



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Cr. Case 20 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

AMOS KITHINJI.....ACCUSED

JUDGMENT OF THE COURT

The enactment and operationalisation of the Statute Law (Miscellaneous Amendments) Act 2007 abolished the role of assessors in murder trials with effect from 15.10.2007.

As a result thereof, I have decided that there will be no summing up in this case hence this judgment. I believe that this decision is not prejudicial to the accused person. The assessors who have sat with me during the trial are forthwith discharged. They are however entitled to payment of attendance allowances incurred to date.

The accused herein was arraigned before me on the 26.4.2006 on one count of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence being that:-

“On the 26th day of March 2006 at Uruku sub-location in Meru Central District within Eastern Province, murdered David Mutwiri.”

The accused denied the charge against him. The prosecution called six witnesses in an effort to prove its case against him. The accused person gave an unsworn statement and called no witnesses. PW1 was Alex Mwangera Mbaabu, a farmer from Kionore village, Nkubu. The deceased herein was his brother while the accused is a neighbour.

PW1 (Alex) testified that on the 26.3.2006 at about 9.30 pm, he was alone in his house taking supper when the accused entered the house and asked for the deceased's whereabouts. That when Alex sought to know why the accused was looking for the deceased the accused retorted by saying that the deceased had abused him (accused) and that as the accused left the house, he (accused) threatened that he would stab somebody with the knife which Alex said the accused was carrying in his right hand front pocket. Alex stated further that about 20 minutes after the accused had left who gentlemen namely Peter Mungathia (PW3) and Peter Muchai (not called as witness) came to the house and informed him (Alex) that the deceased, Mutwiri, had been stabbed, and was lying on the road near the local church. That thereafter, Alex went to the scene in the company of both PW3 and Peter Muchai where they found the deceased lying on the road and unable to speak.

Alex also stated that with the help of other good Samaritans, among them one Muthuri (PW2) the

deceased was taken to Consolata Hospital Nkubu where he was admitted. Alec also said that while at the hospital the deceased told him that it was the accused person who had stabbed him. The deceased apparently succumbed to the stab wounds on the same night that he was taken to the hospital.

During the cross-examination that followed, Alex denied that there was no light in his house by which he could have recognized the accused when the accused allegedly entered the house looking for the deceased, and stated that there was a hurricane lamp burning at the time when the accused who he said was wearing a black jacket, entered the house demanding to know the deceased's whereabouts. Alex also stated that when the accused talked about stabbing somebody that night he did not take out the knife but that Alex could clearly see the shape of the knife that was in the accused's right front trouser pocket. When questioned about his statement to the police, Alex agreed that the statement showed that the accused had gone to his (Alex's) house at 10.00 pm but he said he would not alter the statement though he had told the court in his evidence in chief that the accused had gone to his (Alex's) house at about 9.30 pm. Alex denied that he was a liar and that he had merely concocted a story against the accused person.

PW2 was Joshua Muthuri (Muthuri) a farmer from Uruku. He stated that at about 10.00 pm on 26.3.2006, he was walking from Kiorone in the company of Mungatia (PW3) and the deceased on their way home, until a certain junction where the deceased took his separate path as Muthuri and Mungatia took a separate path. Muthuri also stated that about five metres away from the junction, he heard the deceased screaming and saying he had been stabbed. Muthuri said the night was dark and that the deceased did not say who had stabbed him. That he (Muthuri) and his colleague rushed to where the deceased was screaming from and found him on the ground, alone, but that the deceased told them that it was the accused who had stabbed him. That thereafter Muthuri and Mungatia rushed back to Kiorone to make a report and subsequently, the deceased was taken to hospital but on the following morning Muthuri learnt that the deceased had died.

