REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR NO. 61 OF 2004

LESIIT, J.

REPUBLIC.....PROSECUTOR

VERSUS

P.K.....ACCUSED

JUDGEMENT

The accused is charged with murder contrary to section 203 as read to section 204 of the Penal Code. It is alleged that the accused person murdered M.K. on the 3rd June 2004.

The prosecution called 8 witnesses. PW1 was Cpl Agnes Murithi. Her evidence was that she was mandated to investigate the case and that at the time she took it over it was an assault case. She visited the deceased in the ward where he had been admitted for treatment on the 3rd June, following the incident. PW1 received the news of the deceased death at 4 pm the following day. Cpl Murithi was also the officer who arrested the accused person and recovered a panga from the house of the accused in the presence of the accused. The panga was exhibit 1.

PW2 R.M. was a young person aged 14 years old at the time he testified. He was a nephew of the accused and the deceased because he was the son of their brother J.M., PW4. His testimony is that he was going home from school at around 3 pm when he met the accused picking dry coffee berries in his shamba. PW2 testified that he saw the accused person a little later sharpening a panga after which he walked to the house of the deceased and called him out of his house. PW2 stated that he heard the accused asking the deceased for his axe. He heard the deceased reply by inviting the accused to enter into his house and look for the axe. PW2 stated that the accused, on being told to look for the axe lifted the panga he had and cut the deceased on the forehead. PW2 said that the accused then kicked the deceased on the stomach and when the deceased fell down, PW2 saw the accused cut the deceased 9 times. PW2 then saw the wife of the accused trying to intervene but the accused kicked her and she fell down too. PW2 said that after the attack on the deceased, the accused person started chasing

the wife of the deceased wanting to cut her also. She locked herself in the toilet to escape.

PW 2 testified that he heard the accused swearing that he would kill everybody that day. PW2 stated that he asked the accused not to chase the wife of the deceased and that suggestion turned against him because the accused person started chasing him with the panga also. It was at that point that PW 2 ran to the Assistant Chief where he reported the matter. PW2 also ran to his father PW 4 and also reported to him what had happened to his brothers. Eventually PW2 went back to the home and saw the accused person still very agitated. He said that he then saw the accused cut himself on the hand before wrapping the hand. The accused then removed his clothes and disappeared from the scene. Robert identified the panga which the accused used to cut the deceased as Pexhibit 1

PW3 John Gikundi was with the Assistant Chief. He first heard screams after which PW2 appeared and reported the incident at his home to him and PW5. PW5 was the Assistant Chief Peter Mugwika. After receiving the report from PW1, PW5 told John (PW3) to proceed to the scene of the incident as he joined him later. John's testimony was that he went to the scene and found the deceased lying down with several deep cuts on his body. He also saw the accused walking around the field holding a panga and threatening everybody. John stated that he heard the accused say that he was looking for the wife of the deceased in order to her cut her. PW5, Assistant Chief joined PW3 and others at the home of the accused and deceased. PW5 stated that at the time he arrived at the scene, the deceased was lying on the ground with multiple cuts. PW5 said that the accused was nowhere to be seen. The Assistant Chief PW5 stated that the accused was not known to be a drunkard or a drug addict and neither was he a violent man before this incident.

PW4 J.M. confirmed the evidence of PW2 that he was the one who had reported a fight to him between his brothers, the accused and the deceased. PW4 confirmed that PW2 had reported to him that the accused had cut the deceased. PW4 testified that when he went to their home, he found the deceased lying on the ground with multiple cuts on the head, the shoulder, the hands and the palms. He said that at the time he went home, the accused was nowhere to be found. PW4 stated that the Assistant Chief arrived after him. PW4 said that he went and looked for a vehicle in which they carried the deceased, first to Police Station and thereafter to the hospital. He was admitted but died the following day.

PW4 told the court that the deceased was their eldest brother while the accused was the youngest brother. PW4 stated that he was not aware of any dispute between his brothers but said that he learnt that what caused the disagreement was an axe.

PW6 was B.M.. He too was going about his business when he passed by the gate of the home of the deceased and found a crowd of people at the accused and deceased home. He entered the compound only to find the deceased on the ground with multiple cuts. He helped to administer first aid to the deceased and later accompanied him and others to hospital. Bernard testified that while at the scene the accused person found them as they administered first aid to the deceased and that the accused had said at the time that he wanted the wife of the deceased. PW6 identified the panga Exh.1 as the weapon the accused was holding when he saw him.

PW7 was F, the wife of the accused. She was stood down because she was not a competent witness.

