REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL MURDER CASE NO. 9 OF 2015

REPUBLIC.....PROSECUTOR

V E R S U S

SIMON KAGIRI WANJIKU.....ACCUSED

RULING

1. The accused person Simon Kagiri Wanjiku was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 26/4/2015 at Kirogo Village within Kirinyaga County unlawfully murdered Stanley Kinyua Muriuki.

2. The accused denied the charge.

3. The prosecution called Eight witnesses and closed its case. This is a ruling as to whether the accused has a case to answer.

Summary of Evidence

PW-1- deceased's wife Rispa Wambui Maina –

Heard one Beth Kamau (was not called as a witness) telling her husband Kinyua was stabbed and realised it was her husband. She said she was told that the accused had stabbed her husband. She did not tell the court who told her.

Her evidence is hearsay.

PW-2- Peter Kibuchi Kiragu.

He testified that he was found by one Macharia (Macharia was not called as a witness) who informed him that the deceased had been stabbed. He told him the accused had stabbed him. He was not an eye witness. His evidence is hearsay.

PW-3- Charles Muriuki Kamande.

He was father of the deceased. He testified that he was called by PW-1- and informed that deceased was stabbed. He was not told who stabbed him. He went to the police station the next day and was told that accused and deceased were fighting over a ten shilling note.

There was no evidence to corroborate what he was told. PW-8- testified that she did not gather any evidence that the accused and deceased were arguing. The evidence of PW-3- is not supported by the testimony of PW-8- who is the Investigating Officer.

PW-4- Benson Karimi Muriuki –

He is a brother to the deceased. He was told his brother was killed. He went to Wanguru Police Station and met the accused. He did not give any evidence that implicates the accused to the murder.

PW-5- Dr. Ndirangu Karomo –

He is the Doctor who performed the post-mortem. He testified that the deceased had a small punctured wound on the left side of the chest. Cause of death was cardio pulmonary arrest due to hemopericardium and hemothorax due to injury by a sharp object. He produced the P3 form as exhibit -1-.

PW-6- Dr. Joseph Thuo.

He is a Psychiatrist who examined the accused and found that the accused was fit to stand trial. He produced his report as exhibit -2-.

PW-7- John Maina Kimani.

He knew both accused and the deceased. On the material day he was with the two before the incident at a place where alcohol is sold but that day alcohol was not being sold. He left for a short while. Before he returned he heard screams. He then heard Mburu had killed Kinyua. He went back and found Kinyua lying down on the side of the road and that he had been stabbed on the chest. He never witnessed when deceased was stabbed. His evidence was hearsay. The witness in cross-examination admitted in court that he had cheated. That happened when he was confronted with the statement which he had recorded at the police station and what he had testified in court. He was therefore not a reliable witness.

PW-8- Cpl Roda Nzioka.

She investigated the matter. She recorded statements. She found that accused and deceased were in the bar. The accused and deceased were in the bar PW-5- went out then heard screams. He went and found deceased on the ground bleeding. PW-8- said there was another person who was present who declined to record statement. So it is not only accused who was with deceased when he was stabbed. PW-8- said there was no eye witness.

4. I have considered the evidence tendered by the prosecution. I find that the prosecution proved that the deceased died as a result of injury which he sustained on 26/4/2015. This was proved by the evidence of PW-5- Doctor Ndirangu Karomo who conducted the post mortem and found that the cause of death was cardiopulmonary arrest due to hemopericardium and hemothorax due to injury by a sharp object. This was captured in the post-mortem form which he produced as exhibit-1-.

5. The prosecution had the burden to proof that it is the accused who caused the death of the deceased with malice aforethought.

6. Having considered the evidence, I find that the evidence tendered by the witnesses was hearsay. Not a single witness out of the eight witnesses gave direct evidence as to how the deceased sustained the injury. Even PW-7- who testified that he was with the accused and deceased told the court that he was told it was Simon Mburu who stabbed the deceased. It is when he was cross-examined that it came out that in his statement to the police he had stated that he was told that it was Simon Kagiri who stabbed the deceased. He was not a truthful witness. His evidence was hearsay as he stated in court that he was told and also in his statement to the police.

7. PW-8- the Investigating Officer testified that he investigated the case and found out that the accused and deceased were together in a bar at Kwa Muchiri. PW-8- admitted that there was no eye witness as villagers shield away from recording statements. There was no direct evidence to connect the accused to the charge. **Section 63 of the Evidence Act** provides:-

> ***"(1) Oral evidence must in all cases be direct evidence.***
>
> ***(2) For the purposes of subsection (1), "direct evidence" means–***
>
> ***(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;***
>
> ***(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;***
>
> ***(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;***
>
> ***(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:***
>
> > ***Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.***
>
> ***(3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection."***

The section requires that oral evidence must in all cases be direct evidence. What was tendered and relied on was not direct evidence. Hearsay evidence was tendered and was not corroborated.

8. The accused was charged with murder under **Section 203 & 204 of the Penal Code** which provides:-

> ***"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***
>
> ***204. Any person convicted of murder shall be sentenced to death."***

9. The prosecution was required to prove both mensrea and actus reas. **Section 206 of the Penal Code** gives the incidences of malice

aforethought.

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.***

No attempt was made to prove the actus and mensreas with direct evidence. The prosecution relied on purely circumstantial evidence which I find did not meet the threshold for this court to rely on it to convict. In **Abanga alias Onyango –v- R, Cr. Appeal No. 32/1990, Court of Appeal,** the court set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction.

These are:-

> **a. The circumstances from which an inference of guilt is sought to be drawn must be cogent and firmly established.**
>
> **b. Those circumstances must be of a definite tendency, unerringly pointing towards guilt of accused.**
>
> **c. The circumstances taken cumulatively should form a chain so complete that there is no escape from conclusion that within all human probability the crime was committed by the accused ad none other person.**

10. The evidence tendered is not cogent. This is a matter that could have been proved with direct witnesses but the witnesses were not called and it is said they did not record statements. No murder weapon was recovered. Nobody saw the accused armed with a knife. There are gaps in the prosecution case and this far the prosecution has not discharged its burden to proof its case beyond any reasonable doubts. Hearsay will only be relied on if it is corroborated with direct evidence. Hearsay is inadmissible.

11. The test of prima facie as laid out in the celebrated case of **Bhatt –v- R** is whether if accused is put on his defence and opts to keep quiet, a conviction would stand. It is stated:-

> ***"It is a cardinal principle of our law that the onus is on the prosecution to prove its case beyond any reasonable doubts and a prima facie case is not made out if at the close of the prosecution case it is merely one which on full consideration might possibly be thought sufficient to sustain a conviction ----"***

Remembering that the legal onus is always on the prosecution to prove its case beyond any reasonable doubts we cannot agree that a prima facie case is made out if at the close of the prosecution case is merely one:- where there is some evidence irrespective of its credibility or weight sufficient to put the accused on his defence.

> ***"A mere scintilla of evidence can never be enough, nor can any amount of worthless evidence ------ prima facie case must mean one on which a reasonable tribunal properly directing its mind to law and evidence could convict if no explanation is offered by the defence."***

12. In this case the evidence tendered is not sufficient to sustain a conviction. I find that no case has been made out to warrant the accused to be put on his defence. I acquit him at this stage under Section 215 of the Criminal Procedure Code.

Dated at Kerugoya this 11th day of July 2019.

L. W. GITARI

JUDGE