



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO.105 OF 2009
REPUBLIC.....
....PROSECUTOR
VERSUS
PETER MWANGI MWANGI.....
.....ACCUSED
JUDGMENT

The deceased and the accused persons were neighbours. On 16th December, 2009 in the morning, the two bitterly disagreed over a cow belonging to the accused that had destroyed the deceased person's crops. It was the prosecution case that after the accused learnt that the deceased had driven away his cow to the road, he approached him armed with a knife and the two quarreled but were separated by the deceased person's mother and neighbours, **P.w.3, John Kaburu Mungai (Kaburu)** and **P.W.5, Milka Wanjiku Nderitu (Milka)**.

After the situation was pacified, the accused returned to his home. Later that day at about 7.30p.m., the deceased person's elder brother Benjamin Wanjau Nderitu (Nderitu) received a phone call from the deceased who was returning home from a local trading centre, Riverside. They agreed to meet at their sister's house. Nderitu got to the venue first. While with the sister, **P.W.2 Rahab Muthoni Nderitu (Rahab)** they heard the deceased screaming for help saying that he had been stabbed by Peter Mwangi, (according to Nderitu), Peter Mucheru (according to Rahab) or simply Peter according to **P.W.4, Gabriel Nderitu Muthoni (Gabriel)** and Milka..

It was the evidence of Nderitu that he ran towards the direction of the screams. His flash light picked out a person who was coming towards him, who he identified as the accused person. Upon seeing the light, the accused person ran into his *shamba*. Rahab who was following Nderitu got to the scene. Gabriel on the other hand testified how he first heard the accused person threaten to kill the deceased. He asked the deceased for how long he was going to disturb him. Gabriel then heard the deceased say that Peter "*had killed him*". Gabriel got to the scene and the accused upon seeing him began to chase him.

An administration police officer, **P.W.6 APC Moses Busendik** was on duty on 18th December, 2009 when the accused person reported a fight between him and another person. He was handed over to Kipipiri Police Station where he was re-arrested. Meanwhile, the post mortem examination was conducted on the body of the deceased which revealed that he had suffered deep sharp penetrating stab wound in the chest as a result of which he suffered cardio-pulmonary arrest due to severe haemorrhage.

In his sworn testimony, the accused confirmed that his cow had destroyed the deceased person's crops for which he apologized. However, the deceased person's family demanded Kshs.3,500/= as compensation. At night as the deceased and accused person were returning from the shopping centre, they met Nderitu who demanded the payment of the entire Kshs.3,500/=. They were joined by

Gabriel. Nderitu hit the accused on the head and on the left eye. The rest joined in hitting him on the ankle forcing him to fall down. He got up and ran away dropping Khs.700/=, the only money he had managed to raise. It was confirmed by medical evidence that indeed the accused person suffered reddened left eye, scratch marks on the forehead and general tenderness on the trunk and right thumb, believed to have been caused by a blunt object. That in summary constitutes the evidence presented in this trial.

It is common ground that there was a disagreement between the accused and the deceased person over damaged crops by the former's cow. It is also not in dispute that on the fateful night, the two were together. While it is the prosecution case that the accused stabbed the deceased causing his death, the accused person has maintained that he was attacked by the deceased, his brother Nderitu and their nephew Gabriel.

What is clear, however, is that there was no eye witness to the stabbing. The prosecution only presented circumstantial evidence. It is now established that a conviction can be based on circumstantial evidence if that evidence irresistibly points to the guilt of the accused person and if there are no co-existing factors that may weaken or destroy the inference of guilt. See **Republic V. Kipkering Arap Koske & Another** (1949) 1 EACA 135 and **Simeon Musoke V. Republic** (1958) EA 715.

