REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 82 OF 2007

LESIIT J.

REPUBLIC……..…….....……..…….. PROSECUTOR

VERSUS

JAMES KAIYUNGI MUGAA…….....…….…..…1ST ACCUSED

PATRICK NTONGAI NYUMOO….....…….....2nd 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 the 26th day of November 2007, at Kithare Sub-Location, Muringene Location in Igembe District within Eastern Province, murdered Julius Kiyuki Mutuma.

The prosecution called 6 witnesses. The case for the prosecution was that the two accused persons waylaid the deceased near a canteen at Kithare and hit him on the back side of the head with a *Silai.* Both accused personsleft the deceased lying on the ground and bleeding profusely.

Both accused gave sworn statements. The two accused admitted that they were together that day but denied seeing the deceased or having any encounter with him as alleged. Both accused put forward an alibi as their defence however they admit that they were at t the canteen at the Market Centre at the same time that the incident is alleged to have taken place.

The accused persons are facing a charge of murder. The burden of prove lies with the prosecution to prove the case against the accused beyond any reasonable doubt. The prosecution must adduce evidence to establish that the two accused persons, acting with one common intention, by some act perpetrated by malice aforethought, caused injuries to the deceased which led to his death.

There is one eye witness to the incident. This was PW1, Kendi a woman of 16 years of age. Her testimony was that she was going home from the market and that the deceased was walking ahead going to the same direction. On the way they met the two accused persons at a canteen. PW1 said that she was buying potatoes when the two persons emerged from a canteen and blocked the deceased. PW1 stated that the 2nd accused told the deceased:

"**Wewe leo ulikuwa imeduda miraa na lazima nigawiye kitu kidogo**"

PW1 stated that the deceased protested in Kimeru saying that he did not owe any miraa debt. PW1 testified that as the deceased tried to walk away, the 1st accused blocked him and the 2nd accused hit the deceased on the back of the head with a *silai.* She saw the deceased try to run to his gate but the 1st

accused stopped him. He then tried to run upwards and the first accused overtook him and started waving the slasher he was holding. That it was at that point the 2nd accused cut the deceased on the back side of the head. PW1 saw the 1st accused cut the deceased on the arm near the wrist. PW1 stated that it was at that point that she ran in order to report the incident to the wife of the deceased, which she did.

The prosecution is relying on the single evidence of identification by PW1.

In the case of **Cleaphas 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.'_ ***"***

The defence has challenged PW1's evidence by putting forward an alibi as a defence. That in effect means that both accused persons, even though they admit that they met with PW1 that day, deny that they attacked the deceased at all. It is trite that a case can be proved by the evidence of a single witness. However the court must receive the evidence of identification of a single witness with caution.

I considered that the incident took place at 6.30 pm which means it was still before dusk and therefore in broad daylight. I also considered that PW1 knew both accused before because they come from the same village. Both accused also admit that each of them knew PW1 and that they met her that day. The evidence of PW1 was that of recognition. I considered that no allegation was made of a grudge by PW1 against the accused persons. There was therefore no reason why PW1 would fabricate evidence against the accused persons. I have treated the evidence of PW1 with caution and find PW1 was telling the truth.

There was other evidence against the accused persons and this was by PW5. PW5 testified that she was walking home at about 6.30 pm when she met both accused persons wiping blood from a panga. PW5 stated that she then heard screams coming from the direction where both accused were leaving, and to which direction she was walking. PW5 testified that she quickened her steps and in a short distance she came across the deceased lying on the ground bleeding profusely. She then screamed and PW1, wife of the deceased and other people responded and went to the scene.

The evidence of PW5 was circumstantial evidence that the two accused persons were walking away with a blood stained weapon coming from a direction where the deceased was found lying unconscious with serious injuries. Both accused admitted that they met with PW5 that evening. They did not comment about her testimony that she saw them wiping a blood stained weapon. All they said about her is that she asked them whether they had seen PW1 and one Peter.

