



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 48 of 2006

REPUBLIC PROSECUTOR

VERSUS

HARUN MUTEGI MBUKO ACCUSED

JUDGMENT

The accused was charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 4th July 2006 at Kieni village, in Meru South District of the Eastern Province the accused murdered Alesio Murithi Njagi. The prosecution's case is that the deceased was attacked by the accused together with another person who was not apprehended. At the time of the attack, the deceased was on the way home in the company of PW1 Stella Kagwiria Kathuni. The attack occurred at night. Certainly, after 8 pm which is the time PW1 said that she and the deceased left PW2's bar. The prosecution's case is that the deceased and PW1 crossed over two streams when they met the accused and another person. PW1 had a torch. She stated that the accused held her by the throat. She screamed. The accused threatened her with a sword. PW1 stated that she had known the accused for a long time. He lived across the river away from her. On threatening PW1, the accused was said to have taken Kshs. 10/= from her and her torch. After taking those items from her, the accused is said to have gone to where the deceased was in the company of the other person. At that point, PW1 managed to escape. She proceeded to the deceased brother's home and informed him of the attack. She then went to another bar and from there she was accompanied by two people Geoffrey and Murithi. They went together to the scene. They found the deceased lying down. PW1 did not see any visible injuries. However, later when they arrived home, the deceased begun to vomit blood. He was rushed to hospital where he was pronounced dead on arrival. The matter was reported to the police. PW3 Diana Wambui Murithi is a sister of PW1. She confirmed that PW1 left the bar she was operating in the company of the deceased at 9pm. Although from the proceedings it seems that PW1 on reporting the incident to the police returned to where PW3 was, she did not inform PW3 the names of those who attacked them. PW6 Wilfred Mwiti Njagi was a brother of the deceased. He was informed by PW1 at 11pm that she had been attacked together with the deceased. PW1 informed him that they had been ambushed. They went to the scene in the company of some other people from the bar. He said that PW1 shone her torch at the scene. He noted that the deceased was bleeding from the mouth and nose. The deceased could not communicate. He was taken to hospital where he was pronounced dead on arrival. PW6 stated that PW1 did not disclose the names of their attackers. PW8 was the police officer who drew the sketch mark of the scene. He said that PW1 told the police the names of the attackers. The post mortem report revealed that death was due to severe head injury inflicted by blunt object. The accused raised the defence of alibi. On the material night, the accused said he was at his place of work Nigi Factory where he worked as a night watchman. He had been employed by that factory for two years prior to his arrest for this offence. He denied committing the offence and blamed it on a grudge between him and

PW1. The grudge he said was due to his prior reporting to the police that PW1 was brewing illegal brew.

Whereas the accused has no obligation to prove his *alibi* defence, it ought to be noted that throughout the cross examination of the prosecution witnesses, the accused did not raise such a defence. It was first raised during the defence hearing. That on its own leads me to find that the defence of *alibi* was an afterthought. That as it may be, the prosecution had a burden to prove the case against the accused beyond reasonable doubt. I find that the prosecution failed to meet that standard of proof. The incident occurred at night. The evidence the prosecution relied upon was of a single identifying witness in very unfavourable circumstances. There was no evidence adduced to show that at any time during the attack PW1 shone her torch on the accused. It is therefore not clear how PW1 identified or recognized the accused. In the Court of Appeal case **Martin Mugambi Karindi Vs. Republic** Criminal Appeal No. 76 of 2007 it was stated that identification by a flash light is not safe. The Court of Appeal had this to say:-

“Given that there was no power at the material time, the only light available was that from the torches, when lit, by either the witnesses, or the appellant. There is no evidence of the distance between PW1 and the appellant when the latter is alleged to have flashed his light on the appellant’s face – just as his face-mask came off The sum total of the above is that, in our view, the conviction of the appellant was and still is unsafe.”

Another pertinent case to consider in respect of identification under difficult circumstances is **Richard Magana Irungu Vs. Republic** Criminal Appeal No. 44 of 2001. the Court of Appeal had this to say:-

“In this particular case, the conviction of the appellant was based on the evidence of recognition at night. It is the law that evidence of identification, in unfavourable circumstances especially when it is the evidence of a single identifying witness at night should be tested with greatest care and must be absolutely water tight before it can be the basis of a conviction, see Kiarie V. Republic [1984] KLR 739, Maitanyi V. Republic [1986] KLR 198. In testing the reliability of the evidence of identification at night or in difficult circumstances, it is essential to make an inquiry of such matters as the nature of the light; the strength of light, its size, its position relative to the suspect, etc (Maitanyi Vs. Republic) (supra)”

In this present case, the state counsel did not make inquiry on how PW1 identified or recognized the accused. The fact that there was no such inquiry made makes it unsafe to rely on the evidence of PW1 of recognition. It is also noteworthy that although PW1 said that she had known the accused for a very long time when however she reported the attack to the deceased brother and to her own sister she did not name the attacker. She only informed the police of the name of the attacker the following day when she visited the police station. On the whole, I find that the evidence of PW1 cannot be relied upon to convict the accused on the charge of murder. The evidence of PW1 leaves a lot of doubt of whether the accused committed the offence. That doubt will be considered in favour of the accused. For the reasons stated above, the accused is hereby acquitted of the offence of murder and is ordered to be set free unless he is otherwise lawfully held.

Dated and delivered at Meru this 8th day of October 2010.

MARY KASANGO
JUDGE