REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL CASE (MURDER) NO. 4 OF 2014

REPUBLIC…….....……..PROSECUTOR

-VERSUS-

SAMUEL SANUNKA MPIROI……...…….……..ACCUSED

J U D G M E N T

1. The Accused was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The information states that on 13th November, 2014 at Entasikira Village in Narok South Sub County he murdered **Sanare Ole Kisioki**. The accused denied the offence and was represented by Mr. Terer. The prosecution case was as follows.

2. Both the Accused and deceased were neighbours residing in the same village. The deceased lived at the home of **Sirintai Enauwo Sampero** (PW2), mother to **Mali Joseph Sendeu** (PW1). Having originally settled in the home as a worker, the deceased commenced cohabitation with PW2 and came to be regarded as her partner. Prior to the material date, the accused had laid claims to the land on which PW1 and PW2 considered their ancestral entitlement. He allegedly disputed the boundaries between them in respect of the undivided land.

3. On 6th and 7th November, 2014 the Accused had visited PW1's home demanding to see him. At dusk on the fateful date, PW1, PW2 and the deceased were having a meal in their hut when the Accused came calling, yet again. He was armed with a spear and declared, "I am looking for Mali." Apprehensive, PW2 and the deceased stepped forward to the entrance of the hut in a bid to protect PW1. They begged the deceased to leave PW1 alone even while preventing him from entering the hut. In the process, PW1 was able to escape but the deceased was not so lucky as he was speared to death by the Accused.

4. The Accused then escaped to hide in Tanzania but was traced by a group of villagers who handed him over to the police, together with the spear which had been recovered on the night of the murder. Dr. Titus Ngulungu (PW5) performed the post mortem on the body of the deceased. His opinion was that death was due to *"massive blood loss with asphyxia due to a deep slash, sharp force injury to the neck with trachea and vascular injury"*.

5. In an unsworn defence statement, the Accused stated that on 14/10/2014 at 2.00pm he left home for Mesuti in Tanzania to perform a circumcision ceremony for his children. He remained there for one week but following a group fight, he and others were arrested and escorted to Narok Police Station before being arraigned in court.

6. The fact and cause of death of the deceased is not in dispute. The court must determine whether the said death was caused by the unlawful act of the Accused, with malice aforethought. Two eye witnesses testified for the prosecution – PW1 and his mother PW2. A third witness **Sompe Ole Koiyie** (PW4) (arrived at the scene soon after the murder.

7. Both PW1 and PW2 were well known to the Accused as a neighbor. The witnesses stated that on arrival at the home, the accused demanded to see PW1. The time was between 7 and 7.30pm. Although the witness concede that there was no artificial lighting, they said it was just dusk and not yet very dark hence they could see. It is the evidence of PW1 and PW2 that the deceased and PW2 stepped forward and blocked the entrance to the hut to thwart the entry of the Accused, while entreating him to "leave the young man (PW1) alone."

8. In cross-examination PW1 stated:

> **"Incident occurred at 7.00pm. It was a bit dark but not completely. Yes we have lived as neighbours with accused for a while. I heard the accused's voice calling outside and saw him at the door way. I was in the (hut) where I was seated. I could see the accused. It was a Manyatta hut. The door is low but I saw him with spear at door…… Yes I know well the accused's voice……"**

9. For her part PW2 reiterated that the incident occurred at her doorstep. This is what she stated at cross-examination:

> **"It was dusk but not dark at 7.00pm…… PW1 is my son. When the accused came PW1 was able to escape…… but the accused turned on the deceased because he said he was part of the family. The shamba…… we have not subdivided to get individual title so it is clan land. Everyone uses their own portion. Even the accused had his portion which he used. Prior to the 6th (November) there was no problem until the accused came looking for PW1. The accused started the dispute, not Joseph (PW1) by claiming the land to be his……There was some light I was able to see the accused because it was not very dark as ye. There was light."**

10. From the evidence of PW1 and PW2, the Accused was not a stranger to them. They knew him well by appearance and could identify his voice. According to PW2, the accused had on two previous occasions, the last being just six days to the incident, come to the home in search of the son, PW1. This is the time when, by PW2's evidence the claim over land was raised by the Accused. Thus in this case there is evidence of identification by appearance and voice during an incident which occurred at dusk.

