REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

CRIMINAL CASE NO. 71 OF 2015

REPUBLIC.....PROSECUTOR

V E R S U S

LEONARD MUTUNGA BETH.....ACCUSED

JUDGMENT

1. The accused **LEONARD MUTUNGA BETH** is facing one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. It is alleged that:

> **"On the 12th day of July, 2015 at Laundry Estate in Ruaraka within Nairobi County, murdered ELIJAH KAMAKIA MWANGI."**

2. The prosecution called 5 witnesses. In summary the prosecution case is that the accused stabbed the deceased with a knife in the chest outside a vegetable stall on the material day. The deceased died soon thereafter. The incident was witnessed by PW1 and 2, both young men who knew both the deceased and accused before.

3. The accused gave an unsworn statement and called one witness. In his unsworn defence the accused denied stabbing the deceased. He admitted that they quarreled near a market stall but said that when the deceased picked a knife and scratched him with it on his eyebrow, he ran away leaving the deceased quarrelling with other people.

4. The defence witness Sabina was a sister of the accused. Her evidence was that a child called her out of her stall where she sold chips. The child told her that her brother the accused in this case, was outside bleeding. Sabina testified that she went out and found the accused and 8 others among them one Salome who was holding a knife. She was informed the accused had stabbed the deceased.

5. The defence filed submissions and urged that no evidence was adduced to prove *mens rea* and *actus reus*. Defence stated that the prosecution did not establish motive or malice aforethought and relied on the case of **Joseph Kimani Njau vs. Republic [2014] 3KLR** which I will consider.

Defence took issue with the prosecution relying on the testimony of two minors related to the deceased and urged that their evidence was too weak and incredible and therefore could not be relied upon. Counsel urged that their evidence was contradictory and confused up. Counsel relied on **Rep. vs. Peninah Thara Embu High Court Criminal Case No. 15 of 2009** for the proposition evidence of minors must be corroborated by other independent evidence. Counsel urged the court to give accused the benefit of doubt and cited **Rep. vs. Benison Mchanga & 2 others Mombasa High Court Cr. Case No. 10 of 2005** in support.

6. The Learned Prosecution counsel, Ms. Wafula urged that the two minors, PW1 and 2 evidence was detailed. Counsel urged that both witnessed the incident and that their evidence was corroborated by the findings of the doctor at postmortem.

7. I have considered the evidence adduced by both sides in this case and the submissions by counsels from both sides.

8. The issues which arise in this case are:

(i) Whether the evidence of PW1 and 2 was evidence of children of tender years and whether it required corroboration.

(ii) Whether the evidence of PW1 & 2 was full of inconsistencies, contradictions and therefore unreliable.

(iii) Whether the prosecution established motive for this attack.

(iv) Whether the prosecution has established malice aforethought.

(v) Whether the accused defence is plausible, reasonable and acceptable.

9. Regarding the evidence of PW1 and 2 being evidence of minors which needed corroboration. It was Mr. K'Bahati's submissions that the evidence of PW1 and 2 was of minor children and required corroboration. Counsel cited the case of **Republic vs. Thara** case, supra, in support of that proposition. Counsel relied on the observation by the Learned Judge Ong'udi, J thus;

"A court faced with the evidence of a minor or minors must look for independent evidence to corroborate the minor's evidence. And the independent evidence cannot be that of another minor."

10. PW1 was 16 years of age at the time he testified in court on 29th February 2016. The incident took place on 12th July 2015, six months before PW1 testified meaning he was between 15 and 16 years when he witnessed the incident. PW2 was 14 years when he gave his testimony on 1st March 2016 and was similarly between 13 and 14 years when he witnessed the incident.

11. Mr. K. Bahati for the defence and Ms. Wafula Learned Prosecution Counsel for the State referred to both PW1 and 2 as minors. Mr. K. Bahati went further to submit that being minors, corroboration was required for their evidence to be relied upon.

12. The case of **Republic vs. Thara**, supra, cited by Mr. K. Bahati can be distinguished from the instant case. In the cited case the learned judge observed that the two eye witnesses in the case, were 2 years and 6 years respectively when the incident occurred and 5 years and 9 years respectively when they testified in court.

13. Apart from the age differences between the eye witnesses in the **Thara case**, supra, and the instant case, it is to be noted that the eye witnesses in the cited case were far too young when the incident occurred.

14. The **Children Act** defines a child under **Section 2** of the **Act** as "a human being below the age of 18 years." A child of tender years is defined under the same section as a child below the age of 10. Going by the latter section it is clear that both child witnesses in the **Thara case,** supra, were children of tender years.

