



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 21 OF 2014

LESIT, J.

REPUBLIC PROSECUTOR

-VERSUS -

EDWARD WAITHIRU KAGO ACCUSED

JUDGMENT

1. The accused person, **EDWARD WAITHIRU KAGO** is charged with Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were:

“On the 14th day of February 2014 at Miiri Village, Kanjai Sub-location of Githunguri District within Kiambu County, murdered PETER KAMAU WAITHIRU.”

2. The prosecution called a total of 11 witnesses. The facts of the prosecution case are that on the 14th February 2014 at 6 p.m. PW1 was walking behind the deceased as both went home when she saw the accused emerge from her banana plantation holding a panga in his hand. The deceased was her husband’s step-brother, while the accused was a son of a brother of a brother of the deceased. PW1 saw the accused lift the panga and strike the deceased with it on the head. The deceased fell down and on seeing that PW1 immediately turned and ran back up hill to where she had come from screaming at the same time. After 15 minutes PW1 went back to the scene where she saw that the deceased had been beheaded.

3. PW2 testified that she was at home, which was down the slope towards which PW1 and the deceased had been walking when she heard screams. PW2 testified that the screams were coming from the upper side where their grandmother lives. PW2 went up to check, and that is when she met with the accused running very fast downhill towards her direction. The accused was her first cousin. She stated that when she asked the accused where the screams were coming from, he pushed her aside without saying a word and continued running.

4. PW2 said that she decided to walk up the slope to find out what could have happened when she came across the deceased body lying on a road between Napier grass and a banana plantation. The body had been beheaded. PW2 turned and ran back home screaming and calling out names for help. PW2 met PW3, her father’s brother and also deceased’s younger brother. PW3 was going to see the deceased in his house at the time.

5. PW3 testified that PW2 was running towards him and screaming and that when he enquired from her what had happened, PW2 told him that the deceased had been murdered. PW2 also told him that she had met the accused running from the same direction the body was and that when she asked what the matter

was he declined to answer her. PW2 then pointed PW3 to the place where the deceased body was lying and that he went there to find his brother the deceased dead and beheaded. PW3 is the one who went to report the incident to the police. PW4 testified that when he went to the Police station he found the accused already there at the Report Office and in handcuffs.

6. PW3 testified that when the accused saw him he said to him: “**I have finished that one and you are next.**” PW3 stated that he then made two reports to the police. The first one being that of the murder of the deceased and the second one being threat to his life by the accused. PW3 later accompanied police officers to the scene. Among the police officers who visited the scene with PW3 included the OCS, PW4, CPL Gerald Nyongesa, CPL Mbira and PC Kariithiu.

7. When PW3 was cross-examined by the defence, he testified that at 6am of the same day of incident, a brother of the accused was arrested for assault of and theft from the deceased. Later the same day, the mother of the accused was arrested at the police station when she went to check on her arrested son.

8. PW4’s evidence of the scene was that they found the deceased’s head severed, and the body with deep cuts on the left hand and on the ribs. PW4 recovered Kshs. 19,150/- from the deceased which he produced in court as P. exhibit 1. The OCS summoned Scenes of Crime. PW5 was the Crime Scene Officer who visited the scene and took photographs of the scene and of the deceased body. The photographs and the Report were produced in court as P. exhibits 2 and 3 respectively.

9. PW6 was the police officer on duty at the Report Office at the Police station on 14th February 2014 at 19.20 hours when the accused surrendered himself. PW6 said that the accused first asked him to place him in cells because he had killed someone. PW6 stated that he noted blood stains on the accused hands and on the shirt he was wearing. He observed that the accused person appeared anxious, afraid and was sweating. PW6 interrogated the accused together with the DCIO.

10. PW9, another police officer was summoned by the DCIO to report to the Report Office at the station. PW9 testified that when he went there, he found the DCIO and PW6 with the accused. The accused was shouting saying “**mama nime mumaliza**” meaning “**mother I have finished him**”. He proceeded to give the names of the one he killed which tally with the names of the deceased in this case. On the instructions of the DCCIO, PW6 and 9 placed the accused him in the cells. At the scene of the incident PW9 drew a rough and later a fair sketch plan which he produced in court as P. exh.7 and 8.

