REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 116 OF 2013

LESIIT, J.

REPUBLIC.....PROSECUTION

VERSUS

STANLEY KAMAU IHUTHIA.....ACCUSED

JUDGMENT

1. The accused **STANLEY KAMAU IHUTHIA** is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are:

> **"That on 26th November, 2013 at Soweto village in Embakasi District within Nairobi County murdered ELIJAH KIMANI MBURU."**

2. The case was started by KORIR, J who heard two witnesses. However due to the importance of their evidence, I recalled and heard the two witnesses afresh. The prosecution called a total of nine witnesses. In chief, the prosecution case was that accused and his friend Muchina went for a drink of chang'aa an illicit brew from PW1 at her house. They picked a quarrel with one Gathoni, wife of deceased as a result of which there was a bitter exchange. The deceased found accused and Muchina and sent them away just as accused picked a quarrel with him over their casual labour. As accused left he threatened the deceased and told him that he would return.

3. The accused returned and called out deceased who heeded his call. They fought physically while Muchina and PW1 watched. The accused then tripped the deceased and when he fell, the accused stabbed him on the chest then ran away. The accused was arrested following day and handed over to PW6, a Police Officer at Soweto Police Station.

4. The cause of deceased death was confirmed to be heart and lung injuries due to penetrating trauma probably caused by a knife. The report was P.Exh.3.

5. The accused was placed on his defence. He admitted going to a chang'aa den for a drink with his friend Muchina on 26th where they drank. The accused stated that when one Gathoni went there and he declined to respond to her greetings, she was very wroth with him and hurled insults at him. He said he left the place and went to sleep. Following day he was arrested. He reckoned that after Muchina was arrested, he implicated him (accused) causing his arrest.

6. Ms. Onunga, Learned Prosecution Counsel and Mr. Masara Learned Defence Counsel made no submissions after the close of both the prosecution and the defence cases.

7. The accused faces a charge of murder contrary to **section 203** of the **Penal Code**. The evidential burden lies with the prosecution to adduce sufficient evidence of standard beyond any reasonable doubt to sustain a conviction against the accused. The prosecution should prove, **(a) That the injuries the deceased suffered were caused by accused (b) That the injuries led to deceased death (c) that at the time the accused caused the injuries he had formed the intention to cause death or grievous harm to the deceased and thus had malice aforethought.**

8. What constitutes malice aforethought is set out under **section 206** of the **Penal Code** as follows:

> **"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**

a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not,

b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c. An intent to commit a felony;

d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

9. The issues which arise in this case are:

(a) Whether the conditions of lighting at the scene of attack was conducive for a positive identification.

(b) Whether voice identification which the prosecution relies was safe to found a conviction.

(c) Whether there was a dying declaration.

(d) Whether there was failure to call some witnesses material to this case and whether that failure warrants the drawing of an adverse inference.

(e) Whether accused defence can stand.

10. Starting with the issue of conditions of light at the scene of incident. PW1 who identified herself as the second wife of the deceased testified that where the deceased was when the injury leading to his death was inflicted, there was no light. That was also confirmed by PW2. However, PW2 stated that his house had electricity lights on at the time and that it was 50 meters from the scene of crime.

11. The accused has been identified by PW1 as the one who first threatened the deceased before leaving briefly and returning to fight him. He tripped him before stabbing him on the chest. PW2 is clear that he was not present when the deceased was stabbed.

12. The accused does not deny having gone to PW1's house to drink chang'aa together with his friend Muchina that night. His defence admits that he had an altercation with a woman he refers to as Gathoni. PW1 refers to her as Mary Gathoni her next door or immediate neighbour. The material issue here is that the accused admits going to the house of PW1, where the deceased occasionally also lived; and that what happened there confirms the testimony of PW1.

13. Regarding identification PW1 was sole facial identifying witness. In the case of **OLWENO –V- REPUBLIC (1990) KLR 509**Khamoni, J as he then was held:

"1. Where the only evidence of identification of an accused person is given by a single witness, the court should scrutinize that evidence under two different tests:

a) The first test should be whether the conditions under which the single witness claims to have identified the accused person were such that there was positive identification.

b) The second test to which the evidence of a single witness should be subjected to is whether it could be relied upon, without any other evidence, to sustain a conviction."

14. I am guided. In this case PW1 was sole facial identifying witness. That was however not the only identification against the accused. PW1's testimony was that when the accused returned a second time as he had threatened to do, he called out the deceased for a fight. Her testimony is that she followed the deceased out. When the accused and deceased started fighting, PW1 testified that she tried to separate them but was overpowered. She was present when accused tripped the deceased and when he fell, she saw him stab the deceased once in the chest. Immediately after that the deceased started bleeding from a wound in the chest.

15. I find that PW1 was very close to the deceased and the accused as the two fought just before the accused stabbed the deceased. I find that PW1 was close enough and took long enough to be able to see and identify the attacker both physically and by voice identification. The accused had been PW1's chang'aa customer and had been in her house that same evening.

