



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
Criminal Case 26 of 2003

REPUBLIC PROSECUTOR

VERSUS

JULIUS WAITITU MUTHUITA..... ACCUSED

J U D G M E N T

Waititu Muthuita hereinafter referred to as the Accused is arraigned before this court charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 11th day of August 2002 at Theri village in Muranga District within Central Province, jointly with others not before the court, he murdered Mary Wambui Makumi.

Eleven witnesses testified on behalf of the prosecution. Briefly their evidence was as follows:

On the night of 8th October 2002 at around 9.00 p.m. Jane Nyambura Makumi (P.W.1) was at her home in Kahati Theri village where she was living with the deceased who was her mother.

At about 9.00 p.m., they all went to bed. By midnight P.W.1 who had a small baby had not fallen asleep as the baby kept disturbing her. At about 12.30 a.m. she saw the light of a torch outside the house. She thought of alerting her mother who was sleeping in a different room, however, before she could do so she heard a loud bang and 2 men entered into her room carrying powerful torches. One of the men got hold of her and pulled her out of the room, whilst the second person got hold of a fork jembe which was used by Julius Waititu Muthuita [2005] eKLR in the room. P.W.1 screamed and the man who had taken the fork jembe pushed her into her mother's room.

P.W.1 heard the man tell her mother that she should swallow the land which has been making her take them to court, so that she could die with the land in her stomach. P.W.1 recognised the voice to be that of her paternal uncle whom she identified as the Accused. She testified that at some stage during the incident she actually saw the Accused with the aid of the torchlight being held by the Accused's colleague. She noted that Accused was wearing a long navy blue overcoat and had a black polythene paper tied on his head like a scarf. Apart from the two men who initially accosted her, P.W.1 stated that there were other men though all were strangers to her.

The Accused hit the deceased with a fork jembe on her head. He then told the other people that they should start the job. All the men then attacked the deceased.

P.W.1 who had been made to lie down kept on lifting her head to see what was happening at the same time screaming.

The Accused went to P.W.1 and threatened to stab her with a knife. In an effort to protect herself, she lifted up her hands and the knife cut her on her right thumb finger. The Accused continued to beat up P.W.1. One of the other men pleaded with Accused not to kill P.W.1 as she had a small baby. One of the

men covered P.W.1 with a mattress and when Accused asked whether P.W.1 was finished he replied in the affirmative. The men then went out taking money, picking some things and breaking others as they left. After some time P.W.1 ran out of the house and sought help from neighbours. She was escorted to Kahatia Chief's Camp by Peter Mwangi Mugo (P.W.2), Bernard Wamugu Kamau (P.W.3) and Lee Gachuria Gichuru (P.W.4). It is noteworthy that P.W.1 did not tell any of these witnesses that she had identified any of the persons who assaulted and robbed her mother.

A report of robbery was made at the Murarandia chief's camp, P.W.2, 3 & 4 were sent to the assistant chief, whilst A.P. Cpl. William Kinyanjui Warui (P.W.11) accompanied P.W.1 back to her home where they found the deceased lying on the floor already dead. P.W.11 deployed APC Haniel Njoka and APC Francis James Kamau to guard the scene and he went back to Kahatia Trading Centre where together with the Assistant Chief they telephoned Kahuro police station and reported the matter.

In the meantime Peter Kibathi Chege (P.W.8) the Senior Chief of Muraria Location was woken up at 4.40 a.m. by P.W.2 and P.W.3 who informed him the news of the robbery. P.W.8 walked from his house to the scene of the robbery. On arrival, APC Francis James Kamau who was guarding the scene heard him approaching panicked and fired his gun accidentally shooting his colleague APC Haniel Njoka. P.W.8 looked for a vehicle and took APC Haniel Njoka to Hospital.

P.C. Evans Waweru Wairi (P.W.9), Inspector David Kimani (P.W.10) and other officers from Ol-Kalau Police Station proceeded to the scene. They noticed the deceased lying in a pool of blood in her bedroom, things scattered in the bedroom and the door broken. P.C. Albert Kiarie (P.W.7) an officer from scenes of crime took photographs of the scene showing the disturbed bedroom and different views of the deceased's body. These were produced in evidence.

On the same morning P.W.1 informed P.W.9 and P.W.10 & P.W.11 that she had recognized one of the robbers as her paternal uncle whom she identified by name as the Accused. The Accused was arrested. Both P.W.1 and former assistant Chief Francis Maina Mwangi (P.W.5), and P.W.8 testified that there was a long standing dispute between the deceased and the Accused's family over the deceased's entitlement to her late husband's share of the family land.

