



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL CASE NO. 69 OF 2009**

***LESIT, J***

**REPUBLIC.....PROSECUTOR**

**V E R S U S**

**GILBERT GITUMA THURUMBA.....1<sup>ST</sup> ACCUSED**

**STEPHEN BARIO MWONGERA.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused **GILBERT GITUMA THURUMBA** was charged jointly with **STEPHEN BARIO MWONGERA** with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on night of 24<sup>th</sup> and 25<sup>th</sup> day of July 2009 at Mwirine Village, Chugu Location in Meru Central District within the Eastern Province jointly murdered David Muriungi Angaine.
2. The prosecution called 3 witnesses. After the close of the prosecution cases I acquitted the 2<sup>nd</sup> accused **STEPHEN BARIO MWONGERA** for total lack of evidence. His name was not mentioned by any witness at the trial. The accused **GILBERT GITUMA THURUMBA** was placed on his defence and he gave a sworn statement.
3. The facts of the prosecution case are that PW1 James Mwitia was called by one R M a girl of 12 years old and informed that his brother had been stabbed and his intestines were hanging out. On receiving the news, PW1 left his house and went to his brother's house which was nearby and confirmed that indeed his brother had been stabbed and the intestines were hanging out. PW1 testified that the deceased told him that Gituma is the one who stabbed him. PW1 got a vehicle and took the deceased to the police before going to the hospital where he was pronounced dead on arrival. PW2 was Dr. Daniela Ndegwa who produced the post mortem report prepared by Dr. Muchiri. According to that report, the cause of death of the deceased was massive internal bleeding due to stab wound in the abdomen. PW3 was the investigating officer of this case. He is the one who received the deceased who was accompanied by PW1 at the report office at Meru Police Station. By the time the deceased was taken to him by PW1, he was unconscious he took the report by PW1 before giving them a note to enable them seek treatment at Meru General Hospital.
4. The accused person put forward an alibi as his defence. He stated that he has never lived in Meru Town at the alleged scene of the attack. He also denied that he was ever a tenant at Mwirine as explained by PW1. He said that on the material day he spent the whole day in his farm at Mikinduri which was 15 Kilometres away from the scene. The accused person stated that there

was a long standing dispute between his father and the father of PW1 and the deceased and the same was the cause of fabrication of this case against him.

5. The Accused is charged with murder contrary to section 203 of the Penal Code. That section states as follows:

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

The prosecution has the burden of proof on a standard beyond reasonable doubt to establish that the accused person by some unlawful act and in this case stabbed the deceased, caused the death of the deceased and that at the time he did so he had formed the necessary intention or malice aforethought to cause death or grievous harm to the deceased.

6. The circumstances which constitute malice aforethought are set out under section 206 of the Penal Code in the following terms:

**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.**

7. The issues which arise in this case are 3. The issue of the dying declaration, the credibility of PW1 and the alibi defence raised by the accused person. Beginning with the last issue that of alibi, I agree with the submission by Mr. Mbaabu for the accused that the accused person bears no burden of proving his alibi defence as was the holding in the case he cited of **Sekitoleko vs Uganda 1967 EA 531**. I also agree with the principal stated in the 2<sup>nd</sup> case he relied on of **Wangombe vrs Republic [1976-80]1KLR 1683** that even if the alibi is raised for the first time in an unsworn statement of the accused at his trial, the prosecution has the burden to test the alibi whenever possible but that it is sufficient for the trial court to weigh the alibi against the prosecution case.
8. The accused person placed an alibi as his defence as observed herein above, the accused person does not bear any burden of proving that his alibi is true. It is sufficient if the alibi adduced by an accused person creates doubts as to the strength of the prosecution case against him. If the alibi creates doubt in the mind of the court that the evidence adduced by the prosecution was reliable or may shake the prosecution case, then the accused person should be given the benefit of that doubt. I will test the alibi defence adduced by the accused by weighing it against the evidence adduced by the prosecution.
9. The prosecution is relying on a dying declaration allegedly given by the deceased to his brother PW1 before he died. Regarding dying declarations, in the case of **REPUBLIC -V- PETER MBURU MUTHONI NRB HCCR CASE NO. 27 OF 2004/ [2005], e KLR, OSIEMO, J.** referred to **CHOGE -V- REPUBLIC** and observed as follows:

