



Murder:

- . Evidence of single identifying witness**
- . credibility of single witness**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR NO. 71 OF 2003

LESIT J.

REPUBLIC.....PROSECUTOR

Versus

AUGOSTINO THINE M'MAUTA.....1st ACCUSED

STANLEY MWITHALIE.....2ND ACCUSED

ISAACK M'MUTEA.....3RD ACCUSED.

JUDGEMENT

The accused Augustino Thiine M'Mauta alias Kiaba, Stanley Mwithalie Ntokaibula and Isaac M'Muthua are charged with murder contrary to Section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on the 4th day of June 2003 at K.K. Village in Meru North District within Eastern Province, murdered Joshua Kinyua M'Inoti.

The evidence of the prosecution was heard by Hon. Emukule J, who also placed the accused persons to

their defence. When I took over the matter and complied with section 201(2) of the Criminal Procedure Code and gave the defence the options of determining how they wanted the case to proceed after the proceeding Judge was transferred; all the accused persons through their counsel opted to have the case proceed from where it was left of by Hon. Emukule J. I therefore took the defence of the accused persons.

The prosecution called four witnesses PW1 Isp. Charles Inoti was a brother of the deceased. His evidence was that on the 5th June, 2003 he received information that the deceased had been murdered. He later identified the body of the deceased for postmortem examination on the 16th June, 2003. PW2 was Cpl Aden Roba. He testified that on 4th June, 2003 he received a report of a murder that had taken place at KK Laare area. He was one of the Police Officers who visited the scene of the incident and also arrested the accused persons. Cpl Roba's evidence was that the 3 accused persons were charged because they were the last people to be seen in the company of the deceased before he died.

PW3 told the court that on the 4th June 2003 he was escorting the Assistant Chief of the area at about 9 pm. PW3 testified that after escorting the Assistant Chief he met 4 persons on his way home and identified the four as the three accused in court and a fourth person who is the deceased. He said that the four were all drunk. He said that there was moonlight which enabled him to see and identify the three accused and the deceased.

PW3, during cross examination by Mr. Mosota for the accused persons gave further information which was not given in his examination in chief. He said that when he met the accused persons and the deceased they were standing and that a woman who he identified in court during his testimony was holding the deceased by the shoulder and saying "**bwana wangu**" i.e my husband.

PW4 was Dr. Isaac Macharia who produced the post mortem report, on behalf of Dr. Buba. According to the report, Dr. Buba examined the deceased at Meru District Hospital on the 16th June, 2003. Dr. Buba noted that the body had multiple bruises, fracture of the left forearm, deep cut on the back 8 cms in length, deep cut on the buttock exposing the bone and fractures of sixth, seventh and eighth ribs on the right side, and bleeding in the chest cavity. The cause of death according to Dr. Buba was massive loss of blood.

The accused persons were placed on their defence. The 1st accused gave a sworn statement in which he put forward an alibi as his defence. He accounted for his movement during the day of the 4th June, 2003. The 1st accused testified that he went home at 6 pm that evening and that he did not leave his house till the next day. He denied committing the offence. He also denied ever meeting the 2nd and 3rd accused on the material day.

The 2nd accused gave a sworn defence. He put forward an alibi as his defence. He said that he spent the whole day working in his shamba with his wife. He said that at 6pm, he and his wife left the shamba and went home where he took a shower. He then had his supper and started listening to his radio until 9pm when he retired to bed. He said that he never left his house that evening and that in any event he never walks around at night. He said that after he went to sleep at 9pm that night he did not leave his house again, until the next morning.

The 3rd accused also gave a sworn defence in which he put forward an alibi as his defence. He told the court that on the morning of 4th June, 2003 he left his house and went to a place called Laare where he did the business of buying and selling goats at the market. He said that at 6.30 pm, he left Laare and went back home where he arrived few minutes to 7.00 p.m. He denied meeting his co-accused on the

material night. He also said that he does not take alcohol. He also stated that he did not know the deceased before this incident and he denied murdering him.

I have carefully considered the evidence adduced by the prosecution, and the defence of each of the accused persons. I have also considered the submissions by Mr. Mosota for the accused, and Mr. Kimathi the learned State Counsel for the State. The accused persons are charged with murder. The burden of proof lies with the prosecution to prove that the accused persons caused the death of the deceased through some unlawful act or omission actuated by malice aforethought. Section 206 of the Penal Code gives the circumstances which need to be demonstrated in order to establish malice aforethought. It provides 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 prosecution is relying on the evidence of one witness, PW 3, whose evidence was to the effect that he saw the deceased in company of the accused persons at around 9 pm on the material day. Section 111(1) and section 119 of the Evidence Act create a rebuttable presumption against the accused persons. In this case the rebuttable presumption created is that since the deceased person was last seen alive in the company of the accused persons they should give a reasonable explanation of either how he met his death or how they parted company. These sections states as follows:

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence”.

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”.

