REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 50 OF 2005

REPUBLIC.....PROSECUTOR

VERSUS

GERISHON KUBAI MWITHIA.....ACCUSED

JUDGMENT.

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 2nd February 2005 the accused person murdered the deceased Jeremiah Kimathi.

The prosecution called 5 witnesses. There were two eye witnesses of the murder, PW1 and 2. PW1, Joshua Musyoka in his evidence stated that he was walking to the shop to buy batteries when he saw the accused person chasing the deceased. At the time, PW1 was walking towards the two and was within a distance of 6 meters. He saw the accused person chasing the deceased and that the deceased ran around a tree to avoid being stabbed but that finally the accused caught up with him and stabbed him once on the right side of his chest. PW1 saw the deceased fall down and the accused running away from the scene. PW1 said that he proceeded to report the matter to the Administration Police (AP) camp. PW1 also led the AP to the home of the brother of the accused where the accused used to live, where they found him together with the murder weapon. The murder weapon, a sword was taken by the APs.

PW2, John Kariithi was walking home from his shamba at around 4pm when he saw the accused person chasing the deceased. PW2 said that the accused was holding a sword. PW2 stated that he saw the deceased ran around a tree to avoid being stabbed. That the accused caught up with him and stabbed him before running away from the scene. PW2 said that he was about 70 meters from the accused and deceased when he witnessed the incident.

PW3 Theresia Mutheya was in the company of Alice Ciamoroo at 5pm on the day in question when she received the news that the deceased had been stabbed to death. Theresia stated that she went to the father of the deceased and gave him the sad news. The father of the deceased, PW4 Nelson Ngore confirmed

receiving the news of his son's death from PW3.

PW5 was Doctor Mutugi Muriithi the doctor who performed the post mortem on the body of the deceased. His evidence was that at post mortem the deceased had a penetration wound which was 6 centimetres on the right side of the chest. Doctor Muriithi said that after the examination, he formed the opinion that the cause of death was cardio-pulmonary arrest due to hypovolemic shock due to massive bleeding which led to the collapse of the lungs, due to a stab wound.

The accused gave a sworn statement. He put forward an alibi as his defence. He told the court that he was a miraa dealer. That on the morning in question he left home early and went to Luanda to look for miraa for sale. He said that he returned in the evening and was immediately arrested and charged with the murder of the deceased, which he did not commit. The accused stated that he knew the deceased and also PW1 and 2. He however said that both PW1 and 2 had a grudge against him because each had earlier accused him of taking their money while doing business with them.

The charge against the accused is that of murder. It is the duty of the prosecution to demonstrate through evidence and beyond any reasonable doubt that the accused committed the murder of the deceased. The prosecution has to show that the accused by an act or omission caused the death of the deceased with malice aforethought. The prosecution must show that the accused intended to cause death or do grievous harm to the deceased or that he knew that his action could probably cause death or do grievous harm to the deceased. The burden lies with the prosecution to prove the case against the accused beyond any reasonable doubt.

The trial was conducted by aid of Assessors. Both returned an opinion of guilty on basis of eye witness evidence of PW1 and 2 and the doctor's finding at post mortem.

There were two eye witnesses for the murder, PW1 and 2. PW1 said that he was 6 meters from the accused and deceased when he witnessed the incident. PW2 was walking towards the accused and deceased 70 meters away when he witnessed the stabbing.

I have considered the issue of identification. The incident took place at 4 p.m. It was therefore in broad daylight. Both witnesses knew the accused before the incident a fact the accused does not contest in his defence. In fact PW1 led the Police to the home of the accused where the accused was arrested and the murder weapon recovered the same day of the incident.

The prosecution is relying on the evidence of identification given by PW1 and 2. In the case of **R-V-ERIA SEBWATO 1960 EA 174**, a persuasive authority, the court held;

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

The defence has raised two issues regarding the evidence of PW1 & 2. First, that there was a contradiction in their testimony. Mr. Ondieki for the accused submitted that while PW1 said that accused and deceased were playing hide and seek around a tree, PW2 said he saw the accused chasing the deceased.

I do not see any contradiction in the evidence of PW1 and 2. Their testimony is clear that the accused was chasing the deceased and that the deceased ran round a tree when he got to one, to avoid being stabbed by the accused. The two witnesses both mentioned that the deceased was being chased by the accused and that there was a tree. They both mention that the deceased was stabbed by the accused and that it

happened near a tree. I find in line with Mr. Kimathi's submission that there was no contradiction in the evidence of these two witnesses.