PW8 was Doctor Isaac Macharia who, together with Doctor Njue performed a post mortem on the body of the deceased on the 22nd of June, 2004. He produced the post mortem form prepared by Doctor Njue as P Exh.2. Doctor Macharia testified that their findings were that the deceased had 7 cuts which had been stitched; he also had a deep open wound on the inner right shoulder, another wound on the right arm which was stitched and a big cut on the face which was exposing the brain. Internally they found that the deceased had bleeding over the brain. Doctor Macharia testified that both of them formed the opinion that the cause of death was head injury due to open cut.

The entire prosecution evidence was heard by Hon. Ouko J and he also placed the accused to his defence and took his evidence. Hon. Ouko J. adjourned the case for one defence witness. However, the judge was transferred before he could complete the case. When I took over the matter, the accused person opted to have his defence heard afresh before me which I did.

The accused person gave a sworn defence. His defence was that he worked as a carpenter at KeMU. The accused said that he asked for permission from his employer so that he could go to buy medicine for his wife who was sick at home. The

accused said that he was given the permission and preceded to a Chemist and bought medicine. On his way home he met his friend Naftaly who accompanied him home. Naftaly wanted to buy miraa from him, the accused. The accused testified that he found the wife of the deceased cutting firewood with his axe. That when he asked M. where he got his axe which had been missing for 3 weeks, M. was abusive before calling her husband, the deceased, who came out with a panga. The accused stated that the deceased pierced him on the chest and warned him to be very careful. The accused revealed a scar on his chest. The accused stated that the deceased cut him on his head with the same panga. The accused stated that the deceased aimed at him with a panga and that he lifted his and was cut near the thumb. The accused revealed a two inch healed wound on his hand. The accused stated that he ran away from the deceased and on his way picked a stick with which he hit the deceased on the right hand which was holding the panga, and that the panga fell down. He says that he picked the panga. He said that the wife of the deceased hit him on the head as he and the deceased struggled. He said that as they struggled, the deceased was cut on the right ear. The accused stated that he cut the deceased once on the head to defend himself and then using the flat side of the panga, slapped the deceased on the forehead where upon the deceased fell down. The accused stated that eventually his other brother took him and the deceased in the same vehicle to the hospital where he was treated but the deceased was admitted.

The accused said that the deceased died due to lack of blood. The accused stated that he was arrested for this offence on the 4th October 2004.

The charge facing the accused is that of murder. The burden lies with the prosecution to prove the case against the accused person beyond any reasonable doubt. It is the burden of the prosecution to demonstrate through evidence that the accused due to some act or omission perpetrated by malice aforethought caused the death of the deceased. The prosecution must establish that the accused had formed the intention to cause death or do grievous harm to the deceased; or that the accused person knew his action causing death would probably cause death or do grievous harm to deceased.

The trial was conducted with the aid of assessors. One Assessor Phineas Kaburia insisted on his co-assessor giving a verdict on their behalf. Joseph Munene in his opinion stated that the accused was guilty of murder on the basis of the evidence of PW4, the PW14 year old boy whom he said was old enough to understand what he saw and also because the doctors finding confirmed his testimony. The assessor was of the view that self defence was not available to the accused because he was very aggressive that day and he was the one who attacked his brother.

The accused faces a charge of murder. The burden lies with the prosecution throughout the case to prove the charge against the accused beyond any reasonable doubt.

Mr. Kaumbi for the accused, in his submissions urged that the only eye witness evidence was that of PW2. Counsel urged the court to disregard his evidence on account of his young age and also because he gave contradictory evidence of where he saw the accused that day and of what the accused was doing.

Mr. Kimathi urged that PW2 gave sworn evidence after *voire dire* examination, and that his evidence gave the full details of the movements of the accused immediately before the incident, up to the time after the incident when accused cut himself on the hand as a cover up.

The quality of the evidence of children was considered in the case of **JOHNSON MUIRURI VS REPUBLIC [1983] KLR 445** where it was held:

"Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration."

As stated earlier the prosecution case was heard fully by Hon. Ouko, J. I did not have the opportunity of seeing any of the witnesses. I noted however that my predecessor observed that PW2 was a young person who both understood the nature of an oath and who was also intelligent. PW2 was not a child of tender age. He was 11 years at the time he witnessed the incident and 14 years old at the time he gave his testimony.

Section 2 of the **Children Act**, the definition section provides:

"**A child of tender years means a child under the age of ten years**"

PW2 was 11 years at the time he witnessed the incident. He was therefore not a child of tender year's both at the time he witnesses the incident and at the time he testified. The case is a serious one and quite apart from carefully considering the evidence of PW2 I have sought for corroboration of his evidence from the testimony of the rest of the prosecution witnesses, even though it is not required.

I considered the defence case and found that there is no dispute that the accused and deceased had a confrontation on the day in question and that they were involved in a struggle in which the deceased was fatally wounded. The accused has claimed self defence as his defence for this case. I will consider whether that defence is available to the accused at a later stage.

