



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 14 OF 2011

LESIIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

NICHOLAS MURIUKI.....ACCUSED

JUDGEMENT

1. The accused persons JAPHET KINYUA and NICHOLAS MURIUKI, the 1st and 2nd accused respectively, face one count of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that both accused on 15th March 2011 at Kirima Kiathi village, Nkiriri sub-Location Katheri West Location Meru Central District murdered Isaack Muriuki M’Buuri.
2. The accused persons are brothers and the deceased was their father. The accused were sons of the deceased first wife.
3. The prosecution called a total of 5 witnesses. The facts of the prosecution case were that at about 9 am the deceased left his home informing his second wife PW1 that he was going to prune his coffee. PW1 testified that 30 minutes later she heard screams from her husband. She went towards the coffee plantation. She claimed that she saw the two accused persons leaving the coffee plantations and going towards their home. PW1 said that due to coffee bushes her visibility was obstructed and that he could not tell what both accused were carrying. She proceeded to the scene where she found the deceased with deep cuts on the head and bleeding profusely.
4. The two accused put forward alibi defence and called one witness each. The 1st accused stated that he went to his first cousin’s place, one Moses, DW3 at about 7am on the material morning. After they took tea the 1st accused proceeded with Moses to his land where he went to help Moses prune coffee. The 1st accused stated that at around 9 am he heard his step mother screaming about 200 meters away. They went to find the deceased brutally injured. DW3 corroborated the 1st accused defence and stated that that he was with the 1st accused that whole morning until the screams were heard and the deceased was found brutally wounded .
5. The 2nd Accused defence was that he went to DW4’s home to request to be allowed to repair water pipes in DW4’s land as they were obstructing water flow to his land downstream because they were the ones which took water to his home. He said that he started repairing the pipes in company of one Kirimi. They worked for 2 to 3 hours before they heard screams from his step mother. The 2nd accused stated that by the time the screams were heard DW4 had joined him and Kirimi at the land. He said that the three went to find out what the problem was only to find his father unconscious with deep cuts on the head.

6. DW4 corroborated the 2nd accused story and said that after the 2nd accused and Kirimi had been in his land repairing pipes for some time he also joined them. DW4 said that half an hour after joining them they all heard PW1 screaming and that they went together to find out what the problem was.
7. The accused persons are charged with murder. The burden of proof lies on the prosecution to prove their case against the accused persons beyond any reasonable doubt. The prosecution should adduce evidence to prove that both accused, acting with a common purpose attacked the deceased and cut him severely as a result of which injuries he died. The prosecution must prove that at the time the accused cut the deceased they had formed the necessary intention to cause death or grievous harm to the deceased.
8. What constitutes malice aforethought is 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 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) ...”

9. There was no eye witness of this attack. The witness who was the first at the scene was PW1, the second wife of the deceased. She said that she heard her husband screaming. She then went to the shamba where he was working and found him unconscious with deep cuts on the head, neck and hands. PW1 testified that as she walked towards the place the deceased was, she met with both accused. She said she could not see what both were carrying. She also stated that her visibility was obstructed by coffee trees as the scene was within the coffee plantation.

10.

11. In the case of **ABDULLAH BIN WENDO vs REX 20 EACA 166**, the court of Appeal held:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a 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 such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

12. In the Court of Appeal case of **PAUL ETOLE & ANOTHER VS REPUBLIC C.A. 24 OF 2000** page 3, the court of appeal stated;

“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more

reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.”

13. In Paul Etole and Another vs Republic CA 24 of 2000(UR) pg 2 & 3.

“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made”.

14. The court should test the evidence of identification by a single witness with great care, even if it is the evidence of recognition as in this case. I have carefully considered the evidence of PW1. Even though the identification took place in broad daylight, it was in a coffee plantation with tall coffee trees. PW1 admitted that her visibility was obstructed by the coffee branches. She admitted that she could not tell what the 2 accused were caring due to that obstruction.
15. The issue is whether PW1 really saw the accused persons near the scene soon after the attack on the deceased. This could easily have been established by the evidence of the District Officer or Administration Police Officer to whom PW1 reported the incident. The two could have said what report they received and whether at the time the report was made PW1 stated that she had seen and recognized the attackers. Neither was any evidence of either the Investigating Officer or of the first Police Officer to visit the scene adduced.
16. The evidence of a first report is very important as it helps to verify the evidence of the complainant or other witnesses. Had such evidence been adduced, the evidence of PW1 could have been tested against her first report to determine whether at the time she first made the report to the authorities, she had indicated the identity of the culprit.
17. In the absence of that evidence the prosecution could have achieved the same result if the witnesses who heard PW1 screaming and talking about the attack heard her saying who the culprits were. These witnesses were PW3 and 4. PW3’s evidence was that he heard PW1 shouting that Mwirigi had been assaulted. He then heard her say that people could go and eat meat.
18. PW4 on his part heard PW1 crying saying that Murithi M’Buuri had been killed. Neither PW3 nor PW4 heard PW1 name those who attacked her husband. Nor did they hear her claim that she had seen who committed the offence. The first time she implicated the accused persons is when she identified them to APs at their homes much later after the offence. It does appear to be that PW1’s evidence that it was the accused who committed this offence was an afterthought. The circumstances of identification were shaky and unreliable. The evidence of PW1 standing on its own could not found a conviction. What was required was other evidence implicating the accused with the offence. There was no other evidence to corroborate the evidence of PW1.
19. The accused put forward an alibi defence. How to deal with the defence of alibi is now settled. In the case of UGANDA v. SEBYALA & OTHERS [1969] EA 204, the learned Judge quoted a statement by his Lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

20. The Accused persons have no burden to either prove that their alibi is the truth or to prove their innocence. The only burden they have is to create doubt in the strength of the evidence adduced by the prosecution against them. It is enough for the accused to create a doubt in the mind of the court that may be the prosecution evidence may not be true.
21. The accused persons have stated that they were several meters from the scene when the incident occurred from as early as from 7am up to way passed 9.30am after the incident. Their witnesses have supported them that indeed they were together far from the scene when the first screams of PW1 were heard. From this evidence it is impossible for the accused persons to have committed the offence. The only explanation is that PW1 mistook the identity of the people she saw leaving the scene after the incident.
22. The evidence by the prosecution was shaky and weak. The accused alibi defence has dislodged the prosecution evidence against the accused. It has created a doubt in my mind whether the accused could have been the ones who attacked and wounded the deceased on the material morning. In view of this doubt, the court has no alternative but to give both accused the benefit of doubt and acquit them for this offence.
23. I have come to the conclusion that the prosecution has failed to adduce sufficient evidence to prove the charge against both accused on the standard required of proof beyond any reasonable doubt. I accordingly give the accused benefit of doubt and acquit them both for this offence.

SIGNED AND DELIVERED AT MERU THIS 3rd DAY OF DECEMBER, 2013.

J. LESIIT

JUDGE