



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 75 OF 2005

REPUBLIC PROSECUTOR

VERSUS

HARUN KIMATHI NTOITI ACCUSED

SUMMING UP

This is the summing up of the case to the three assessors who have participated in this trial.

The accused person **Harun Kimathi Ntoiti** is charged with murder contrary to section 203 of the Penal Code. The particulars of the charge are that the accused person on the 26th June 2005 at Maili Saba Market, Kithima Sub Location, Ntumburi Location Meru Central District murdered Roopa Lesirko.

I will first remind you of the evidence adduced by both sides. I will then direct you on the law applicable to those facts. This case was heard in full by Hon. Ouko J. I took over the matter from Hon. Kasango J. who had placed the accused person to his defence. I have therefore only heard the defence case.

The prosecution called a total of 8 witnesses. Of these witnesses, there was only one eye witness of the incident, that is, PW1. His evidence was that at 8pm on the 26th June 2005, he closed the kiosk where he was an employee and proceeded to look for his employer in order to give him the proceeds of the sale for the day. He said that he met the accused person and one Mwitwi beating the deceased with sticks. He said he was within 10 paces from the two and that he was able to identify them facially and also recognised their voices. The other witnesses, that is PW2, 3 and 8 said that they knew nothing absolutely about the case and that they did not witness the incident. PW5, 6 and 7 were police officers who visited the scene of the incident one day later and collected the body of the deceased. They said they took the body of the deceased to Isiolo District Hospital. PW5 PC Kiso said he was present during the post mortem and he identified the post mortem but he did not produce it as an exhibit.

The accused was placed on his own defence. He gave a sworn statement. He denied the offence and said that he had a kiosk at Isiolo Maili Saba where he sold *miraa* on a daily bases. He said that he however never slept in Isiolo but travelled to and from Igembe on a daily basis. He said he knew PW1 because he was selling in a kiosk next to his. He said that on the date in question he arrived at Maili Saba at 11am and that he sold the miraa up to 2pm when he travelled back to Igembe. The accused stated that the case was a publication because PW1 wanted to be left at the kiosks as the only person selling miraa so as to make business.

The accused is facing a charge of murder. Murder is committed where a person causes the death of

another with malice aforethought. One is said to have malice aforethought 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. In this case, the prosecution is relying on the evidence of one witness who is also the sole eye witness of the incident. His evidence is that he saw the accused and one Mwititi beating the deceased at 8pm on the material night. PW1 did not describe the nature or condition of lighting at the scene he alleges he witnessed the accused and the other beating the deceased. It is however clear that by 8pm it must have been dark and unless there was any form of lighting at the scene, it was impossible for PW1 to see and recognise anybody. On the issue of facial identification it is difficult to test whether PW1 could have been able to see and identify anybody since he did not say whether there was any form of lighting at the scene.

PW1 said that he recognised the voices of those who were beating the deceased as the voice of the accused and one Mwititi. He said that he was 10 paces from where the two were beating the deceased. When considering the evidence of voice identification there are certain things you must bear in mind. You must exercise caution because of the extra need of care that the voice heard was that of the person allegedly identified. In order to test the correctness of identification by voice, one has to consider the words spoken and whether they were sufficient to enable a correct identification. It is also important to consider from how long the witness in this case PW1 heard the accused persons speak and the distance at which the words were heard. PW1 said he heard the accused speaking 10 paces from where he was. The actual words spoken were not given to the court. It was important to know how many words were spoken in order to determine whether by hearing those words one could be able to distinctly recognise the voice of the speaker and determine whether it was the voice of a person they know. The words that were spoken were not disclosed. If you find that it is difficult to determine whether PW1 correctly recognised the voice of the accused as that of one of the two people who were beating the deceased on the material day you will return a verdict of not guilty. If however you are satisfied that the accused person was correctly identified you will return a verdict of guilty.

Before arriving at a verdict of guilty or not, you must bear in mind that the prosecution did not produce the post mortem report on the deceased and therefore it is not known what the cause of death of the deceased was and whether it was related to any beatings as narrated in the evidence of PW1.

I called for the post mortem on the body of the deceased after the close of entire case and I will mention here that the doctor after examining the body of the deceased formed the opinion that the cause of death was indeterminate also of interest is the fact that the doctor found no physical injuries on the body of the deceased. I decided to bring that to your attention because by looking at the post mortem one will be forgiven to conclude that the prosecution was concealing evidence when they failed to adduce this post mortem report as an exhibit. You must bear in mind the totality of the evidence before you and determine whether you are satisfied that it was the accused who murdered the deceased and that the cause of death was related to the beatings that PW1 testified he saw the accused inflict on the deceased.

You will also bear in mind the defence of the accused he put forward an *alibi* as his defence that means he was saying that he was not present at the scene where the deceased met his death. The accused person bears no burden of proving that his defence is true. All that is required is for that defence to raise a doubt on the prosecution case. If you find that the accused defence of *alibi* creates doubt in the evidence of the prosecution against him you will return a verdict of not guilty of murder. You will now retire to consider all these issues and when you resume, I will expect an opinion from each one of you.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF DECEMBER 2011.

LESIT, J.
JUDGE