Regarding circumstantial evidence, In the case of **ABANGA alias ONYANGO V. REP CR. A NO. 32 of 1990(UR)** 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."

Mr. Omari for the accused submitted that PW5's testimony contradicted that of PW1 for reason that PW5 said that she was alone when the accused persons assaulted the deceased. Counsel urged that PW1's testimony that she was alone when the deceased was attacked by the accused persons was of no value in view of the contradiction.

I have considered the evidence of PW1 and 5 and find that there was no contradiction between the evidence of the two witnesses. Each of the two witnesses had a different encounter with the accused persons and the deceased. PW1 witnessed the assault. PW2 came after the fact and saw the two accused wiping a blood stained weapon coming from the direction where PW5 found the deceased lying injured.

The evidence of PW5 establishes that both accused were seen wiping blood from a weapon at the same time that PW5 heard screams coming from the direction the two accused were leaving.

The fact the accused persons had a blood stained panga and were coming from the direction where screams were heard and the body of the deceased was found, is sufficient for the court to draw an inference that they had something to do with the injury caused to the deceased. No one else was seen at that place. This means that the murderers were the two accused. If they were not, both had a duty to explain what they were doing with the blood stained weapon (silai or panga) at the scene of attack. They denied the incident overtook place.

The evidence of PW2 corroborates that of PW5. PW2 was an eye witness. Taking the evidence of these two witnesses cumulatively I find that a chain so complete is formed which leads to the inescapable conclusion that it was the accused and no one else who caused the death of the deceased.

Both accused have put forward an alibi as their defence In regard to the alibi defence, 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 two accused said they were together. That they met Kendi PW1 and Maritha PW5. However they denied seeing the accused or causing him any harm.

I find that the accused alibi defence does not shake the strong evidence adduced against them by the two key witnesses in this case. The two accused were seen attacking the deceased. They were later seen wiping a blood stained weapon soon thereafter. There is no escaping the conclusion that not only were they at the scene the time of murder and not only did they meet PW1 and 5, but that they also attacked and seriously injured the deceased. He died soon thereafter. I reject their alibi defence in the circumstances.

Section 21 of the Penal Code describes who joint offenders are and stipulates as follows:

"S.21 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 Court of Appeal in the case of **Njoroge vs. Rep [1983] KLR 197,** considered the meeting of

common intention and stated as follows at page 204.

"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.

The appellants and Karuga set out to rob the deceased. All three were armed. Assuming that it was Karuga who killed the deceased with his axe the appellants joined him to dispose of the body by throwing it into a pit but changed their mind and threw it into the bush. Muiruri carried a big stone to throw it with the body into the pit. They brought the body out of the house. They were aiding Karuga in pursuance of a common purpose to rob which resulted in the death of the deceased which was a probable consequence which could necessarily ensue as a result of their unlawful design to rob, and each of them is deemed to have committed the act as provided in section 21 of the Penal Code (Cap 63). Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault Rep vs Tabulayenka s/o Kirya (1943) 10 EACA 51."

The accused were charged jointly for committing the offence. The evidence of PW1 graphically established that the two accused persons acted in concert with one common intention. They both cornered the deceased, 1st accused from in front and 2nd accused from behind. Each cut the deceased, the most serious attack being on the back of the head by the 2nd accused.

I find from the evidence presented by PW1 the sole eye witness of the incident that the two accused had formed a common intention to harm the deceased. The injury which caused death was the one to the back of the head. According to the evidence, it is the 2nd accused who caused it.

I find that both accused were armed during the attack. They aided each other to corner and attack the deceased. Both used the weapon they had. The intention of the two accused can be inferred from these circumstances to be to cause grivious harm to the deceased given the fact both of them had sharp weapons. I find that the intention was either to cause death or grievous harm to the deceased. Malice aforethought is therefor proved beyond any reasonable doubt.

I find that the prosecution has proved its case against the accused beyond any reasonable doubt.

I reject their defences, find them both guilty of murder contrary to section 203 of the Penal code and convict them accordingly.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF NOVEMBER, 2011

LESIIT, J
JUDGE.