**“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person. See CHOGE –V- R [1985] KLR 1.”**

10. Mr. Mbaabu for the accused submitted that what the prosecution was relying on was not a dying declaration for two reasons. The first one was because of lack of corroboration and secondly because according to Mr. Mbaabu the deceased was awake when he arrived at the police station in company of PW1 and yet he did not tell the police what PW1 alleged he told him.
11. I have no doubt in my mind that if the deceased made the statement alleged by PW1, that it was a dying declaration since it was made just before he died. It is also a misdirection to say the deceased was conscious when he arrived at the Police Station where PW3 received the report of the attack. This is because PW3 is on record as stating that by the time the deceased arrived at the Police Station with PW1 he was unconscious and could not speak.
12. There are other concerns which should be addressed which affect the dying declaration made by the deceased. According to PW1 the deceased was attacked at 11 pm seven and half hours before PW1 spoke to the deceased. PW1 was clear that his house was near to the deceased house and that he could remember vividly that at 11 pm that night he had a commotion and then a scream coming from the deceased house. Since he never went to check on him there is no evidence to show whether at the time of the attack the circumstances of identification at the scene were positive for a correct identification of the attacker or attackers by the deceased. We are not told anything about the lighting at the time of this attack so the court cannot be certain beyond a reasonable doubt that the deceased was capable of seeing his attacker and therefore identify him or of the circumstances under which this attack took place. The court cannot be sure of the circumstances which led to the conclusion by the deceased that it was one Gituma who stabbed him.
13. Regarding the name Gituma, I noted from the evidence of PW1 that according to him the deceased gave only one name as his attacker. That name was Gituma. The question is whether it is safe to identify a person by a single name given in a dying declaration. According to PW1 Gituma who is the accused was a tenant at their home and that he had been there only for 3 weeks before this attack. PW1 stated very casually that the deceased had given the name Gituma as the one who stabbed him. Pw 1 did not explain how he came to the conclusion that the deceased meant that it was Gituma the accused person who stabbed him. Gituma must be common Meru name and it was therefore very important for the prosecution to adduce sufficient evidence that points irresistibly to the accused as the Gituma the deceased meant in his dying declaration. No such evidence was adduced.
14. The other difficulty presented in this case is the apparent apathy by PW1 to find out why there were screams and commotion in his brother's house at 11 pm and why even by morning PW1 had not gone to investigate the noise until one Rosalina Makena called him. It is curious that PW1 delayed to investigate the incident for seven and half hours before he was called by a third party. In that regard the case cited by Mr. Mbaabu of **Ndungu Kimanyi Vs Republic [1976-80] 1 KLR 1442** applies for reason that PW1's apathy raises suspicion about his trustworthiness.
15. The other fact which is very clear is that in his first report PW1 did not inform PW3 what the deceased had informed him about the attack. According to PW3, pw1 did not name any names in connection with the attack. A first report is very important because it gives some assurance about the consistency of the report regarding facts and where relevant like in this case, persons implicated with the offence. Since there was lack of corroboration in this case it is material that PW1 did not implicate the accused person in his 1<sup>st</sup> report to the police. That creates further doubt as to the credibility of PW1 and the weight that can be assigned to his evidence.

Before the prosecution closed its case, a list of names were given of persons who needed to be

called as witnesses and who the prosecution claimed was unable to procure for one or other reason. Violet Angaine is such witness who going by the name was most likely the mother of PW1 and the deceased. Her evidence was important if not for any other reason to confirm that the accused was a tenant at her home. She was not called as a witness because according to the prosecution she was paralyzed and could not talk no proof was adduced to support the allegation concerning her health. On the other hand the accused denied that he was ever a tenant at that home and absence of anything to establish the tenancy the accused denial carries the day. Rosalina Makena was alleged not to have been found for purposes of bonding. Her together with Jedida Ginali were also not called as witnesses yet they were allegedly present when the dying declaration was made by the deceased. From the circumstances of the case an advance inference to the effect that those not called as witnesses were not called because their evidence was slightly to have been adverse to the prosecution case is justified to be made against the prosecution in this case. **BUKENYA & OTHERS** 1972 EA 549 LUTTA Ag. VICE PRESIDENT held:

**“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.”**

16. Having carefully considered the entire evidence adduced in by both the prosecution and defence I have come to the conclusion that the prosecution has failed to prove the case against the accused person beyond any reasonable doubt. I accordingly give the accused person the benefit of doubt and acquit him for this offence.

**DATED, SIGNED AND DELIVERED AT MERU THIS 13<sup>TH</sup> DAY OF NOVEMBER 2013.**

**LESIIT, J.**

**JUDGE**