Before sections 111(1) and 119 of the Evidence Act can come into operation the court must be satisfied that the evidence against the accused persons that they were the last persons seen with the deceased when he was still alive is cogently established. PW3 stated that he saw the accused persons and the deceased standing somewhere at around 9 pm on his way home. At the same time PW3 stated that they were all drunk. When asked how he knew that they were drunk, PW3 informed Mr. Mosota for the accused that he could tell that because they were swaying from side to side. When asked how he was able to see the four people PW3 testified that there was bright moonlight that night which enabled him to see the accused. He said he knew the accused persons and the deceased before the incident. In the case of MAITANYI VS REPUBLIC [1985]2 KAR 75, the court of Appeal held:

“ Although a fact may subject to well known exceptions, be proved by the testimony of a single witness, it was necessary to test the evidence of a single witness respecting identification with the greatest care especially when the conditions favouring a correct identification were difficult.

In the absence of any corroborating evidence whether direct or circumstantial the trial magistrate ought to have made enquiries regarding the nature of the light available, the size of the lamp and its position relative to the sitting assailant”.

The conditions of identification were in my view difficult for correct identification reason the nature of the brightness of the moon which enabled PW3 to identify the 4 people he alleges he saw on the material night was not clearly described. To merely say bright moonlight, standing on its own was not sufficient. I carefully considered the evidence of this witness and I realized that he did not approximate the distance at which he allegedly saw the accused person and the deceased. He said he walked across the road from them. PW3 did not also give consistent evidence in that he contradicted himself when in his evidence in chief he said that he saw the four people standing. When asked how he knew they were drunk, PW3 changed and said that he could tell they were drunk by the way they were walking because they were swaying from side to side.

I find that the evidence of identification by PW3 was not watertight. The conditions of identification were in my view not proved to be favourable for correct identification. The distance at which PW3 saw the four was not disclosed. The length of them he saw them was not given. It is however clear he walked passed them across the road. I am not satisfied that in the circumstances described by PW3 that he saw them clearly enough to see and recognize anyone he saw that night.

I also tested the credibility of PW3 from the evidence he gave. Unfortunately it is not me who took his evidence and therefore I cannot comment on his demeanour. However from his statement in court, PW3 described himself as the only person who disclosed the identity of the persons who were seen in the company of the deceased the last time the deceased was seen alive. Yet this same witness perjured himself when in cross examination he changed his evidence in chief. Apart from contradicting himself as to whether he saw the accused persons and the deceased standing or walking, PW3 introduced more information of what he saw that night. PW3 said that he saw a woman holding the deceased by the shoulders and declaring loudly that the deceased was her man or husband.

Having sworn in his evidence in chief that the accused persons were the only persons he saw in the company of the deceased, his evidence that there was a fifth person in that company raises questions as to the credibility of this witness. Not to mention that PW3 purported to identify a woman in the court audience at the time he gave his testimony, as the one he saw holding the deceased that night. The woman stood up in court and is recorded to have promptly denied both the name “**Christine**” which PW3 appears to have ascribed to her. The credibility of PW3 was therefore also questionable.

It is trite law that where the circumstances of identification are difficult, especially where the identification is by a single witness, there must be other evidence adduced to corroborate the evidence of the identifying witness. The other evidence of corroboration required is one which implicates the accused person by the commission of the offence by some material particular. That requirement is not lessened merely because the evidence of identification was that of recognition. See **JOSEPH NGUMABIO NZARO V. REPUBLIC (1991) 2 KAR 212.**

Corroboration of the evidence of PW3 will also be required for reason that his creditworthiness was in doubt. In **NDUNGU KIMANYI V REPUBLIC (1979) KLR 282** the court of appeal held:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence”.

I have sought for any corroboration in the evidence adduced by the prosecution and I found none. The evidence PW 3 stood on its own that he saw the deceased in the company of the accused persons.

PW3 stated that a woman was also seen in the company of the deceased before he met his death. The question is why this woman is not among the accused persons, or a witness for the prosecution. Cpl Roba gave a list of persons who were implicated with the offence. That list contained six names excluding those of the accused. Among the six names was the name “Christine”. I think that the prosecution owed us an explanation why each of those six persons were implicated in the offence and also why they were not considered as possible witnesses. Considering the totality of the prosecution evidence too many questions were left unanswered all these queries erodes the veracity of the prosecution evidence against the accused persons.

I also considered the defences of the accused persons in which they put forward an alibi as their defence. The principle which applies in regard to alibi was set out by the court of appeal in the case of **KIARIE V. REPUBLIC (1984)KLR 739** where it was held:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate’s finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.

I find that the alibi by each of the accused created a doubt in my mind whether in deed any of the accused persons were ever in the company of the deceased just before he died. I doubt that with the evidence of the prosecution especially that of PW3 that the prosecution succeeded in discharging the alibi.

Having carefully considered the entire evidence adduced by the prosecution and the defence in this case. I find that the prosecution has been unable to prove on the standard beyond any reasonable doubt that the accused persons were in any way responsible for the death of the deceased. I have given the accused persons the benefit of the doubt and I consequently acquit them under Section 306 of the Criminal Procedure Code.

Dated, signed and delivered this 24th day of March 2011

J. LESIIT

JUDGE.