



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO 34 OF 2016**

**LESIT, J.**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**PETER WAINAINA NDUTA.....ACCUSED**

**JUDGEMENT**

1. The accused, **Peter Wainaina Nduta**, 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 the night of 9<sup>th</sup> of April 2016 at Silanga Estate in Njiru District within Nairobi County, murdered BONIFACE WAMBUA”.**

2. The prosecution called **six witnesses**. The facts of the prosecution case were that the deceased while together with **PW1**, were attacked by a group of 10 youth and the accused, who was part of the group, stabbed the deceased in the stomach.

3. There was one eye witness, **PW1**. He told the court that he was a friend of the deceased. **PW1** testified that on the night of the 8<sup>th</sup> of April 2016 at about 8:30 p.m., he and the deceased left the latter’s house to buy cigarettes at a nearby shop. On their way there, they met a group of about 10 youth who proceeded to grab both of them.

4. After a brief struggle, **PW1** managed to free himself and he landed on some loose rocks. He proceeded to throw stones at the group of youth while shouting, “**THIEVES! THIEVES!**” in Kiswahili.

5. **PW1** said that he saw the deceased struggling with the accused who was holding a knife. He also asserts that he saw the accused stab the deceased in the stomach with that same knife and that the accused was the last person to leave the scene. **PW1** testified that the accused, while still holding the knife, beckoned to the rest and said, “**Twendeni!**” The group of men fled the scene. **PW1** said that he did not know anyone else in the group of 10 other than the accused.

6. **PW1** continued to state that he recognized the accused because he had seen him around the area he had lived for over three years until the time of the incident. During the attack, **PW1** claims to have seen the accused face to face. He identified him in court.

7. PW1 added that the deceased clutched at his stomach and said, “*Wamedunga Kabisa!*” After attempts by PW1 to assist the deceased to walk, he resorted to getting the car of the deceased from his compound which was approximately 500 meters away.
8. PW3 who is the wife of the deceased stated that on 8<sup>th</sup> of April while at home, she recalls that at around 8:30p.m., the deceased left the house with PW1 to buy cigarettes. 20 minutes later, after realizing the two had delayed returning home, PW3 decided to call her husband but all she heard was screams and upon calling again, someone else picked up and notified her that her husband had been stabbed with a knife.
9. It is the prosecution case that on the 9<sup>th</sup> of April 2016, PW5 was the Duty Officer attached to Mowlem Police Post. At around 1.00 a.m., four (4) people walked into the police station while crying saying they had a body of their brother who had been murdered at the back of their car. The body was covered with a blanket. They had been referred from Mama Lucy Hospital. PW5 recorded the incident into the Occurrence Book and asked them to return at a later date after taking the body of the deceased to Kenyatta University Mortuary since they were inconsolable and therefore in no state to record a statement.
10. On 9<sup>th</sup> of April, 2016 at about 7.00 p.m., PW5 went to the crime scene at the T-junction next to huge security lights that were similar to floodlights. He indicated that it was brightly lit. He returned to the scene at around 11 a.m. the following day. He did not find any blood stains at the scene to distinguish it as a scene of murder so he returned to the station.
11. On the 11<sup>th</sup> of April 2016, PW5 booked a post mortem which was carried out by PW6 on the same day at Kenyatta University mortuary. PW6 conducted the post mortem on the body of the deceased. He found that the deceased was pale due to loss of a significant amount of blood. He found that the deceased had a total of four (4) stab wounds, three on the left upper abdomen and one on the chest. The cause of death was established as internal injuries caused by sharp force trauma. PW6 produced the post mortem report as P. Exhibit 3.
12. The prosecution case is that on 13<sup>th</sup> of April 2016, PW2 who was attached to Dandora Police Station at Mowlem Police Post received a call from an anonymous person claiming that some youth were terrorizing members of the public. While acting on this information, at around 6.00 a.m., he found the accused standing by the side of the road with a dagger knife which had a red handle.
13. On enquiring, the accused couldn’t explain the reason for having the dagger and he looked anxious. PW2 proceeded to arrest the accused and eventually charged him at Makadara Law Courts with the offence of preparation to commit a felony.
14. PW5 testified that on 13<sup>th</sup> of April 2016, the family of the deceased came to the Police Station to report the murder. PW1 together with PW4 and PW3 came to his office. PW1 explained to PW5 that he was with the deceased at the time of the incident and knew the perpetrator by name. PW1 said that he knew the accused because they were living in the same area and therefore saw him almost on a daily basis.
15. Later on, PW5 recognized the name of the accused who was in one of the cells at Mowlem Police Post facing another charge. That is how PW5 brought accused to face the instant charge.
16. The accused was placed on his defence after the court was convinced that a prima facie case had been established by the prosecution against him. The accused opted to give an unsworn statement in his defence.
17. The accused in his unsworn defence denied having been part of the murder of the deceased person. He explained the circumstances of his arrest as having been accosted by Police while carrying empty Chang’aa containers and was subsequently taken to Mowlem Police Station. He was eventually charged

with this offence.

