REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR NO. 50 OF 2007

LESIIT J.

REPUBLIC.....PROSECUTOR

VERSUS

Z.K.....ACCUSED

JUDGEMENT

The accused was charged with murder contrary to section 203 as read with section 204 of the Penal code. It is alleged that on the 7th September 2007 at M[...] Village, K[...] Sub-location, N[...] Location, in Meru North District the accused murdered C.K.

This case was heard by Hon. Ouko J. who heard all except the last prosecution case. I did not therefore have the privilege of seeing the witnesses in order to test their demeanor. Nonetheless I have carefully considered the evidence in the case and have analyzed and evaluated it as well as I can in the circumstances.

The facts of the prosecution case are that the accused person is a niece to the deceased because the mother of the accused is a sister to the deceased. The prosecution case was that on the material day at about 6 am A.K., a boy of 12 years at the time of the incident woke up and went to help himself in the latrine. PW1 said that as he returned from the toilet he heard screams. He ran back to his grandmother PW2, P. who is the mother of the accused, to alert her. PW1 was a son of the accused. PW2 P. told him to go and find out whether it was K. screaming. PW1 said that when he went to the scene he found the accused cutting the deceased who was lying down on the ground. He said that even though the accused chased him away, he returned to observe what was going on. PW1 said that he saw the accused persons return to the scene where she picked up a jerry can containing milk and the panga which was the murder weapon. A. said

that the grandmother went to the scene at that time and started screaming.

PW2 confirmed the evidence of A. P. told the court that after her grandson informed her about the screaming he had heard, she went to the scene where she found the deceased already dead and the accused nowhere to be found. She said that she observed that the deceased had cuts on the head and hands. She continued screaming and calling out M.G. who was PW3 and a neighbor.

PW3 was returning from the market when she heard the screams. She called her son and together they went to the scene where she says she found the accused with her mother PW2. She said that she saw the accused ran away but P. just walked towards her. PW3 said that when she walked to where she had seen the accused standing, she found the deceased lying on the ground with deep cuts on her body.

The accused gave a sworn defence. She told the court that at 5 am she woke up and prepared herself to take milk to the market. The accused said that she left her home at 6 am for the market. The accused stated that she met the deceased on the road and that when she greeted her there was no response. That instead the deceased held her and pushed her to the side armed with a panga which she aimed at her. The accused stated that the two of them wrestled each other and she was able to disarm the deceased. She screamed and her mother came to answer the screams and in the process she forcibly removed C. from her and the two of them started fighting. The accused said that her mother (PW2) took the panga and cut the deceased. The accused stated that on the day before the incident she had taken away a cardigan from the deceased and given it back to her mother, PW2, and that her aunt the deceased was not happy about it.

The accused person is charged with murder. The burden lies with the prosecution to prove the case against the accused person beyond any reasonable doubt. The prosecution must adduce evidence to prove that the accused by some act, actuated by malice aforethought caused the death of the deceased.

Mr. Manasseh Kariuki acted for the accused person in this case. In his submissions the counsel for the accused raised issue with the evidence of PW1, and urged that he never witnessed the incident. Counsel urged that from the evidence PW1, 2, 3 and 4, it was dark at the time of the incident and that it raised doubt with the ability of any of the prosecution witnesses identifying the two people alleged to be fighting at the scene. Mr. Kariuki urged the court to find that the evidence of PW 1 was not credible.

Mr. Kimathi learned counsel for the state submitted that the prosecution had proved its case against the accused person beyond any reasonable doubt. Counsel urged the court to find that the circumstances of identification were favourable for correct identification. Counsel urged that the accused in his defence admitted being at the scene of the incident and admitted identifying the deceased and also her mother PW2, at the same scene. Mr. Kimathi urged the court to find that from the evidence adduced by both sides, identification was not an issue.

In **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

"**Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule 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. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."**

The prosecution is relying on the evidence of PW1, a child of 12 years at the time of the incident. Regarding the evidence of children, the court in the case of **JOHNSON MUIRURI VS REPUBLIC [1983] KLR 445** 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."

The above case holds that it is the evidence of children of tender years whose evidence should be corroborated before the court can rely on it to convict. PW1 was not a child of tender age. The Children Act under section 2 defines a child of tender age as "a child under the age of ten years". The evidence of PW1 received support from other evidence implicating the accused with the murder. That evidence is therefore corroborated in all material particulars by other evidence implicating the accused with this offence.

PW1's evidence was that he heard screams as a result of which he ran to his grandmother to report. The grandmother, PW2 told him to go and find out if it was the accused. PW1 said that he ran to the scene only to find the accused cutting the deceased with a panga. PW1 did not say so but the investigating officer told the court that PW1 was the son of the accused. PW2 on her part said that she went to find out where the screams were coming from only to find her sister, the deceased dead, and the accused standing over her. PW3 was going back home same morning after delivering milk to the market. She said that she saw PW2 and her daughter the accused, and that the former ran away while the latter walked towards her. It was when she went nearer that she saw the deceased lying on the ground with serious cuts all over her body.

PW1 said he saw the accused clearly as she cut the deceased. Bearing in mind PW1's evidence that the accused chased him from the scene, I am satisfied that the witness had a good opportunity to see and identify the accused. Besides the accused is his mother and at his age at the time of the incident, I do not find it logical that he could have failed to identify his own mother.

The evidence of PW2 and 3 shows clearly that visibility at the scene was clear. PW3 could make out PW2 and the accused at a distance. I find that visibility at the scene at the time of incident was good for correct identification. Besides, even though the burden lies on the prosecution to prove its case beyond any reasonable doubt, the accused admitted being at the scene at the time the deceased met her death. The defence cannot make an issue of what they have in the same case admitted as that would mean that the defence is approbating and reprobating at the same time. I find the issue of identification does not arise at all in this case.

