



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL CASE NO. 15 OF 2016**

**REPUBLIC .....PROSECUTOR**

**versus**

**J N G .....SUBJECT**

**JUDGMENT**

1. **HADIJA WANJERA JULLOW** the deceased was a hard working mother of 6 children. It became apparent from the evidence adduced before court that the deceased was not living with her husband the father of her 6 children. The fact the deceased was poverty stricken was not a hindrance to her making a living to enable her feed herself and her children. She engaged in collecting scrap metal in the Nanyuki town for resale.

2. Because she could not afford to pay rent **Abdi Aboto Shida (Abdi) (PW 1)** gave her a room to stay with her children, rent free. Abdi was employed, by a person called Mahiga, to provide security to Mahiga's piece of land in Muthaiga estate in Nanyuki. Mahiga provided Abdi with two rooms for his residence on that land. Abdi on learning that the deceased could not afford to pay rent gave her and her 6 children one of those rooms to occupy. That was where the deceased was residing until her untimely death.

3. The events surrounding this case all began on 14<sup>th</sup> June 2016. On that day **Hallake Golcha Sala (Hallake) (PW 2)** at 2 pm was on foot at Muthaiga Estate Nanyuki. As he neared the land of Mahiga he heard screams coming from there. He decided to check why someone was screaming. He went to the direction where the screams were coming from. He realised it was a lady that was screaming. He entered that land. He saw two people struggling together. He was about two to three steps away from those two people. He noticed that a young boy who was struggling with the lady had a knife. This is what he stated in his evidence.

***“I saw the young boy had a knife holding it in a stabbing motion. The boy and the lady were holding each other. The boy's face was facing me. The lady's back was towards me..... I saw with my own eyes the boy stab the lady. On stabbing the young boy ran away.”***

4. As Hallake watched the above events he saw Abdi coming from one of the rooms on Mahiga's property. He heard Abdi screaming that **“someone had killed someone else.”**

Hallake said as the young boy ran away the lady ran away in the opposite direction. The lady however collapsed and fell before reaching her house. Hallake saw Abdi run in the direction the young boy ran. He noted the young boy ran towards the stream which is within the land of Mahiga. The young boy was arrested by Ali Ahmed Baron (Ali) (PW 5) and someone else who Hallake did not know. The young boy was brought by those who arrested him to the place where the deceased fell down.

5. Hallake stated that as the young boy ran away and because of the very long grass he lost sight of him. That was just before he got arrested by Ali and another. When the boy was brought to where deceased lay Hallake said that he noted it was the young boy that he had seen stab the deceased. Those who arrested the young boy brought with them a bloody knife which had a blue handle. Hallake identified the knife he saw on that material day, when it was brought to the place deceased lay, as the knife before court marked as exhibit No. 1. Hallake further stated:-

***“As the boy and the deceased were struggling I could see the face of the young boy and that was the same boy arrested by Ali Baron ..... The boy was brought together (with) the knife. I noted the knife had a blue handle and it had blood.”***

6. Hallake noted that the young boy when he was brought by those who arrested him he had blood on his hand. Hallake identified the young boy who was arrested as the subject before the court, in the dock. Hallake said he used to see the deceased before that fateful day.

7. Abdi lived next door to the deceased and her 6 children in one of the two rooms provided for him by his employer. They had lived next door to each other for 7 months before her death. He said that the deceased was poverty stricken, could not afford to pay rent, and she used to collect scrap metal within Nanyuki town which she then sold to enable her feed her children. Abdi on 14<sup>th</sup> June 2016 had been to Nanyuki town. He returned home at 2 p.m., whilst in his house he heard screams. He said the screams were loud. He ran into the shamba from where the screams were coming from. He met the deceased who was clutching the area near her stomach. He saw blood was shooting from that area towards the deceased's face. Deceased was not talking. He noticed someone was running away from where the deceased was towards the stream inside Mahiga's land. He saw the back of that person who was running away and shouted:-