In his further testimony during cross-examination, Muthuri testified that after he was stabbed the deceased ran for about one hundred metres before he fell down. Muthuri was also questioned about his statement to the police in which he had said that he had heard the accused telling the deceased that if he (deceased) was man enough, then he (deceased) should wait for him (accused). Muthuri also testified that though he could not say who the person was, he heard the running footsteps of a person soon after the deceased had been stabbed. He also testified that Alex went to the scene long after the deceased had been stabbed, though when he went back to Kiorone, he left Mungatia at the scene with the deceased. Contrary to what Alex had said that the deceased was unconscious, when he (Alex) arrived the scene, Muthuri said that the deceased was conscious throughout and that he (deceased) also talked throughout the time they were with him.

PW3 was Peter Mungatia M'Itonga (Mungatia). He stated that on 26.3.2006 at about 10.00 pm, he was at Sydney (Kiorone) market where he had gone for recreation but that just around that hour, he left the market in company of Muthuri and the deceased. He said that a little while after the deceased had taken his path to his home, he (Mungatia) heard the deceased screaming and saying, "I have been stabbed by Amos Kithinji." That as he and Mungatia went towards the screams, he saw the deceased running towards the market, and that he ran for about hundred metres down the road before he fell down. That when Mungatia and Muthuri reached where the deceased was lying down on the road, he told them that he had been stabbed by Amos Kithinji. That while Muthuri kept the deceased company, Mungatia and one Peter Muchai went to inform the deceased's relatives about the attack. Thereafter, Mungatia said they took the deceased to Consolata Mission Hospital at Nkubu through Kariene Police Station.

During his further testimony, Mungatia stated that the night was dark and that he could not see anyone and that he could only estimate the distances. He however said that when he saw the deceased after the stabbing, the deceased was holding onto the left side of the chest where he had been stabbed. He also stated that when he remained behind to keep the deceased company, the deceased was fully conscious though he did not talk the whole while.

PW4 was Bernard Muthoni Magambo (Magambo), a farmer from Uruku village. He stated that at about 10.30 pm, on 26.3.2006, he was asleep in his house when Alex went to the house and informed him about

the attack upon the deceased, and also sought to use his vehicle to take the deceased to hospital. That he helped take the deceased to Consolata Mission Hospital at Nkubu and that while at the hospital the deceased told him that he (deceased) had been stabbed by Amos Kithinji. Magambo also told the court that the deceased was his cousin and that the accused was arrested by members of the public on the morning of 27.3.2006. Magambo also stated that any lapses in his statement to the police were due to the shock he had got as a result of the deceased's death. He also said that while they were at the hospital and after being attended to, the deceased told him that it was Amos Kithinji who had stabbed him. Magambo denied a suggestion by the defence that he was a liar.

PW5 was Dr. Isaac Mwangi Macharia a Medical Officer of Health at the Meru District General Hospital. Dr. Macharia is the one who performed the post-mortem examination on the body of the deceased on the 31.3.2006. According to his report which was produced as P exhibit 1, the deceased had a stitched wound on the lower left side of the chest with a collapsed left lung accompanied by bleeding in the left side of the chest. He also said that the deceased had fractures of the 7th and 8th ribs, a broken diaphragm and a lacerated, left lobe of the liver. The doctor opined that the cause of death was massive haemorrhage. No questions were put to Dr. Macharia in cross-examination.

PW6 was number 230722 Chief Inspector Mohammed Mahamud, the Kariene Police Station OCS. He stated that on the 27.3.2006 at about 10.00 am, while he was in his office at the police station, he received a report of the deceased's murder and further that that the deceased had been stabbed by the accused herein. Chief Inspector Mohamud also testified that after the report was looked by one of his officers by the name Musavi, the two of them proceeded to the scene, but that on the way, they found the accused having been arrested by members of the public. He said they then re-arrested the accused and took him along to the scene of crime where they saw blood stains but were unable to recover the murder weapon. Chief Inspector Mahamud also stated that after interviewing witnesses he recommended that the accused be charged with the present offence. During cross-examination, Chief Inspector Mahumud said that on the 27.3.2006, the deceased had made an assault report as per the record of the Occurrence Book at the police station.

