



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 56 OF 2009

LESIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

PETER GITONGA NGERA.....APPELLANT

JUDGMENT

1. The accused **PETER GITONGA NGERA** 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 16th day of May, 2009 at Muringene Location Igembe district within the Eastern Province murdered Boniface Muroki Kiruri.
2. The prosecution called a total of 4 witnesses. The facts of the prosecution case are that on the night of 16th May, 2009 PW1, 3 and the deceased were sleeping at a place where the accused worked as a watchman. They paid 10/ per day to the accused to be able to access the premises to spend the night. On the date in question, PW1 and 3 were able to pay but the deceased was said to have no money. It is said that the accused person assaulted the deceased for coming to the place before making the necessary payment and it was out of those injuries that the deceased died.
3. The accused person gave a sworn statement in which he denied being a watchman. He also denied that he ever accommodated PW1, 3 and the deceased anywhere. He said he was a miraa dealer and that PW1 and 3 used to buy miraa from him at the local market.
4. The accused person is facing a charge of murder. Section 203 of the penal code defines murder as follows:

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

5. Malice aforethought is a mandatory ingredient for the charge of murder. The circumstances which constitute malice aforethought are provided for 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) ...

(d)

5. The burden of proof lies with the prosecution to prove the case against the accused person beyond any reasonable doubt. According to the post mortem report the cause of death was cardio-pulmonary arrest due to severe head injury. The burden lies with the prosecution to prove that the accused person is the one who caused the injury on the deceased head as a result of which the deceased died.
6. This case was heard by Justice Apondi who heard PW1, 2 and 3. I took over the case and heard PW4 and the defence. Mrs. Ntarangwi acted for the accused person and in her submissions she has challenged the evidence adduced by the prosecution for being inconsistent contradictory and in terms of the facts for being unbelievable. Counsel also submitted that material witnesses were not called by the prosecution for instance the employer of the accused person whose name was given as Karumba or Karumbi was not called and yet his evidence was very important because it would have helped to solve the dispute of whether or not the accused was a watchman.
7. Mr. Mungai for the state urged the court to find that the prosecution adduced sufficient evidence to prove that the accused person was identified as the one who perpetrated this offence. The learned state counsel urged the court to find that the evidence PW3 was credible and that he was consistent even in cross examination to the effect that it was the accused person who assaulted the deceased as a result of which he died.
8. I have carefully considered the entire evidence adduced by the both the prosecution and the defence. There were two eye witnesses PW1 and PW3. The evidence of PW1 was that at about midnight on the material night the accused who was a watchman and used to charge Ksh. 10 per night as "rent" to any person who wished to spend the night at the premises where he guarded demanded payment from several youth including PW1, 3, the deceased and others. PW1 said that the deceased did not have any money that night and that he promised the accused that he would pay the following day. PW1 testified that the accused declined and that he turned against the deceased with a rungu with which he hit him on the neck, chest and the waist until the deceased fell down. PW1 stated that he left the deceased sleeping the following morning and that a week later he learned that the deceased died.
9. The evidence of a child must be received with caution especially where the child is of tender years. In **JOHNSON MUIRURI VS REPUBLIC [1983] KLR 445** held:

"Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration."

10. PW3 was 13 years old at the time of the incident. His evidence was that on the material night the accused person who had given them a place where he works as a watchman came at around 1 am and attacked the deceased on the chest and on the head for failing to pay Ksh.10 for the night. According to PW3 after the accused hit the deceased on the head and the chest the deceased fell down and died. According to him the accused person ran away from the scene. PW3 testified that he left the premises and went to the home of PW2 who was the mother of the deceased and informed her of the attack. He said that he accompanied PW2 back to the scene where PW2 took away the deceased to Maua hospital.
11. PW2 was the mother of the deceased and she said that the deceased was her fifth born. According to PW2 the deceased had gone home to her the previous night and reported to her that he had been assaulted. PW2 testified that at that time the deceased was complaining of pain on the head the chest the stomach and the legs. She says that on the next day 17th May she took the