***“stop that person who has killed someone.”***

Abdi saw people ahead and the person who was running was met by those people who arrested him. He stated in evidence:-

***“I saw him (the young boy) being arrested and those people began to bring him towards me. He was brought up to where I was. That person was arrested by Ali, Ocharo and another person I cannot recall his name. They brought the person to me together with the knife he stabbed deceased with..... When I first saw the subject (young boy) I did not lose sight of him until he was arrested and brought to where I was standing.”***

8. Abdi said that when he saw the deceased bleeding the deceased went past him towards her house but did not reach her house because she fell down. He further noted that the deceased had dropped her things at the place where she was stabbed. Those things were scrap metal, spaghetti, cooking oil and beans wrapped in white cement bag and also wrapped with a pink clothing. They were produced as exhibit No. 2.

9. **David Ochola Odhiambo (David) (PW 3)** was on 14<sup>TH</sup> June 2016 doing car wash when he heard screams. The person screaming was a man he seemed to fondly refer to as his uncle called Abdi (PW 1). He heard Abdi say:-

***“arrest that one, arrest that one.”***

David was in the company of Ali (PW 5) who was herding his cattle. On hearing those screams both of them looked to see where they were coming from. Ali stated that before the screams of a man he had heard a woman scream. It was then they noted someone was running from where the woman was screaming. Ali and David arrested the person running who was young boy. They both demanded that the boy remove what he had stolen. It was then the young boy put his hand in the pocket and removed a bloody knife. David and Ali noted that the knife was kitchen knife with a blue handle. They both also noted that the young boy had blood on his hands. Ali picked up the knife and both he and David escorted

the young boy to where the deceased lay. Ali and David stated in their evidence that the young boy they arrested was the subject who was before court in the dock.

10. Both Ali and David previously knew the deceased. David out of respect referred to her as auntie. Ali on confirming that he knew the deceased had this to say about her:-

***“She was a poor lady who survived by collecting scrap metal.”***

11. **Mohamed Ali Ado (Mohamed) PW 4** was on 14<sup>th</sup> June 2016 at 2 p.m. coming from his home where he had taken lunch. He heard a man shouting. The person was shouting:-

***“arrest.”***

Mohamed then went to the place where a young boy had been arrested. The boy had already been arrested. He saw a knife on the ground near the young boy’s legs. He also noted that the young boy had blood on his hand. He was able to identify Exhibit No. 1 as the knife he saw where the young boy had been arrested. As they escorted the young boy back to the scene he noted the deceased items of property. Mohamed said that he previously knew the deceased. He was also able to confirm that the boy arrested on that day was the subject before court in the dock.

12. **A.P.C. Paul Kahoro (PW 7)** was called by a member of the public on 14<sup>th</sup> June 2016 and informed that there was a young boy who was being subjected to mob justice. He was able to rescue that young boy and took him to the police station. He confirmed the young boy he re-arrested was the subject before court in the dock.

13. **Doctor Omenda Juma Tony (PW 10)** produced the post-mortem of the deceased. The body was identified by **Guyo Dida Dabasso (PW 6)** husband to the deceased. The doctor found a 2 x 1 cm wound in the muscle between the 2<sup>nd</sup> rib of the deceased body. Deceased body also had missing teeth. In the respiratory system there was haemtoma and blood in the left lung cavity. There was a punctured wound on the medial aspect of the upper part of the left lobe measuring 1 cm by 0.5 cm by 5 cm in depth. The doctor found the cause of death to be cardio respiratory failure secondary to massive haemothorax due to a penetrating injury to the chest. Blood sample of the deceased was extracted during the post-mortem.

14. The extracted blood of the deceased and that of the subject and the knife with the blue handle were taken to the government chemist for analysis. **Lawrence Kinyua Muthuri (PW 12)** carried out DNA analysis which revealed that the blood on the knife matched the deceased’s blood.