At the close of the prosecution's case, the accused gave a brief unsworn statement in his defence. He stated that he spent the better part of the afternoon of 26.3.2006 at Kamurita market in the company of one Mwit. He stated that as he was going to work on the morning of 27.3.2006 three people accosted him and arrested him and later handed him to the Kariene Police Station OCS. He also stated that he was kept at the police station for one month before being taken to court on the 26.4.2006. The accused denied all the allegations that were made against him.

Mr. Mwanzia who appeared for the accused submitted that the prosecution had failed to prove its case beyond any reasonable doubt against the accused person. Mr. Mwanzia dissected the evidence by all the prosecution witnesses and said that though PW1 alleged to have seen the accused carrying a knife at about 9.30 pm on the fateful night when the accused allegedly went on PW1's house and asked for the deceased, PW1 admitted on cross-examination that he did not actually see the knife. That he only allegedly saw the shape of a knife in the right front trouser pocket of the accused. As regards the evidence of PW2 and PW3 Mr. Mwanzia submitted that that evidence was worthless since both witnesses admitted that they did not see anyone in the darkness of the night after the deceased screamed. As for the evidence of PW6, Mr. Mwanzia submitted that the officer who was both the arresting and investigating officer did not carry out any independent investigations into the allegations against the accused person. Mr. Mwanzia dismissed the whole of the prosecution's case as one based entirely on suspicion alone, and urged the court to find that suspicion no matter how strong cannot form the basis of a conviction, and that the evidence as presented does not displace the defence of alibi put forth by the accused.

Secondly, Mr. Mwanzia submitted that the accused's constitutional rights as enshrined in section 72(3) of the Constitution were violated for the reason that no explanation was given by the prosecution as to why the accused was kept in custody for one month before being charged in a court of law. For this reason, Mr. Mwanzia argued, the accused should be set free on the strength of the Court of Appeal decision in *Albus Mwasia Mutua V R Criminal Appeal No.120 of 2004 (Nairobi)*. Mr Mwanzia urged the court to uphold the provisions of the constitution by acquitting the accused. Mr. Mwanzia also relied on the case

of Gerald Macharia Githuku V Republic Criminal Appeal No.119 of 2004 (Narobi).

Mr. Muteti, Principal State Counsel did not agree with Mr. Mwanzia. He submitted that the prosecution had proved its case beyond reasonable doubt that the deceased's dying declaration was sufficient to connect the accused person to the offence and also to corroborate the evidence given by PW1 (Alex) and further that the dying declaration was repeated to more than one person. Mr. Muteti submitted that no evidence had come forward to show that any of the witnesses could have framed the accused in this case.

Mr. Muteti also submitted that the first report given to PW6 clearly showed that the name of the accused was given as the one who had fatally assaulted the deceased. It was further contended by Mr. Muteti that the evidence of the dying declaration is so clear that it leaves no doubt in anyone's mind that it was the hand of the deceased that was behind the death of the deceased. Regarding lack of investigations into the case, Mr. Muteti submitted that any further investigations by PW6 would have started and ended with the accused person. On the issue of delay in arraigning the accused before court within the stipulated time, Mr. Muteti contended that the complaint came too late in the day of the prosecution to offer an explanation and urged the court to find that the complaint was brought up as an afterthought.

After the evidence and the submissions placed before me only three issues arise for determination; (a) Whether the accused was properly identified on the fateful night as the deceased's assailant, (b) whether the fact that the accused was not arraigned before court within the 14 day limit vitiates the prosecution's case against him and (c) Whether even if the answer to (a) is in the negative, the evidence of the dying declaration was sufficient to positively connect the accused to the death of the deceased.

