



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HCCR NO. 23 OF 2006

REPUBLIC.....PROSECUTOR
VERSUS

ZAKAYO M'RUKARIA KAMAKIA.....RESPONDENT

JUDGMENT.

The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that the accused on the 28th March, 2006, at Uruku Location in Meru Central District, within Eastern Province the accused murdered GEDION MWENDA.

This case was started by Hon Ouko J. who took the evidence of the first three witnesses. I then completed the case after taking direction under section 201(1) of the Criminal Procedure Code.

The prosecution called eight witnesses. There was no eye witness of the incident, but there was voice identification by one witness. The incident took place between 7 and 8 pm on the 28th March, 2006. It was therefore after dusk.

The prosecution case is that the accused and the deceased were seen together outside the shop of Francis Guantai, PW1, said that the accused came first with a group of others and did some purchases. That after the accused and his group left, the deceased came with another group, took change of Ksh.50/- and also left the shop.

PW6 a civic leader from the area said that he had passed by PW1's shop where he found the deceased talking with Guantai. He noticed that the accused was standing alone across the shop. He went away and after thirty minutes he heard a commotion on the road. But when he went out to check, he found the deceased lying in a pool of blood. The accused was not there but he assisted in arresting him the same night. PW6 was in the company of the Area Chief PW4, the Investigating Officer PW8 and others at the time the accused was arrested. PW4's testimony was that the accused was not at his house when he went searching for him.

PW4 said that they found the accused under the bed in his brother's house. The brother was PW1, the shop owner. At the time the accused was pulled out from under the bed of his brother PW1, PW1 and his wife were sleeping on top of the bed.

PW5 in her testimony said that she was outside her home tying her cow between 7 and 8 pm on the night in question. Her testimony was that she heard two people talking. She said that she could recognize the voices of the two men as the accused and the deceased, and that they were talking only 20 meters from

where she was. PW5 testified that the two men were near PW1's shop, which is 20 meters from her shamba. She said that she heard the deceased ask the accused **"Say if its money you want"**. She said that she heard the deceased reply **"I do not want money. I want to kill you"**

PW5 said that soon thereafter the two started a quarrel which took 20 minutes. She then heard blows as the two of them fought. PW5 said that they fought for 10 minutes then there was silence. She then decided to go back to her house. She said that 20 minutes later she heard PW7, the wife of the deceased, screaming. When she went out PW5 said that she found the deceased lying outside PW1's shop. PW5 helped to return PW7 to her house and to calm her down.

PW8 was the Investigating Officer, CI Mohamud. He said that he received the report of the death at 11.30 pm on the same day. PW8 said that he proceeded to the scene where he found the body of the deceased with a deep cut on the head. He collected the body. PW8 said that he arrested the accused the same night of the incident, at his brother's home. PW8 told the court that he took the accused person for mental assessment. PW8 received the report which is Exhibit 2, signed by Dr. Njuguna the Psychiatrist, Meru Central District Hospital, dated 4th April 2006. This was a week after the incident. The doctor's opinion was that the accused person was abnormal, not fit to plead, and required treatment.

CI Mohamud testified that when he brought the accused to court, the judge ordered that he should be escorted to Mathare. PW8 testified that he escorted the accused person to Mathare Mental Hospital where he was admitted. PW8 testified that he collected the accused from Mathare Mental Hospital on the 13th March, 2007. The hospital gave him a report which is Exhibit 4. The report declared that the accused was fit to plead. He was also given the treatment notes on the accused from Mathare Hospital, which is Exhibit3. The accused was then brought for trial.

The accused was brought to court and the charge against him was eventually read to him on the 14th of June, 2007. This was after the AG informed the court that he wished to proceed with the case against the accused under section 163(2) of the CPC.

The accused pleaded not guilty to the charge.

The accused person was put in his defence he gave a sworn statement. In his statement the accused said that on the 28th March, 2006 he was at his nephew's place, one Kimathi where he was taking tradition brew called *Kathoroko*. He said it was between 7 and 8 pm. He said that there were many other people in that compound taking the brew. The accused said that after some time they heard a knock on the door and they were ordered to go outside. He said that they were all arrested and taken to Kariene Police Station. The accused stated that he never saw the deceased the whole of the day in question. He said that he had passed Rubiri Market with a cow he had bought that day. He said that Guantai's shop was along the road near Rubiri Market, and that he greeted PW1 at around 6 pm that evening. The accused said that he reached home at 7pm, took a bath before proceeding to his nephew's place, 15 meters from his house.