15. PW1 in the instant case was not a child of tender years. He was mature enough to testify. I did not even see the need to carry out a *voire dire* examination before taking his evidence as he was of age to testify without being tested.

16. PW2 on the other hand appeared young and of small stature to me and the reason for carrying out the *voire dire* examination was to find out his age and secondly test him to determine if he understood the meaning of an oath and the duty to tell the truth and also whether he was possessed of sufficient knowledge to testify in this case.

17. PW2 said he was 14 years old and was in standard 7. The age was commensurate to the class he said he was. He was also fully aware of the meaning of an oath. Understood the duty to tell the truth and was possessed of sufficient knowledge to testify. He gave his evidence on oath.

18. It is settled in the law of precedence that a child of tender age is the one that is 10 years or below. See **Rep. vs. Johnson Muiruri [1983] KLR 447**.

> **"A child of 14 years cannot even by the stretch of the most imaginative mind be regarded as a child of tender years. A child of 16 years is obviously way too old to be regarded of tender age."**

19. In law the evidence of PW1 and 2 did not require corroboration before it could be taken into consideration in evidence. The cited case of **Rep. vs. Thara**, supra, is good law but does not apply to the circumstances of this case.

20. Mr. K. Bahati submitted that the evidence of PW1 and 2 was full of contradictions, inconsistences and being that of persons related to the deceased, ought not to be relied upon. Counsel went further to submit that the evidence of PW1 was a made up story full of falsehood, outright lies and obvious contradictions which he proceeded to summarize the contradictions by comparing evidence in court and that of the statement to police. Counsel took issue with reference to PW2 in PW1's statement to police but not in his evidence in chief. Counsel took issue with PW1's mention of PW2 during cross-examination.

21. Counsel took issue with PW1's evidence where he said there were people in the pool table area, then later said accused threw stones inside that area which had 10 people yet hit none. Counsel submitted that it was unbelievable.

22. Regarding PW2 Mr. K. Bahati submitted that his evidence was incomprehensible and incoherent, confused and obfuscated to the extent counsel doubted whether he was present at the scene at all the time of incident.

23. Mr. K. Bahati summarized the contradictions in PW2's evidence as including the fact PW2 just said he was waiting for PW1 at the pool structure, then later he said he went to visit the deceased who had married his sister and then later said he met PW1 on the road.

24. Counsel urged further that PW2 concocted a story that he and PW1 were also chased by the accused with stones to make their story plausible that the accused chased the deceased with stones. Counsel urged that the scenario created in PW2's evidence was totally different from the one PW1 created in his evidence.

25. PW1 in his evidence stated that at around 4 p.m. he was passing by laundry area where there was a pool table headed to Elijah (deceased) home unaware that the deceased was at the pool table. He said that as he took a corner to laundry area he heard the deceased calling him.

26. That is when he saw the deceased standing near the pool table stall. The deceased told him that he wanted to send him to buy fried 'githeri' (food) and gave him 50/= with instructions to buy food worth 30/= for his (deceased) son and 20/= for him (PW1) and to proceed to his home (deceased) to eat with his son.

27. PW1 testified that he did exactly that, bought the food, took it to deceased home where he and deceased son ate the food as instructed. PW1 testified that he returned to the pool table stall and found the deceased outside alone. PW1 testified that while there he saw the accused pick stones and started

throwing them at the deceased. PW1 testified that as he threw the stones the accused told the deceased to return his (accused) money.

28. PW1 said that the accused, the deceased and he walked down together to a nearby vegetable stall where they sat on stones.

29. PW1 testified that he heard the accused telling the deceased that one who is defeated at the pool must pay. PW1 said he did not understand what the two were talking about. He said he then saw the accused stand, lift some sacks on top of the nearby stall, picked a knife as the deceased stood up and stretched. PW1 stated that he saw the accused suddenly lift up the knife in his hands and with great force stabbed the deceased on the neck, on the front side.

30. PW1 testified that he saw the accused pulled out the knife from the deceased neck and then looked at the blood on it. PW1 then saw the deceased hold the neck area where he was stabbed, looked at PW1 and then at the accused then walked away.

31. PW1 testified that a brother of the accused came just then and took away the knife from the accused. It was at that point that PW1 ran after the deceased screaming.

32. When PW1 was cross-examined about PW2, he stated that PW2 was not at the market stall at the time of stabbing but came much later when he tried to help the deceased up. PW1 stated in re-exam that PW2 had also been hit with a stone by the accused outside the pool table stall but that he had not said anything.

