



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE 24 OF 2004

REPUBLIC.....PROSECUTOR

VERSUS

JEREMIAH KIIRU NYAMBURA.....ACCUSED

JUDGMENT

The Accused before the court is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap.63). It is alleged that on 5th December, 2003 at Majengo Estate in Thika District within Central Province, he jointly with another person not before the court murdered Simon Kamande Njoki.

The case of the Prosecution rests on identification and dying declaration of the deceased before the witnesses who went to the scene and accompanied him to the hospital. The deceased died on the way to the hospital.

How the deceased met his death has been testified by PW.2 Hosea Ng'ang'a (brother to the deceased), PW.3 James Awandu, PW.4 John Mwaura and PW.5 Stephen Mutheru. All these witnesses were outside a shop along Majengo estate with the deceased at about 7.30 p.m. The deceased then told them he was going to visit his brother-in-law at a place he referred to as garage which was not far from the place where they were.

According to PW.2 after sometime he heard screams and ran towards that direction. He saw the deceased with a stab wound holding his stomach. He was with James (PW.3) and Stephen (PW.5). He saw two persons running away and they gave a chase but they disappeared round a corner. He saw the Accused when he looked back running from a distance of about 60 to 70 meters. According to him the incident occurred at a distance of 300 meters from the place they were standing. He was emphatic that there was lighting at the lodgings and path was lighted and that the lights were illuminating the path and he could see the Accused from those lights. He also knew the accused before the incident.

After they were unable to catch the Accused, they came back to the scene and took the deceased to hospital in a taxi and on the way the deceased disclosed the names of his assailants which were 'Coco Tea' and 'Junior'. 'Coco Tea' is the nickname of the Accused. The deceased was coherent and was audible though he was in pain. This witness also disclosed that there was a dispute between the Accused and the deceased as the latter had helped in having the Accused being arrested on an incident of fire at his friend's place. This happened about nine months prior to the incident of stabbing herein.

PW.3 testified that within 15 minutes from the time the deceased left them, he heard the screams of the deceased asking for help. They all rushed to the scene and he spotted two young men at a distance of about 20 yards who ran on seeing them approaching. He had seen both of them earlier when they were standing outside the shop and he identified them by their clothing. He also reiterated that the deceased gave their names while they were taking him to the hospital in a taxi. He heard him properly. He also said naturally that the deceased was in pain and gasping for breath. He denied having any grudge against the Accused and none was suggested or specified by the Defence.

PW. 4 only stated that on hearing screams he ran to the scene and saw that the deceased was stabbed. He saw two persons running away but did not identify anyone. He however stated that as he was in front of all others, the deceased gave him names of his assailants and then he saw the two persons running in the light of the shop. He did not go in the taxi but followed them to the hospital where the deceased was declared dead.

Lastly, PW.5 stated that after the deceased left them he heard screams for help from the deceased and that he told that he was attacked by two people whom he saw running and escaping into a corner. He also stated that he saw them running away from lights from shop and road. This witness did not name any assailants. He confirmed the position of lighting in the area. In cross-examination however, he stated that the deceased gave names of assailants after they came back to him when their chase was unsuccessful. He testified further that he did not recall whether John (PW. 4) overtook them. He emphasized that there was a dark alley at the corner.

PW. 8 PC David Mwendu in his cross-examination corroborated the lighting situation at the scene. He said that the path is lighted as one approaches the trading centre and that the scene was at a distance of 15 meters from the shops and that it was possible to see someone running from the scene by a person if he is at the scene.

From the evidence on the mention of the dark alley it has come out clearly that till that corner, there was lighting and once a person enters the corner alley it was dark. That could be the reason why the chase was unsuccessful as none of them would have dared to go into a dark alley seeing that the deceased was stabbed. This fact is amply corroborated by evidence of Dr. Jane Wasike who after performing an autopsy on the body of the deceased formed an opinion that the cause of death was a penetrating chest injury consistent with sharp object.