16. I find that even though the circumstances of identification were difficult for lack of any lighting, the fact accused had called out the deceased and had engaged him in a fight which PW1's actively tried to stop them from that encounter just before the deceased was stabbed gave PW1 ample time to identify the accused as the culprit.

17. Apart from physical or facial identification, PW1 and PW2 also identified the accused person by voice. PW2 said he had known the accused for a mouth. PW2 testified that he knew the accused well and that the accused had quarreled with his wife Mary Gathoni prior to this incident. Both PW1 and 2 are in agreement that the accused first threatened the deceased before leaving telling him he was leaving but would return and he would see him. They are also in tandem that accused used abusive words against the deceased calling him out of his house with menaces for a fight. The next thing PW1 and 2 heard was deceased saying "Kamau" had stabbed him. For PW1 it is clear by

Kamau the deceased referred to accused. For PW2, he only heard his voice but did not see him at the time of incident.

18. Regarding voice identification, in the case of **Choge vs. Republic (1985) KLR 1** the court held:

> **"that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the Appellant's voice and recognized it and that conditions obtaining at the time the recognition was made were such that there was no mistake in testifying to that which was said and who had said it. (See also Karani vs. Republic (1985) KLR 290)."**

19. I am well guided. I find that PW1 and 2 knew accused voice prior to the incident. On PW1's part, she was with the accused and the deceased just before the fight broke out. She heard the insults hurled at the deceased by the accused before he was challenged to a duel. She remained there as the two wrestled before the accused tripped the deceased before stabbing him. I find that in the circumstances, PW1's identification of the accused as the culprit both by voice and physically was safe and reliable in the circumstances. I find that both PW1 and PW2 heard the accused long enough and close enough to be able to identify him by his voice.

20. Regarding a dying declaration PW1 and 2 said they heard deceased say that he had been stabbed by Kamau. Both identified accused as the Kamau who stabbed deceased. The deceased made the statement shortly before he died. I find that the circumstances under which the statement was made was driven by deceased desire to say the truth of who caused him the fatal injury. I am also satisfied that the deceased had had a good opportunity to know who caused him the fatal injuries.

21. The other issue for determination regards witnesses not called by the prosecution. The evidence of PW1 and PW2, and accused own defence all refers to a woman by name Mary Gathoni. She had quarreled first with PW1 earlier that day, and later in the evening with the accused.

22. There was also Muchina a friend of the accused whom he admits being with on the material night of incident. PW1 also refers to him extensively in her testimony. Muchina was among the two men handed over to PW6, CPL Kililo at Soweto Police Station on the morning following the incident.

23. The question is whether they were material witnesses. In **BUKENYA & OTHERS 1972 EA 542** LUTTA Ag. VICE PRESIDENT held:

> **"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

24. The prosecution has a duty to call the number of witnesses who are sufficient to establish the facts, whether or not the facts favour their case or not. In regard to Mary Gathoni's testimony if she was called to testify she could only have confirmed PW1's testimony and the accused defence that there was an altercation between the accused and herself [Mary]. She was not present during the incident in question. Her testimony was therefore not of material importance.

25. Muchina, was with the accused throughout the incident. He was an accomplice for reason he had accompanied the accused at the initial time and on the second visit to the scene. I can understand why the prosecution would opt not to call him as his evidence being an accomplice is of little probative value. .

26. As to the motive for the attack the prosecution has not demonstrated any. **Section 9(3)** of the **Penal Code** stipulates thus:

> **'(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.'**

27. That provision was the subject of interpretation in the case of **Choge Vs Republic (1985) KLR1** , where the Court of Appeal held as follows:-

> **"Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not."**

28. In the case of **Libambula -Vs- Republic (2003) KLR 683 the Court of Appeal** stated:

> **"We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya.**
>
> **Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial**

evidence. Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime."

29. I find that the prosecution did not prove motive for this attack. It is not required that motive for a murder must be proved. In this case the evidence the prosecution is relying on is not circumstantial. Failure to prove motive is therefore not fatal to the prosecution case.

30. As to whether accused had malice aforethought, I find same proved. Accused left the scene having threatened the deceased and warned him he would see him when he returned. The accused went away for what PW1 stated was 15 minutes only to return, called out the deceased with insults, challenged him to a duel only to trip him and when he fell down, he stabbed him once in the chest and ran away. The fact the accused left the scene to arm himself for the attack is proof of premeditation which is proof of malice aforethought.

31. The final issue is whether the accused defence can stand. Accused admitted going to PW1's home for chang'aa that night. He did not talk about any quarrel or fight with the deceased. His defence does not say much. It is a denial by implication. I find that it does not dislodge the prosecution evidence against him.

32. I find that the prosecution has sufficiently discharged its burden of proving the case against the accused beyond any reasonable doubt. I find that the charge of murder contrary to section 203 of the Penal Code has been proved against the accused. I accordingly reject his defence, find him guilty of murder as charged and convict him under **section 322** of the **Criminal Procedure Code**.

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF FEBRUARY 2019.

LESIIT, J

JUDGE