11. PW11 was the Investigating Officer of this case. He confirmed that PW4 went to his office and requested him to accompany him to the station Report Office. He testified that when he went there he met the accused shouting. He said that he heard the accused utter the words “**nimemuua Peter Kamau Waithiru**”... “**mama nimemaliza yeye**”. PW11 said that he noted that the accused was addressing his mother who was held in the cells. He also noted that the accused shirt was full of blood.

12. PW11 said that he organized for the post mortem to be conducted on the deceased which revealed that the cause of the deceased death was excessive bleeding. He produced the post mortem report by consent of the parties as P. exhibit 11.

13. The blood stains on the checked shirt of the accused were seen by PW6, 9 and 11. The blood stains were analyzed by PW8 the Government Chemist. He said that the blood stains gave a partial DNA profile of an unknown male origin. PW8 produced the report as P.exh.5. From the Report, one sees that DNA profiling of the said blood did not give all the variables for every locus item, thus the partial DNA profile. However PW8 stated that the results are clear the said blood could not have been from the deceased, or even the accused for that matter.

14. There was other evidence of reports made by the deceased to Githunguri Police Station and also to the Inspector General of Police. This was disclosed by PW10, a police officer based at Githunguri Police Station. PW10 testified that on the 11th February, 2014 PW11 called him to his office where he introduced the deceased to him. PW11 instructed him to assist the deceased. He said that the deceased told him he had a letter from the Inspector General of the Police requesting that he be assisted. He said

that the deceased told him that the letter was written for him after he complained that the accused and 2 others had attacked and beaten him up at his house some times in 2012, and had stolen from him Kshs.17, 500/-, a mobile phone, a Seiko 5 watch and a hat. He said no action had been taken by Githunguri Police Station and that it was the reason he had gone to the I.G.

15. PW10 testified that they agreed to meet with the deceased again at Githunguri Police Station on 14th February 2014. The purpose of the meeting was in order to arrest the suspects. PW10 stated that on that day at 10:15 am the deceased identified the brother of the accused to him whom he arrested and placed in cells. PW10 said that he then called the mother of the accused and summoned her to the station. He said that she went to the station an hour later and that he also arrested her and placed her in the cells. PW10 said soon thereafter he parted ways with the deceased only for him to receive a call at 7:20 pm on the same day from CIP Agutu, and the DCIO informing him that the deceased had been murdered.

16. Eventually on the 21st February, 2014 the accused was examined by PW7, DR. Joseph Maundu and was found to be mentally fit to stand trial. The P3 form was produced as P. exhibit 4.

17. The accused was placed on his defence. He gave a sworn defence. The accused told the court that he spent his day working as usual. He said that he went to Githunguri Police Station after receiving a call from his brother informing him of his arrest and that of their mother. The accused said he arrived at the Station at 6:20 pm and was immediately arrested and put in the cells.

18. In cross-examination the accused denied that he with his siblings had fought over land with the deceased. He stated that at the Police Station he met one Dominic Ngugi Waithiru (PW3) who pointed at him and said **"This is he"** after which he was ordered to enter the cells where he met his mother and brother. The accused stated that he was summoned the following morning by the OCS and asked why he murdered the deceased. The accused denied murdering the deceased. He denied meeting with PW1 on 14th February 2014 or even going to the scene of murder. He also denied that he surrendered himself to the police. The accused said he had a good relationship with the deceased and had never disagreed with him.

19. DW2 was the younger brother of the accused. He said that he was arrested on his way to Nairobi as he returned from Githunguri on 14th February, 2014. The police informed him that he was a suspect. He said that he was taken to Githunguri Police Station where he was placed in cells. He was however allowed to make a call, which he did to his mother informing her of his arrest. The mother went to see him at the station at midday and was also arrested. DW2 made another call this time to the accused, same day at 5pm. DW2 testified that he too went to see him at the station same evening and he too was arrested.

20. That was the evidence adduced by the prosecution and the defence.

21. Counsel for the accused person, Mr. Wakaba filed written submissions in which he has mainly challenged the conditions of lighting at the scene and the evidence of identification. Counsel for the accused challenged the conditions of identification at the scene. He urged that the conditions obtaining at the scene at the time of the incident allegedly witnessed by PW1 and PW2 were not favourable for positive identification and noted that PW1 ran away immediately after she allegedly saw the accused person hit the deceased with a panga. Counsel cited among other cases the Court of Appeal case of **Wamunga -Vs- Republic, 1989 KLR 424** in which the Court rendered itself thus:

"Where the only evidence against a defendant is evidence of identification on recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that circumstances of identification were favourable and free from possibility of error before the court can safely make it a basis of a conviction."