It is not in doubt that none of the witnesses saw the accused assault the deceased. It is also not in doubt that the deceased was fatally wounded within an hour or so after the accused had allegedly gone to the home of the deceased and sought to know from Alex where the deceased was. Though Alex initially said he saw the knife which the accused had vowed to use to stab someone that night he later said he only saw the shape of a knife. There is also evidence by Muthuri and Mungatia that after they rushed to where the deceased was after he screamed, he (deceased) told them that he had been stabbed by Amos Kithinji. According to Mungatia, the deceased told them "I have been stabbed by Amos Kithinji," while PW4 (Magambo) stated that after the deceased had been attended to by medical staff at the Nkubu Consolata Mission Hospital, and on being asked by Magambo who the assailant was, the deceased stated that it was Amos Kithinji. For the accused he simply said he was not at the scene. There is also no doubt that the accused was not taken to court until after one month from the date of his arrest on 27.3.2006.

After carefully considering all the evidence and the law, I am not persuaded that the accused was properly identified as the deceased's assailant. The evidence on record reveals that at the time of the alleged attack, it was pitch dark. So, how did the deceased know that the accused is the one who stabbed him? It is to be recollected that both Mungatia and Muthuri were only about five metres away from the scene of attack, but none of them said that they heard any verbal exchange between the deceased and his assailant. All they said is that they heard the footsteps of someone fleeing, and that most likely there was a third person at the scene but they could not say who may have been that third person. The courts have held on occasion without number that there is need to test with the greatest care the evidence of identification/recognition especially when the conditions favouring a correct identification were difficult. The courts have also held that in cases where the only evidence to connect an accused person with the crime is the evidence of identification, such evidence must be water tight and that a witness may be honest but mistaken (See Kiarie Vs Republic (1984 KLR 739 and applied in Ali Haji Daudi & Another Vs Republic Cr. Appeal No.237 of 2004 (unreported)). Mungatia stated as follows in part of his evidence during cross-examination:-

"After we parted company with Mutwiri, Joshua Muthuri and I took one way. Before long I heard screams saying, "I have been stabbed by Amos Kithinji." I could not see that night, so I just assumed the distance."

For his part, Muthuri said,:

“Some five metres (demonstrates) from where we had parted company, I heard Mutwiri screaming and saying he had been stabbed. The night was dark. Mutwiri did not say who had stabbed him.”

What is clear from the above evidence is that apart from the fact that the night was too dark for either of the two eye witnesses to identify anyone, there is discrepancy between the testimonies given by Muthuri and Mungatia as to whether the deceased simultaneously gave the name of his assailant with the screams or whether he (deceased) said it later after the two witnesses got to where the deceased had fallen down. If both Muthuri and Mungatia were together, how come they heard different words from the deceased? For these reasons, I find that it would be unsafe to convict the accused on the strength of the evidence. It follows therefore that the evidence of the dying declaration cannot stand even if it is said that it was given to Muthuri, Mungatia and Magambo.

The other issue is whether the 16-day-delay was sufficient to vitiate the prosecution’s case against the accused person. The principles governing an accused person’s constitutional rights under section 72(3) of the Constitution were set out in the *Albunus Mutua* case (above). But the court has also held in the case of *Eliud Njeru Nyaga V R* (Criminal Appeal No.182 of 2006 (Nyeri) that the defence should not ambush the prosecution with a complaint on non compliance with the provision of section 72(3) of the Constitution at the eleventh hour. In that case, a complaint raised by the defence on the morning of the hearing was disallowed. The position is even worse in this case where the complaint was only raised during final submissions. Had the prosecution settled the issue of identification of the accused person without any doubts I would have found it difficult to favourably consider the accused’s complaint of delay since the prosecution was not given adequate time to provide an explanation for the same.

In the result, I find and hold that the prosecution has not proved its case beyond any reasonable doubt against the accused person. I therefore find him not guilty and acquit him accordingly. Unless otherwise lawfully held, the accused is to be released from prison custody forthwith.

It is ordered.

Dated and delivered at Meru this 18th day of January 2008.

RUTH N. SITATI

JUDGE