33. PW2 in his evidence testified that on the material day at 4 p.m. he was at laundry area in Baba Dogo where he had gone to visit the deceased who was married to his cousin. PW2 testified that he met the deceased along the road and that he told him to wait for him outside the pool table stall. He saw the deceased enter the pool table stall and also saw him meet the accused.

34. PW2 testified that the deceased called him in to witness as he, deceased played with the accused. PW2 testified that the two were betting and that it was agreed the winner would take all the money while the loser got nothing.

35. PW2 testified that since he was below 18 years old, he could not stay inside the pool table stall so he went outside and stood there alone. He witnessed as the two played as the stall was an open area with only a roof over it. PW2 said he saw the accused pick a stone and with it started chasing the deceased.

36. PW2 testified that PW1 who had been sent to buy githeri arrived back as accused chased the deceased. PW2 stated that when the accused threw a stone at him and missed, he decided to go and hide somewhere for a short time. PW2 testified that when he emerged from his hiding place, he found the accused and deceased arguing, with the deceased persuading the accused to take 20/=. PW2 said he heard the accused tell the deceased that once a person was won he does not get his money back.

37. PW2 testified that when the accused threw few stones at the deceased and missed, he walked to a nearby stall where he touched around, pulled out a knife as the deceased was enquiring from PW1 whether he bought the githeri. PW2 testified that the accused went to where deceased was held him and stabbed him on the throat. Immediately he did so, the accused was disarmed by his older brother who was around. PW2 testified that he saw the deceased walk away and that he and PW1 followed after him.

38. I have analysed and evaluated the evidence of PW1 and 2. I find that there were no material contradictions in their evidence. I find that each witness gave the sequence of the events each saw unfold before their eyes.

39. It is clear from the evidence of PW1 and 2 that they came to the scene separately and secondly at different times. PW1 arrived first and was sent by the deceased to buy food for his child. PW2 was headed to see the deceased and came later to find him alone outside the pool table.

40. It is clear that PW2 saw how the argument between the accused and deceased arose, a fact PW1 did not see or know about as he came at the time the game between accused and deceased was over and the argument over money had started. In fact in PW1's evidence he said that he did not understand what the accused meant when he told the deceased that if one was won he got nothing.

41. The only difference I found in the evidence of PW1 and 2 was the failure by PW1 to mention that PW2 was also present until he was cross-examined and re-examined about it.

42. Mr. K. Bahati cited the case of **Rep. vs. Benson**, supra regarding contradictions where Sergon, J found that the evidence of the key witness was discredited due to self-contradiction. I looked at the judgment and it was clear to me that the key witness was giving evidence of what he was told, not what he saw. That case is distinguishable from the instant case.

43. I find that the differences in the evidence of PW1 and 2 were not a contradiction or inconsistency. It was more of variations – borne more from the fact the two witnesses were not there at the same time.

44. Variations are expected in evidence. In fact it has been held that if no variations occur there is a likelihood that the witnesses may have been coached.

45. Having analyzed and evaluated the evidence of PW1 and 2, I am satisfied that they were truthful witnesses, that they gave candid and clear evidence of what they saw. I was impressed by their forthrightness and I am satisfied that they were honest witnesses who told the truth and who were worthy of belief.

46. Mr. K'Bahati submitted that no motive and no malice aforethought was established in this case. Counsel then relied on the case of **Joseph Kimani Njau vs. Republic [2014] eKLR** where the court observed;

> **"In this case the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remain uncertain; It is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that** *mens rea* **for murder was not proved."**

47. I have analyzed and evaluated carefully and cautiously the entire evidence before court. I find from the evidence of PW2 that he was there when an argument arose between the accused and deceased.

48. From PW2's evidence the two had played a game of pool and were betting that whoever lost the game lost his bet. According to PW2, there was an arbiter who received the money from the accused and deceased before the game begun. From PW2's evidence, it is clear that the argument arose after the accused won the game and the deceased declined to surrender his part of the money.

49. I find that the prosecution established the reason for the argument between accused and deceased. It is established that the deceased persuaded the accused that they leave the pool area. It is clear the accused was unhappy and was busy throwing stones at the deceased to force him to give him his bet. The motive for the attack is therefore clearly established.

50. The accused in his defence denies stabbing the deceased and stated that it was the deceased who attacked him. I have considered that defence. I find it is a bare denial and is neither plausible nor reasonable. PW1 and 2 were known to accused before. No suggestion was made to them that they were lying or had any grudge against the accused as to falsely implicate him. I find accused defence is not plausible.

