



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 7 OF 2014

(Formerly Kisii High Court Criminal Case No.51 of 2010)

REPUBLIC.....PROSECUTOR

-versus-

ZABLON CHACHA alias PASTOR..... ACCUSED

JUDGMENT

Introduction:

1. When **JOHN KERARIO MOSABI** woke up on the bright Wednesday morning of 9th June 2010 little did he know that he was going to meet his death later in the day. And as usual, it was yet another market day at the local Kehancha Township.
2. **JOHN KERARIO MOSABI** was the Assistant Chief of *Igore* Sub-Location within Kuria of the larger Migori County and was married with several children. I shall henceforth refer to the said **JOHN KERARIO MOSABI** as "***the deceased***" in this judgment.
3. As the deceased was at the Kehancha Market at around midday on the fateful day, he was stabbed by an assailant. On being rushed to the Kehancha District Hospital, he was pronounced dead on arrival. A report was made to Kehancha Police Station and subsequently one **ZABLON CHACHA alias PASTOR** was arrested and arraigned before the High Court at Kisii where he was charged with the murder of the deceased. That was on the 1st July 2010. On denying the information the Court ordered a trial of the case but before that happened the matter was transferred to this Court.

The Trial:

4. The prosecution called a total of 6 witnesses in a bid to prove its case against the said **ZABLON CHACHA alias PASTOR** whom I shall refer to as '***the accused***' in this judgment.
5. **PW1** was **Lucas Mwita Chacha**, a *boda-boda* rider while **PW2** was **Daniel Chacha Gitangita** who was a farmer and a construction worker. The Assistant Chief of Kehancha Township one **Lukas Mwita Taruru** testified as **PW3** while a brother to the deceased one **Bernard Taruru Kerario** testified as **PW4**. The doctor who conducted the autopsy testified as **PW5** and the prosecution closed its case with the evidence of the Investigating Officer who testified as **PW6**. I will henceforth refer to the said prosecution witnesses with their respective numbers.

6. The evidence of PW1, PW2, PW3 and PW4 was taken before **Hon. D.S. Majanja, J.** who left this Court station before completion of the trial. Upon compliance with **Section 200 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya**, parties agreed and indeed proceeded with the hearing from where it had reached. This Court therefore took the evidence of PW5 and PW6 as well as the defence case.

7. The facts surrounding the death of the deceased can be briefly summarized as follows: In the morning of 9th of June 2010, PW1 was hired by the deceased at Taranganya stage to take him to the District Commissioner's office. He obliged and on reaching there he waited for his client to finish his assignment and to return him to Taranganya as they had agreed. When the deceased was through, the two left and the deceased asked PW1 to first take him to the Kehancha market to see his wife before they proceeded on with their journey. PW1 again obliged. As the deceased went into the market, PW1 waited for him outside one of the shops. After a while the deceased came out and as he was heading towards PW1, PW2 appeared and cordially took the deceased aside to enquire on how he would get a letter from the deceased on his lost identity card. As the deceased and PW2 talked, a man appeared from the direction of the market and went straight in-between the two. The man grabbed the deceased by the collar of his shirt and asked the deceased where he had taken the man's wife to.

8. Visibly shocked, PW2 intervened and sought to know which wife the man was referring to but PW2's further shock came when the man put him off by telling PW2 that he was not talking to him but to the deceased. The deceased then asked the man if he was sure that he had the man's wife. In a split of a second the man stabbed the deceased on the chest with an item and PW2 intervened by pushing the deceased away so as to be able to escape. The man with a view to teach PW2 a lesson not to interfere with issues which did not concern him swiftly stabbed PW2 as well. PW2 then ran away while raising alarm and calling for help. As the deceased attempted to also run away, the man tripped him and the deceased fell down. The man then continued to stab the deceased severally as he was on the ground.

9. As PW1 was watching what was happening from a distance of about 10 metres away, he feared intervening in view of what had happened to PW2. PW1 instead ran into the market as he also raised alarm. The man on realizing that there may be an uproar from the members of public also fled from the scene. Members of public however pursued the man.

10. PW1 then hurriedly reported the matter to the Kehancha Police Station. When the police visited the scene, they took the deceased to the Kehancha District Hospital where he was pronounced dead on arrival.

11. As PW3 was in his office at the Kehancha Town at around midday, he heard some commotion towards the local market and on enquiry he was informed by one **Mwita Morabu** (not a witness since he died before testifying) that the deceased had been stabbed by one **Zablon Chacha** using a knife. PW3 was further so informed that the deceased had since been rushed to the hospital and that the said Zablon Chacha was being pursued by members of public as he had escaped from the scene. The said Mwita Morabu went on to tell PW3 that as Zablon Chacha took off he dropped the knife he had used to stab the deceased and which knife the said Mwita Morabu had picked and handed over to PW3. That knife was later on handed over to PW6 by PW3 on the same day.