22. Counsel for the accused also cited the cases of **Joseph Muchangi Nyaga & Another -Vs- Republic [2013] eKLR; Waithaka Chege -Vs- Republic (1979 KLR 271; Gikonyo Karume & Another -Vs- Republic [1980] KLR 23; Abdalla Bin Wendo & Another -Vs- Republic (1953) 20 EA CA 166; Wamunga -Vs- Republic (1989 KLR 42; and Maitanyi-Vs- Republic (1986 KLR 198);** to

demonstrate that before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight.

23. Mr. Wakaba for the accused raised the issue of contradictions in the Prosecution evidence. He pointed out that although PW2 stated that the police arrived at the scene at 7pm, PW1 on her part said they arrived at 11 pm.

24. The accused Counsel submitted that the accused went to Githunguri Police Station to enquire about his mother and brother, according to DW2 who had been arrested that same day. Counsel urged that had it been the case that he knew of or was in any way involved in the murder of the deceased, he would not have voluntarily taken himself to the police station knowing full well that he would be arrested.

25. Counsel for the accused urged that the evidence by PW4, PW 6, PW 9 and PW 11 that the accused confessed to murdering the deceased were inadmissible by dint of **Section 25A (1) of the Evidence Act**.

26. Mr. Wakaba for the accused further submitted that the evidence of PW 6, PW 9, PW 10 and PW11 that the accused person had blood stains on his face, hands and clothes when he went to Githunguri Police Station were inconclusive as PW8 the Government Analyst testified that she did not obtain DNA profiling resembling that of the deceased from the accused person.

27. Counsel for the accused also urged that although several of the prosecution witnesses who were police officers testified that the accused person presented himself to Githunguri Police Station while covered in blood, PW 8 testified that the accused person's shirt was moderately stained with blood and that there was no DNA traces belonging to the deceased that were found on the accused person's shirt.

28. The doctor in his evidence concluded that the result of the DNA profiling showed that the accused person did not come into contact with the deceased.

29. Ms. Onunga learned prosecution counsel urged that there were two eye witnesses to this incident PW1 and PW2. Counsel urged that the accused was identified and placed at the scene by PW1 and PW2 who were well known to him. Counsel submitted that PW1 saw the accused attack the deceased with a panga whereas PW2 met the accused immediately after as he was fleeing from the direction where PW2 found the body of the deceased.

30. Ms. Onunga, urged that the conduct of the accused person was suspect as he did not explain why he was running away and instead pushed PW2 when she attempted to stop him and find out why he was running away. Counsel submitted that there was evidence of preparation and that the accused and deceased were embroiled in a family feud which could have led to the murder.

31. The accused person faces a charge of murder contrary to **section 203** of the **Penal Code** that reads:

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

32. The burden of proof lies on the prosecution to adduce evidence to prove that it was the accused that attacked and beheaded the deceased. The prosecution must adduce evidence to prove that at the time the accused attacked the deceased, he had formed the necessary intention to either cause death or grievous harm to the deceased.

33. The circumstances which constitute malice aforethought are described under **section 206 of the Penal Code**. The section provide 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. ...

d. ...”

34. There are four issues for determination in this case:

a. Whether the prosecution has established that the injuries which led to the deceased death were inflicted by the accused person.

b. Whether the prosecution has established that the accused had formed the necessary malice aforethought at the time the accused inflicted the injuries in question on the deceased.

c. Whether the prosecution has established the motive for the attack on the deceased.

d. Whether the accused defence was reasonable and plausible.

35. Regarding the evidence of a single eye witness, the court of appeal in ABDULLAH BIN WENDO VS. REX 20 EACA 166, emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

36. The prosecution has placed reliance both on direct evidence of PW1; and circumstantial evidence from other witnesses including PW2, 4, 6, 9 and 11. PW1 was the sole eye witness of the offence. According to PW1 she was walking home with the deceased, who was her brother in law. It was 6 pm and that there was still daylight. Her testimony was that she saw the accused emerge from a plantation, panga at hand, and immediately cut the deceased on the head whereupon the deceased fell. She did not wait to see what followed but instead ran back up hill while screaming.

37. I considered the circumstances of lighting at the scene of incident. PW1 said it was clear daylight and one could see clearly. She said she was walking right behind the deceased at the time and therefore the accused came quite close to her to enable her see him clearly and identify him.

