REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Criminal Case 59 of 2007

REPUBLIC ……..…….. PROSECUTOR

VERSUS

SAMSON KIRIMI M'ABIRU……....…….. ACCUSED

JUDGEMENT

The accused Samson Kirimi M'Abiru is charged with murder contrary to section 203 as read with section 204. It is alleged that on 23rd day of September 2007 at Antuabiu Sub location, in Antuabui Location in Igembe district within the Eastern Province, he murdered John Ntarangwi.

The prosecution called seven witnesses. Apart from the last prosecution witness and the defence case, the rest of thr evidence was heard by Hon. Ouko J. and Hon. Kasango J. The facts of the prosecution case were that the deceased was at his hotel watching television with his two brothers, PW1 and 2 when gangsters struck. The gangsters were armed with guns. They held PW1 and robbed him his jacket and mobile phone. PW2 managed to escape from the scene. The deceased was however shot once in his chest and died later that evening as he was being taken to hospital. The accused person has put forward an alibi as his defence and called two witnesses to corroborate the story. He called his worker DW3 and his wife DW2 to say that he was at his hotel at Gandone on the 23rd October, 2007 from about 6 pm until midnight when he closed his hotel.

The accused person faces a charge of murder. The burden lies with the prosecution to prove its case against the accused person beyond any reasonable doubt. The prosecution must prove that the accused person in company of others who are not before the court, shot the deceased. It must be proved that the deceased died as a result of the injuries inflicted by the gun shot fired by the accused. The prosecution must adduce evidence to establish that at the time the accused shot the deceased, he was motivated by malice aforethought. Alternatively the prosecution must adduce evidence to establish that the accused had formed a common intention with others to cause death or grievous harm to the deceased and that the deceased was injured in the execution of that common intention. Section 206 of the Penal code gives the instances when malice aforethought can be inferred 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) 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."

The Penal Code describes what constitutes common intention as follows:

"21. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

There are two eye witnesses in this case, PW1 and PW2. The evidence of PW1 was that he, PW2 and the deceased were seated at the hotel owned by the deceased watching television. All 3 were brothers. He said that four people entered and ordered them to lie down. PW1 describes how he was robbed of a jacket and mobile phone by one of them. He said that another one of the gangsters shot the deceased once in the chest and that after the shooting the four walked away as neighbours started screaming.

PW2 said that immediately he saw the gang of three enter his brothers hotel armed with a gun, he ran away from the scene and returned ten minutes later after they had left. While PW1 said that he was able to identify 3 of the gangsters, PW2 said that he only identified one.

PW1 said that he identified 3 of the four people in the group, among them the accused. He testified that three were armed with guns and wore coats, but that the accused was not armed. PW1 stated that the one who shot his brother is called Isaya. He gave the names of the other two as the accused and one Kiburi. I have carefully considered the evidence by both the prosecution and the defence. The evidence of identification is by a single witness that of PW1. In the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

"**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**."

In another case of **PAUL ETOLE AND ANOTHER VRS REPUBLIC CA No. 29 of 2000,** the Court of Appeal held:

"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".

PW1 described the light which enabled him to identify the accused at the scene. It was 9 pm and therefore long after dusk fall. There was a full moon outside the hotel. However the identifying witness was inside a hotel watching television. PW1 described the lighting inside the hotel as coming from a pressure lamp at the entrance area. PW1 said that he and his brothers were seated at the entrance to the hotel before the attack. He said he saw the gangsters walking towards the hotel but did not know their motive until they attacked them. He said that he had known the accused person for one year before the incident as one who owned a hotel next to their place. I noted that PW1 did not disclose the role played by the accused, neither did he disclose where and at what stage of the attack he noticed and recognized the accused. PW1 did not say where in relation to the pressure lamp the accused was when he saw him. I am not satisfied that PW1 made a proper, safe and accurate identification of the accused. The role the accused played at the scene was also important in order to determine whether common intention could either be inferred or established as against the accused.

The evidence of identification was by a single witness. I tested the veracity of PW1's evidence against the evidence of other witnesses. I considered the evidence of PW5 the OCS of Laare Police Station and PW6 the first Police Officer to receive the report of murder respectively. PW6 CPL Waweru testified that PW1 gave him three names of people he claimed to have identified during the attack. Among the three names included the name of the accused. PW6 was clear that PW1 did not give any names when he made the first report of the incident to him the same night of the incident. PW6 testified that PW1 gave him those names the following morning when he, PW6 and the OCS PW5 visited the scene of the murder. The only conclusion which can be made why PW1 did not give any names of the attackers to the Police during his first report is only one; that it was an afterthought. That creates doubt whether PW1 identified anyone of those who robbed him and fatally attacked his brother.

Given failure by PW1 to name the attackers at the first opportunity, the evidence of identification by PW1 needs corroboration before it can found a conviction. I looked for such corroboration in the rest of the evidence. PW2 was with PW1 during the attack. PW2 said he was only able to identify one man by name Kiburi. According to PW5 members of public were able to apprehend the same night one Kiburi whom they lynched and burned beyond recognition. PW5, 6 carried the remains to the Police Station. That was the person PW2 could identify. PW2's evidence therefore added no value to the evidence of identification by PW1. PW1's evidence against the accused was weak and could not on its own sustain a conviction.

The prosecution needed to adduce evidence to establish common intention. The Court of Appeal in the case of **NJOROGE VS. REP [1983] KLR 197,** at page 204, considered the meaning of common intention and stated as follows:

"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly..."

According to PW5, the following morning, 25th September, he was called on the phone and he proceeded to Gandone Market where he found a large crowd destroying the building of a father of one of the other suspects by the name Isaya. He was able to disperse the crowd. While still at the scene he got information that a third suspect had been arrested by the members of the public. He proceeded to where the accused was and found him in a coma. PW3 explained that he stopped the members of public, which was large crowd from lynching the accused. He said that he had to lie on him to stop them from lynching him.

The accused put up a strong defence to the effect that on the night of 23rd September, 2007 he was busy at his hotel with his worker Robert DW3 preparing food for their customers. His defence was that he was at the hotel between 6 pm and midnight of the material day and that he never left the premises. His wife DW2 also confirmed his statement. The accused explained the incident where a large crowd of people demolished a building which was 20 steps from his hotel at 2 pm one day after the murder incident. He claimed that the people demolished the building of a father of one of the suspects called Isaya. He said that the crowd left after the OCS PW5 went to the scene. The accused said that he was at the scene all this time and that nobody laid their hands on him until on the 25th, three days after the incident when he was arrested and almost lynched if it was not for the help of a local pastor.

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."

The principle applicable to alibi defence is that the accused bears no burden of proving his alibi. When the prosecution case is however weak an alibi may as well raise doubts to the case against an accused. In this case, the prosecution case was weak for lack of corroboration to PW1's evidence of identification. The accused alibi does raise further doubt as to the credibility of the prosecution case against the accused.

Having considered the entire evidence adduced by both the prosecution and the defence, I find that the prosecution failed to prove the case against the accused beyond any reasonable standard. I will give the accused the benefit of doubt and acquit him of the charge of murder under section 306 of the Criminal Procedure Code.

DATED SIGNED AND DELIVERED THIS 7th DAY OF JUNE, 2012

LESIIT, J.

JUDGE.

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