Each of the prosecution witnesses saw different things and it is important at this stage to determine whether their evidence is contradictory. PW1 was the only eye witness of the attack on the deceased and he implicated the accused for the offence. PW2 went later to find the accused at the scene where the deceased was lying down already severely injured. PW3 came next and merely witnessed the accused running away from the scene; the deceased severely injured lying on the ground, and PW2 walking towards her. I find that these witnesses came to the scene at different times and that therefore what they saw was bound to be different. I find that there was variation in their testimonies due to the said circumstances, but the same did not amount to contradiction or inconsistency.

Mr. Kariuki urged that PW1 ran away from the scene and that therefore his evidence should be treated with suspicion. PWI explained that the day the incident took place was a Friday and that he went to school that day where he arrived at 7am. PW1 was a boy of 12 years and he saw his own mother cutting up his own aunt. Even if he did not explain his conduct to leave the scene that day, it is my view that he had suffered trauma to see such a gruesome act at his age. His conduct is understandable. In any event,

his explanation of why he left the scene is quite reasonable. I do not find the behavior of this witness strange in any way. I find nothing turns on this point.

Mr. Kariuki urged that the defence of the accused was credible because she was able to explain how the deceased met her death. Counsel urged that besides, from the evidence of P. PW2, PW5 G.M., her son confronted her for killing the deceased. Counsel urged that the only reason for that confrontation was because it was P. and not the accused who murdered the deceased.

I have considered the entire evidence and I saw that in cross examination PW2 admitted that her son, PW5 quarreled her alleging that she had killed the deceased. PW5 did not witness the incident and in his evidence he implicated no one for the murder. Even if PW5 quarreled PW2, his conclusion must have been based either on conjecture or hearsay.

I noted that PW2 was arrested and held for this offence.PW6 the investigating officer said that after their investigations he released PW2 because no one implicated her with this offence.

I have perused the record of this case and have found that PW2 was cross examined on the issue raised by the defence. It was not, however, put to PW2 that she was the one who caused the death of the deceased. Neither was it suggested to her that she had not told the court the truth. I find raising such defence at this stage was an afterthought. I find it of no material importance to the case and neither does it assist or advance the defence case.

I will consider the accused person's defence alongside the circumstantial evidence against the accused. In **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** at page 5 the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

Part of the circumstantial evidence against the accused was a skirt and rope recovered from the house of PW2. Mr. Kariuki for the accused submitted that the evidence adduced by the prosecution, the accused left the scene immediately after the incident and never went back home and that therefore the presence of blood stained skirt and rope in the house of PW2 is further proof that PW2 was the murderer.
Mr. Kimathi learned State Counsel, in response submitted that the accused had an opportunity to return to the house of PW2 after the incident. Mr. Kimathi urged the court to remember that the accused was living with her mother, PW2 and further that the blood stained skirt was identified as belonging to the accused.

There was no evidence that the accused went back to her home after the incident. PC Wambua did not give the time he visited the scene or the time of the accused arrest. However the evidence is clear that the accused was arrested on the same day and that the skirt, the rope and the murder weapon were recovered after her arrest.

The skirt was not shown to any witness in court to identify the owner of it. The State made an omission of important piece of evidence. That notwithstanding, it is clear from PW6's evidence that the initial report made to him at the Police Station, when the deceased was being taken to hospital from the scene, was that the accused was the one who had inflicted the injuries on the deceased. PW6 said that one of the reportees was PW2.

The other evidence against the accused was that she left the scene soon after committing this offence. The accused has not denied running away from the scene immediately the offence was committed. The accused offered no explanation for leaving either. She merely said that she left for the market and that she did so after the deceased was injured.

PW6 the I.O. stated that the matter was reported to him by PW2 and other members of public. It is illogical and unreasonable that PW2 could have taken her sister to hospital through the Police Station if indeed she was the culprit. The conduct of PW2 was not consistent with that of a person with a guilty mind. It was the conduct of the accused to leave the scene leaving the deceased for the dead, which was consistent with conduct of a guilty mind.

The accused defence that it was the mother, PW2 who injured the deceased is not supported by the rest of the evidence. There was the eyewitness evidence of her son implicating her. There was the first report to the police in which her name was given as the one who inflicted the injuries upon the deceased. The first report was made while the deceased was still alive. There was the recovery of a skirt said to be hers, the murder weapon, a panga and a rope all found in the house shared by the accused and PW2. The skirt, panga and rope were found to have blood stains matching that of the deceased in group. The blood group of the accused was found to be different from that of the deceased.

The other important evidence against the accused is circumstantial evidence which is the fact the accused ran away after committing this offence. She ran away the moment PW3 went to the scene. There was no other explanation for running away. I find the act conduct of a person with a guilty mind. This conduct taken together with the direct evidence of PW1 and the supporting evidence of PW3; together with the evidence of the blood stained skirt irresistibly points to the accused as the person who committed this offence. I find that there are no other existing circumstances which may weaken the inference of guilt on the basis of the circumstantial evidence established in this case. I find that the circumstantial and direct evidence adduced in this case taken cumulatively forms a chain so completethat there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

Having come to this conclusion, I find that the prosecution has proved the charge against the accused beyond any reasonable doubt. I reject the accused defence, find her guilty as charged and convict her accordingly.

Dated, Signed, and Delivered at Meru this 12th day of May, 2011.

LESIIT, J.

JUDGE