



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 69 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD KIRIMI KABAYA.....ACCUSED

JUDGMENT

Accused: I was in church

[1] **BERNARD KIRIMI KABAYA** (“the accused”) has been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya. The particulars of the offence being that on the 31st day of December, 2011 at Gitura Location, Igembe South District in Meru County murdered Jackson Mwirigi. The prosecution called six witnesses to establish its case. The defence called two witnesses.

Submissions by the accused

[2] The prosecution did not file submissions as had been ordered by the court. But the accused did. His arguments were that four issues fall for determination, namely:

- a. Whether there was enough evidence to reach a safe conclusion that there was proper identification/recognition of the accused at the scene.
- b. Whether there are any or fatal inconsistencies in the prosecution evidence by **PW1, PW2 and PW3**.
- c. Whether there is lack of evidence on identification of the deceased’s body during post-mortem.
- d. Whether there is proof beyond reasonable doubt that the accused committed the offence.

ANALYSIS AND DETERMINATION

[3] I should evaluate the evidence adduced with judicious alertness in order to discern the subtleties of the evidence so as not to miss the grace and power of the testimony of witnesses and the applicable law. The evidence is already recorded and is part of the record. But what exactly should the prosecution prove in order to secure a conviction on a murder charge?

Elements of murder charge

[4] The accused is facing a charge of murder under Section 203 of the Penal Code which defines the offence as follows:-

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

As a matter of law and arising from the above section, the prosecution must prove the following beyond any reasonable doubt::

- 1. The fact of the death of the deceased**
- 2. The cause of such death**

3. That the deceased met his death as a result of an unlawful act or omission on the part of the accused person and

4. That the said unlawful act or omission was committed with malice aforethought.

Death of deceased

[5] The accused argued that none of the prosecution witnesses identified the body of the deceased during postmortem. He relied on the case of **Republic v Beth Wangari Kimangu [2003 eKLR]**. Hold on. The Postmortem Report produced by **PW5 Dr. Njeru Charles Muchangi (PEXH 1)** was in respect of the body of Jackson Mwirigi, the deceased herein. According to the report, the body of the deceased was identified to the doctor by Andrew Muthamia and Milton Kabwae. Again, PW4, the father of the deceased stated that he identified the body. PW6, the investigation officer also stated that he, PC Lucheli and family members were present during the postmortem examination by Dr. Njeru- PW5. The claim by the accused that none of the prosecution witnesses spoke to identification of the body of the deceased is therefore not defensible whatsoever. Of importance is that the Report shows that the body of the deceased was identified and indeed the deceased died. Therefore, the fact of the death of the deceased or the body that was examined herein is not in doubt. The death of the deceased was duly certified and proved.

Of cause of death

[6] The Postmortem Report referred to above (**PEXH 1**) as well as the testimony of PW5 shows that:

a. Externally at the back on the left side had two stab wounds; one superficial 2cm long and the other penetrating into chest 2.3cm long.

b. The neck and chest had bruises.

c. The left foot had a degloring injury exposing the bones (skin and muscles had peeled off) due to friction between the body and ground on a rough surface. No fractures that were noted.

d. Internally, the body had respiratory stab wounds from the back-left lung which had collapsed. There was blood in left chest cavity – haemothorax. Other systems were normal.

Based on the autopsy examination, the doctor (PW5) formed the opinion that cause of death was cardiopulmonary arrest due to severe chest injury (stab wound penetrating) and hypovolemic shock. Now I move to the next step.

Whether death as a result of an unlawful act or omission by the accused person

[7] This is where the rubber meets the road: was death of the deceased a result of an unlawful act or omission on the part of the accused person? Identification of the perpetrator of the crime is one of issues raised by the accused. The accused submitted that the incident occurred at night for about 3- 4 minutes and the only source of lighting was the little moonlight and torches. According to him, the evidence produced does not describe the intensity of the lighting which enabled proper identification. He relied on the cases of **TITUS WAMBUA vs. R [2016] eKLR** and **R vs. TURNBULL [1976] 3 All ER 549**. What does the evidence say?