The accused admitted that when he was taken for mental assessment he was found to have mental problems. He stated that he always developed mental problems when he took alcohol and that he had been advised to stop drinking.

Murder is committed where a person causes the death of another with malice aforethought. One is said to have malice afore thought when he intends to cause death or do grievous harm to another, even if that other is not the one who is killed. Malice aforethought is also proved if it is shown that the person charged knew that his actions causing death would probably cause death or do grievous harm.

The prosecution is relying on the circumstantial evidence that the deceased and the accused were heard quarrelling by PW5. The same witness heard them boxing each other followed by a deep silence. Twenty minutes later the deceased was found with a severe head injury lying on the ground. The prosecution is relying on circumstantial evidence that the accused was found hiding in his brother's home, the same night of the incident.

The principle applicable when considering circumstantial evidence was discussed in the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)**, at page 5 where the learned Judges of the Court of Appeal stated:

“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.”

The incident took place between 7pm and 8pm. It was therefore after night fall. The circumstantial evidence the prosecution is relying on is the fact the accused was heard threatening the deceased with death, then they were heard fighting and soon thereafter the deceased was found wounded. The doctor’s finding at post mortem confirms the cause of death was severe head injury. The report was P. exhibit 1.

The circumstantial evidence relied on by the prosecution was based on voice identification of the voices of both the accused and the deceased by PW5.

In **CHOGE VS REP. 1985 KLR 1**, the court of appeal held:

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In order to rely on the evidence of voice identification, the court must be satisfied that the identification was safe and positive. In order to test and ascertain whether the voice identification was correct, I considered the distance at which PW5 heard the voices she identified. PW5 gave the distance at 20 meters. PW5 explained that the two were her neighbors of many years and that she knew them well.

I also considered the length of time PW5 heard the conversations of the two and the words she heard them speak. PW5 gave details of the first sentences each of them spoke. She then said that they stood quarrelling with each other for 20 minutes before they exchanged blows and fought for another 10 minutes. All these time PW5 was listening to the two without any detraction.

I find that PW5 had a good opportunity to hear and identify the voices of the accused and the deceased. PW5 knew both men very well and had lived with them as neighbors for a very long time. The two witnesses quarreled for 20 minutes which gave PW5 ample time to hear and identify their voices. I am satisfied beyond any reasonable doubt that the evidence of voice identification against the accused was safe, positive and correct.

There was a lapse of 20 minutes between the last time the accused and deceased were heard fighting to the time the deceased was found with serious wounds. I considered the fact the accused was found hiding under his brother’s bed consistent with the conduct of a person with a guilty mind. His brother was on top of the bed with his wife, proof that the two of them were aiding the accused to evade arrest.

I find that the circumstances taken cumulatively 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 am convinced that the prosecution evidence points directly and irresistibly to the accused person as the person who inflicted the head injury on the deceased, and that it is the head injury that caused the death of the deceased.

I have also considered the entire evidence and find that there no co-existing circumstances that would weaken the inference of the accused person’s guilt.

The accused put forward an alibi as his defence, that he was not at the scene where the deceased met his death and that he had not seen the deceased the whole of that day. He said that he was at his nephew’s Kimathi’s place taking a local brew, and that he was arrested alongside many other people by the police.

CI Mahmud, PW8 was the arresting officer in this case, alongside PW4, the area Chief and PW6 a Local Civic leader. These were men of high integrity. They had no grudge against the accused. They gave corroborative evidence that they were unable to get the accused in his house. They said that they found the accused in his brother's house hiding under his bed. I believe their evidence. I find the accused defence that he was arrested at his nephew's place with many others taking a local brew was not true. He was arrested with his brother, his brother's wife and another under the brother's bed. Accordingly I find that the alibi defence is not available to the accused and I reject it.

Finally we have the medical report showing that the accused person was of abnormal mental status one week after the death of the deceased. The accused in his defence stated that he normally got mental illness whenever he took alcohol and that he had been advised to stop alcohol. P exhibit 3 the treatment notes on the accused and P exhibit 4 the report, both from Mathare indicate that the accused had a long term mental illness and was to remain under long term drug prescriptions. I find that the medical documentation on the accused establish that the accused had a long term mental illness. That he was so ill one week after the incident.

The accused was not taken for mental assessment until a week after the incident. There is doubt, in view of the accused medical record, that the accused was insane at the time of this incident.

Having considered, analyzed and evaluated the evidence in this case, I enter a finding that the accused is guilty of murder under section 203 of the Penal Code, but insane.

DATED, SIGNED AND DELIVERED THIS 10th day OF NOVEMBER, 2011

LESIT, J.
JUDGE.