18. The accused person faces a charge of murder contrary to **Section 203** of the **Penal Code**. This section creates the offence of murder and provides as follows:

**“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder”**

19. Malice aforethought is an essential ingredient in the offence of murder. The circumstances that constitute malice aforethought are set out under **Section 206** of the **Penal Code** as follows:

**“206. 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.”**

20. The onus and evidential burden of proof lies with the prosecution to prove its case against the accused person beyond any reasonable doubt. The prosecution must prove that it was the accused who caused the death of the deceased by stabbing the deceased. The prosecution must equally prove that at the time the accused stabbed the deceased, he had formed an intention to either cause death or grievous harm of the deceased.

21. Having considered the entire evidence by both sides and submissions of both counsels, I find that the following are the issues for determination.

**a. Whether the evidence of identification by PW1 was free of error or mistake.**

**b. Whether the prosecution has proved that the accused stabbed the deceased.**

**c. Whether the prosecution has proved which knife was used to stab the deceased and if it is before the court.**

**d. Whether the prosecution has proved that at the time of the commission of the offense, the accused had formed malice aforethought to commit the offense.**

**e. Whether the accused defence is plausible, reasonable and logical.**

22. As to whether the evidence of identification by PW1 was free from error or mistake and whether the prosecution has proved that the accused stabbed the deceased. There was one eye witness to the attack and subsequent murder of the deceased; PW1. The issue is whether there has been a clear, positive and reliable identification of the accused person as being present at the scene on that fateful day and as having participated in the attack on the deceased.

23. The incident, as told to the court, occurred between 8:30 and 9:00 p.m. Considering it was night time, visibility was naturally poor. It was the submissions of the Defence Counsel that PW1 could not possibly

identify or describe the accused. PW1, PW3 and PW5 stated that there is a bright street light at the scene. PW5 stated that the street light was situated at a T junction where there is a considerable amount of human traffic. From the account of PW1, the attack which entailed grabbing of the deceased and PW1, throwing stones at some of the ten youth and yelling by PW1, took a short time. None of the attackers wore masks to cover their faces in any way that would hinder identification and recognition if necessary.

24. PW1 told the court that he recognized one of the attackers and clearly pointed to the accused in court as the attacker he recognized. He was sure of the identification of the accused because he had known the accused from before. PW1 added that the accused stabbed the deceased with a kitchen knife, the ones that cut cabbage and other vegetables.

25. This therefore, is not a case of identification, but that of recognition since there was prior knowledge of the accused to PW1 before the incident. In the case of **ANJONONI & 4 OTHERS VS. REPUBLIC** the Court of Appeal held as follows:

**“.....recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.**

**As such, the parties knew each other well and the witnesses were in a position to recognize the accused.”**

26. In this case the accused was identified by one witness at night. The circumstances of identification according to PW1's evidence was that ten youth confronted him and the deceased. They were grabbed by 3 youth each and roughed up. PW1 was eventually thrown down after deceased was stabbed.

27. Having been under attack himself, it is not clear how PW1 could have had a good and clear opportunity to see the attacker of the deceased. In fact PW1 was not able to identify any of those who attacked him yet they were closest to him.

28. As to conditions of lighting at the scene, PW1 said that there were flood lights at the scene which were bright and lit a large area.

29. The prosecution had to adduce evidence to show the exact position the light at the scene was from the person identified and the one identifying. PW1 had to give the distance at which he alleges he saw the accused person. This he did not do. He gave generalized evidence of conditions of lighting at the scene and the actual circumstances surrounding the identification.

30. There is another issue which concerns me. This is how well PW1 knew the accused. PW1 said he had been seeing the accused in the area where he lives for 3 years. He said that he even met the accused in some club.

31. From PW1's evidence, I do not find that PW1 knew the accused well enough as to give an assurance that he could recognize him without making a mistake. The alleged knowledge he had of the accused identity was a fleeting one, of seeing the accused at a distance and within his area of residence. There was no known close encounter with the accused or of any opportunity of having talked with him or had close meeting with him. Most importantly however is the total failure to give any description of the accused to the police during the investigations.

