



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 10 OF 2008

LESIIT J.

REPUBLIC..... PROSECUTOR

VERSUS

PAUL MULINGE KAZIOKI.....ACCUSED

JUDGEMENT

The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on 21st day of January 2008 at Murera Village, Amwathi II Sublocation Kabachi Location in Igembe District within the Eastern Province jointly with others murdered Justus Njiru.

The prosecution called six witnesses. The prosecution case was that the accused, his brother Peter Kimuchua and three others attacked the deceased, cutting him on the head, hands, legs and the back and left him on the road for the dead. The deceased died at the scene of the attack before he could be taken to the hospital.

The accused gave a sworn defence and called two witnesses, his wife Judy, DW2 and a friend Joshua DW3. The defence case was that the accused was attacked by thugs who included PW5. The thugs robbed him and also cut him on the head. This was on the 17th January 2008. The accused defence was that on the 21st January when the deceased was murdered, the accused was at Maua attending hospital.

The accused is facing a charge of murder. The burden lies on the prosecution to adduce evidence to prove that the accused, together with others, way laid the deceased, cut him up with sharp weapons causing him severe injuries out of which he died. The prosecution must also adduce evidence to prove that the accused had formed the necessary malice aforethought to commit the offence.

The prosecution is relying on the evidence of PW1 who was the sole eye witness in this case. PW1 is a sister or a step sister of Judy (DW2), the wife of the accused. The deceased was therefore the father in law of the accused. PW1's testimony was that she was at home when the accused, the accused brother and 3 others went to their home carrying sharp weapons known locally as c-line. PW1 said that the accused asked her where her father was. PW1 testified that she told him that he was not at home. She said that they then went to her father's kiosk which they broke into, and stole cigarettes and Marera spirit wine. They then went to her brother Henry's house where they took a pair of shoes called Sahara. The five men then left the premises.

PW1 testified that after a short while she heard screams but could not recognize the voice of the one

screaming. She said that she went to the road to see what was happening and she found the accused and his brother Peter, cutting the deceased her father while the other 3 stood by watching. When she started screaming the accused chased her back home PW1 said that she remained there until 11 am.

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 circumstances under which PW1 saw the attackers. It was at 6 am according to her testimony, and it was therefore in broad day light. PW1 knew the accused person before because he was married to her step sister. Unless there was any reason for PW1 to lie against the accused, the circumstances of identification were conducive for positive identification of those who committed this offence. This is more so because according to PW1 she went up to where her father was being attacked, and she claims that the accused chased her away from the scene. She therefore had a good opportunity to see and identify those who attacked the deceased. In her testimony PW1 said she only identified two of the people who murdered her father.

PW2 did not witness the incident according to his testimony. He was asleep in his house when at about 6 am, he heard someone hit the door of his house. He said that he woke up and dressed quickly and found his door open. He said that on going outside his house he saw the accused, his brother, and 3 others walking away. He said that shortly afterwards he heard screams and that he went to the scene where he found the deceased lying on the ground groaning with deep cuts all over his body. PW2 testified that he ran to the home of PW5 and informed him about the deceased because he was a relative of the deceased.

The evidence of PW5 was that he had woken up at 6 am that morning to prepare his children to go to school. He said that at 6.30 am he heard dogs barking and that when he went out he saw the accused and four others carrying long slashers. He said that one of them cut the dog which was barking on the back, and that the dog died out of those injuries. PW5 testified that later on PW2 went to his home and reported to him that he left the accused, the accused brother Peter and 3 others cutting the deceased. PW5 said that he accompanied PW2 to the scene and that they found the deceased already dead with his head divided into two, with a gaping wound on the top of the head.

From the prosecution evidence PW1, 2 and 5 were the people at the scene at around the time the incident took place. PW2 told the court that he did not witness the assault on the deceased, yet PW5 testified that PW2 had told him at the time that he left five people cutting the deceased and named two of them to PW5. PW2 did not come out clean since what he reported to PW5 has been proven not to be true. In addition to this PW2 testified that he had no relationship also ever with the deceased yet Judy DW2 testified that he (PW2) and 5 were her father's brothers.