[8] **PW1 John Mwit** stated that on the 31st December 2011 at about 8.30 PM he was headed to his brother – in law's home, that is Charles Mathangia, when he heard screams by the deceased saying "don't kill me". He knew the voice was the deceased's for he was the son of Charles; he knew and had lived with the deceased. The deceased, accused and two other people were about 10 meters from where he had stopped after he heard the screams by the deceased. He specifically stated that there was a half moon and he also had a torch which he used to flash at them. He flashed at the face of the accused for about a minute. He saw the accused and another person, he did not know, holding the deceased on his trouser from either side. He also stated that the accused was holding a knife. He asked what the problem was and the accused replied that he had a problem with the deceased over miraa and that he had been looking for the deceased for a while then. PW1 pleaded with the accused to stop so that they could talk but he refused and stabbed the deceased on the left side of the back between the ribs above buttocks. The deceased was also injured on the right side of the stomach.

[9] PW1 continued with his testimony and stated that after the accused had stabbed the deceased, he shouted that Kabaya (the accused) was killing Mwirigi. Immediately Maore came and asked him to go to the home of Charles Mathangia to inform them of what was happening. Another old man also responded to the shouts and came to the scene. He also sent him to Charles's home. But before Charles Mathangia- the deceased's father- could arrive at the scene, the accused released the deceased and he together with the others ran away on the road that goes round Kilalai School. When the deceased's father and mother came, they took the deceased, on a motor cycle, to Maua Methodist Hospital where he was pronounced dead. While he was being attended to they were informed that he had died. They reported and recorded statements. He recorded his statement in 2013. He said that the accused disappeared for over 1 ½ years after the incident. He also told court that the accused and deceased used to do business together.

[10] The evidence of PW1 was corroborated by **PW2, PW3** and **PW4** in material respects. **PW2 Joseph Maore** told the court that on the material day he was walking home from the neighboring area at Kilalai Tea Buying Centre when he found people on the road making noise about 8.00PM. The deceased was screaming and pleading with the accused to release him. He also stated that **PW1** was pleading with the accused to stop. Again, he told the court that there was a little moonlight and he had a torch. He flashed a torch at them when he was about 3 meters away. He also flashed the torch light at the face of the accused for about 2 minutes and was able to see that he was dressed in a black jacket and had a knife in his hand. He also confirmed that the accused was in the company of another who was in a green jacket. He saw the accused stab the deceased on the left side. He shouted and ran to call the deceased's parents whose home was about 50 meters away- it took him about 2 minutes to get there. He left **PW1** at the scene making noise. They came back and found the deceased on the ground. He saw the accused and the other person with him running away. They got a motor cycle and took the deceased to hospital where he later died. He

recorded a statement after the accused was arrested.

[11] **PW3 Henry Muroki** testified that, on the material day he saw the accused stab a boy called Mwirigi while on the road at about 8.00PM. He had a torch with three batteries which he flashed on the face for a short while and was able to see the face of the accused. He saw him stab the deceased on the ribs (points at the right side). He also saw three people at the scene but only knew Mwirigi and Bernard. He did not know the other person. He said that he did not see anybody else as he stayed there for about 2 hours because it occurred at his gate. When he saw the accused stab the deceased he ran to Charles' home to inform him what had happened. They went back and took the deceased to hospital.

[13] **PW4 Charles Mathengia** father of the deceased told the court that on that 31st December 2011 at about 8.00PM he was at home with his wife Nkirote. They were called by PW2 who informed them that the deceased had been caught by 4 people. When they reached there they found that the deceased had been stabbed. There were no people at the scene. They took him to Maua Methodist where they were later informed that he had died. He identified the body on the 3rd day before post-mortem. He could not recall the date. The relationship with Bernard's family from their forefathers has never seen bed even to date.