A postmortem examination was later conducted on the body of the deceased by Dr. John Kinyanjui Ndungu (P.W.6) who was then attached to Muranga District Hospital. The postmortem report produced by P.W.6 showed that the deceased had cut wounds on the left knee, forehead, and multiple cuts on the head, she had also a compound fracture on the left temporal bone and a subdural haematoma. P.W.6 formed the opinion that the cause of death was cardio pulmonary arrest secondary to head injury.

The Accused was also taken to Muranga District Hospital where he was examined by Dr. Macharia. The Accused was subsequently charged.

In his defence the Accused gave a sworn statement denying having committed the offence. He testified how on the material night he was asleep in his house with his wife and children. At around 1.00 a.m. he heard some disturbance outside. This included footsteps, a knock on their window and then gunshot and screams. He heard sounds of a crowd outside but did not leave the house until morning when he woke up and went round looking. He saw people looking towards the deceased's home which was about 50 to 60 metres away.

He joined the people and they went to the home of the deceased. Later the assistant chief informed him that there were people who wanted to talk to him. He went and the people introduced themselves to him as officers from Kahuro police station. He was later asked to accompany the police officers and was taken to the police station where he was locked up. Under cross examination he conceded that he was not relating well with the deceased because his family had a quarrel with her over land. The Accused's wife Mary Wangare Njagwa also testified and confirmed that she spent the material night with her husband and children in their house. She swore that they never left the house during that night even though they heard commotion outside. In short the Accused has raised an alibi in his defence and this must be disproved by the prosecution beyond reasonable doubt.

Mr. Wambugu who appeared for the Accused urged the court to reject the identification by P.W.1 as the circumstances were not conducive for a positive identification. He castigated the evidence regarding the arrest of the Accused as unsatisfactory as the evidence of P.w.9 who carried out the arrest, did not tally with that of P.W.1 he questioned why no efforts were made to arrest Simon Muthuita whom P.W.1 also purported to have identified. Finally he submitted that the prosecution made no effort to test the veracity of the alibi put forward by the Accused.

Mr. Orinda Senior State Counsel responded that the identification of the Accused by P.W.1 was reliable as P.W.1 was a close relative known to her. He submitted that the arrest of the Accused was not in doubt and that in any case the evidence of the assistant Chief (P.W.5) throws light as to who identified the person who attacked the deceased. As to the failure to trace and charge Simon Muthuita who was also named by P.W.1, Mr. Orinda submitted that this was not prejudicial as the Accused was charged jointly with others not before the court. Learned Senior State Counsel urged the court to reject the defence as it was far fetched and the evidence of the witnesses clashed in material particular.

The death of the deceased has been amply established. The evidence of P.W.1 that the deceased was attacked and fatally wounded is clearly supported by the evidence of P.W.5, 8, 9, 10 & 11 all of whom visited the scene and found the body of the deceased lying in a pool of blood in her bedroom, with the bedroom in total disarray and the door to the house broken. It is also supported by the evidence of P.W.7, the officer from the scenes of crime who took photographs of the scene including different views of the body of the deceased showing fresh injuries. The evidence of P.W.1 in this regard is also consistent with the evidence of P.W.6 who carried out a postmortem examination on the body of the deceased and noted cut wounds on the left knee, cut wound on the forehead and multiple cuts on the head as well as a compound fracture on the left temporal bone and subdural haematoma leading P.W.6 to the conclusion that the deceased's death was as a result of Cardio Pulmonary arrest due to head injury.

The question is therefore who attacked the deceased and caused her those fatal injuries.

P.W.1 who was present during the assault on the deceased identified the accused person as having been among the gang of 7 people who attacked and fatally wounded the deceased. The Accused however claimed to have been asleep in his house. His wife (D.W.2) also swears that the Accused never left the house that night.

In the case of Wang'ombe v/s the Republic [1980] KLR 149 the court of appeal held as follows:

“When an Accused raises an alibi as an answer to a charge made against him, he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution (or police) ought to test the alibi wherever possible, but different consideration may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution.”

With the above in mind, the alibi raised by the Accused must be considered and weighed against the prosecution evidence, in particular the evidence of P.W.1 who was very certain that she identified the Accused by his voice and also saw him with the aid of a torchlight and visually recognized him.