51. The defence witness, DW2 was not present during the stabbing incident. What she introduced in evidence is that 8 relatives of the deceased, all not called as witnesses implicated the accused with the offence yet he was innocent. DW2's evidence is of no probative value as she was not present at the scene at the material time. In addition, she told the court what she believed about the accused character being

older than him. That unfortunately is of no assistance to the court.

52. In the submissions by counsel, Mr. K'Bahati made a passing reference to drunkenness and urged that "Drunken people lose judgment and can sometime pick a quarrel over flimsy or unimaginable issues". He then cited **Joseph Kimani Njau's case**, supra, as I earlier quoted.

53. The accused did not raise any defence safe to deny committing this offence. **Section 13** of the **Penal Code** provides that a person who claims intoxication has the burden to prove that he was intoxicated. The burden clearly the accused made no attempt to claim, leave alone prove that defence.

54. Even though it was not claimed by the defence, I did note that PW2 in cross-exam testified that the accused had taken alcohol, but that the deceased was sober at the time of the incident. I therefore cannot ignore the evidence that the accused was drunk at the time of this incident.

55. As counsel for accused submitted a drunken people lose judgment and can sometime pick quarrel over flimsy or unimaginable issues. In the case counsel cited in support of that proposition, **Joseph Kimani Njau**, supra, the Court of Appeal cited another Court of Appeal decision of **Isaak Kimanthi Kanuacholi vs. Republic Nyeri CA No. 96 of 2007 (UR)** commenting on malice aforethought thus:

> **"There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause of heinous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example rape or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have constructive malice aforethought.** (See Republic vs. Stephen Kiprotich Leting & 3 others [2009] eKLR HCCC No. 34 of 2008). **In the circumstances of this case, where there was a fight involving the appellant and others in a place of worship leading to another fight where the appellant stabbed the deceased with fatal consequences, we do not think there was malice afterthought at all. The appellant should not be convicted of murder but should have been convicted of manslaughter/see Juma Onyango Ibrahim vs. R, Kisumu CA No. 312 of 2009**]."

56. In the instant case, it cannot be said that the prosecution proved express or implied or constructive malice. I find that malice was not proved in this case.

57. Before I conclude this judgment, I must mention some matters. First of all the weapon used in this case was not produced as evidence. PW4 who arrested the accused from members of public on same day of this incident did not make any mention of recovering a knife.

58. PW5 who was the D/OCS of Ruaraka Police station who sent PW4 to arrest the accused from scene of crime testified that he received the accused from PW4. He too did not mention seeing any weapon accompany the accused to the police station.

59. I have considered the rest of the evidence in regard to the weapon used to cause death. PW1 and 2 were clear that after the accused stabbed the deceased, his elder brother known commonly as "uncle" is the one who took away the knife from him.

60. DW2, accused sister in her evidence stated that she saw one, Salome, a relative of the accused holding a knife and also holding the accused.

61. Neither 'uncle' nor Salome were called as witnesses in this case. More importantly however is the fact that the knife does not appear to have been handed over to the police. That notwithstanding I am satisfied that accused stabbed the deceased with a knife. Failure to have it produced in evidence and failure to call the 2 witnesses seen with the knife does not affect the veracity of the prosecution case.

62. The other matter I wish to mention is prosecution did not adduce medical evidence regarding accused

mental status and the post mortem findings on deceased body. Both are not contested both in evidence and in submissions by both learned counsels of the prosecution and the defence.

63. Both the P3 form on accused mental status and P23 postmortem report on deceased body were part of the committal bundles and witness statements supplied by the prosecution. The P3 shows accused was fit to stand trial. The P23 postmortem form signed by Dr. Njeru shows that the cause of the deceased death was a chest injury due to penetrating sharp force trauma.

64. I have said enough in this case. In conclusion, I find that the accused stabbed the deceased once causing him severe injury as a result of which the deceased died. I find the killing was unlawful. I find that malice aforethought was not proved to the required standard. I find that the prosecution has failed to prove the charge of murder contrary to **section 203** of the **Penal Code**. I find that the evidence adduced established the offence of manslaughter contrary to **section 202** of the **Penal Code**.

65. In the result I substitute the charge against the accused from murder contrary to **section 203** of **Penal Code** to manslaughter contrary to **section 202** of the **Penal Code**. I find the accused guilty of manslaughter contrary to **section 202** of **Penal Code** and convict him accordingly under **section 322** of the **Criminal Procedure Code**.

66. I commend the counsels who represented the parties in this case, Ms Wafula and Mr. K. Bahati for their insightful submissions.

DATED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2017.

LESIIT, J

JUDGE