- deceased to Muringine where he was treated and discharged. She said that on the 23rd of May the condition of the deceased worsened and that he died that day as they took him to hospital. PW3 testified that before he died the deceased informed her that it was one Gitonga who assaulted him.
12. The investigating officer of this case was PW4 PC Kivilu. He told the court that he took over the case after investigations had been carried out. He stated that according to their records the first report to the police was made on 23rd May, 2009 by PW2 the mother of the deceased. The report she made was that on the 16th May, 2009 her son who is the deceased reported to her that he had been assaulted by one Martin one, Munene Gatwimba and one Mwenda. PW4 in cross examination stated that on 24th May 2009 the police also received a report from APC Chelule and APC Atieno to the effect that the APC had received a report from a woman who was not named to the effect that her son had been assaulted and had died.
 13. As stated earlier there were two eye witnesses of the incident. There is great disparity between the evidence of these witnesses. PW1 was an adult. His evidence is clear that the accused assaulted the deceased with a club as a result of which the deceased fell down. He said that he found the deceased sleeping the following morning when he left the rented place. PW3 on the other hand his evidence was to the effect that when the accused hit the deceased he fell down and died. He however contradicts his own evidence when he testified that he went and reported the incident to PW2 the mother of the deceased and accompanied her to take the deceased to the hospital. In cross examination he contradicted himself further when he stated that he was aware that the deceased went back to his mother after this incident.
 14. PW3 was a child of 13 years at the time of the incident his evidence is not only contradictory compared to the evidence of PW1 but more importantly it was contradictory of itself. It is my view that PW3 may have been too young at the time he witnessed the incident and as a result the line between what he saw and imagination seems to be blurred. I say so because on one hand PW3 says the accused hit the deceased and that he fell down dead immediately after the attack. Yet in the same breath PW3 stated that he went to the mother of the deceased and reported the matter to her and that they went back to the scene and took the deceased to hospital. His evidence in itself does not make sense and I have therefore disregarded it all together.
 15. According to the investigating officer who took over the case from another officer i.e. PW4 according to him the mother of the deceased reported that the deceased had been assaulted by Martin, Munene Ngatwimba and one Mwenda. According to this evidence the only suspect of the assault was PW3. PW2 on the other hand in her evidence stated that the deceased told her that it was Gitonga who assaulted him. Gitonga is the accused.
 16. I find that the evidence adduced in this case is full of controversy the two eye witnesses of the incident PW1 and 3 gave contradictory evidence whose disparity was so big it could not be resolved. I must also point out that the evidence of PW1 that he left the deceased sleeping at the place they used to rent seems to be contradicted by PW2's evidence who said the deceased had gone home the previous night and had reported that he had been assaulted to his mother, PW2. Even the date of the alleged attack is in issue. The culprits of the attack are also in issue.
 17. The other point is that material witnesses were not called to testify. This included the alleged employer of the accused because the accused denied he ever worked as a watchman and also denied that he ever rented any premises to the deceased PW1 and PW3. The other material witness not called to testify were the officers who were arrested or rearrested the accused allegedly from the members of the public. They are said to have been Administration Police constables Chelule, Otieno and Inspector Opiyo. The reason for the accused arrest by members of the public on the circumstances under which he was re-arrested were all material facts that needed to be addressed through evidence.
 18. The other important fact was that PW1 and 3 were sleeping when it is claimed that the accused pounced on the deceased demanding to be paid the Ksh.10/- for the night. It was at midnight, at least in PW3's evidence where the demand was made there was no form of lighting and the only light available was in the next room which was separated from the incident took place by a sack. Given the circumstances that PW1 and 3 had been sleeping before the accused allegedly assaulted the deceased and given the poor lighting of the scene I am not satisfied that there was sound evidence of identification given against the accused person. It was necessary that some other evidence implicating the accused person in this offence was adduced by the prosecution. No such

evidence was available in the entire prosecution case.
19. Consequently I find that the prosecution did not adduce sufficient evidence to found a conviction in this case and therefore give the accused person the benefit of doubt and acquit him for this offence accordingly.

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

LESIT, J.

JUDGE