The Prosecution has thus proved the death of the deceased and also the fact that it was not a natural death but one caused by an infliction of injury. The Accused was arrested the next day by people who were with PW.1 Peter Waweru Ng'ang'a, another brother of the Accused. PW.1 was informed by someone about the whereabouts of the Accused and he with his friend Daniel Muringe (not before the court) and all the aforesaid four witnesses went to a place at Majengo where illicit brew was being served. There they arrested the Accused with two other persons and took them to Thika Police Station where they were rearrested.

Other witnesses i.e. PW.2 to PW.5 also testified similarly. However, there are discrepancies in their evidence as to descriptions of the knife which was recovered from the Accused as well as other items which are stated to have been recovered from the Accused.

PW.1 stated that he recovered only a knife whose blade was around 10". It was recovered from the waist pocket of Accused's trousers and its sharp side was inside the pocket. He stated that he kept the knife until they reached the police station and then handed over the same to Police Officers. PW.2 stated that the knife recovered was a small knife and was very sharp from both sides. He further stated that bhangis and some drug tablets were also recovered. The knife was recovered from his waist and other items were recovered from his pockets. The knife was held by him but at the Police Station he gave to PW.1 who handed it over to the police. As per his evidence, PW.3 stated that the knife was hidden at the waist of the Accused and other two items were recovered from his pockets.

PW.4 described the knife as one with a sheath and leather handle. He is the witness who was shown

and identified the knife and sheath, which according to him looked familiar. The knife was removed from the waist of the Accused.

PW.5 identified only the knife (Ex.1) by stating that when PW.1 removed it he only saw the knife and not the sheath (Ex.2). He stated that the knife was held by PW.2 but PW.1 gave it to the police on reaching the police station.

The Accused in his unsworn statement stated that on the material date he worked up to 5 p.m. selling fodder at Majengo. Then he went to Gangwa Estate which is at a distance of 5 k.m. At 7 p.m. he went to Thika Arcade and boarded a matatu. At 7.30 p.m. he was still in matatu and reached his stage (he did not mention its name) at 7.35 p.m. and went home to sleep. The next day he worked up to 4.30 p.m. and went in a shed to rest where he was joined in by two persons whom he did not know. After a while he saw a group of ten men coming towards them who were armed with pangas. They were asked who amongst them were 'Coco Tea' and 'Junior'. No one knew and then they were tied and taken to the police station. He was then arrested by the Police and later charged with this offence.

Mention of those two names by the Accused is very relevant and in my view it corroborate the testimonies of the prosecution witnesses who had testified that the deceased before dying gave those two names as the names of his assailants. All these witnesses have testified further that they knew the Accused prior to the incident.

The way the Accused has been very exact about the timings of his boarding and alighting a matatu without giving name of his destination makes his statement unworthy of any credit. He also stated that he worked at Majengo and thus I am inclined to believe the testimonies of the Prosecution witnesses that they knew the Accused as well as Junior who is not before the court.

I have also considered the discrepancies about the knife and items recovered from the Accused. I first of all note that the knife was recovered the next day from the Accused and not from the scene. Thus in my view its recovery or description is not very material. I only consider one fact that a knife was recovered from the Accused. I can only rely very comfortably on the evidence that the Accused was stabbed with a sharp object on the material time and died due to such injury almost immediately after the assault.

The only issue to determine now is whether it was the Accused with another not before the court who were at the scene and the deceased was assaulted by them. To determine this issue I have to consider very closely the evidence of identification and dying declaration made by the deceased when his death was imminent. The Court of Appeal in the case of **Choge –v- Republic (1985) KLR 1**, has discussed the law on dying declaration and its admissibility as well as the credence to be given to such dying declaration.

From the evidence before the court, I am of an opinion that the statement made by the deceased to all the persons who came to his aid and who took him to the hospital is admissible as dying declaration under Section 33(a) of the Evidence Act (Cap.80).

