



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HCCR. 32 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

JOSPHAT MUTUMA.....1ST ACCUSED
PAUL MUGAMBI MICHUBU.....2ND ACCUSED
WILLIAM MUNJIA MICHUBU.....3RD ACCUSED

J U D G M E N T

The three accused Josphat Mutama, Paul Mugambi Michubu and William Munjia Michubu are charged with murder contrary to section 203 as read with section 24 of the Penal Code. It is alleged that on the 6th day of April 2008 at Kongo Kiama village, Antuambui Sub location, Antuambui Location within Igembe District of Eastern Province jointly with others murdered David Meme.

The prosecution called six witnesses. The facts of the prosecution case was the wife of the deceased, PW1 used to sell chang'aa at her house. On the material day she sold chang'aa to the 1st and 2nd accused who had come to her house in company of the deceased at about 9 pm. PW1 served her husband and the three accused persons with supper which they ate and left. At about 2 am PW1 was woken up by sounds of arguments between the deceased and the accused person. The accused persons were demanding cigarettes from the deceased and threatened him that if he did not give them any cigarettes they would kill him. The deceased was then cut with pangas on the head and the hand. By the time PW1 opened the door to let in the deceased he was seriously injured. He died on his bed. PW1 said that all three accused and the deceased were drunk.

The accused persons were placed on their defence. The 1st accused in his sworn defence admitted that on the night in question he passed by the home of the deceased and PW1 and bought three glasses of chang'aa, which he drunk. He said that while at that home PW1 started a quarrel with her husband. He said that he left immediately he finished his drink and went home. The 2nd accused in a sworn statement denied the charge. He put an alibi as his defence and said that on the 6th April 2008 he was in his house that night and that he never left the house until the following morning. He denied the charge. The 3rd accused gave a sworn statement he put forward an alibi as his defence. He said that he was a shop- keeper and that he sold at his shop that night until 10 pm when he closed the shop and went home. He denied the charge.

I have considered the evidence adduced by the prosecution and also by the defence. I have also considered the submissions made by Mr. Mwanzia for the accused persons and Mr. Mungai the learned

State Counsel for the State.

The accused persons are charged with murder contrary to section 203 of the Penal Code. The burden lies with the prosecution to prove the charge against the accused persons beyond any reasonable doubt. The prosecution has to adduce evidence to establish that the accused acting with a common intention, attacked and seriously injured the deceased as a result of which he sustained injuries which led to his death.

The post mortem report which was P.Exhibit.2 shows that the body of the deceased had deep cuts on the face, a compound fracture on the jaw bones on the right, four deep cuts on both hands with compound fractures of the radius and ulna bones in both hands. The cause of death in the doctor's opinion was the head injury caused by a sharp object.

The issues which arise in this case are those of identification dying declaration and the issue of the alibi defence. On the issue of identification Mr. Mwanzia for the accused submitted that from the evidence of the witnesses there was no source of light and therefore they could not have identified any of the accused persons. Counsel submitted that the conditions of lighting were not favourable for identification. Mr. Mungai for the state urged that the accused persons were properly identified by PW1, 2 and 3 who knew them very well prior to the incident. Mr. Mungai urged that even though it was at night the deceased was screaming and calling out the names of the three accused persons. Counsel urged that PW2 the daughter of the deceased, heard the deceased mention the three accused by name.

The incident took place in the night. According to PW1 she was awoken by noises and the sound of people chasing each other around (outside) her house at about 2 am.

In the case of **Cleophas Otieno Wamunga Vrs. Republic 1989 KLR 424**, the Court of Appeal stated (which reinforces our finding) as follows:-

“The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery CJ. in the well known case of R. VS Turnbull 1976 (3) All E.R. 549 at pg 552 where he said:

‘Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’

There are three witnesses who claimed to have identified the accused persons as the ones who attacked and critically injured the deceased. These are PW1 Tabitha wife of the deceased. PW2 Mercy daughter of the deceased. PW3 Pauline a neighbour of the deceased. According to PW1 the deceased and accused persons visited her home two times on the night of 6th April 2008. The first time was at 10.00pm. when they had supper. The second time was at 2 am when she heard the three accused demanding cigarettes from the deceased and chasing him around the compound of their home. PW1's testimony was that she was attracted to the noise and sound of footsteps as the accused persons chased the deceased around the outer part of the house. PW1 stated that the moment she opened the door and went outside, the deceased entered the house followed by the accused persons. She said that she had left a lamp on within the room and that it enabled her to see what was happening through cracks on the timber wall PW1 said that she saw the first accused cut the deceased on the right lower arm while the 2nd accused stood watching. She then started screaming for help together with her daughter Gloria.

PW2 contradicted herself. Initially in examination in chief PW2 stated that one Edith who lived in her parents' house called her in the night and told her to go and see the people who were killing her father. She said that she went with a torch which she flushed and saw the three accused persons behind

her parents house, cutting her father. In cross-examination PW2 retracted her statement and stated that it was Edith and Pw1 who woke her up from her house and told her the father was being killed. PW2 stated that she did not leave the house after opening the door for PW1 and Edith due to fear.

PW3 the neighbor said that she heard the deceased screaming while mentioning the names of the three accused persons. She said that she walked up to the hedge dividing her compound and the compound of the deceased. She claims that from there she was able to see the 1st accused cutting the deceased on the hand as the deceased tried to block the 1st accused from cutting his head. She said that she saw the 2nd accused cut the deceased on the head as he attempted to escape from them. PW3 testified that she saw the deceased hit the door of his house and that when he entered he was followed by the 3 accused persons. She says that she saw the 2nd accused trying to lift the deceased on the bed and that she noticed he was dead.