38. PW1 said that the accused is her husband’s nephew and she therefore knew him very well. The evidence of identification by PW1 is that of recognition. Indeed no identification parade was conducted for PW1 to identify the accused, which is in order given the close relationship between the two.

39. The evidence of PW1 received support from that of PW2. PW2 stated that when she went to answer the screams by running towards them, she saw PW1 running up hill away from her. She therefore decided to run faster after her, only to meet with the accused running towards her at top speed from the direction that she had seen PW1. PW2 therefore supports PW1’s evidence by placing her at the scene. PW2 also places the accused at the scene immediately after the incident. Her evidence paints a picture of a person running away from an incident in that when she asked the accused what the matter was, even going to the

extent of holding him by his shirt collar, the accused reaction was to push her so violently that she fell down. Immediately thereafter PW2 came across the beheaded body of the deceased.

40. The evidence of PW1 is further supported by that of the post mortem findings by the pathologist, Dr. Odour and the photographs taken of the body of the deceased. They show deep cuts on the middle of the head towards the left side and decapitation of the head. The deep cuts on the head of the deceased were testified to by the Crime Scene officer who took the photographs, PW5. Photographs 9, 10 and 11 were close up views of the deep cuts on the deceased head.

41. All these evidence corroborates the evidence of PW1 that the deceased was cut on the head. That evidence is in tandem with that of PW1, which goes further to affirm that indeed PW1 must have been at the scene and must have witnessed the incident as she narrated in her evidence.

42. The evidence of PW1 was not the only evidence the prosecution was basing reliance on. There was circumstantial evidence. The first piece of circumstantial evidence was by PW2. She was a first cousin of the accused because their fathers were brothers. She met the accused coming from the direction where she shortly later found the deceased body. It was also the direction from which she saw PW1 running backwards from as she screamed. Having been seen running away at top speed from the scene where the body was found placed the accused squarely at the scene of crime soon after the murder. The incident took place in broad day light, and being first cousins and having held him by the collar, PW2 had a very clear and good opportunity to see and identify the accused. The evidence of PW3, her uncle whom she met as she ran from the scene while screaming after seeing the body shows consistency on PW2's part. PW3 confirmed that PW2 reported to him about the deceased body and also about meeting with the accused running from the scene of murder. That evidence adds credence to PW2's evidence.

43. In regard to this piece of evidence by PW2, under **sections 111 (1) and 119 of the Evidence Act**, the accused had a statutory burden to explain why he was running from that scene of murder soon after the offence had been committed. **Section 111 (1) of the Act** provides as follows:

111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

44. **Section 119** of the same **Act** provides as follows:

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

45. The accused did not explain why he was running when he met with PW2. Instead he has denied having been at that scene on the day in question. I did consider the proceedings and found that during cross examination of these witnesses, PW1, 2 and 3 no suggestion was made to them that they were lying against the accused.

46. The other evidence implicating the accused are the alleged admissions he made to several witnesses after the incident, the threat to PW3 and the allegation he surrendered himself to PW4 after the incident.

The question is whether these statements made by the accused are admissions of crime, and whether they are admissible in evidence? The **Evidence Act** under **section 3** gives an interpretation of the term “evidence”. That section provides:

“3. (1) In this Act, unless the context otherwise requires–

“evidence” denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity;”

47. From that section it is clear that accused admissions can be used in evidence if admitted as same. The issue is whether the statements attributed to the accused are admissible in evidence. Under **sections 62** and **63** of the **Evidence Act**, the law provides that oral evidence must be direct evidence. It will be admissible if it meets the requirements set out under the two sections. **Sections 62** and **63 (1)** and **(2) (a)** and **(b)** of the Act stipulate as follows:

“62. All facts, except the contents of documents, may be proved by oral evidence.

“63. (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; ...”

48. The Evidence Act has to be considered holistically. While **sections 62** and **63** of the **Act** are a good guide in determining admissibility evidence generally, when it comes to statements made to police officers, **sections 62** and **63** must be considered alongside **section 25A** of the **Act**. That **section** provides:

“25A. (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person’s choice.”

49. Under section 26 of the Act, further restrictions are made regarding statements by an accused tending to the proof of guilt of an accused, whether an admissions or confessions, thus:

“26. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”

50. PW 6, PW 9 and PW 11 were police officers, and were on duty at the station where it is alleged the accused presented himself before making the said admissions or confessions. None of them cautioned him. Section 25A of the Act applies. What the accused said to PW6, 9 and 11 is therefore not admissible.