The prosecution relied on the following circumstantial evidence. There was a disagreement between the deceased and accused person in the morning of the incident; that on that occasion, the accused was armed with a knife and a club; that he uttered threatening words; that the deceased gave the name of the accused person as the one who had inflicted his injuries; that Nderitu and Gabriel saw him fleeing from the scene of the stabbing; that Gabriel heard his voice; that the accused person's marvin hat was recovered at the scene; that on 18th December, 2009 he reported to APC Moses Busendik that he had fought with a someone.

The disagreement that was witnessed by several people was in the morning at about 10a.m. Rahab, Kaburu and Milka, all witnesses to the morning incident confirmed that the accused was armed with a knife. They also said that he issued threats directed at the deceased. That very evening, the accused and the deceased person were together walking from Riverside. Gabriel heard and recognized the voice of the accused, who was a neighbour, asking the deceased for how long the deceased was going to disturb him. The deceased was exclaiming that the accused was going to kill him. The deceased then screamed that Peter "*had killed him for nothing*". When Gabriel got to the scene, which was only 15 meters from his house, he saw the accused holding a torch. Gabriel was categorical that, with the aid of the torch light as well as moon-light, he was able to see the accused person. He also recognized him from his voice.

In **Mbelle V. Republic** (1984) KLR 625, the Court of Appeal laid down guidelines as regards the evidence of voice recognition as follows:

“In dealing with evidence of identification by voice the court should ensure that:

- a) the voice was that of the accused;**
- b) the witness was familiar with the voice and recognized it;**
- c) the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it.”**

I am persuaded that being neighbours and with the aid of torch light Gabriel recognized the accused person both from his appearance and voice.

On recognition by Nderitu, the witness was categorical that he flashed his torch on the accused person who was coming towards him. That the accused person was only 30 meters from the witness.

It is now established by judicial pronouncements that evidence of visual identification must be examined carefully to minimize mistaken identity and the court must warn itself of the special need for caution before convicting in reliance on the correctness of the identification. See **Cleophas Otieno Wamungu V. Republic**, Ksm. Criminal Appeal No.20/84.

In view of the fact that Nderitu and the accused person are neighbours, the distance between them was only 30 meters and facing each other and with the aid of a torch light, it is plain to me that there was no mistake in the identification of the accused by Nderitu.

Similarly, it has been held that generally speaking, it is very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. See **Pius Jasanga s/o Akumu V. Republic** (1954) 21 EACA 331.

As Gabriel was making his way to the scene, he heard the deceased screaming that “*he had been killed*” by Peter. When Gabriel got to where the deceased lay down, it was his evidence that the deceased stated repeatedly that “*he had been killed*” by Peter for nothing.

The description of Peter taken, with what Nderitu heard, more or less at the same time, to the effect that the deceased was crying that Peter Mwangi had stabbed him, together with the evidence of Rahab, the only person fitting the description in the circumstances was the accused person.

Although it was after 7p.m., there was unanimous evidence that the deceased was with the accused person hence the former could not have mistaken the person who attacked him. An independent witness and a neighbour to both the accused and the deceased person, Milka also confirmed that the deceased told her that he had been stabbed by Peter.

From all the foregoing, I find that the accused was positively recognized as the person who inflicted the single fatal wound on the deceased.

The accused, in his defence, contended that he had been attacked by the deceased, Nderitu and Gabriel. But according to P3 form produced in the evidence, he told the examining doctor that he had been attacked by two persons, known to him. Indeed he had reddened eye, scratch marks on the forehead and general tenderness on the trunk and right thumb.

It is my view in the circumstances of this case that these injuries must have been sustained in the process of the accused stabbing the deceased and a struggle between them. The circumstantial evidence points irresistibly to the guilt of the accused person and I find no co-existing factors that would weaken that inference.

Although there was a single stab wound, the fact that from the morning incident the accused had all through been armed with the knife and made threatening statements, I have no doubt that he intended to cause grievous harm to the deceased.

For the reasons stated, I find the accused guilty of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

Dated, Signed and Delivered at Nakuru this 21st day of February, 2012.

W. OU KO
JUDGE

