



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 48 OF 2009

LESIIT J.

REPUBLIC.....PROSECUTOR

VERSUS

JAMES NTURIBI.....ACCUSED

J U D G M E N T

The accused **JAMES NTURIBI GACHIATA** is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 23rd day of April, 2009 at Kitheo Location Tigania District within the Eastern Province murdered **JOHN GITONGA MUTURA**.

The prosecution called 8 witnesses however, out of these witnesses there was only one eye witness PW1, Micah, the brother of the deceased. His evidence was that he and his brother the deceased went for a celebration of circumcision of PW2's son at their home. That during that party the accused borrowed his lighter and he refused to return it. When PW1 told his brother about the lighter his brother told the accused that he must return the lighter. That the accused told the deceased not to defend PW1 because if he did he might die in his place. PW1 stated that at 8 pm on their way home he saw the accused hiding with a panga and he warned his brother the deceased before running away. PW1 said that he spent the night in the bush and on the following morning his brother was found dead. The cause of death according to the post mortem conducted by Mr. Macharia was haemorrhage due to a stab on the neck by a sharp object. The doctor found that the deceased had a deep cut on the right side of the neck with severe jugular and carotid blood vessels.

The accused person put forward an alibi as his defence and called one witness. The accused defence was that he spent the night in question at his sister's place. He said he could only remember one name of his sister that is Fridah. His witness Jonathan testified that on the night in question, 23rd April 2009 he spent the night at a macadamia store with the accused. He said the accused did not leave the place from evening and that it was not possible that he committed the offence.

The accused person is charged with murder 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”.

The elements of malice aforethought are established when evidence proves any one or more of the circumstances set out under section 206 of the Penal Code

“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;

(c) ...

(d) ...”

The evidence against the accused person is by a single witness i.e PW1 from his testimony it is clear that the identification was made at night after night fall.

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.”

I have considered the evidenced of PW1 the sole eye witness in this case. The incident he describes took place at 8 pm. It was in the rural area where there is no electricity it also happened in the open field where as he described there were bushes on the side. PW1 testified that the only source of light was the moon light. He also described that he saw the accused person hiding in the bush at a distance. Even though he did not describe at what distance he saw the accused, he made it very clear he never went near the accused. I find that the circumstances under which PW1 saw the accused person were difficult for the correct identification as they were not conducive as they were not conducive for positive identification. PW1 failed to give a proper description of the condition of lighting at the scene except saying there was moonlight it is not clear how bright that moonlight was. Considering that PW1 did not near the accused because of fear of being attacked, given all these circumstances I find that the identification of the accused by PW1 was not safe.

As the judges in **ABDULLAH BIN WENDO VS. REX 20 EACA 166** supra held what is required in this case is other evidence whether direct or circumstantial pointing to the guilt of the accused. I have closely examined all other evidence adduced in this case and found none whether direct or circumstantial pointing to the guilt of the accused. The other evidence was that of PW2 the owner of the home where the party was. She told the court that she did not witness any incident during the party. She also did not mention the people who went for the party except the deceased whom she said that she met on that date. She did not mention any other person she saw. PW3 and 7 identified the body of the deceased for post mortem. PW4 assisted the mother of the deceased to search for the body of the deceased. They found the body in his farm and according to him it was partly eaten by wild animals. PW5 was the doctor who

produced the postmortem form. PW6 and 8 the chief and the police officer who first visited the where the body was testified that they helped to collect the body and to take it to the mortuary.

The accused in his defence denied being at the scene at the time in question. It is however very clear that his witness contradicted him on material particulars. While the accused said that he spent the night at his sister's place, his witness said that they spent the night together in a macadamia store. I find that the accused lied concerning where he spend the night on the material day. He could not even recall the full names of his sister. Given that his witness went further to contradict him I find that he spoke a lie and that he did not spend the night at the place he claimed.

The issue is whether the fact that the accused lied is reason to find him guilty for this offence. I find that from the circumstances of this case even though I believe that the accused lied in his defence, the evidence by the prosecution was not sufficient to found a conviction against the accused. In the circumstances I give the accused person the benefit of doubt and acquit him accordingly.

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

J. LESIIT
JUDGE