32. The court of appeal further stated in **Maitanyi -vs- Republic (1986) KLR 198,**

**'..There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that**

**he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained.'**

33. In the circumstances, it was necessary for an identification parade to have been conducted for the identification of the accused. Without this, the evidence of identification was that of dock identification which has little probative value.

34. Besides the conditions of identification being at night and distance of light from assailant not clear, the evidence of identification has to be received with caution. I find that PW1 did not tell the police that he had recognized anyone during the attack until 5 days later. It was on 13<sup>th</sup> April 2016 that PW1 told PW5 that one Wainaina was the person he saw and recognized at the scene. The delay of 5 days to give accused name as the assailant raises further doubt of PW1's ability to identify the accused at all.

35. Be that as it may, given the circumstances of identification and conditions of lighting, and fact it was identification by one witness, what was required was other material evidence implicating the accused with this offence. I found none.

36. As to whether the prosecution has proved which knife was used to stab the deceased and if it is in court. PW1 stated that the knife used to stab the deceased was a kitchen knife used to cut cabbages and other vegetables. He further indicated the knife was about 5 inches in length.

37. PW2 arrested the accused on the 13<sup>th</sup> of April 2016 with a dagger which had a red handle in his possession. PW2 further says that the accused did not justify his reason for having it considering he wasn't a security officer in the area. When the question of identification of the knife came up in court, both PW1 and PW2 were recalled. PW1 said that the red-handled dagger was not the knife he saw the accused with at the time the deceased was stabbed. However, PW2 confirmed it was the knife that he recovered from accused at the time of arrest. This is corroborated by the fact that the accused was arraigned at Makadara Law Courts on the charge of preparation to commit a felony over possession of the same knife.

38. Having considered the evidence of PW1 and 2, I find that the knife exhibited in court was not the murder weapon in this case.

39. However, PW5 who was the investigating officer in this case said that he did not recover the knife used to commit the unlawful act as described by PW1.

40. As to whether the prosecution has proved that at the time of the incident the accused had formed malice aforethought. The burden of proof lies on the prosecution to show that the accused indeed not only fatally stabbed the deceased, but had formed the necessary malice needed to prove intention. The intention to cause death or grievous harm is malice aforethought and under **section 206** of the **Penal Code** the circumstances which constitute malice aforethought are well stipulated.

41. In the case of **Nzuki vs Republic (1993) KLR 171**, the Court of Appeal stated that malice aforethought is a term of art and emphasized that:

**“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused: -**

**a. The intention to cause death;**

**b. The intention to cause grievous bodily harm;**

**c. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.**

**It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and intention are aimed at a potential victim other than the one who succumbed. (See Hyman vs. Director of Public Prosecutions [1975] AC 55”.**

42. The prosecution case is that the accused knowingly and intentionally stabbed the deceased repeatedly. If the evidence of identification was free of error or mistake, then the prosecution’s evidence could have supported a finding that the accused action was motivated by malice. This is because the deceased was stabbed four times in the chest and abdomen, proof of intention. I however found that the identification of the accused was not watertight and therefore no malice was proved as against the accused.

43. As to whether the accused’s defense is plausible, reasonable and logical, the accused in his unsworn testimony said that he was arrested with empty chang’aa containers and that the police charged him with another felony he didn’t commit. He also added that the police colluded to charge him with murder and that he neither knows the deceased nor has seen the red-handled dagger which he was arrested in possession of. The accused gave an alibi as his defence for this charge. The prosecution case was already weak for lack of either evidence to corroborate that of PW1. In the circumstances accused defence raises doubt in prosecution case and is therefore plausible.

44. Before I end I wish to mention one more thing. The date of offence as per information contradicted the evidence of PW1 and 2 in this case. They said incident occurred on 8<sup>th</sup> April, 2016. The information reads 9<sup>th</sup> April 2016. The error was not material since the accused was fully aware of the offence he faced and was able to defend himself.

45. Having considered the evidence of identification, the conditions of lighting at the scene and the lack of specific evidence demonstrating clearly the distance PW1 was from those who attacked the deceased, the fact the evidence of recognition is insufficient to give an assurance that PW1 knew the accused sufficiently to recognize him. I find that that the evidence adduced by the prosecution was not good for a correct and safe identification of the accused. I find that the prosecution evidence fell far below proving the charge against the accused on the required standard.

46. Accordingly I will give the accused the benefit of doubt and acquit the accused of the offence charged under **section 322** of the **Criminal Procedure Code**.

47. I order that the accused be set free unless otherwise lawfully charged.

**DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH, 2017.**

**LESIT, J.**

**JUDGE**