



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 75 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

DAVID CHEGE KIMANI.....ACCUSED

RULING

The accused, **DAVID CHEGE KIMANI**, is on trial for the offence of **murder contrary to section 203 as read with section 204 of the Penal Code**. It is the prosecution's case that on 10th December 2000, at Dagoretti Market, Nairobi, the accused murdered **JOHN MBUGUA MUIRURI**.

By the close of the prosecution case, a total of nine witnesses had given their evidence.

The accused believes that notwithstanding the evidence already tendered, the prosecution has failed to establish a prima facie case, which would warrant his being placed on his defence.

PW 1, SUSAN SAIMO, was the mother to the deceased. She was informed by a neighbour, Baba Sam, that her son had been knifed. **PW 1** rushed to the scene and found the vehicle which was about to ferry the son to hospital. She boarded the vehicle, together with **PW 5** and Chege Nganga, who told her that **DAVID CHEGE** is the person who had knifed the son.

Whilst on the way to hospital, the deceased never spoke to **PW 1**. According to her, the deceased did not have

ability to speak. He died at about 12.00 midnight.

PW 1 accompanied the police to Dagoretti Market, where the incident took place. She later accompanied them to Karen Police Station.

But before going to Karen Police Station, the police were searching for DAVID CHEGE. The search was not successful.

However, five years later, **PW 8** recognised DAVID CHEGE whilst the two of them were serving time at Industrial Area Prison. **PW 1** did not know the accused, and could not have identified him.

According to **PW 1**, the deceased never spoke whilst he was in hospital. She also said that when **PW 8** arrived at the hospital, he found her holding the deceased, as he lay on a bed. **PW 1** testified that he held onto the deceased until he passed on.

It was the evidence of **PW 1** that the deceased did not speak to anyone.

PW 2, DANIEL MUTINDA MUTISYA was a brother-in-law to the deceased. It is he who ferried the deceased from the scene to Kikuyu Hospital.

PW 2 did not hear the deceased communicate with anybody whilst he was inside the vehicle.

PW 2 remained at the hospital until after the deceased passed away. And it was his evidence that the deceased did not speak. He added that if the deceased had spoken, he would have heard.

PW 3, DAVID MARMO MBUGUA, was an older brother to the deceased. He testified that when the deceased was inside the vehicle which ferried him to hospital, he said that a boy had knifed him. However, **PW 3** did not hear the deceased naming the culprit who knifed him.

When they reached the hospital, **PW 3** remained outside.

During cross-examination, **PW 3** said that those who accompanied the deceased in the vehicle which took him to hospital were, **PW 2, PW 7** and Ms. Njeri Chege, his sister. He could not recall if **PW 1** was present in the vehicle, although he did remember seeing her at the hospital.

He also remembered that **PW 8** stayed outside the hospital, with him.

But in re-examination, **PW 3** said that it was possible that both **PW 1** and **PW 8** had entered the ward at the hospital.

PW 4, CHIEF OFFICER JOSEPH OKINDA, was attached to the Industrial Area Prison as at October 2004.

He told the court that **PW 8** was an inmate at that prison during that month. During that time, **PW 8** reported to **PW 4** that he had recognized, amongst the other inmates, a person who killed his brother a few years before that date. **PW 8** said that the suspect had disappeared after committing the crime.

PW 4 called the suspect, who is the accused herein. And it was **PW 4's** evidence that the accused first denied any knowledge of the incident giving rise to this case. However, the accused is reported to have later told **PW 4** that it

was his friend who committed the crime.

PW 4 then escorted the accused to Karen Police Station, where he verified that there was a report of the crime; and also that the police were searching for the accused.

In cross-examination, **PW 4** said that **PW 8** had told him that the crime was committed two years before 2004. But it is instructive to note that **PW 4** also added that **PW 8** was not specific, in that regard.

PW 5, HENRY CHEGE MVUTO, went with the accused to a football match at Ruthimitu, on 10th December 2000. The two of them met the deceased at the football field.

After the match, the three of them went to Dagoretti Market. And because it was raining, they took shelter near a shop.

Whilst still sheltering themselves from the rain, the accused started smoking a cigarette. The deceased then asked the accused to allow him two puffs of the cigarette.

As the accused was passing over the cigarette, it fell down into the mud. **PW 5** then offered to buy another cigarette for the accused. **PW 5** left the accused with the deceased, and crossed the road, to go and buy the cigarette. He bought it and then handed it over to the accused and the deceased. He then went on with his job, of touting.