11. In the Case of **Joseph Muchangi Nyaga and Anor –Vs- Republic [2013] eKLR** the Court of Appeal outlined the manner in which visual identification evidence should be handled. The Court stated:-

> **"Evidence of visual identification should always be approached with great care and caution (see Waithaka Chege versus Republic (1979) (KLR 217). Greater care should be exercised where the conditions for favourable identification are poor. (Gikonyo Karume and Another Versus Republic (1980) KLR 23) ……before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of and the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him……"**

12. In the instant case, it was clear that the Accused was well known to the two witnesses by appearance. It is therefore a case of recognition which makes the identification a bit more credible. As stated in **Anjononi –Vs- Republic [1980] KLR 59:-**

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

13. Even though the natural light was not intense, it is evident that both PW2 and the deceased came face to face with the Accused at the manyatta entrance as they tried to obstruct his entry there into. They spoke to him as they plead with him to leave PW1 alone.

14. In my estimation PW2 was a sincere and truthful witness. She freely admitted that the Accused had no dispute with the deceased prior to the offence and had even given him jobs. PW2's evidence is reinforced by the testimony of **CPL Gatana** (PW3) who said that the body of the deceased "lay just at the entrance of the house but inside", confirming the actual scene of confrontation. He also recovered the murder weapon, a spear produced in court as an exhibit. PW4 also testified that as the first person to arrive at the home, he found the Accused. He saw the body and spear (Exh. 1) at the scene. He too stated in cross-examination that darkness by the time not yet set in, that he met with PW1 who was in flight and that the body of the deceased lay at the door of the hut.

15. In the circumstances of this case, it does seem that even though it was dusk the prosecution witnesses were able to identify the Accused person. The physical identification evidence is further reinforced by the voice identification of the Accused by PW1 and PW2, the latter from close quarters. The Accused was a neighbor with whom they had evident previous relations, including the interaction with PW2 between 6th and 7th November when he visited in search of PW1. In the circumstances both PW1 and PW2 were well placed to recognize the Accused's voice, without any possibility of mistake.

16. In the case of **Choge –Vs- Republic [1985] 1 KLR** the Court observed as follows regarding identification by voice:

> **"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the Accused's voice, that the witness was familiar with it and recognised it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it." (emphasis added)**

17. The Accused's defence in this case is an *alibi* to the effect that he was in Tanzania from 14/10/2014 until the date of his arrest. In the case of **Osiwa –Vs- Republic [1989] KLR 469** the Court of Appeal stated that an Accused person who advances an alibi defence does not assume a burden to prove it. (**See Leonard Aniseth –Vs- Republic [1962] EA, 206, Ssentate –Vs- Uganda [1968] EA 365**). Such defence however, like any other defence, must be examined in light of the entire case to gauge, for instance, whether it was plausible or an afterthought raised at the last possible moment.

18. In the present case, the *alibi* defence was not canvassed with the prosecution witnesses during cross-examination. In particular, the fact of the Accused being away in Tanzania was not put to PW2 who testified that before 13/11/2014 the Accused had twice visited her home on 6th and 7th November in search of PW1. Nor were the alleged circumstances of his arrest in Tanzania put to PW4 who testified that he and others flushed out the Accused from his hiding in a bush in Tanzania a day after the offence. This witness had also stated to have seen the Accused at the home of PW2 on the material night. PW4 was not a member of the deceased's family and there is no indication of bad blood between him and the Accused.

19. On the evidence tendered by PW1, 2, 3 and 4, the only plausible reason for the Accused was hiding on the Tanzania side on 14/11/2014 was a guilty mind. He was trying to escape from the consequences of his actions on the previous night and not engaged in a circumcision ceremony. His alibi has been totally displaced and is not tenable in the circumstances of this case. Although motive is not a necessary element of the offence charged, PW2's unchallenged evidence established that the Accused had an axe to grind with PW1 over a land dispute and the action of searching for PW1 on several occasions earlier and on 13/11/2014 while armed with a spear indicates the hostile state of his mind.

20. On realizing that PW1 had managed to sneak away, he turned on his protector, the deceased and speared him to death. **Dr. Ngulungu** (PW5) testified that the injuries were so severe that the trachea and

the neck vessels were slashed. This is consistent with assertions by PW1 and PW2 that the deceased succumbed instantly to the injuries. The severity of these injuries is by itself evidence of malice aforethought. It matters not that PW1 not the deceased, is the person whom the Accused was really pursuing when he committed the offence.

21. Section 206 of the Penal Code defines circumstances by which malice aforethought may be deemed as proved 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."**

22. In my evaluation of the evidence, I am satisfied that the accused is the person who, of malice aforethought attacked the deceased with a spear, thereby unlawfully causing his death. I do find that the prosecution has proved its case beyond any reasonable doubt and will convict the Accused as charged.

Delivered and signed at Naivasha, this **9th** day of **October, 2015.**

In the presence of:-

State Counsel : Mr. Koima

For the Accused : Miss Siele holding brief for Mr. Terer

C/C : Steven

Accused : Present

C. MEOLI

JUDGE