



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 99 OF 2012

LESIT, J.

REPUBLIC.....PROSECUTION

VERSUS

JOSEPH WAMBUGU MWANGI alias JUMA.....ACCUSED

JUDGMENT

1. The accused **JOSEPH WAMBUGU MWANGI alias JUMA** is charged with Murder contrary to **section 203** as read with **section 204** of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are:

“On the 15th day of October, 2012 at Reuben Village in Industrial Area within Nairobi County, murdered Francis Wanjohi.”

2. The prosecution called a total of 9 witnesses. The facts of the prosecution case were that the deceased was a neighbour to the accused person and both were living at Mukuru Kwa Reuben Village in Industrial Area. The two were also related in that they were first cousins.

3. PW8 was the first one to respond to the deceased’s cry for help. He was the deceased’s neighbour and their houses were 7 meters apart. He testified that on 15th October 2012, at around 9 pm as he entered his house, he heard screams from the deceased’s house saying **“Neighbour why don’t you come to help me”**. PW8 immediately went to the deceased’s place and found him outside his house on the corridor bending and holding his abdomen while he writhed in pain. The electricity lights outside were on allowing him to see the deceased clearly.

4. PW8 called the neighbours PW1, PW2 and PW4 who responded immediately. They came together and lifted the deceased and placed him on a sack to rush him to hospital. PW8 testified that they each inquired from the deceased what had happened and he responded by saying; **“It is Juma”**. **“Juma has murdered me because of my wealth”**.

5. PW1 confirmed he heard PW8 one of his neighbours who lived next to the deceased call him out. PW1 ran towards the deceased house and found him lying outside the veranda bleeding with fresh stab wounds. The deceased was still alive as he was able to talk to them.

6. PW2 on his part said that he was the deceased's friend and neighbour and had known him for about 25 years. PW2 testified that PW8 frantically knocked at his door and on opening, he informed him that the deceased had been stabbed with a knife and needed help. He immediately accompanied PW8 to the deceased's house and found him on the veranda with stab wounds on his body.

7. PW4 told the court that the deceased was his uncle and cousin to his mother. He knew the accused well as he was his neighbour. PW4 testified that he was at his uncle's, PW2's house when PW8 went to their house and informed them that the deceased had been stabbed with a knife in his house.

8. PW1, 2, 4 and 8 testified that they carried the deceased to Reuben Police Post to report the matter before they took him to Kenyatta National Hospital.

9. PW1 testified that he asked the deceased who had assaulted him and he responded that it was Juma who had stabbed him. PW1 testified that he knew who Juma was as that was the alias name of the accused who was a cousin to both him and the deceased. PW1 counted 11 stabs in total on the chest, stomach and back of the deceased.

10. PW2 testified that he too inquired from the deceased who stabbed him and he told him that Juma had stabbed him and had taken Kshs. 11,500/- from him. The deceased, died the same night while he received medication. The same report was repeated by the deceased to PW4.

11. PW3 David Ndirangu Macharia testified that the deceased and his wife were cousins. He had known the deceased for about 5 years as he used to stay at Mukuru kwa Reuben at Industrial Area. The accused on the other hand was his wife's brother who he had known for over 10 years and also lived alone at Mukuru kwa Reuben. The accused's and deceased's house he noted were proximate to each other as they were only a plot away from each other. PW3 owned the houses that were between that of the deceased and that of the accused which he had constructed together with the deceased for rental purposes.

12. On 15th October 2012, PW3 was at home in Nairobi Makongeni with his wife Elizabeth Wangui when his wife received a telephone call from PW1 who informed her that the accused alias Juma had stabbed the deceased. PW3 advised PW1 to rush the deceased to Kenyatta Hospital for treatment. PW3 also rushed to Kenyatta Hospital where he saw the deceased in a critical condition with many knife stabs on his chest, stomach, back and other parts of the body.

13. PW3 testified that he talked to the deceased as he took him to the x-ray room inquiring what had happened. He said that the deceased told him that the accused had stabbed him. When the accused removed his shirt he saw several stab wounds on the stomach that exposed the intestines. There were also stab wounds on the chest, back and the arms.