15. **J N G (the subject)** was charged with the **offence of murdering Hadijah Wajera Jullo, on 14<sup>th</sup> June 2016, contrary to section 203 as read with section 204 of the penal Code.** He pleaded not guilty. His age was assessed at Nanyuki Teaching and Referral Hospital and he was found to be, as at 20<sup>th</sup> June 2016, 15 years old.

16. At the close of the prosecution’s case and after the court found the prosecution had laid out a prima facie case, the subject gave his defence under oath. In his defence he stated that he was a student in form 3 at [particulars withheld] school. He was a boarder in that school. On 13<sup>th</sup> June 2016 he was sent away from school because he had not fully paid up his school fees. On 14<sup>th</sup> June 2016 he said that he went to Laikipia District Library. On his way home he decided to use a short cut near Mahiga farm. This route, he said, was a short cut to his home. As he crossed the river he saw someone who was running with a sack. This person was dirty and his clothes were dirty. This person who emerged from the tall grass knocked him down and as he fell down the subject said he scratched his right hand with a stick. When he got up from where he had been knocked down he walked about 500 meters then Ali and Baraka arrested him at the bridge. Those who arrested him demanded he return that which he had stolen. He denied having stolen anything and he denied that he killed the deceased. The subject alleged that those who arrested him did so because they had a grudge against him. On being asked why they had a grudge the subject answered.

***“One time at that River they (the arresting men) asked me for money and I did not have.”***

17. The prosecution bears the burden of proof beyond reasonable doubt in this case. The subject has no obligation to prove his innocence. That obligation of the prosecution was the subject of discussion in the case **WAFULA JUMA & 2 OTHERS V REPUBLIC (2014) eKLR** where it was stated:-

***“Of instant benefit to this appeal is that, after a long raging debate, dating back to the late part of 1700, on whether or not legal burden of proof could shift under any circumstances, it is now a well settled principle of law that, the legal burden of proof in criminal matters never leaves the prosecution’s backyard. Viscount Sankey L. C. in the case of H. L. (E)\* WOOLMINGTON V DPP [1935] A.C 462 pp 481 in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that:-***

***‘Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilty subject to what I have already said as to the defence of insanity and subject also to any statutory exception ..... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.’***

18. The prosecution has to prove beyond reasonable doubt that:-

***(a) That the deceased died;***

***(b) That the subject did an unlawful act that caused the death of the deceased; and***

***(c) That the subject acted with malice aforethought.***

19. The prosecution adduce evidence which proved beyond reasonable doubt the death of the deceased. PW 1, 2, 3, 4, and 5 categorically stated that the deceased died at the scene. PW 6, the husband of the deceased confirmed that he identified the body of Hadijah Wajera Jullo the deceased before post-mortem was performed. Doctor Oluenda Juma Tony PW 10 confirmed that the deceased was dead and proceeded to give the cause of death to be massive haemathorax due to penetrating injury to the deceased’s chest. Death of the deceased therefore was proved.

20. The second ingredient the prosecution needed to prove was that the subject did an unlawful act which caused the death of the deceased. Hallake was very clear in his evidence that on being attracted to the scene by screams he proceeded there and he said he saw clearly the subject, whom he did not know struggling with the deceased and saw the subject stab the deceased. His testimony was unshaken by cross examination.

21. Abdi who also was alerted by the screams saw the subject bolt away from the scene leaving behind the deceased who was bleeding at the chest. Abdi too was very clear that he ran toward the direction that the subject went and managed to alert those that were near the stream to stop the subject. Abdi stated that he kept the subject in sight until he was apprehended by David, Ali and Mohamed. All those witnesses testified that they did not know the subject before that date. These witnesses were not cross examined on the allegations made by the subject, in his defence, that they had a grudge against the subject. The witnesses statement that they did not know the subject before the date of the incident was not even subjected to cross examination by the subject’s counsel. It follows that the subject’s defence that his was a case of mistaken identity or that he was arrested by Ali and David and Mohamed because they had a grudge against him is an afterthought and is rejected. The prosecution’s evidence that it was the subject who stabbed the deceased was direct evidence, not circumstantial. Hallake directly saw the subject stab the deceased and bolt away. The act of stabbing the deceased was unlawful act which caused the death of the deceased. The second ingredient was therefore proved.

