



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 3 OF 2007

LESIIT J.

REPUBLIC.....PROSECUTOR
VERSUS

GODFREY KIRAGU MUTEGI alias KASUMANI.....1ST ACCUSED
JAMES NKUNJA.....2ND ACCUSED

J U D G M E N T

The accused persons **GODFREY KIRANGU MUTEGI** alias **KASUMANI** and **JAMES NKUNJA** are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 26th day of October, 2006 at Gakoromone Sub Location, Municipality Location in Meru Central District of the Eastern Province murdered **JOHN MUTWIRI**

The prosecution called four witnesses. The prosecution case was that the deceased was attacked by two men outside the timber yard owned by PW3 and guarded by PW1. PW1 identified the two accused as the two men who caused the deceased death.

The 1st and 2nd accused gave sworn defences. They denied the offence and put forward an alibi as their defence.

The accused persons are jointly charged with murder contrary to section 203 of the Penal Code stipulates:

“203 Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

Section 21 of the Penal Code defines what common purpose is in the following words:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

The burden lies with the prosecution to prove the case against the accused persons beyond any reasonable doubt. The prosecution must adduce evidence to show that the accused, acting with one common intention, did an act or omission which led to the injuries which in turn caused the death of the deceased. There were two eye witnesses, PW1 and 3. P W1 was guarding the timber yard belonging to PW3 when

he heard a sound like of a gunshot. He had to climb up the gate to see outside. PW1 described the lighting at the scene. He testified that there was an electric light 40 feet away from where he was outside one Mutwiri's building. PW1 testified that there was also moonlight. PW1 said that he first saw two people struggling and the one now deceased in this case asked the other 'Is it me you are stabbing with a knife Kasumani?'

PW1 said he did not know anyone by the name Kasumani. The deceased fell down and his attacker ran away. PW1 said that another man came with a white dog and started whipping the deceased until he started bleeding, then he left. PW1 stated that the man with a white dog came back after 30 minutes. He said that he had a slasher, jacket and that he recognized him then as the 2nd accused. PW1 said that upon seeing the incident, he woke PW3 up who also came to the gate and climbed. PW3 warned him not to interfere or open the gate.

PW3 in his evidence said that when PW1 woke him up, he saw two youths cutting up a person. He could not recognize them at the time. He went to the gate and climbed over and that when he recognized them as Nkunja, identified as the 2nd accused, and Asumani whom he identified as the 1st accused. PW3 said that he also recognized the white dog which he said followed the 2nd accused everywhere.

I have considered the evidence of PW1 and 3 and find inconsistency in their testimony. PW1 saw most of what happened to the deceased. By the time he called PW3 to see, there was nothing to see going by his testimony. PW1 said that all PW3 saw was the deceased lying outside. Yet PW3 said that he saw the two accused cutting up the deceased and claims he was able to recognize them.

According to PW1, the attackers were not together at any one time. He first saw a person he did not identify struggling with the deceased just before the deceased called out name Kasumani and asked him why he stabbed him. He then saw a man with a white dog but had no opportunity to see and identify him. Thirty minutes later PW1 then saw a man with a white dog whom he identified as the deceased. It is clear that at the time he saw and identified the 2nd accused, he was just walking passed the scene with a slasher, jacket and gum boots.

The burden lay with the too prove the charge against the two accused persons beyond any reasonable doubt. The evidence of PW3 could not be true. He saw the deceased after he had been injured and left for the dead outside his sawmill. His evidence contradicted that of PW1 as I demonstrated herein above. Even if I was to believe his evidence that he saw the deceased being cut up, whatever he saw he was alone. His evidence was that of a single witness. The circumstances of identification were difficult, as there was only one source of light 40 meters from the scene. I find that due to the circumstances of identification the evidence of PW3 needed corroboration.

In the case of **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 issue is whether PW1's evidence can provide the needed corroboration. It is my view that it does not. For one, at the time PW3 was looking out, PW1 did not look out and therefore he cannot have seen what PW3 alleged to have seen. Secondly PW1 did not see the two attackers together at any time. His evidence cannot be used to corroborate PW3's evidence. More important however is the clear evidence of PW1 that he did not identify the man who struggled with the deceased and stabbed him, and who the deceased referred to as Kasumani. He did not identify the second man who whipped the deceased and who had a

white dog. PW1 recognized the third man who passed by dressed in slasher, jacket and gumboots. He identified him as the 2nd accused. That man did not touch the deceased. There is therefore no nexus between the death of the deceased and the 2nd accused. For that reason also, PW1's evidence does not provide any corroboration to PW3's evidence. The evidence of PW1 and 3 stood on its own and is without corroboration.

The accused persons denied being together that day. They also deny being in the scene of attack that night. They also denied seeing or hurting the deceased that night or any other night.

The Court of Appeal in the case of **LEONARD ASENATH VS REP (1957) EA 206** adopted with approval an English decision, **REP VS JOHNSON 46 CR. APP. R. 55[1961] 3 ALL E.R. 969** which held as follows:

“Though an alibi is commonly called a defence, it is to be distinguished from a statutory defence such as insanity or diminished responsibility and is analogous to a defence such as self-defence or provocation. A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer, and it is a misdirection to refer to any burden as resting on the prisoner in such a case.”

I find that the accused alibi defence has not been dislodged by the prosecution case. In the circumstances I give the accused the benefit of doubt and acquit them for the offence charged.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF NOVEMBER, 2011

J. LESIIT
JUDGE