12. A Post-mortem examination that was conducted by PW5 revealed that the deceased died from a cardio-vascular collapse secondary to perforation of the arch of the aorta. PW4 identified the deceased's body at the Pastor Machage Hospital Mortuary in Migori Town prior to the said post-mortem examination.

13. When the prosecution closed its case, this Court was satisfied that the prosecution had established a *prima-facie* case and placed the accused on his defence.

14. The accused opted for an unsworn defence and raised an *alibi*. It was the accused person's testimony that he was a Pastor and ran a shop at the Kehancha Township. That on the fateful day he had closed his shop in the morning so as to rush to Sirare town to pick some goods since it was a market day at the

Kehancha township. As he rode on a motor cycle as a pillion passenger the motor cycle was involved in a grisly accident when it hit some cows which were being driven to the market. He lost consciousness only to recover and find himself in Kehancha Hospital with serious injuries. He was then admitted for one and a half months. When the accused was discharged from the hospital he went to report the accident at Kehancha Police Station and instead he was arrested and charged with an offence he knew nothing about.

15. The accused then closed his case without calling any witnesses.

Parties' submissions:

16. The accused through Counsel filed written submissions and referred to several judicial decisions. His submission were centered on twin issues that he was not properly indentified as the one who caused the death of the deceased given that an identification parade was not conducted and that crucial witnesses were not called to testify thereby leaving the prosecution's evidence with a lot of irreconcilable gaps. Counsel further submitted that the prosecution failed to prove all the ingredients of the charge of murder and prayed that the accused be acquitted forthwith.

17. The State on its part relied on the evidence on record in calling for a conviction.

Analysis and Determinations:

18. I have carefully considered the evidence on record as well as the exhibits and the Counsels' submissions. As the accused is charged with the offence of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

I will therefore consider each of the issues independently.

(a) Proof of the fact and cause of death of the deceased:

19. It is not in dispute that the deceased died. That fact was proved by PW1, PW2, PW4, PW5 and PW6. On the cause of the deceased's death, PW5 confirmed that a post mortem examination on the deceased was conducted on 17/06/2010. The Doctor formed the opinion that the deceased's death was as a result of cardio-vascular collapse secondary to perforation of the arch of the aorta.

20. Since there is no any other evidence contradicting that of PW5 on the possible cause of the deceased's death, this Court hence concurs with the medical finding that the deceased died as a result of cardio-vascular collapse secondary to perforation of the arch of the aorta.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person:

21. As the accused denied the offence, it was the sole duty of the prosecution to prove that indeed it was the accused who authored the death of the deceased. The accused contended that he was not properly identified as the man who stabbed the deceased.

22. PW1 and PW2 were eye-witnesses. Whereas PW1 was about 10 metres away from where the commotion between the deceased and the assailant ensued, PW2 was indeed with the deceased during such a time. When PW1 was giving his testimony-in-chief, he said of the assailant as follows:

"....Daniel Chacha and Zablon Chacha were not there when I came back with the police.

The person was Zablon Chacha..... I had not known the person who stabbed the deceased....."

23. On being cross-examined, PW1 had the following to say about the very same assailant:

".....The person, I did not know came from the market gate. I just saw the person hold the Chief by the collar. He said something but I did not hear what he said....."

24. PW2 on his part had the following to say on the assailant during his examination-in-chief:

"..... While we were at the side talking and I explaining to him that I needed his letter to get my identity card a man suddenly appeared. I did not know the man. He asked 'Where is my wife? I replied to him, 'Which wife?' He replied. 'I am not asking you. I am asking the chief'. Suddenly the man stabbed Chief on the chest. I pushed the chief so that he can run away. I was also stabbed by the person. I began raising alarm as I ran to the market where my in-law was. I was asking people to help....."

The person who stabbed the chief, I can identify him if I saw him. He is the accused seated in the dock..."

25. On cross-examination PW2 stated that:

".....As I was talking to the chief, I did not see the person who stabbed us coming. He appeared suddenly. He spoke to the chief....."

It was my first time to see the accused. I cannot recall how he was dressed. I was confused at the time....."

26. Apart from the foregone evidence on the identity of the assailant, nothing more followed. Since both PW1 and PW2 did not know the assailant before the day of the incident, it is not clear how PW1 came to know the name of the assailant as one Zablon Chacha. Further the attack was sudden and did not last long. PW2 was also suddenly stabbed and in his own words he confirmed that ***'I cannot recall how he was dressed. I was confused at the time'***.