PW2 said that he first saw the accused plucking coffee berries. He then saw him sharpening a panga after which he went with it to the house of the deceased and called him out. PW2 heard accused ask the deceased for his axe and that the accused immediately lifted his hand and cut the deceased and proceeded to viciously attack him. The deceased was unarmed and did not fight back whether in self defence or in retaliation.

The evidence of PW2 was that he saw the accused cut the deceased nine times. PW2 said that after cutting the deceased, the accused also cut himself on his hand between the thumb and index finger.

I considered the evidence of the other prosecution witnesses. There was other evidence which supported the evidence of PW2 in material particulars. There was the evidence of PW3 and evidence of PW6, who saw the accused person with the panga, produced in court as a murder weapon Exh.1. These two witnesses heard the accused threatening to kill the wife of the deceased. By the time he was seen by PW3 and PW6, the deceased had already been injured. That evidence supports PW2's testimony that the accused was aggressive on the day in question.

The counsel for the accused in his submission urged that the evidence of PW4 and PW5 was inconsistent and therefore contradictory to the evidence of PW2, PW3 and PW6. PW4 and PW5 said that when they went to the home of the accused they did not find the accused person in the compound and that they never saw him at all.

The evidence of all the prosecution witnesses clearly demonstrates that each of them went to the scene alone and at their own time. None of the witnesses went to the scene in the company of another. I find that in those circumstances the mere fact that each witness saw something different from the other witness does not necessarily amount to contradiction. It is clear that PW4 arrived at the scene but left at some point to look for a vehicle to take the deceased to hospital. PW5 was among the last to arrive at the scene. It is therefore possible that the two witnesses missed the accused by few minutes.

In regard to the details of the injuries caused to the deceased, there was variation between the evidence of the prosecution and that of the defence. The doctor's finding were that the deceased had several cuts, some deep and others open totalling to 10 cuts on the head, arms and on the face. The testimony of PW2, 3, 4, 5 and 6 was that when they saw the deceased he had multiple wounds on his body. The accused defence was that he cut the deceased only once and that he acted in self defence at the time.

The doctors findings at post mortem was that the deceased had 10 cut wounds which he described as some deep wounds and some open wounds. The Doctors finding corroborated PW2's evidence, and indeed that of PW 3, 4, 5 and 6 all who said that the deceased had multiple cut wounds on his body. The accused defence that he cut the deceased only once is a lie.

In **RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226**, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denial which was obviously false. It was held that:

" The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which

he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect. This case, in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holdings, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available evidence."

I am guided by cited case. I find that the accused gave an obvious lie that he cut the deceased only once, when in fact it is proved the deceased had ten cuts. The principle applicable to such circumstances is that an obvious lie will serve as corroboration to the prosecution case. The prosecution adduced evidence which has proved that it was the accused that cut the deceased several times on the material day. His admission that he cut the deceased only once could not possibly be true. I find that the accused cut the deceased at least nine times on his head, hands and hands. The injuries were obviously very deep and severe. I find that by inflicting such injuries, the accused knew that the same could either cause death or grievous harm to the deceased.

The accused put forward self defence that he was attacked by the deceased and that he only acted to defend himself. In **ANTHONY NJUE NJERU vs REPUBLIC CA NO. 77 of 2006**, the Court of Appeal dealing with a similar situation stated as follows:

"**A killing of a person can only be justified and excusable where the accused's action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack**.

I have considered the entire evidence before me, especially the defence, in determining whether self defence is available to the accused. I find that the evidence before court does not show that the accused was averting a felonious attack. I also find that the evidence on record shows that it was the deceased who was in immediate danger as the accused was the one who confronted him and viciously attacked him before he could even defend himself.

The cause of the attack was a missing axe. The accused said the deceased and his wife had taken his axe for 3 weeks apparently without his permission or consent. I do not find that the accused attack on the deceased can be justified on such a ground. The accused had no justification to attack his brother as he did in search of a missing axe. More importantly I find that there was no evidence to suggest that the accused was in imminent danger at the time he confronted the deceased. There was no threat of a felonious attack on the accused by the deceased or any other person at the time of the incident. The accused act was in all the facts of the case excessive, illogical and inexcusable. I find that self defense is not available to the accused in all the circumstances of the case.

I find that the prosecution has proved its case against the accused beyond any reasonable doubt. I am satisfied that the accused viciously attacked the deceased causing him fatal injuries from which he succumbed and died. I find that by cutting up the deceased as he did, the accused knew that the injuries were likely to cause death or grievous harm to the deceased. I am satisfied that the prosecution has proved that the accused had formed the necessary malice aforethought to cause death to the deceased on the required standard of proof beyond any reasonable doubt.

I reject the accused's defence, find him guilty of murder contrary to section 203 of Penal Code and convict him accordingly.

Dated, signed, and delivered this 12th day of May 2011

J. LESIIT

JUDGE