In the case of NDUNG’U KIMANYI V REPUBLIC 1979 KLR 282 the court of appeal held as follows:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

The testimony of the three witnesses was so inconsistent as to create an impression in my mind that they were not telling the truth. First of all the three eye witnesses agree that the incident took place at night, at 2 am. Except PW2 none of them referred to any form of lighting outside the home of the deceased where the attack on the deceased began. In particular PW3 gave vivid descriptions of what she saw while standing at the edge of her house which separates her compound from that of the deceased. The distance at which she saw the incident. She gave the distance at which she saw the whole scene as 3 meters. She however did not say whether she had any torch or whether there was any form of lighting at the scene, whether natural or artificial.

PW3 appears to have seen more of the attack than PW1. However, PW3’s evidence contradicted that of PW1 on two material particulars. The first one was where PW3 said that the deceased hit the door for his house before entering. PW2 in her testimony said that she opened the door to the deceased. The other contradiction was the role played by the accused person after they entered the house of the deceased. PW1 said that she saw the deceased enter the house and lay on the bed, and that the 1st accused cut the deceased on the right lower arm while the 2nd accused stood watching. PW3 on her part testified that when the deceased entered the house, she saw the 2nd accused trying to lift the deceased on the bed and that she realized then that he was dead.

From the testimony of PW1 and 3 it is quite obvious that what they claim to have seen at least from the time the deceased entered his house was quite different, and yet there was a lamp that was on inside the house, according to the evidence of PW1. The evidence of PW2 is much more mysterious since she retracted her statement during cross examination.

What is common in the evidence of the three eye witnesses is that the light which enabled the three witnesses to see details of the attack as described in their testimony was neither disclosed nor described. I find that the conditions of lighting at the scene may not have been good for correct identification. The witnesses did not disclose the lighting conditions especially outside the house where most of the attack took place. I am not satisfied that the witnesses were able to positively see and identify any of the assailants. In the case of Augustino Ritho vs Republic CA No. 99 of 1986 the court of appeal held:

“It is trite law that where the evidence is inconsistent or it is contradicted it cannot be relied upon.”

In view of the discrepancies in the evidence of the prosecution and in view of the fact the discrepancies could not be resolved, I find that the evidence of PW1, 2 and 3 could not be relied upon to sustain a

conviction.

There was evidence that the deceased mentioned the names of three people as those who were attacking him. PW 2 and 3 testified that the three people were the accused in court. PW2 retracted her statement during cross examination to the effect that she did not see anything or hear the deceased say anything, because she never left her house after her mother reported the incident to her,. We therefore have only the evidence of PW3 giving the names of the three accused persons as allegedly stated by the deceased.

CHOGE –V- R [1985] KLR pg. 1 the court of appeal held

“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

I am guided by the above case. The issue is whether the alleged dying declaration by the deceased can be admitted as evidence against the accused persons. I find it difficult to admit the alleged evidence of dying declaration for the simple reason that PW3 who alleges to have heard the deceased mention the names of the accused is an incredible witness. She created an impression in the mind of the court that she was not a reliable person and that she may not have been telling the truth. In the circumstances her statement as to the words spoken by the deceased must be treated with extreme caution. This is more so because PW2 who was much nearer to the scene never mentioned hearing similar words. What PW2 says she heard was the accused saying that he did not have cigarettes, a matter PW3 never referred to.

The accused persons have denied committing the offence. Only the first accused admitted that he passed by the home of PW1 and the deceased, and bought some Chang’aa which he drunk. He said that he left the home when PW1 started arguing with the deceased. PW4 an independent witness seems to corroborate the statement of the 1st accused because he confirms that he heard loud noises of insults in the home of the deceased and that when he went there he found PW1, the 1st and 2nd accused and the deceased. PW4 said that the deceased was quarreling his wife and that before PW4 left, the deceased told him to make arrangement to escort PW1 and him to the area chief to resolve their marital problems. Going by the evidence of PW4, the 1st accused told the truth in his defence that we went to PW1’s home but the 2nd accused lied that he was never in that home on the material night.

Considering the totality of the evidence adduced in this case, the prosecution was able to place the 1st and 2nd accused at the scene where the incident took place, but at 10 pm, four hours before the fatal attack on the deceased. The prosecution was unable to place the third accused at the scene of the incident at any time on the material night. The only person who implicated the 3rd accused was PW3 in the alleged dying declaration by the accused, which evidence I found inadmissible.

After carefully considering the evidence in this case I find that reasonable doubt has been created whether the accused persons had anything to do with the murder of the deceased. The evidence of PW5 the deceased brother shows that there was blood within and without the house of the deceased, and all over the compound which gives an indication that the accused was viciously attacked both within and without the house. From the doctor’s evidence, the deceased received severe injuries with deep cuts on the face, two fractures on the jaws, four deep cuts with compound fractures involving the two bones radius and the ulna of both hands. The eye witnesses did not say they saw all these injuries being inflicted on the deceased. The account the eye witnesses gave was only to an injury on one hand. The eye witnesses did not witness the infliction of the rest of the injuries.

I do find that the prosecution did not prove their case against the accused persons on the standard required of proof beyond any reasonable doubt. I therefore give the three accused persons the benefit of doubt and acquit them accordingly.

Dated, signed and delivered at Meru this 27th day of October 2011

LESIIT, J
JUDGE