REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR NO. 29 OF 2005

REPUBLIC…….PROSECUTOR

VERSUS

MARTIN MUGAMBI KAREWA……ACCUSED

LESIIT J.

JUDGEMENT

The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 11th January 2005 at Muringene Location in Meru North district within Eastern Province he murdered Judy Kagwiria.

The prosecution case was heard fully by Hon. Ouko J. who also placed the accused on his defence but was transferred before he could hear the accused.

From the record the prosecution called 8 witnesses. The prosecution case was that PW1 Mugambi was guarding Miraa trees for his employer PW5 Charity on the 11th January 2005. As Mugambi guarded the trees some thieves came and one of them climbed a tree in order to steal miraa. Mugambi said that when he confronted him and flushed him with a torch, the man came down the tree and started running away. It is while he ran away that he met the deceased and PW2. The deceased was the daughter of the owner of the farm PW5. These were children of about 15 years who had been sent by Charity PW5, to the local centre to buy paraffin. According to PW2 they were walking back from the shops when they heard many people shouting "**Martin was stealing miraa**". That is when Martin emerged from a fence and stabbed the deceased on the side of the stomach she died just on arrival at the hospital.

There were other witnesses who came to the scene after the incident. These included one Isaiah PW3, one Stanley PW4 and Charity PW5. They did not witness the deceased being stabbed but they found her lying on the ground bleeding profusely from the abdomen.

The accused was arrested one day after the incident by PW7, AP Chief Inspector Abdul Nazis. It was Mugambi PW1 who took PW7 to the place where the accused was and identified him to PW7. When the Doctor performed the postmortem on the body of the deceased he found that she had a stab wound on the right side of the abdomen near the waist and that it had penetrated deeply into the abdomen perforating the large intestines, leading to excessive bleeding. In the Doctor's opinion the deceased died of Cardio-pulmonary arrest as a result of the bleeding from the stab wound.

The accused person did not deny being at the scene of incident at the time the incident took place. He however denied committing the offence. In his defence, the accused described himself as a known bhang smoker who smoked bhang daily. He says that he was arrested on the 12th January, one day after the incident with bhang in his pocket. He claims that he was arrested by Cpl Ali Hassan for being in possession of bhang and taken in, together with several other suspects. The accused stated that he was eventually charged for this offence for reason that he did not have the 30,000/- demanded by the police for his release.

This trial was conducted with the aid of assessors. The Assessor Ann Muriungi returned an opinion of not guilty on the basis the evidence of identification by PW1 and 2 was not satisfactory. She also stated that the accused may not have been normal at the time because of drugs and that whatever he did may have been influenced by drugs.

The other Assessor Joseph Munene returned an unclear verdict. On one hand he said that PW1 may not have seen the offender clearly. On the other hand he said that the accused was a bhang smoker and that he could have committed the offence as a result of the drug.

I have not agreed with the finding of the Assessors. The defence of intoxication is not a blanket defence and from the circumstances of this case it is not available to the accused.I will demonstrate this in the judgment.

The accused person is facing the charge of murder it is the duty of the prosecution to demonstrate by evidence and beyond any reasonable doubt that the accused person committed the offence of murder. The burden lies with the prosecution to prove its case against the accused person beyond any reasonable doubt

The offence of murder is committed where a person causes the death of another with malice aforethought. One is said to have malice aforethought when he intends to cause death or do grievous harm on another even though that is not the person whose death is caused. One can also be said to have malice aforethought where one knows that one's action causing death would probably cause death or do grievous harm.

There were two eye witnesses who said that they saw how the deceased met her death. These were Mugambi who said that he was chasing away the accused and others who had gone to steal miraa from his employer's farm. The second one was PW2 who was walking side by side with the deceased immediately before she was stabbed. These two witnesses said that they identified the accused as the one who stabbed the deceased. They testified that the incident took place at about 7.30 p.m., which was after sunset. Regarding the quality of the identification I have taken into account that apart from PW1, neither PW2 nor the deceased had a torch. I will get to the dying declaration at a later stage. PW2 described the night as being bright because of moonlight. It was early evening but after sunset.

I will rely on the following cases regarding identification and the principles applicable in testing the evidence of visual identification. In the case **R VS ERIA SEBWATO 1960 EA.174,** the court held:

"Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely water tight to justify a conviction."

In the case **R VS TURNBULL AND OTHERS (1976) 3 All ER 549,**

"Whenever the case of an accused person depends wholly or substantially of the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken."

In the case of **MAITANYI VS REPUBLIC 1985) 2 kar 75** it was held:-

" **Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.**

When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision; it must do so when the evidence is being considered and before the decision is made.

Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."

The evidence against the accused is by two witnesses, Mugambi, PW1 who was guarding miraa trees for his employer PW5 and PW2. There was also the dying declaration of the deceased. PW1 said he was having a torch and that he flushed and saw the accused, who he knew very well before the incident, on the tree. He ordered the accused person to come down, which the accused did and that the moment he reached down the accused started running away, together with the others who were with them. Mugambi is clear that he flushed the torch light at the accused and that he saw him clearly.

Certain issues arise from the evidence of PW1, Mugambi. During cross examination of PW1, it came out in evidence that the statement Mugambi gave to the police spoke of the thieves having been 3; and that the deceased was stabbed with a spear; that he did not mention he had a torch; and that he only saw the back side of the accused as he ran.