It is evident that the case against the accused turns on the evidence of identification by a single witness i.e. P.W.1. The danger of relying on the evidence of a single identifying witness cannot be over emphasized. As was held by the court of appeal in the case of **Maitanyi v/s Republic [1986] KLR 198:**

“(1) Although It is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care, the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult.

(2) When testing the evidence of a single witness a careful inquiry ought to be made into

the nature of the light available conditions and whether the witness was able to make a true impression and description.

(3) The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

Bearing the above caution in mind and being guided also by the case of **Mbelle v/s Republic [1984] KLR 626**, where the court of appeal laid down the guideline regarding the evidence of voice recognition as follows:

“In dealing with evidence of identification by voice, the court should ensure that:

(a) The voice was that of the Accused

(b) The witness was familiar with the voice and recognized it.

(c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it.”

I have carefully considered the evidence of P.W.1. She testified that she heard and recognized the voice of Accused as she knew him well, the Accused being her paternal uncle. She testified that the Accused spoke in kiswahili language, which she clearly heard and understood what the Accused said which was to the effect that the deceased should swallow the land which has been making her take them to court, and die with the land in her stomach. It was apparent from the evidence of P.W.1, the evidence of former assistant chief Francis Maina Mwangi (P.W.5) and that of Chief Peter Kibathi Chege (P.W.8) that the deceased had a long standing dispute with her in laws, i.e. the family of the Accused which was denying her the right to inherit her late husband’s share of the family land. This long standing grudge clearly explained the words that were allegedly uttered by the Accused.

P.W.1 was wide awake when the assailants arrived, given that the Accused was well known to her and having clearly heard the voice and what was being said, I find that she clearly recognized the voice and there was no possibility of a mistake. Moreover, P.W.1 was able shortly thereafter to recognize the Accused by face when the light of a torch from one of his other colleagues illuminated him. It is clear that this incident happened at night and that the conditions were not quite favourable for a visual identification particularly because P.W.1 was made to lie down. However P.W.1 explained that she kept on lifting her head and that the torches the men had were very powerful. The incident also took a considerable length of time P.W.1 estimating about 1 hour to the time she escaped. The Accused also did not exercise any caution in trying to hide or disguise his identity as he apparently kept talking and even confronted and beat up P.W.1. P.W.1 therefore saw the Accused well and was able to describe how he was dressed.

It is interesting that P.W.1 did not mention to her neighbours P.W.2, P.W.3 or P.W.4 who were the first persons to give her assistance, that she had identified her uncle as one of her assailants. She did however during the same morning report to P.W.9, 10 & 11 who were police officers that she had recognized her uncle whom she identified by name as the Accused, as one of the persons who fatally injured the deceased. I do not see the conduct of P.w.1 in this regard as contradictory. She was merely being cautious in not alerting her neighbours before the arrest of the Accused. She was wise in reporting the matter to the police officers who could properly act on the information. There was some inconsistency regarding where the Accused was arrested and whether he was pointed out by P.W.1 during the arrest. P.W.1 did not however testify that she pointed out the accused during the arrest. She testified that the Accused was within her home and that she saw him later sandwiched between police officers when being taken to the police vehicle. It is evident that P.W.9 did not speak the truth when he claimed P.W.1 pointed out the suspect to him at the time of arrest. This contradiction does not reduce the efficacy of P.W.1’s evidence as I believe she spoke the truth that she had identified the Accused by name to the officers.

I have weighed the alibi of the Accused against the evidence adduced by the prosecution but find it rather difficult to believe that Accused and his wife could have ignored or slept through the commotion including the shooting of APC Haniel Njoka which was happening just about 60 metres away from his house. Although the prosecution did not make any effort to interview members of the Accused's family with a view into inquiring into his alibi, they had sufficient evidence showing that the Accused was at the scene of the murder at the time the deceased was attacked. I therefore reject the alibi defence of the Accused as untrue. I find that the Accused was indeed identified by P.W.1 both through voice recognition and visual recognition as one of the persons who attacked and fatally wounded the deceased. Given the comments made by the Accused during the attack and the fact that the deceased had a dispute with the Accused's family over her late husband's share of the family land, I find that the attack on the deceased was a premeditated action actuated by the land dispute. I therefore concur with the unanimous opinion of the Assessors and do find the Accused person guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. I convict the Accused of this offence under section 322 (3) of the Criminal Procedure Code.

Dated signed and delivered this 2nd day of August 2005.

H. M. OKWENGU

JUDGE