51. As for what PW3 said the accused told him at the Station, saying that he had killed the deceased and threatening him that he would be the next, is admissible, just as any evidence under **section 62** and **63** of

the **Act**. It has to be tested as to evidential and probative weight, just as other evidence.

52. There was also the evidence of PW4 that the deceased had reported an assault and theft against the accused, DW2 and their mother, and that he had arrested their mother and DW2 and was looking for the accused person as well. The deceased was murdered the same day he arrested the other two. This evidence establishes that the accused had a possible motive why he would eliminate the deceased. Not only was he being sought but for two years before this time, the deceased had complained against him, his mother and DW2 but no police officer had taken any action. It is only when the deceased went to see the I. G. that action was taken. I find that the prosecution had established a motive for the attack as against the accused.

53. Counsel for the accused submitted that the evidence of PW 6, PW 9, PW 10 and PW11 that the accused person had blood stains on his face, hands and clothes when he went to Githunguri Police Station was contradicted by PW8 the Government Analyst. PW8 testified that she did not obtain DNA profiling resembling that of the deceased from the accused person. I do not agree that the findings of the Government Chemist are proof of accused not having any role in deceased murder. The evidence of PW1 and 2 was clear that after the heinous act, the accused left the scene in a hurry. He was found at the Station by PW4. The fact he left the scene means he had ample time and opportunity to interfere with evidence. The finding by PW8 is of little consequence.

54. Mr. Wakaba urged that although several of the prosecution witnesses PW6, 9 and 11, who testified that the accused person presented himself to Githunguri Police Station while covered in blood was contradicted by PW 8. PW8 testified that the accused person's shirt was moderately stained with blood and that there was no DNA profile belonging to the deceased found on the blood. I do not find this evidence a contradiction for the same reasons as earlier stated. The accused had time to interfere with evidence, and the finding of PW8 in the circumstances is not significant.

55. Mr. Wakaba urged that there were contradictions in the prosecution evidence. He urged that PW1 contradicted PW2 when she stated in her evidence in chief that the police arrived at the scene at 11 pm, while PW2 said that they came at 7pm. I examined the record of proceedings and found that during cross examination, PW1 clarified that the police arrived at the scene at 8 pm. The disparity in time in evidence of PW1 and 2, being only one hour is in my view not material.

56. The accused denied the charge putting forward an alibi as his defence. He denied going to the scene on the material day. He also called his brother DW2 who said that he was the one who called the accused asking to see him and their mother at Githunguri Police Station as they had been arrested. The evidence of DW2 does not assist the accused as he was in the cells and could not vouch for accused movements before going to the police station.

57. The accused on his part gave elaborate details of his movement. I did not find his evidence plausible, reasonable or believable. The accused was placed at the scene of crime by PW1 and 2. The incident took place at 6pm, in broad day light. It was along a path and the accused carried out the attack on that path. PW1 who witnessed the incident was not obstructed at all. PW2 who met with him also saw PW1 leave the scene screaming and running back where she had come from. The accused was running towards her. He did not want to stop or talk to PW2. These two witnesses were related to the accused as wife of his father's brother and daughter of his father's brother respectively. They all lived in the same place. They both knew the accused well. I find that there was no possibility of error or mistake in identification. I find that the circumstances of identification were good for positive identification of the accused.

58. From his conduct I can infer that the accused left the scene in a huff after committing the offence. Given the fact no murder weapon was recovered, I can also infer that he was leaving the scene to dispose of the said weapon.

59. I have thoroughly considered the evidence adduced by both sides in this case, and have carefully analyzed and evaluated it. I find that the prosecution has adduced sufficient evidence which proves beyond any reasonable doubt that the accused is the one who ambushed the deceased and attacked with a

panga. He cut him severely on the head and also beheaded him before running to the police station where he was arrested. I find the accused defence is not plausible or reasonable and therefore I reject it in total.

60. Having considered the entire evidence adduced in this case, I find that the prosecution has proved the charge of murder contrary to **section 203** of the **Penal Code** against the accused person, beyond any reasonable doubt. I find the accused guilty of murder as charged and convict him accordingly under **section 322** of the **Criminal Procedure Code**.

DATED AT NAIROBI THIS 8th DAY OF MARCH, 2017.

LESIIT, J

JUDGE