I considered the evidence of identification given by PW2 and 5. According to PW2 he woke up from sleep when his door was hit open and that when he went out to check he saw five men walking away. He said he identified two of them as the accused and the brother to the accused. These people were walking away when he saw them. It was at 6 am and depending with the season, it was day break. Considering that PW2 saw these men as they were walking away, and considering none of them turned back or spoke to him, he saw their backs. PW2 did not say how he was able to recognize the two. PW2 did not describe any feature that could have enabled him to ascertain that the people he saw that morning were the accused and his brother. That identification was not cogent and cannot be said to be reliable. PW2 did not see those people again that morning.

PW5 also saw five men walking away. He must have seen only the back sides of these men. The only description that PW5 gave of the five men was that they were carrying long slashers. PW5 did not describe any other thing concerning the men. He did not disclose what about any of them enabled him to be certain that it was the accused and his brother he saw walking away. The quality of identification by PW5 was equally poor because he only saw the back side of the five men. He has not adduced any evidence that will form the basis of a finding that his identification of the accused was beyond reproach.

There was a contradiction of the possible time the attack occurred in the evidence of PW2 and 5. According to PW2 it was at 6 am but according to PW5 it was after 6.30 a.m. More importantly there was nothing in the evidence of PW5 which could have formed a nexus between the people he saw walking away with slashers and the death of the deceased. Merely carrying slashers in the village is not proof that the people had bad intentions. The carrying of slashers is capable of an innocent explanation. It cannot be said that the five men seen by PW5 were the same ones who murdered the deceased. According to PW2 none of the five men he saw that morning were carrying any weapons. In light of the inconsistency in the evidence of PW2 and 5, and in view of the lack of nexus between the five men seen by these two witnesses and the murder. The evidence of PW2 and 5 is incredible. In totality the evidence against the accused persons is only that of PW1.

The other 3 prosecution witnesses were formal witnesses. PW3 and 4 were police officers, while PW6 was the doctor who carried out the post mortem on the deceased. PW3 received the report of the murder from PW2 and 5. He visited the scene with other police officers and collected the body and escorted it to the mortuary.

PW4 was an Administrative Police Officer, Senior Sgt Ali. According to PW4 the accused surrendered himself to him on the 31st January 2008, ten days after the murder of the deceased. PW4's testimony was that one week before the accused surrendered to the police, he saw him with a heavy bandage on the head, which appeared fresh. The accused was at the time in the company of the OCS Mutuati. PW4 testified that the accused and the OCS had gone to the D.O.s office, and that at the time the accused filled a formal complaint against a son of the deceased. PW4 stated that the accused left in the police vehicle in the company of the OCS and that the accused was not under arrest. PW6 the doctor concluded that the cause of deceased death was haemorrhagic shock due to multiple cuts. The body had multiple cuts all over the legs neck, hands, head shoulders and back. The doctor stated that the body was pale due to excessive blood loss.

The accused put forward an alibi as his defence. The accused in his own statement testified that he was attacked by thugs who included PW5, on the 17th January 2008. He stated that he had to call his wife from home to take him some money and also escort him to hospital which she did at 8 pm that day. The accused has produced medical notes of his treatment as defence exhibit 1. Those notes show that the accused was seen by a doctor at Maua Hospital at 9.10 pm on the 17th of January, 2008. The notes also show that he had a big cut on the forehead measuring 10x5x3 cm. The accused stated further that he and his wife slept in a lodging on the night of 17th. That on the 18th he went and reported the matter to the police and then went home. He was at home on the 19th. That on the morning of 20th he felt very sick and he called his friend Joshua DW3 who escorted him to the hospital. He produced an official receipt for hospital charge. He said that since it was late he and Joshua slept at Maua Town on the night of the 20th.

The accused stated that he was supposed to go back to the hospital the following morning for an X-ray. The accused stated that he and Joshua were preparing to go back to the hospital when his wife called him and gave him the sad news of the murder of his father in law. He said he abandoned the hospital and decided to go back home. He that when he reached at Mutuati Market he found his wife and children there crying. That is when he came to know that the brothers of his wife had burnt down his house and had also cut down miraa trees. His wife, DW2, also reported to him that the villagers were saying that it was he, the accused who committed the murder with others.