14. PW3 inquired from the deceased whether he had quarrelled with the accused. PW3 stated that the deceased told him that he had not quarrelled with the accused and that he did not know why the accused had attacked him. He had just arrived at his house from work when the accused came and found him preparing tea. They took tea together before he decided to rest as he felt tired. The deceased told him that he lay on the sofa set and slept leaving the accused seated in his house. The deceased told him that he was suddenly woken up by the accused who was stabbing him with a knife. The deceased told PW3 that he asked the accused why he was hurting him but he continued stabbing him. PW3 stated that the deceased told him that after stabbing him, the accused took cash from his pocket totalling to Kshs. 11,500/-.

15. PW1, PW2, PW3, PW4, PW8 and other relatives and neighbours of the deceased reported the matter to Reuben Police Post and later Industrial Area Police Station where they all recorded statements. They led the police to the house of the deceased where they found blood and other house articles strewn all over the house which was evidence that struggle and jostling had taken place.

16. PW1 discovered a knife outside the deceased's house when they came back from hospital. The knife was 25 centimetres long, and was made of a plastic handle and was also stained with blood. The knife was handed over to the police at the Industrial Area Police Station. PW7 s a Government analyst received

it and blood swabs from the deceased on the 7th December 2012. PW7 examined them on 28th November 2013 and found the swab item "A" was slightly stained with human blood; and the Kitchen knife item "B" was moderately stained with human blood. He did a DNA analysis and DNA profile which formed part of his report. From the profiles, he established that the blood stains from the knife did not match those on the cotton swab. He prepared the report dated 13th June 2014.

17. PW5 Police Constable Daniel Kieni visited the scene of crime at Mukuru Kwa Reuben Slum accompanied by Corporal Otieno on 16th October 2012. PW5 noted that the house was made of iron sheets and was a single room; there was a table and a chair in the room and the utensils were strewn on the floor. There was electricity light in the room. PW5 took seven (7) photos at the scene. PW5 also went to Kenyatta National Hospital Mortuary on 29th October 2012 where he was shown the body of the deceased. PW5 took other photographs. All these photographs were processed under his supervision and he prepared his certificate which he signed on 2nd September 2013. He produced them in evidence as P. Exh. 2 (a) (b).

18. PW6 Dr. Andrew Kanyi presented the post mortem report, on behalf of Dr. Bernard Mindia who was abroad. He testified that Dr. Mindia carried out the post mortem on 18th October 2012 at Kenyatta Hospital Mortuary. According to the report, the deceased was aged 46 years and had sustained multiple stab wounds. The deceased had stab wounds on the abdomen and part of the intestines had come out. The second stab was a deep penetrating injury in the chest that was bleeding, and another one at the back measuring about 3 cm. There were multiple incision wounds at the back and left forearm. The Doctor formed an opinion that the cause of death was massive haemorrhage due to penetrating chest injuries caused by multiple stab wounds in keeping with assault. The report was signed on 18th October 2012 and produced it in court as P. Exh. 3.

19. PW9 Corporal Stephen Otieno was the investigating Officer. He was allocated this case to investigate on 16th October 2012. He interviewed 4 witnesses who had come to report the murder and recorded their statements. From these statements, he could tell where the scene of crime was. PW9 visited the scene with the scenes of crime officers where they were led to the deceased's house. They found blood spilt all over it and house articles strewn all over. PW9 stated that the place was disturbed and a scuffle seemed to have taken place. They took photos of the scene and collected blood samples for analysis in swabs.

20. PW9 stated that the witnesses had earlier on brought a knife from the scene to the station. PW9 took the knife and blood swabs to the Government Chemist to establish if it had been used against the accused. PW9 witnessed the post mortem on the deceased body on 19th October 2012.

21. PW9 visited the accused house on the same day of the scene visit and found the house was abandoned. He said that he learnt that both the accused and deceased were relatives. The accused was spotted in Pangani area by his relatives and PW9 together with the OCS pangani and another officer, tracked and arrested him.

