bar selling with his brother Boniface. In the bar were several people including one Francis Kinoti who is PW5. PW3 stated that PW5 left the bar that after 15 minutes he ran back and reported to him that the deceased and the accused were fighting. That is when they went out to check and found his father lying on the ground unconscious. PW5 on his part said he heard the voice of the accused and the deceased quarreling but he could not see them from where he was. He also heard the 3rd person's voice which he could not recognize. He said that he went and informed Patrick who is PW3 and his brother Boniface.

5. The accused person in his sworn statement denied the charge. He said that he was going home from a center where he had been playing darts that he found a group of people. The accused person stated that he thought those people were five and among them he could only recognize the voice of the deceased who is his elder brother. He said that he was held by two people who stated beating him with blows to the face before he was hit with a club on the forehead. He said that he also saw the other two beating his brother. The accused persons stated that he then ran away from the scene screaming for help and that he later fell to the ground due to the injury he had suffered. He said that his parent came to where he was and that they asked one Gitonga to carry him home which he did and that eventually his parent took him to hospital where he was treated and discharged.
6. The accused person stated that the next day he was arrested at his home where he was sleeping and taken to a police vehicle inside the police vehicle he found one Koome who was PW4 and one Mwenda both of whom had been arrested for fighting with him. He said at the Police station he was informed that he had killed the deceased. The accused denied killing the deceased and said he had no problems with him. The accused stated that the only differences that existed between family members were between the deceased and their father over a land case. He said that the case was fabricated against him because he used to escort his blind father to court for the said case. The accused produced a statement under inquiry which he made with the police in police custody.
7. I have carefully considered the evidence adduced by both the prosecution and the defence in this case. The accused person is facing a case of murder. The prosecution must adduce evidence to prove beyond reasonable doubt that it was the accused who hit and fractured the deceased head causing him the injuries that led to his death. The prosecution must also prove that by the time the accused threw the fatal blow he had formed the necessary intention to either cause the death or grievous harm to the deceased. The circumstances that constitute malice aforethought are set out under section 206 of the Penal Code 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
b. death of or to do grievous harm to any person, whether that person is the person actually killed or not;
c. 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;
d....e ...”
8. The prosecution is relying on the evidence of PW4 and 5. PW4 said that he was walking home at about 8 pm when he heard screams a distance ahead of where he was going. He then came across the deceased person lying on the ground with blood oozing from the back of the head. He then heard more screams 30 meters from where the deceased was lying. He proceeded to the second scene where he found the accused person crying while 3 others were watching. He continued with his journey and said he never discovered why the accused was crying.
9. The second witness the prosecution was relying on was PW5 who said he was seated outside a shop belonging to the deceased, eating a doughnut he had bought when he heard the voices of 3 people quarrelling as if they wanted to fight. He said that he recognized the voices of only two which was the voice of the accused and the deceased. He could not identify the third voice. He did not say what the 3 people were talking about or saying. PW5 then heard the voice of the mother of the accused calling one Rosalia after that he ran back into the shop and called out Patrick, PW3 and Boniface, both children of the deceased, and told them about what he had heard.
10. From the evidence before the court both PW4 and 5 did not see any fight or the action that led to the fatal injury of the deceased. There evidence against the accused is circumstantial. In regard to

circumstantial evidence, the test to apply in determining whether it is sufficient to establish the case against an accused person is settled. In SAWE –V- REP [2003] KLR 354 , the Court of Appeal held as follows:“

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.
2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.
3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.
4. ...
5. ...
6. ..
7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

11. PW5 said he heard people quarreling and those people were 3. Even if we are to believe that he correctly identified the voices of people he claims he heard quarrelling, his evidence does not disclose whether the accused and the deceased were quarreling one another or whether the two of them were quarreling the third person not identified. It is very important for the prosecution to establish whether the accused and the deceased were against each other that night or whether they were victims of the third man whose voice PW5 heard. The evidence of PW5 was therefore of no assistance whatsoever in relation to the issue of how the deceased was injured and also the issue whether it was the accused who inflicted the injury upon him.

12. PW4’s evidence appears to show that there were two scenes; the first scene being where the deceased was fatally wounded, and; a second scene where he found the accused person crying, surrounded by his parents and one Mwenda. In terms of the quality of the evidence of PW4 it does not assist the court to determine the critical issue of how the deceased was injured and by whom. However PW4’s evidence does show that the accused and the deceased were both injured on the material night, and therefore corroborates PW5’S evidence that there was a confrontation that night which involved both of them. In light of PW4’s evidence, even without going into the details the test of voice identification, I am satisfied that the accused and the deceased with another or others were involved in a confrontation on the material night. In any event, the accused does not contest that he was at the scene of incident. The prosecution’s evidence was however unable to reveal the nature of the confrontation and whether the accused and the deceased were on one side of the confrontation or were against each other.

13. I have considered the statement of the accused in his defence together with his statement under inquiry. That statement of inquiry is in line with his statement before the court. The only additional evidence it has is that he was able to identify Koome, maybe PW4, as among those he found attacking the deceased and who turned against him as well on the night in question.

14. The inculpatory facts adduced against the accused must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. I find that the evidence adduced by the prosecution does not disclose the offence charged. It does not establish that the accused, whether alone or in company with another or others attacked the deceased causing him the injuries which led to his death. I find that the facts disclosed by the prosecution were capable of an explanation other than that of guilt. The accused has explained that he was a victim of attack after finding five men attacking his brother. Neither PW4 nor PW5 nor any other witness has adduced any evidence to controvert the accused defence. His defence raises a possibility that he too was a victim of attack. In the circumstances I find that the prosecution has failed to prove the case against the accused to the required standard.

15. Accordingly I give the accused the benefit of doubt and acquit him of the offence charged.

DATED SIGNED AND DELIVERED AT MERU THIS 21st DAY OF NOVEMBER, 2013.

J. LESIIT

JUDGE