[14] **PW6 NO. 81451 PC Joshua Kiambati** was the one who investigated this case. He told the court that on 11th January 2012 he was called by PC Eric Lucheli who agreed to accompany him to Maua Methodist Hospital where he was going to attend and witness a postmortem of the deceased, of which they did. Dr. Njeru and family members of the deceased were present. PC Lucheli who was handling the matter was transferred in 2013. In 2013, the OCS called to inform him that the suspect was in custody and that PC Lucheli who was investigating told him to look for the file and continue with the investigations. **PW6** could not trace the file from the officer who was left with the file by PC Lucheli. He started the file afresh because file was misplaced. He called the witnesses to record their statements of which they did. He came to learn that the accused and deceased argued over miraa which belonged to the deceased. They quarreled and the accused stabbed the deceased. He visited the scene after arrest of the accused in 2013 July about 1 ½ years later.

[15] The accused refuted the claim that he was at the scene of crime and stabbed the deceased. He testified that he was not at or anywhere near the scene of the crime. He stated that, at 8.00pm on 31st December 2011, he was at a '**kesha**' at Pentecostal Hilliness Church situated at Kirarai - 30km away from the alleged scene of crime. He stated that he neither met nor saw the deceased at the material time. He stated that he never left the church until the morning of the following day. He called Irene Kinya (DW2) who testified that she was with the accused at the material time and never left church until the following morning.

[16] Upon careful analysis of the evidence by **PW1, PW2** and **PW3** several things are clear; that they were at scene; they saw the accused and two other persons at the scene; they saw the deceased at the scene; they saw the accused stab the deceased; and the accused together with other two persons ran away after the act. Here, I should however dispel the argument that **PW3** contradicted the rest of the witnesses for he stated that it was only him, the deceased and accused and no one else was at the scene. In cross-examination he stated that Maore was also at the scene. As such there is really no major contradiction which justifies rejection of his evidence. What the accused is raising is a trifle that does not deliberately affect the truthfulness of the main substance of the prosecution's case which is that the accused stabbed and caused the death of the deceased. On this, see the Court of Appeal in the case of **Erick Onyango Ondeng' v Republic [2014] eKLR** that:

*As noted by the Uganda Court of Appeal in **TWEHANGANE ALFRED VS UGANDA**, Crim. App. No 139 of 2001, [2003] UGCA, 6 it is not very contradiction that warrants rejection of evidence. As the court put it:*

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

[17] Coming back to the main. PW1 stated that he was at the scene at about 8.30pm on 31st December, 2011. PW2 stated that he was at the scene at about 7.30pm on 31st December 2011. PW3 stated that he was at the scene at about 8.00pm on 31st December, 2011. The time given varies a bit but this is a matter that is reconciled by looking at the totality of the evidence. Witnesses may not be exact on time especially in a situation such as this where 'the attention of the witness is on the bizarre happenings. Only a specially trained witness may be expected to check or record the time of the event according to his watch. Witnesses normally give estimated time. From the testimonies PW1, PW2 and PW3, the incident took place between 7.30pm and 8.30pm on 31st December, 2011. The accused wants to take advantage of the seeming contradiction when he stated that he went to church at 8.00pm and remained there until morning of the following. This was an afterthought intended to create an alibi. However, the witnesses stated categorically that the accused ran away after the attack. The time was round about 7.30 to 8.30pm. Nobody knows where the accused went after the incident. He may have gone to church after the incident. The evidence of DW2 is not subtle; but a clever way of rendering credence to what the accused stated. The evidence by DW2 does not claim to know where the accused had come from when he came to church or whether he may have left the church before dawn. She admitted that she was not at all times with the accused during the church service; sometimes she or the accused separately went to the washrooms. The alibi does not hold sway. It has been dislodged by the evidence adduced by PW1, PW2 and PW3 which the court believes. In any case, it was introduced during the defence hearing. There is nothing to make this court disbelieve the evidence by PW1, PW2 and PW3 that the accused was at the scene at the material time. These witnesses knew the accused well and the accused knew them too. They stated that they saw him at the scene and identified him under the torchlight as well as moonlight as the person who stabbed the deceased. Identification by recognition is always reliable. Except, however, where circumstances surrounding identification by recognition are difficult the court ought to be cautious so as to eliminate any spec of mistaken belief of identity. See the wisdom in the opinion by Lord Widgery CJ in **R vs. TURNBULL (1967) 3 All ER. 549** that:

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

[18] The foregoing words were similarly echoed by the Court of Appeal in the case of **WAMUNGA vs. R [1989] KLR 426** that:-

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

[19] In any event, PW1 gave succinct evidence that he spoke with the accused during the incident and kept on pleading with him to stop stabbing the deceased. PW2 corroborated this fact. The fact that PW1 was in a conversation with the accused- a person he knew- and recognized him through flashes of torchlight is sufficient identification by recognition. I hold that the accused was properly identified by PW1, PW2 and PW3. Similar holding was made in the case of **WAMBULWA vs. REPUBLIC [1985] eKLR** where the Court of Appeal stated that;

“In the recent decision of this court in Samuel Awiti Karani vs. Republic Criminal Appeal No 181 of 1984 at Kisumu, identification by a single witness by means of flash of a torch couple with identification by voice of the appellant was held to be a valid identification.”

[20] Applying court’s judicious alertness, the grace and power of the testimony of the prosecution witnesses is that; each of the witnesses namely PW1, PW2 and PW3 had a torch; each one of them flashed the torch light at the face of the accused and recognized the accused and also saw him stabbing the deceased. The defence argued that, on the basis of the sworn testimony by the accused and *alibi* witness, a reasonable doubt was raised that it was not the accused who committed the offence. He relied on the case of **JOHN ODERO OMENDA & ANOTHER vs. R [2014] eKLR**. But, I am aware of and I have evaluated the defence evidence in which the accused denied flatly ever being at the scene of crime on the material time; his alibi was that he was at the church at 8.00pm on 31st December, 2011. I have also evaluated the evidence by DW2. But contrary to the submission by the accused, the exact details of presence of the accused at the scene as narrated by the three prosecution witnesses (PW1, PW2 and PW3) leave no doubt that the accused was at the scene at the material time i.e. between 7.30-8.30pm on 31st December, 2011 and stabbed the deceased.

[21] The fact that the deceased was stabbed was corroborated by the Postmortem Report referred to above (**PEXH 1**) and the testimony of PW5 that:

a. Externally at the back on the left side had two stab wounds; one superficial 2cm long and the other penetrating into chest 2.3cm long.

b. The neck and chest had bruises.

c. The left foot had a degloring injury exposing the bones (skin and muscles had peeled off) due to friction between the body and ground on a rough surface. No fractures that were noted.

d. Internally, the body had respiratory stab wounds from the back-left lung which had collapsed. There was blood in left chest cavity – haemothorax. Other systems were normal.

And, the doctor (PW5) formed the opinion that cause of death was cardiopulmonary arrest due to severe chest injury (stab wound penetrating) and hypovolemic shock. These findings of the cause of death are consistent with the stabs inflicted by the accused on the deceased. Therefore, I find and hold that the death of the deceased was as a result of an unlawful act of stabbing committed by the accused person.

Was the unlawful act done with malice aforethought?

[22] The last hurdle; whether the unlawful act was done with malice aforethought. Here, Section 206 of the Penal Code is useful. It provides that:-

“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)

(d)

[23] The injuries on the deceased were caused by a knife. The knife is a dangerous weapon. The deceased was not indicated to have been armed, died of the stab injuries inflicted by the accused. It was also shown that the accused had been looking for the deceased in order to settle a business dispute on miraa which had arisen between him and deceased. Important to note also is that the accused attacked the deceased in the company of others who were not before this court. In addition, PW1 stated that he pleaded with the accused to stop stabbing

the deceased but the accused continued and even said to him that he will finish the deceased. These circumstances clearly demonstrated intent on the part of the accused to cause the death of or do grievous harm to the deceased.

[23] Accordingly, I am satisfied that the prosecution has proved its case beyond reasonable doubt. In light thereof, I find the accused guilty of the murder of Jackson Mwirigi and convict him for the offence of murder in accordance with Section 203 of the Penal Code CAP 63 Laws of Kenya. Right of appeal explained.

Dated, signed and delivered in open court at Meru this 17th day of September 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. E. Kimathi for accused

Kiarie for State

Accused – I understand Kimeru

F. GIKONYO

JUDGE