In the case of **UGANDA v. SEBYALA & OTHERS [1969] EA 204**, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his

lordship observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

The accused does not have any evidential burden to prove that his alibi is true. All that is needed is to shake the prosecution case against him. I have carefully considered the evidence adduced by the accused in support of his alibi defence. The accused gave a sworn statement. His statement was supported in all material particulars by the evidence of his two defence witnesses. His wife Judy, DW2 and Joshua DW3 both corroborated the accused alibi. DW2 confirmed that the accused was seeking treatment in Maua Town, far from the scene of the incident, both on the night before and in the morning the incident took place.

DW3 corroborated the accused alibi by confirming that he was in fact with the accused from the evening of 20th January, the night before the incident, upto the morning of the incident at Maua, several kilometers from the scene of the incident.

I took the evidence of all the witnesses in this case both by the prosecution and the defence. They were all impressive witnesses except that the witnesses for the prosecution have been caught lying about mundane facts, like relationships with the deceased. In any event the prosecution case hangs on the evidence of one witness, PW1.

In regard to PW1 it has been shown that she was a step sister to the wife of the deceased. It has been shown by the defence that the land where the accused, his wife and their children were living was given to them by the deceased. PW1 in cross examination asserted that Judy DW2 was her sister sharing both father and mother. There was no independent evidence to confirm the relationship between PW1 and DW2. whether they were sisters or step. Nonetheless they shared at least one parent I considered PW1's testimony that she witnessed her father being cut by five men, two of whom she recognized. Yet her testimony was that after she was chased from the scene she went back home and remained there until 11 am, or thereafter, when police arrived. It is difficult to imagine that knowing she was the sole eye witness to the incident, as there was no one else at the scene except the attackers that PW1 could stay put and not make any attempt to report the incident to any person, not even the authorities. It is clear PW2 and 5 lived very near to the home of the deceased. Even if she did not want to go far, PW1 could at least have gone to the neighbours, PW2 and 5 or others nearby to report the incident.

The only conclusion I can make of this glaring strange conduct of PW1 is that it was unusual that she stayed five hours at one spot knowing fully well that her father had been seriously attacked by people well known to her. I do not believe that PW1 was telling the truth. I find that her credibility is questionable. It may well be that there indeed existed a grudge between her, mother and the wife of the accused as the defence case alleged.

It is instructive that Judy stood by the accused her husband even after he was charged with this offence. In addition to that the accused defence received independent corroboration from DW3 who had no relationship whatsoever with the family.

I did consider the evidence of Senior Sgt Ali PW 4 whose evidence supports that of the accused that indeed he had a wound and a big bandage over his forehead. The doctor's notes, defence Exhibit 1 proves that the cut wound was 10 cm long 5cm wide and 3 cm deep. It was a serious injury inflicted five days prior to the murder. PW4's testimony corroborates the statement of the accused, and the evidence of defence witnesses, that the accused had a serious injury on his head and that he not only received treatment for it but also reported it to the police.

The accused has put forward a claim that there was an existing grudge between him, PW2, and PW5 prior to this incident. As against PW2 the accused stated that he rented miraa plants from him but that he was not allowed to harvest the same. That question was put to PW2 in cross examination by Mr. Kaumbi for

the accused. PW2 admitted that he rented his miraa to the accused but insisted that he allowed him to harvest the miraa for the period they had agreed. As against PW5 the accused stated that he was the one who injured him with others as they robbed him of his money and personal effects on the 17th January, 2008. PW5 was however not cross examined on that point. That question was however put to PW5 in cross examination. All in all the prosecution's case does not establish a motive for this attack if the accused had any grudge according to PW2 and PW5, it was against David, the deceased's son and Richard PW5's brother.

Having heard both sides, and having carefully analysed and evaluated the evidence adduced before the court, I find that the prosecution has failed to prove the charge against the accused beyond any reasonable doubt. I find that the evidence of identification by PW2 and 5 was very weak and unreliable. On PW1's part I did not believe her evidence that it was the accused who committed the offence. I find the alibi defence put forward by the defence shook the prosecution case against him in terms of identification and the lack of credibility of the prosecution witnesses. I therefore give the accused the benefit of doubt and acquit him for the offence charged accordingly.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF NOVEMBER, 2011

**J. LESIIT
JUDGE**