The second issue was raised in the evidence of the accused. The accused said that both witnesses (PW1 and 2) had a grudge against him and that they had accused him of stealing money from them, separately, prior to this incident.

I have carefully considered the cross-examination of both PW1 and 2 recorded by my brother Hon. Ouko, J. I noted that the learned defence counsel, who conducted the entire case for the defence never put to either witness that they fabricated the case against the accused, nor did he question them about the existence of any grudge between each of them and the accused. I find this line of defence an afterthought hatched at the defence state. I find that the allegation does not hold any water. I reject the accused contention that a grudge existed between him and either or both PW1 and 2.

In regard to identification by recognition I find both PW 1 and 2 knew the accused very well prior to the day in question. They saw him in broad daylight, PW1 at a very close distance. PW1 and 2 acknowledge in their evidence that they saw each other at the scene and agreed that PW1 would go for the Police while PW2 guarded the deceased. PW1 led police to accused brother's home after the incident, where the accused was living prior to this incident, where the murder weapon as also recovered and the accused arrested. All these circumstances together with the conditions of lighting prevailing at the scene at the time of incident establish that both PW1 and 2 witnessed the incident and saw the accused stabbing the deceased. I find that the evidence of identification adduced by the prosecution was watertight.

An issue was raised regarding failure by PW5 to call the arresting and investigating officer and to produce exhibits. Mr. Kimathi for the state urged that failure to call either witness was not fatal as there were no gaps left in the prosecution case which the two witnesses could have filled.

The Court Of Appeal, in **JOSEPH MAINA MWANGI V REP CA NO. 73 OF 1992** observed as follows regarding failure by prosecution to call witnesses:

"In the result failure by the prosecution to call Mr. Kikwai is of no consequence. In BUKENYA V UGANDA EA 549, it was held that where the prosecution fails to call a witness and it transpires that the evidence in support of the charge against the accused concerned is barely adequate, the court trying the case is perfectly entitled to draw an adverse inference to the prosecution case. We cannot hold that the evidence regarding the appellant's possession of the rifle is barely adequate."

I have considered the evidence on record and find that it establishes the circumstances leading to the arrest of the accused and details given of the officer who arrested the accused. There is no doubt who, when, and where the accused was arrested. The evidence of PW1 is very clear on those facts and the accused did not contest it.

It was desirable to have the investigating officer especially because the murder weapon said to have been used in this case was recovered. He should have testified and produced the weapon in evidence. The failure to produce the weapon or to call the investigating officer is not fatal to the prosecution case. This is because from the evidence adduced by the prosecution I cannot say that that evidence as barely adequate. I find that the evidence adduced in this case was adequate and therefore failure to call the officers is of no consequence.

The accused put forward an alibi as his defence. The accused bears no burden to prove that his alibi is true. All he needed to do is create doubt in the evidence of the prosecution.

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."

I find that the evidence of the prosecution is water tight against the accused. I find that the prosecution has established that the accused chased after and stabbed the deceased. I am satisfied from this evidence that the accused had formed the necessary intention to cause death or grievous harm to the deceased first by arming himself, secondly by chasing the deceased and thirdly by stabbing him in the chest area.

The Doctor's evidence of his finding at post mortem is in tandem with the evidence of PW1 and 2. The doctor found a stab wound at the exact place the two eye witnesses saw the accused stab the deceased. Mr. Ondieki's submission that the accused could only have stabbed deceased on the back and not sides if he was chasing him is purely conjecture. The direct evidence of witnesses who were present at the scene at the time said that the deceased was stabbed in the chest. The doctor's findings at post mortem confirmed it. The counsel's submission is in the circumstances rejected.

The accused put forward an alibi as his defence. With the defence of alibi, the accused need not prove that his defence is true. All the accused needs to do is create doubt in the evidence of the prosecution and shake the credibility of the prosecution case against him. I find that the accused defence did not shake the prosecution case. The evidence by the prosecution is watertight. I am satisfied that its credibility has not been shaken.

Having carefully considered the evidence adduced in this case, I am satisfied that the prosecution has proved its case against the accused beyond any reasonable doubt.

Consequently I reject the accused defence, find him guilty of the offence of murder contrary to section 203 of the Penal Code as charged and convict him accordingly.

DATED, SIGNED AND DELIVERED this 12th day of May, 2011

LESIIT, J

JUDGE