REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR NO. 72 OF 2006

LESIIT J.

REPUBLIC …….....……PROSECUTOR

VERSUS

JOSEPH MWENDA MARANGU …….....……RESPONDENT

JUDGMENT

This is a murder case contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on 21st day of November 2006 at Mwirangombe Village Katheri Location in Meru Central District of the Eastern Province murdered Samuel Muthamia Nguku.

Hon. Emukule Judge heard six out of the eight prosecution witnesses called in support of the prosecution case. The fact of the prosecution case were that the deceased and his wife Nancy Wanjiru PW1 were at home with a child of the accused person and their own children on the material day. At 8pm after the children had gone to sleep, PW1 heard a knock on the door. She heard the accused person saying that he had come for his child. PW1 was making the bed in the bedroom while the deceased was in the sitting room. She heard the deceased open the door and within two seconds he shouted "**Mama Gacheri I have died**" she then heard someone running away. When she went to the sitting room she found her husband lying on the table with a knife protruding from his chest. When PW1 screamed her brother-in-law David Muthuri PW2 who also lived within the same compound ran to their home. Eventually the accused was taken to the hospital where he died the next morning at 10 am.

The accused person was placed on his defence he gave an account of how he spent the day of 18th November, 2006. He said that he had left his child in the home of the deceased who is said to be his brother. At 8 pm he said that he went to his brother's home and knocked at the door and called out he had gone for his son. That the deceased's opened the door and asked him whether that was the time to pick the child. The accused then said that his brother called him a dog and that he went outside the house and hit him with a metal object. He fell down and the accused sat on him. In the ensuing struggle he heard his brother the deceased saying that he had been stabbed. He called the wife out of the house and that he also administered first aid. The accused said that he ran away and slept in the shamba till 9.30 a.m. The following morning because he heard people saying that if one was stabbed they would kill the other. He said that the following day he surrendered himself to the police.

I have carefully considered the entire evidence adduced by both prosecution and the defence. I have also considered the submissions made by MS Nelima for the accused and Mr. Kimathi for the State.

The prosecution is relying on visual identification of the accused and a dying declaration by the deceased given by PW2. Voice identification and circumstantial evidence by PW1 and a confession by the accused

to PW3 the Assistant Chief and PW5. I must start by saying that the accused person did not deny being involved in brawl as a result of which the deceased was stabbed. The accused however contradicts the prosecution evidence of how the incident occurred.

The prosecution case has shown that the accused who was related to the deceased and PW2 a brother of the deceased lived within the same compound. On the material day the accused left his child who was aged 3 years old with the children of PW1. He told PW1 that he would pick his child later. At 8 pm the accused admits that he was the one who knocked the door and announced to PW1 that he had come for his son. According to PW1 within two seconds of the deceased opening the door of their house, she heard the deceased say "**Mama Gacheri I have died**." She left the bedroom immediately and on reaching the sitting room she found her husband lying on the coffee table with a knife protruding from his chest. She then heard someone running away from the scene. PW2 who went to answer her screams said that he met with the accused person running away. He then found his brother with a knife in the chest.

The accused person put forward a defence of self defence claiming that it was the deceased who attacked him because of going late to collect his son.

I find from the evidence of PW1 and 2 that the accused person suddenly attacked the deceased the moment he opened the door of his house to allow the accused collect his son. PW1 who was in the same house said that the attack took place inside their sitting room within two seconds of the deceased opening the house for the accused.

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 denials which were 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".

I find that the accused person's defence that the deceased suddenly attacked him and engaged him in a brawl outside their house was not true and I therefore do not believe that part of his defence. His defence corroborated the prosecution case against him. The burden lies with the prosecution to prove its case against the accused beyond any reasonable doubt. The prosecution is relying on direct and circumstantial evidence. However since the accused does not deny that he was the one involved with the deceased before he died identification is not an issue.

The prosecution has adduced other evidence against the accused. There was the evidence of PW3 the Assistant Chief of the area and PW5 Arnold who was with the Assistant Chief at the time. The following day after the incident the accused went to PW3's home and requested PW3 to escort him to the police. PW3 and PW5 described the accused as having wet clothes and wet shoes and was physically trembling. The two witnesses said that the accused told them that he had slept near a river for fear of mob justice because he had stabbed someone. He asked the two to escort him to the police to ensure his safety. I find that the evidence of PW 3 and 5 was consistent with the accused statement in defence that he had stabbed the deceased. In addition I find that the conduct of the accused person to run away from the scene immediately he stabbed the deceased, to hide in the shamba until the following morning and to surrender to the police the next day was all conduct of a person with a guilty mind.

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."

I do not find that all the circumstances taken cumulatively for a chain so complete as to lead to the conclusion that within all human probability the murder was committed by the accused.

Ms Nelima had urged the court to believe the accused defence that the stabbing of the deceased was an accident and that the knife belonged to the deceased. Counsel urged that from the evidence of the witnesses both the accused and the deceased were friends and there was no known quarrel between them. Counsel urged that in the circumstances malice aforethought is not proved.

Mr. Kimathi in his submissions urged that the prosecution was not required to prove that there was a grudge existing between the accused and the deceased or to prove that the accused had a motive to kill the deceased since these were not required in order to establish malice aforethought. Mr. Kimathi submitted that malice aforethought was proved against the accused because at the time he stabbed the deceased he had knowledge that stabbing the deceased the way he did may cause death or grievous harm to the deceased. Counsel urged that not only did the accused stab the deceased on a sensitive part of the body but he also left the knife dangling from the body.

I have considered the submissions by both counsels. I find that the evidence of PW1 and 2 clearly establishes two important points. The first is that the accused went armed with a knife to the home of the deceased and used the excuse that he had left their son in their home to demand the deceased to open for him. Not only was the accused armed but he also stabbed the deceased in the chest immediately the deceased opened the door. The accused act to arm himself and secondly to stab the deceased in the chest was prove both of premeditation to commit that offence and also prove of intention on the accused part to cause death or grievous harm to the deceased. The second act of running away from the scene immediately he committed this act is further prove that the accused person had not only premeditated the offence but had also carefully calculated the entire act. I do find that the prosecution has proved malice aforethought within the meaning of section 206 (b) of of the Criminal Procedure Code. The section stipulates:-

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(*a*) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(*b*) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

I have also considered the evidence of Dr. Mutuku who produced the post mortem report on the deceased conducted by Dr. Macharia. According to that report the cause of death was cardio respiratory arrest due to penetrating chest injury with fracture of third, fourth ribs and deep laceration on the left lung. The findings of postmortem were consistent with the evidence of PW1 and 2 that the deceased had been stabbed in the chest.

I have also considered the evidence of the investigating officer Chief Inspector Mohammud. His evidence was that he took over the accused from his counterpart i.e. the OCS Kariene Police Station. He said that

he also recovered the murder weapon which was a knife exhibit one. From his evidence it is clear that the murder weapon was also recovered and exhibited in court. That weapon was capable of causing the kind of injuries that were inflicted on the deceased.

Having carefully considered this case I find that the prosecution has proved its case against the accused person beyond any reasonable doubt. I find that the defence of self defence is not available to the accused. Accordingly I reject the accused defence, find him guilty as charged and convict him accordingly.

Dated signed and delivered this 28th day of July 2011

LESIIT, J
JUDGE