22. The accused gave a sworn statement in his defence. He pleaded alibi and testified that he was arrested in Ngara on 1st December 2012 as he went to check on his friend. He stated that on the fateful date of 15th October 2012, he was in Mangu at Gatukuyu Market. He had left Kwa Reuben on 11th October and did not go back until the day he was arrested. He used to sell shoes at Gatukuyu Market. He said that he was nowhere near the scene of crime at the time the murder occurred and therefore it did not concern him. He lived alone and on the said date, he had locked his house and hidden his key at his usual place because he knew mama would come and collect a tank for cooking pig food from his house. He told the court that he did not know how the deceased died. He denied stabbing the deceased or that he ran away from the scene of crime and was in hiding.

23. The accused is charged with murder contrary to **section 203** of the Penal Code which provides as follows:

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

24. The Penal Code under **section 206** gives the circumstances that constitute malice aforethought as follows:

“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”.

25. In this case the prosecution has to adduce evidence to prove that the accused is the one who stabbed the deceased, and that at the time of stabbing him, he had formed the necessary intention to cause death or grievous harm to the deceased. The burden to prove the charge of murder against the accused person therefore lies with the prosecution to prove beyond any reasonable doubt that the accused person attacked and inflicted injuries on the deceased resulting in his death.

26. I have carefully considered the entire evidence adduced by both sides together with the submissions by Mr. Muoki for the accused and Ms. Onunga learned Prosecution Counsel for the State.

27. There is no dispute that the accused and the deceased were cousins and that they were neighbours at their residence, with only one plot separating them, apparently belonging to PW3, their in-law.

28. From the entire evidence adduced by the prosecution in this case, there was no eye witness account of what exactly transpired on the material night or of how the deceased got injured leading to his death. The prosecution is relying on circumstantial evidence, in the form of deceased’s statements to PW1, PW2, PW3, PW4 and PW8 as he was being driven to hospital and while at the hospital as he received treatment before he eventually succumbed at 3am on the material night.

29. Mr. Muoki for the accused urged that the prosecution evidence showed that the deceased and the accused were in good terms and that they even had tea before the deceased was attacked. Counsel urged that that evidence negated the deceased alleged statement to PW3 that it was the accused who attacked him. Counsel urged the court to observe that the deceased was sleeping on his sofa when he was attacked and could therefore not tell who attacked him.

30. Mr. Muoki relied on the *Locards Exchange Principle* and cited **Crime Investigation: Physical Evidence and Policy Laboratory- Interscience Publishers, Inc: New York 1953** which explains the principle as follows:

“Wherever he steps, whatever he leaves, even unconsciously, will serve as a silent witness against him. Not only his fingerprints or his footprints, but his hair, the fibres from his clothes, the glass he breaks, the tool mark he leaves, the paint he scratches, the blood or semen he deposits or collects. All these and more bear mute witness against him. This is evidence that does not forget. It is not confused by the excitement of the moment. It is not absent because human witnesses are. It is factual evidence. Physical evidence cannot be

wrong, it cannot perjure itself, and it cannot be wholly absent. Only human failure to find it, study it and understand it can diminish its value.”

31. Mr. Muoki relied on the evidence of the recovered knife and urged that it was not connected to the accused for failure to lift fingerprints from it; and that since the blood found on the knife was not from the deceased, maybe someone else was involved in this case.

32. Ms Onunga in her submissions urged that there was evidence from PW2 that the accused was within the area where this offence took place that evening. Counsel urged that PW1, 2, 4 and 8 all confirm that the accused was not seen in that area again until his arrest in a different place in December, 2012, two months later. Counsel urged that the deceased told the same people that the accused was the one who attacked him that evening. Counsel urged the court to find the accused guilty of this offence.

33. Regarding dying declarations, Mr. Muoki urged that relying only on the dying declarations made by the deceased would not be sufficient proof to convict the accused since PW3 in his testimony alleged that the deceased actually told him that he was sleeping on the sofa when the accused attacked and stabbed him.

34. The prosecution are relying on the statements made by the deceased to PW1, 2, 3, 4 and 8 on the evening of the offence. The first question to consider is whether the statements amount to dying declarations.