These are however not of material in my view and neither do they affect the veracity of the evidence of Mugambi. He was consistent that there were three thieves in PW5's farm that night. The failure to mention that he had a torch at the time he gave his statement to the police is not fatal to his evidence. Mugambi was clear from the word go that what enabled him to identify the accused was light from his torch and that he went up to the tree where the accused had climbed in order to flash the beam of the torch at the accused, therefore forcing the accused out of the tree. The weapon used to stab the deceased was a sharp object. I do not regard the description between a knife as per evidence of PW1, and a spear as per his statement to the police significant. The injury either could cause is consistent with the doctor's finding. I find that PW1 wnet up to the tree where the accused had climbed, that he had an opportunity to flash the beam of his torch at him, and therefore in the circumstances PW1 saw the face side of the accused at close quarters. I find in the circumstances that the possibility of an error or mistake occurring in the identification of the accused was not there.
Regarding PW2 did not have any torch. Her testimony was however there was clear moonlight and that she could therefore see clearly. She was walking next to the deceased and she said that she was able to see the person who stabbed the deceased because they came face to face.

It came out in the evidence of PW2 that she did not know the accused by name but only knew him physically. It therefore follows that when PW2 heard the name Martin just before the deceased was stabbed, she did not know that Martin was the accused. In her evidence, PW2 was very clear that she knew the accused physically before the incident for reason he came from the same area as she did, and that she was capable of identifying him if she saw him.

Having considered the evidence of PW2 I am satisfied that PW2 knew the accused physically but not by his name and therefore when she saw him she was able to recognize him.

I find that the evidence of these two witnesses, PW1 and 2 corroborated each other. The accused person was no stranger to them as he was well known to both of them. I have warned myself of the possibility of a mistake in the identification of the accused. However considering the evidence that each of the identifying witnesses saw the accused under different conditions, one by the aid of a torch inside a miraa plantation, and the other in an open area under moonlight, I find the possibility of mistake or error does not exist. Mugambi and PW2 came very close to the accused, and being well known by the two of them, I am satisfied that he was properly identified as the one who stabbed the deceased. I find that these two witnesses corroborated each other's evidence on the issue of the identification of the accused.

There was also the evidence of a dying declaration in which the deceased told PW2 that the person who stabbed her was Martin.

In the case of **REP –V- PETER MBURU MUTHONI NRB HCCR CASE NO. 27 OF 2004/ [2005], e KLR,** where OSIEMO, J. referred to **CHOGE -V- REP** 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."

I have considered the statement made to PW2 by the deceased and I am satisfied that it is admissible having been made when the deceased was at the point of death and also because it concerns the identity of the person who stabbed the deceased and the circumstances of her death. I am satisfied that the deceased made the declaration under the influence of an impression that death was impending and that there was no hope of ultimate recovery. I have considered that the deceased knew the accused both physically and by name. I have warned myself that the circumstances under which the deceased saw the accused were very much similar to those affecting PW2's evidence. The only difference between the two is that PW2 only knew the accused physically but the deceased knew him both physically and by name. I accepted the dying declaration as additional evidence which corroborated the testimony of Mugambi and PW2 that it was the accused who stabbed the deceased.

I have carefully considered the defence of the accused person does not deny being within the area where this incident occurred at the time it occurred. He admits being at the place where the incident occurred. He however denies stabbing the deceased. The accused put forward a defence of intoxication even though he did not come out clearly with it. It was his defence that he was unknown bhang smoker. He hinted that he had not smoked bhang that day however he did not commit himself as to whether he was high or not on the material day.The question is whether the defence of intoxication is available to the accused. **Section 13 (1) & (2)** of the **Penal Code** gives the circumstances when intoxication can be a defence and provides as follows:

"Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and

(a) The state of intoxication was caused without his consent by the malicious or negligent act of another person: or

(b) The person charged was by reason of intoxication insane, temporarily or otherwise, at the time

of such act or omission."

In the case of **REPUBLIC VS KIMAIYO ELD. HCCRC NO. 40 OF 2005** where the court stated thus:

"**The main ingredients in a charge of murder are that the accused must have formed the criminal intention and have had a motive to cause death or bodily harm prior to killing the deceased and that the death must have been as a result of an unlawful act or omission on the part of the accused, while the first two ingredients would be lacking in the charge of manslaughter.**

I have taken his statement into account and noted the fact that he has consumed busaa and chagaa during the material day and night. The fact that he had even engaged in a fracas with his own brother earlier that evening when both were armed with bows and arrows would convince me that he was in a state of intoxication which in my view was a condition graver and more extreme than just being mere drunk, or under the influence of drink. Such is a condition which exists " *when as a result of his consumption of intoxicating liquor (a man's) physical or mental faculties, or his judgments, are appreciably and materially impaired in the conduct of the ordinary affairs or acts of daily life"* (per Fair, J., in R. v. Ormsby, (1945) N.Z.L.R. 109.

Based on the above, I find that the elements of malice aforethought and intention are lacking. Having found that the circumstances tend to incriminate him, I do however find that the accused would qualify for a defence of intoxication, and in such case then I find him guilty of the lesser charge of manslaughter."

I have considered the accused person's defence of intoxication. That defence is however not available to the accused for reason that just before he attacked the deceased, the accused was capable of going to steal miraa. When he was confronted by PW1, he had the state of mind to know he could escape. In fact the motive of stabbing the deceased can be deciphered from the facts of this case, that he was securing his escape and anyone on his way trying to stop him had to be dealt with severely. Unfortunately, the person he stabbed was an innocent by passer coming from the shops who did not know what was taking place at the scene. The accused intended to cause grievous harm on anyone trying to block his escape. I find the offence proved Having considered the evidence adduced by the prosecution I am satisfied that it was the accused that stabbed the deceased on the material day. I am satisfied that the prosecution discharged its burden of proof and has proved the charge against the accused beyond any reasonable doubt. I find the accused guilty as charged and convict him accordingly.

Dated Signed and delivered at Meru this 17th day of March, 2011.

LESIIT, J.
JUDGE