27. Another equally important issue relates to the fact that the assailant was not arrested and detained at the scene. Indeed none of the witnesses stated how the assailant was ever arrested. Whereas there was an attempt to say that members of the public pursued the assailant and eventually arrested him, the record reveals otherwise. There is no evidence to show that any witness chased the assailant throughout until his arrest without his losing sight of the assailant at any time.

28. Another equally disturbing aspect on the issue of the identification is whether the testimony by PW6 that the assailant was identified by PW1 and PW2 at the Kehancha Hospital a day after the deceased died was honest and could be relied on. To me that is not the case. I say so since neither PW1 nor PW2 stated such in their respective testimonies.

29. Holding the foregone at that, it is imperative that I revisit the settled legal guidelines governing the issue of identification of suspects in such circumstances as those in this case. The principles were discussed in the *locus classicus* case of **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, where the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused

under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

30. The Court of Appeal in the case of **Wamunga vs. Republic (1989) KLR 426** stated as under:-

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

31. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction. (Also see the Court of Appeal cases of **Roria v. R (1967) EA 583**, **Kamau v. Republic (1975) EA 139**, **Francis Kariuki Njiru & 7 others v. Republic Criminal Appeal No. 6 of 2007 (unreported)**, **Mutonya Kariuki & Ano. v. Republic (2014) eKLR** among others.)

32. As the witnesses had never seen the assailant before and since the prosecution only relied on the dock identification of the accused, the Court of Appeal in the case of **Gabriel Kamau Njoroge v. Republic (1982-88)1 KLR** stated with such clarity that:

'A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.'

33. By juxtaposing the foregone legal guidance with the evidence on record, I come to the finding that the circumstances of this case called for the conduct of an identification parade so as to pre-empt any possible doubt as to whether the accused was the assailant. I therefore find that the identification evidence on record was not safe and free from error.

34. Turning to the contention that crucial witnesses were not called to testify, the starting point is **Section 143 of the Evidence Act, Chapter 80 of the Laws of Kenya**. That section gives discretion to the prosecution to call any number of witnesses it desires in proof of any fact which is in dispute in a trial. It is however settled that whenever the prosecution fails to call a crucial witness without any justification then an adverse inference is made against the prosecution that the witness(es) would have been adverse to the prosecution's case. (See the cases of **Bukenya & Others -versus- Uganda (1972)EA 549** and **Nguku -versus- Republic (1985)KLR 412**).

35. I have carefully perused the record and noted that there is no witness who was called to explain how the accused was arrested. The evidence of PW6 on the same comes into play much later and after the alleged assailant was in hospital. Given that the accused raised an *alibi* and gave his account of how he was arrested by the police, it remained incumbent upon the prosecution to lead evidence on the issue and such failure brings the adverse inference into play since there was no attempt to justify the absence of such witness(es).

36. As I come to the end of this analysis, allow me to express utter disappointment in the manner in which the investigations were conducted in this case. Had the investigators been diligent enough, the need to conduct an identification parade and to get witness(es) to at least explain how the accused was arrested before being taken to hospital would not have escaped their minds. I once again reiterate the need for thorough investigations in any criminal case moreso in such a case where a life was lost and the accused

risks a death sentence on conviction.

37. The totality of this matter is that this Court can only smell suspicion that the accused might have caused the death of the deceased. That being so this Court remains alive to the truism that suspicion alone even though so strong cannot be a basis of a conviction in a criminal case. That was the finding in the Court of Appeal case of James Tinaga Omwenga v. Republic (2014) eKLR where it held that: -

“ 20. Based on the evidence on record, we find that the only thing that connects the appellant to the offence is suspicion.....”

It is trite law that suspicion alone cannot be the basis for inferring guilty. In Mary Wanjiku Gichira vs. Republic -Criminal Appeal No. 17 of 1998, the court held,

'suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.'

See also this Court's decision in Sawe vs. Republic (2003) eKLR 364.”

38. It is therefore the finding of this Court that the prosecution failed to establish that it is the accused person who caused the death of the deceased.

Disposition:

39. Having therefore found that there is no nexus between the accused and the commission of the offence, it will serve no purpose at all for me to deal with the third ingredient.

40. The upshot is that the information of murder facing the accused has not been proved. The accused person is hereby found not guilty of the murder of **JOHN KERARIO MOSABI**. He is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 02nd day of November 2016.

A. C. MRIMA

JUDGE