When he was about 30 metres from where he had left the two, **PW 5** heard screams. He rushed back to where the screams had emanated from, which is where he had left the accused with the deceased; and he found the deceased lying down. The deceased was saying that he had been knifed. But the deceased did not say who had knifed him.

PW 5 got **PW 2** to drive the deceased to hospital. He escorted the deceased in the said vehicle.

According to **PW 5**, the other persons who were inside the vehicle were **PW 2, PW 1, PW 8** and Njeri (who was a sister to the deceased). It was the testimony of **PW 5** that the deceased did not say anything whilst in the vehicle, save to complain of pains.

Once they reached the hospital, **PW 5** remained outside. However he saw **PW 1, PW 8** and Njeri enter the hospital.

During cross-examination, **PW 5** said that he never told anyone about the identity of the person who had stabbed the deceased with a knife. He said that he never told anybody that it was the accused who had committed that act.

Indeed, **PW 5** made it clear that he did not witness the stabbing.

But he knew that the accused was not seen in that area for a number of years since the incident.

PW 6, DR. ZEPHANIA MWANGI KAMAU, was a police surgeon. He examined the accused, and concluded that he was of sound mind. **PW 6** assessed the age of the accused as being 20 years old. And he found no physical injuries on the accused.

PW 7 DR. JANE WASIKE SIMIYU, is a pathologist. She produced the Register of Death No. 931458. After

perusing the said register, the witness said that the deceased died from a stab wound to the chest.

In cross-examination, the witness reiterated that the cause of death was a stab wound to the chest, although she conceded that a post-mortem report would normally have more details than the Register of Death.

PW 8, ROBERT WAMBU MBUGUA, was a brother to the deceased. On the material day, he was having a drink when he heard that someone had been knifed. When he rushed to the scene of that incident, he found that it was his brother, **JOHN MBUGUA MUIRURI**, who was the victim.

PW 8 testified that he was one of the people who escorted the deceased to hospital. And whilst at the hospital, **PW 8** says that he was told by the victim, that it was the accused who had stabbed him. Apparently, the deceased gave the names of the deceased, and it transpired that those were names of a person whom the witness knew well.

About four years after the incident, **PW 8** was in prison custody, having been convicted for being drunk and disorderly. Whilst at the said Industrial Area Prison custody, **PW 8** saw the accused, and he alerted **PW 4** to the fact that the accused was a wanted person, for the reason that he had killed **PW 8's** brother some years before.

PW 8 corroborated the testimony of **PW 4**, about the accused having been taken to Karen Police Station, where the police confirmed that they had been looking for the accused, in relation to the murder in issue herein.

During cross-examination, **PW 8** insisted that the accused did talk to him directly, whilst he sat next to him, on the bed, in hospital. As far as

PW 8 was concerned, the other relatives were about 3 feet away from the deceased.

Having given due consideration to the evidence on record, it is clear that the main thread tying the accused to the incident is that provided by **PW 8**. It is only he who heard the deceased say that he had been stabbed by the accused.

But it is significant that as at the time **PW 8** was with the deceased, at the hospital, **PW 8** was already "*a bit drunk*", by his own admission. In those circumstances, I cannot be entirely sure that even if the deceased spoke, the witness heard correctly.

I cannot be sure that the deceased spoke because his mother, **PW 1**, testified that she was holding the deceased in her arms, until he breathed his last. That implies that she was as close to the deceased as can be.

Of course, **PW 8** said that the other relatives of the deceased were about 3 feet away. That piece of evidence was possibly intended to explain why it was only **PW 8** who heard what the deceased allegedly said.

Of all the witnesses, it is only **PW 4** who was at the scene of crime. But he too, did not witness the actual stabbing. Therefore, there was no eye-witness to the incident.

In the circumstances, the only nexus between the accused and the incident were the words allegedly uttered by the deceased. But nobody other than **PW 8** heard the deceased name the assailant. And because **PW 8** was already a bit drunk when he heard the deceased name the accused, as his killer, I find and hold that it would be unsafe to place reliance on **PW 8's** evidence.

In the absence of the evidence of the alleged ***“Dying Declaration”***, there was nothing else that the accused could be called upon to answer to.

In the event, I do find and hold that the prosecution has failed to establish a prima facie case which would warrant the accused being put to his defence. Accordingly, I find that the accused has no case to answer. The case against him is dismissed. And I order that he be set at liberty forthwith, unless he is otherwise lawfully held.

Dated, Signed and Delivered, this 11th day of March, 2010

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FRED A. OCHIENG
JUDGE