I shall quote some passages observed in the case of Choge (Supra) at page 44:

“The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting; and ... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed ... The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (Ramazani bin Mirandu (1934) 1 EACA 107; R –v- Okulu S/o Elok (1938) 5 EACA 39; R. –V- Muyoya bin Msuma (supra). Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, more difficult than in daylight (R. –v- Ramazan bin Mirandu (supra); R. –v- Muyovya bin Msuma (supra). The fact that the deceased told different persons that the appellant was the assailant, is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid)”.

In the case of **Okethi Okale and another –v- R., 1965 (E.A.C.A) 555** the caution to have the conviction solely based on dying declaration has been repeated and the direction given in Okethi's case was approved by the Court of Appeal in the case of **Simon Mbelle –v- R. (1984) IKAR 578.**

However I am also inclined to support the earlier direction given in case of R. – v- Eligu S/o Odel (1943) 10 EACA 90 which the Court of Appeal in Choge's case has also observed with approval:

“Here we repeat what this court said in the case of R –v- Muyovya bin Msuma 6 EACA 128 at 129: ‘We are not prepared to rule that in no circumstances can a conviction proceed upon evidence consisting of a dying declaration, but on the other hand we are prepared to say that a careful direction should be given by the judge as to the nature of such evidence and the caution with which it should be received’ He also directed himself and the assessors as to whether there was any corroboration is desirable, of course, though we do not say that it is always necessary to support a conviction. To say so would be to place evidence on the same plane as accomplice and that would be incorrect”.

The deceased in this case definitely died almost immediately after the attack on him and as per the condition of lighting testified by several witnesses including a police officer, I cannot find that there could be a mistake on the part of the deceased to recognize his attackers. Nothing is shown that the deceased could have reasons to implicate the Accused and another person named by him if that was not the truth. He was audible to the witnesses and all have stated in one word that the two names were given by the deceased when he was in great pain and gasping for breath. Even the Accused in his defence has stated those names i.e. he was asked who were ‘Coco Tea’ and ‘Junior’, however, fell short of stating that neither of them was his name or that he did not know any of the witnesses. He definitely stated that he worked at Majengo the place where those witnesses lived.

All these factors go to give credence to the dying declaration which is testified by the witnesses.

In addition to this fact I have identifying witnesses. PW.2, PW.3 and PW.5 categorically stated that they saw the 1st Accused with another running away towards a corner before a disappeared in a dark alley. PW.2 and PW.5 stated that they saw him when he turned to look back while running. PW.3 also stated that he had seen the Accused earlier and recognized him from his dressing. Thus I have evidence of three identifying witnesses which is consistent on identification. I do not have to reiterate the issue of lighting, which is corroborated by a police officer who stated that it was possible to see a person at the shopping centre from the scene.

Thus in my view, the dying declaration has been amply corroborated by more than one witness who had sufficient opportunity to identify the Accused. The issue on discrepancies on evidence of the knife recovered is, my opinion not relevant, simply because it was found the next day on the Accused and nothing more has come out from its production.

The learned Defence Counsel stressed on the fact that PW.5 had agreed in crossexamination that before coming to give evidence, they had all met, but in the same breath he said that they agreed at the meeting to tell the court what was in their statements which was the truth. It is not on record whether there is any contradiction in his testimony and his statement. Thus I cannot accept the contention from the defence that the witnesses were coached. Nothing is shown to make them not to tell the truth or to make them lie under oath. The minor discrepancies in their respective evidence also go to strengthen my opinion that they were not coached. I also cannot accept the submission that the deceased could have given the accused's name on his death bed because of the disagreement or dispute between him and the Accused, while I can take it as a reason for the Accused's attack on the Deceased.

I further state that from the demeanor of all the witnesses, I am satisfied and do find that they were creditworthy witnesses and had nothing to say otherwise. In the premises, I do find that the Prosecution has satisfactorily proved the guilt of the Accused as charged. I thus enter a finding of guilty against the

Accused and convict him of the offence of murder as charged.

For the reasons given, I disagree with the Assessors. As I have no alternative in law, I sentence him to death as per section 204 of the

Penal (Code Cap.63).

Right of appeal within 14 days.

Dated and signed at Nairobi this 20th day of June, 2005.

K.H. RAWAL

JUDGE

20.6.2005