



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HCCC NO. 30 OF 2003

LESIIT J.

REPUBLICPROSECUTOR

Versus

JACOB KAIMENYI M’ MIRITI.....ACCUSED

JUDGEMENT FINAL DRAFT

The accused is charged with murder contrary to section 203 as read with section 204 of the penal Code. It is alleged that the accused person on the 31st January, 2002 at Kijja Location Meru Central District jointly with another not before the court murdered Elizabeth Rengeria.

The entire prosecution case was heard by Hon. Lenaola. The matter was eventually taken over by me. I heard the defence of the accused, which was by way of sworn evidence.

The prosecution called 6 witnesses. The key witnesses were PW4 Evelyn Nkatha who at the time she testified in court was agd 8 years old. Her testimony was taken on 22nd February, 2007 which is five years after the incident in question. That also means that at the time the incident took place this witness, Evelyn, was 3 years old. According to Evelyn she was walking home from the Shamba in company of her mother who is the deceased in this case. As they walked along a wide road she said that somebody emerged from the bush and hit her mother on the head and continued hitting her. Evelyn said that she ran away from the scene screaming and that she met with 3 women to whom she reported the matter. She took the 3 women to the scene where they found her mother lying on the ground and that they

carried her home. She said that she saw the person who hit her mother and that it was the accused person.

Evelyn testified that the accused was wearing a yellow t – shirt with white strips and a black trouser. Evelyn testified that she was bale to identify the accused at an ID parade upon his arrest.

The other witnesses were not present when the incident occurred. PW1 a neighbor of the deceased for 20 years was one of the people who identified her body to the doctor for post mortem on the 11th February, 2002. PW2 was the husband of the deceased. His testimony was that after 7pm on 31st January, 2002 a person called him and informed him his wife had been killed. He testified that he went and looked for a vehicle to take her to the hospital but found a huge group of people carrying her. PW2 then carried his wife to Nkubu Consolata

Hospital where she died the next day. PW2 told the court that he did not know the accused personally but only heard people calling him by the name Kaimenyi. PW2 said he knew where the accused lived and that it was very far from their home.

The evidence of PW 3 John Mwirigi was full of hearsay evidence. His testimony was that at around 5 am in the material evening he was in his house when he heard screams. He said that he took his panga and went to the direction of the screams to investigate. PW3 said that he met one Mukiri who told him that someone had died whose name he could not mention. He said that he went and hid himself in the bush so as to see who could have killed the deceased. PW3 testified that he then saw the accused hiding in the bush and that he started screaming to attract the attention of other people. He said that he suggested to the people that Kaimenyi should be arrested. PW3 stated that he proceeded to Nkubu Police and later to Kariene Police Stations and reported the case against the accused person.

The other witness was M' Mukiri M' Muthuri. This witness was stepped down before he could testify.

The learned state counsel informed the court that his evidence was not material. PW 6 was a retired chief of Kijja Location. He testified that he received the report that the deceased had been beaten by thugs at 11pm on the 31st January, 2002. He said that he got two names of suspects, the accused person and one Muthini. PW6 said that he organized an ambush and arrested several people in connection with the murder. These people included the accused. He handed all of them to the police.

The accused gave a sworn defence in which he put forward an alibi he testified that he did not know the deceased neither did he know any of the witnesses. He said he had no grudge with either the deceased or the prosecution witnesses. He stated that at 7am on the 31st January, 2006 he left his home for the Kitunguu market where he sold cereals, fruits and vegetables. He said that he worked there till 6pm when he left for his house where he arrived at 7.30pm. The accused stated that he did not leave his house again until the following morning. He says that he was arrested on the 13th February, 2002.

The accused is charged with murder. It is the duty of the prosecution to demonstrate the evidence and beyond any reasonable doubt that the accused person committed the offence of murder. 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 or where one knows that one's action causing death would probably cause death or do grievous harm to another.

The prosecution is relying on the evidence of Evelyn, the only eye witness to the incident. She was a child of tender years. On the issue of the evidence of children, the law is very well settled. Section 124 of the Evidence Act provides as follows:

“S.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him”.

In the Court of Appeal case of ONSERIO v. REP. [1985]klr 618, it was held:

“ An accused can only be convicted on the evidence of a child of tender years if corroborated by other material evidence in support thereof implicating him as set out in section 124 of the Evidence Act.”

Evelyn PW5 was 3 years old when she witnessed the incident. The law is that where the evidence against the accused person is that of a child, the accused shall not be liable to be convicted on such evidence in support thereof, implicating the accused.

Before corroboration can be sought for the evidence of the child witness, the court must be satisfied with the evidence itself. The court must be satisfied that the evidence of identification by Evelyn was safe. In

testing that evidence I have considered the circumstances under which Evelyn says that she saw the accused commit this offence. According to her testimony her mother was attacked at about 7 pm. Evelyn claimed in her testimony that it was not yet dark at the time the attack took place.

The father's evidence, PW2 was to the effect that Evelyn was taken home by certain women at about 7 pm. Depending with the time of year and in most cases, 7pm in Kenya is after dusk, and is likely to be dark. The burden was upon the prosecution to adduce evidence to support their case that on the material day, 7 pm was not dark.

I find that the circumstances under which Evelyn allegedly saw the accused were not conducive for positive identification of the accused. It was dark; the witness was a child of tender age at the time. It is not certain that what she claims she saw was real or out of imagination given her tender age at the time, and given the added disadvantage that there had been a considerable lapse of time before she finally testified in this case. That evidence in my view was not cogent to support the charge against the accused. There is no point looking for corroboration of Evelyn's evidence.

As I have already indicated the evidence adduced against the accused was merely that of the child witness.

The only other evidence was that of PW3 who said that he first heard scream and then went to his gate where he met with man who informed him that the deceased was lying on the road. By the time he went to hide in the bush so as to see who committed the offence, the deceased had already been attacked and left for the dead. I find that the evidence of PW3 that it is the accused who committed the offence was not credible evidence since he did not himself witness the incident. His evidence that it is the accused who murdered the deceased was based on conjecture, not evidence.

The prosecution did not avail crucial witnesses in this matter. This includes the evidence of the investigating officer. There is therefore no explanation why certain witnesses named by PW3 for instance were not called as witnesses. Evelyn PW4 mentioned that she identified the accused in an identification parade. PW4 could not tell when the parade was conducted or by who. More importantly however, the parade officer was not called to testify. There was also no evidence from a doctor or any medical opinion as to the cause of death, we cannot even tell whether the deceased died of injuries testified to by Evelyn, or other causes. The burden was on the prosecution to prove that the cause of death was homicide.

The accused person was arrested on 13th February, 2002 two weeks after the incident. He has denied committing the offence or having any involvement in the murder of the deceased. The accused put forward an alibi as his defence. The accused did not have to establish that his alibi was reasonably true. All he had to do was create doubt as to the strength of the case for the prosecution. The evidence of the prosecution is so weak that the accused defence that he was not involved in the offence remains unchallenged.

Having carefully considered the evidence adduced in this case, I find that the prosecution failed to prove the case against the accused on the required standard. I find that the accused should get the benefit of doubt, which I accordingly accord him. I therefore acquit the accused of the charge facing him of murder contrary to section 203 of the Penal Code.

DATE, SIGNED AND DELIVERED THIS 7th day of APRIL, 2011.

**LESIIT, J
JUDGE**