35. **Section 33 (a) of the Evidence Act, Cap 80** of the Laws of Kenya provides:

“Statements, written or oral, of admissible facts made by a person who is dead are themselves admissible in the following cases:

(a)When the statement is made by a person as to the cause of his death, or as to any circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and such statements are admissible whether the person who made them was or was not at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;”

36. As to what qualifies to be a dying declaration in the case of **Choge V. Republic 1985 KLR 1**, the Court of Appeal held:

“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

37. The Court of Appeal in the case of **MICHAEL KURIA KAHIRI -V- REP CRIMINAL APPEAL NO.45 OF 1991 (NRB)** observed:

“There is no doubt that the appellant’s conviction by the superior court was dependent on the deceased’s statements as to her cause of death. The law relating to the weight to be attached to such statements was correctly stated in PIUS JASUNGA s/o AKUMU –V- REGINA [1954] 21 EACA 331. In that case the Court of Appeal for Eastern Africa said that although it is not a rule of law that, in order to support a conviction; and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused, it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration.

And in MIGEZO MIBINGA –V- UGANDA [1965] E.A. 71 the same Court pointed out that:

‘It is not always appreciated that the probative force of a statement as to the cause of his death by a person since deceased is not enhanced by its being made in the presence of the accused unless by his conduct, demeanor, etc., the accused has acknowledged its truth. Consequently, it is advisable that a trial judge should expressly state whether he is satisfied or not that there was such acknowledgement.’

In this regard therefore, it is instructive to take note of Lord Atkinson’s observation in REX V CHRISTIE [1914] A.C. 545 at page 554:

‘The rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him is not evidence against him of the facts stated, save so far as he accepts the statement, so as to make it in effect his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanor, and it is function of the jury which tries the case to determine whether his words, action, conduct or demeanor at the time when a statement is made amounts to an acceptance of it in whole or in part.’

As was observed in PIUS JASUNGA s/o AKUMU –V- REGINA, supra,

“The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case; it is no guarantee of accuracy.”

38. The test of admissibility and reliability of a statement as a dying declaration are clearly set out in the **Choge** case, supra, and **Michael Kuria Kahiri** case, supra. The test is that the statement was made in extremity when the maker is at a point of death and the mind was induced by the most powerful consideration to tell the truth. It would be different if the statement was made in the presence of the accused, and the accused acknowledges it either verbally, by his demeanor or by his conduct.

39. In this case the accused was not present when the statement was made. There is however no doubt that at the time the deceased made the statements he was staring death with his eyes. It is clear that at the time PW1, 2, 4, and 8 went to answer the pleas for help by the deceased he was in a critical condition. PW8 who was the first to see him among them describes him as on his knees and bent over holding his abdomen on the right side. Considering his situation, I believe he was compelled to tell the truth. I am satisfied that the deceased statement as to the person who injured him qualifies as a dying declaration.

40. The evidence of PW1, 2, 4 and 8 shows that all the way from the Police Station to Kenyatta Hospital, quite a long distance, and the deceased kept repeating that it was the accused who stabbed him. The deceased even gave jealousy or intention to rob him as the motivation the accused had for stabbing him. The deceased repeated the statement to PW3 who came to the hospital to see him. At the time he spoke to PW3 he was waiting to be X-rayed and they were alone. The deceased therefore repeated the statement several times to several people. That is evidence of consistency.

41. The scene of the attack is described by PW8 as being well lit and quite bright, that is outside the deceased house. All the witnesses who were at the scene including the Investigating Officer are in agreement that the deceased had electricity lighting in his house. According to the deceased, he was alone with the accused when he attacked him. I also agree with Mr. Muoki that from the evidence by PW3 the deceased had relaxed on his sofa set as the accused sat at table just before the attack.

42. The concern regards the deceased ability to positively identify the assailant given he was relaxed in a lying position and possibly with closed eyes. The deceased was stabbed several times in the chest, abdomen, back and left forearm. That is a demonstration that for some of the stabs especially to the hand and back, the deceased had moved position. He could not have done it if he remained sleeping during the attack.