22. The subject raised alibi defence. That alibi defence was raised for the very first time when the subject gave his defence. That being so the prosecution could not investigate that alibi. It follows then the court

can only weigh that defence against the prosecution's evidence. This is what was stated in the case **KENNEDY OCHIENG ODONGO –V- REPUBLIC [2015]eKLR** thus:-

*“As regards the alibi, the learned magistrate directed her mind to the case of **STEPHEN CHEBII CHEBOWO –V- R ELD HCCRA NO. 172 OF 2011 [2013] eKLR** where **Kimondo J., following Wangombe V Republic [1976 -80]KLR 1683** stated that:*

*‘When an alibi evidence is proffered, the prosecution is obliged to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution’s case. It was thus open to the trial court to weigh it against the evidence already tendered.’*

23. On weighing the alibi defence with the cogent and very clear convincing uncontroverted prosecution's evidence the alibi evidence is rejected by this court.

24. The subject's learned counsel Mr. Thuku highlighted what he termed as inconsistency in the prosecution's evidence. The Court of Appeal considered inconsistencies or discrepancies in the case of **JOSEPH MAINA MWANGI – VRS REPUBLIC – CRIMINAL APPEAL NO. 73 of 1993** where Tunoi Lakha and Bosire J J A, held:-

*“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences”.*

25. The question to consider in this case is was there any inconsistency in the prosecutions. If so were such inconsistency fundamental to cause prejudice or weaken prosecution's case.

26. There were no inconsistencies in this case in the prosecution's evidence. Hallake said that he lost sight the subject as the subject bolted. Abdi followed the subject and it is not surprising he was able to keep in sight the subject until he was apprehended by David, Ali and Mohamed.

27. The prosecution's witnesses David, Ali and Mohamed testified how the subject removed the knife from his pocket. It is not an impossibility as suggested by Counsel for the subject for one to keep a knife in a pocket while running. It ought to be remembered that the subject was running scared trying to avoid being apprehended. In view of that fright of apprehension he could have done, what in normal circumstances may seem impossible.

28. In the face of the clear evidence of the prosecution's witnesses who saw the subject attack the deceased and run, the subject's defence that he was knocked down by a dirty man wearing dirty clothes is rejected.

29. I am satisfied beyond reasonable doubt that it was the subject who was criminally responsible for the death of Hadijah Wajera Jullo deceased. I had the opportunity to see the subject as he testified and I did not believe his defence. It is for that reason his defence is rejected.

30. The third element the prosecution needed to prove was that the subject acted with malice aforethought. The prosecution in other words needed to prove that the subject's intention was to cause death or very serious harm. The prosecution in my view proved this. Hallake testified that there was screaming and a struggle between the deceased and the subject before the subject used the knife and fatally injured the deceased. In stabbing deceased the subject clearly intended death or serious harm to the deceased. The subject therefore acted with malice aforethought.

31. In the end the prosecution proved beyond reasonable that it was the subject who stabbed the deceased which stabbing resulted in the deceased's death. **For the above reasons the judgment of this court is that there is a finding of guilt against the subject for the murder of Hadijah Wajera Jullo.**

**DATED and DELIVERED at NANYUKI this 7<sup>th</sup> JUNE 2017.**

**MARY KASANGO**

**JUDGE**

**Coram**

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Subject: Joseph Nyugutu Gathirua

For accused.....

For state: .....

Language .....

**COURT**

Judgment delivered in open court

**MARY KASANGO**

**JUDGE**