43. The finding of the Investigating Officer and the witnesses PW1, 2, 4 and 8 was that the attack happened in the house due to signs of a struggle. That is in tandem to the deceased statement. Furthermore, PW1, 2, 4 and 8 found him outside his house having walked out and shouted loud enough to be heard by PW8 who lived nearest to him, apart from the accused who lived closer. Furthermore, the accused was his first cousin and was no stranger. He had been with him. I find that from the evidence adduced, the deceased had a good opportunity to see his assailant.

44. There is other circumstantial evidence which the prosecution is relying upon. That is the evidence by PW4 that he had seen the deceased walking alone at around 10 pm on 15th October 2012. That was around the time of the incident but just before the attack was executed. Likewise PW2 said he saw the accused within the area in the evening one day before the attack. He was walking on the road.

45. Soon after the attack, PW8 went to accused house to call him to help assist the deceased but he found the door closed and the padlock hanging on the latchet but not locked. The accused was not seen in the area again. It is evident from the evidence of PW4 and 8 that the accused was within the area of the scene of the attack that day and that he left the area in a hurry, not even locking the door properly. That was glaring evidence that the accused was around even soon after the attack on the deceased. The accused entire conduct was that of a person with a guilty mind.

46. The accused put forward an alibi as his defence. He said he was not in that area on the day of the alleged offence. He mentioned he had moved his business to Gatukuyu Market, in Ruiru on the 11th, 4 days before the day of the incident. I do not accept accused alibi defence. PW4 testified he saw the accused on the day of the attack in the area where the attack took place. PW2 testified that he saw the accused walking on the road one day before the day of attack. PW2, 4 and 8 were all not questioned about the accuracy of the date they saw the accused, or the glaring proof of being in the area in the manner in which he left the door to his house. That, I find is proof that the accused alibi defence was an afterthought. The accused alibi defence has not dislodged the evidence by the prosecution. Furthermore the deceased had no reason fabricate such a serious case against the accused, and the accused did not make such a claim against him. I reject the alibi defence by the accused in this case.

47. The question is whether the prosecution has established the circumstantial evidence against the accused person. In the case of **ABANGA alias ONYANGO V. REP CR. A NO. 32 of 1990** the test to apply in order to determine whether to convict based on the circumstantial evidence relied upon set out in the following manner:

“When a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

a. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

b. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

c. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

48. I find that the prosecution has cogently and firmly established the circumstantial evidence upon which the inference of guilt is sought to be drawn. I find that the evidence of PW1, 2, 3, 4 and 8 irresistibly points to the accused as the one who stabbed the deceased. The prosecution has established the facts upon which I can no escape from making the conclusion that the accused and no one else caused the injuries on the deceased from which he died.

48. Regarding malice aforethought, the prosecution must adduce evidence which falls within the circumstances set out under section 206 of the Penal Code. In **MORRIS ALOUCH VS REP CR. APPEALS NO 47 of 1996 (UR)** stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later.”

49. The above case is authority to find that if an accused person is found to have inflicted a multiplicity of blows or even stabs as in this case, malice aforethought can be inferred from such action. In this case the deceased was stabbed 12 times according to PW8 and 11 times according to PW1, 2, 3 and 4. The post mortem shows there was medical intervention and incisions as doctors tried to save his life. The post mortem doctor could not therefore tell the exact number of stab wounds the deceased had but has clearly described them as multiple stab wounds. The evidence is clear that the accused stabbed the deceased several times especially in the chest and the stomach. These stabs are proof that the accused had formed the intention to either cause or grievous harm to the deceased. I find that malice aforethought in terms of **section 206 (a)** of the **Penal Code** was proved.

50. **Having carefully considered the evidence adduced by the prosecution in this case, I am satisfied beyond any reasonable doubt that the prosecution has proved the charge of murder contrary to section 203 as read with S. 204 against the accused. I reject the accused defence, find him guilty and convict him accordingly.**

DATED AT NAIROBI THIS 16TH DAY OF JULY, 2015.

LESIIT, J.

JUDGE.