



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 46 OF 2008

REPUBLIC.....PROSECUTOR

-VERSUS -

JAMES KAMANDE WACHORI.....ACCUSED

JUDGEMENT

The accused James Kamande Wachori faces a charge of murder contrary to **Section 203** as read with **204** of the **Penal Code**. It is alleged that on the 19th April 2008 at Kibagare slums in Kangemi, Nairobi area, he murdered Sylvester Mutuku. The accused denied the charge.

It is important to state that this case was heard by three judges. Ochieng, J heard six witnesses being PW1 – PW6 while Kimaru, J heard two witnesses PW7 and 8. This court took over the case thereafter and heard four witnesses PW9 – PW12 before the prosecution closed their case. I also heard the defence case and prepared this judgment. The cause of the change-over was due to transfer of judges to other courts or divisions.

The evidence of the prosecution is that the accused and the deceased lived in Kibagare slums at Kangemi in Nairobi Area at the material time. The facts are that on the 19th day of April 2008 at around 8.30 p.m. the accused and the deceased were seen by some witnesses quarrelling over an allegation by the deceased that the accused had thrown human faeces at the door of deceased's brother's house namely Mutinda. The deceased demanded that the accused removes the dirt which he resisted. When the deceased insisted persistently, the accused picked the dirt and invited the deceased to follow him to go and throw it away. The deceased followed the accused towards a river near the slum dwelling area. A short while later, the deceased was heard screaming and calling for help at the valley. On rushing to the scene, the neighbours found the deceased in a critical condition with a bleeding stab wound in the stomach. The deceased was rushed to hospital where he later died. The accused was later arrested hiding in the valley not far from the scene. He was later charged with the offence and some exhibits including a knife and accused's trouser were forwarded to the Government Chemist for analysis.

It was the evidence of PW1 Mary Kivindu that on the material day at around 8.30 p.m. she saw the accused and the deceased outside the house of the accused quarrelling. The cause of the quarrel was that the accused had thrown human faeces at the doorstep of the deceased brother's house. The accused was a next door neighbour to Mutinda while the deceased and his mother (PW4) lived in the general neighbourhood. The deceased told the accused to remove the human waste from Mutinda's doorstep. The accused was with his wife at the time of the quarrel. After some heated exchange the accused came out of his house and agreed to pick the human waste to go throw it away. He asked the deceased to accompany him to go throw away the waste. The accused led the deceased towards the valley next to the

slum. The two young men crossed the river and soon thereafter the deceased was heard calling for help. Neighbours rushed to the scene and found the deceased with a fresh stab wound in the stomach.

PW2 Dominic Odhiambo alias Daddy who was a resident of the Kibarage slums said that on 19th April 2008 at around 8.30 p.m., he was walking from the kiosk when he found the deceased and the accused quarrelling over human faeces thrown outside Mutinda's house. The deceased insisted that the waste be removed by the accused. PW2 passed and went to his house just to hear the deceased call for help from the valley a short while later. When PW2 went to the scene, he found the deceased having been stabbed in the stomach. Deceased sent PW2 to go call his mother to come help him. After the deceased was taken to hospital, the accused was fished out of the thickets by some of the residents after a search and handed over to the police.

PW3 also witnessed the quarrel as he passed near the house of the accused. He was to answer a distress call of the deceased later in the evening. The deceased told PW3 that a neighbour had stabbed him. PW3 removed his shirt and tied the bleeding wound of the deceased before he was taken to hospital where he died.

PW4 the mother of the deceased was called from her house by a neighbour who informed her that the deceased had been stabbed with a knife. She was led to the scene by PW2. The deceased was taken to hospital where he died the same night before being taken to the theatre. PW4 testified that she later recovered a blood-stained knife believed to be the murder weapon which she handed it over to the police.

PW5 and PW6 were the village chairman who received the murder report and the identifying witness respectively. PW5 testified that the accused was arrested from the bush where he was hiding near the scene.

The blood analysis report was produced by PW7 with the result that the blood on the trouser of the accused and the knife was that of the deceased. Dr. Zephania Kamau's report dated 5th May 2008 declared the accused fit to plea and found that he had bodily injuries which were 16 days old at the time of examination.

The accused was re-arrested by PW9 Cpl Eric Kipkoech of Spring Valley Police station from the custody of CPL Matei in-charge of Loresho police post. PW9 testified that on 22nd April 2008, he received a blood-stained knife from PW4. PW10 accompanied PW9 to visit the scene of crime. He also witnessed the postmortem at City Mortuary on 13th May 2008 and took the exhibits to Government Chemist for analysis.

Dr. Peter M. Ndegwa who performed the postmortem found the cause of death to be sphere hemorrhage due to the abdominal stab wound. The case was investigated by IP Nyamongo of Spring Valley police station who later charged the accused with the offence.

In his sworn statement of defence the accused denied the offence. He said that in the material evening he had met the deceased at the shops whom he gave Kshs.10/= on his request. Around 8.30 p.m. the accused was attacked in his house by a group of men who were speaking Kikamba language. They stabbed him on both arms and robbed him of his Kshs.800/=. On his way to the police station to report the matter, the accused met a mob near the river who beat him up on allegation that he had stabbed someone. He was later handed over to the police. The accused states that the blood on his clothes was from his body because he had been injured.

The State in their submissions said that the State has proved the case against the accused persons as required. The accused admitted being at the vicinity of the murder scene and being a neighbour and friend of the deceased. The quarrel was witnessed by PW1 and a dying declaration made by deceased to PW2 and PW4. Mr. Karuri fro the State said the accused had malice aforethought given the murder weapon he used and the manner in which he inflicted the injury. He urged the court to convict the accused.

The defence submissions filed by Mr. F. N. Njanja are that the ingredients of the offence being malice aforethought causing death, by an unlawful act have not been proved. It was argued that the blood group of the accused was not identified in order to connect him with the offence and further that the dying declaration did not meet the required evidential standards. The prosecution urged the court to acquit the accused persons.

PW1 told the court that she stood outside near the house of Mutinda as the accused and deceased quarrelled. Explaining why she remained where she was, PW1 said she stood there just to listen. In her evidence she gave a detailed account of the quarrel from the beginning to the time the accused and the deceased walked away together. It was her evidence that during the verbal exchange, the accused told the deceased to move away or else he will stab him with a knife. The deceased did not move away despite the threat. As the quarrel progressed PW2 and another person referred to as Santos came to the scene. PW2 testified that he passed at the house of the accused and he found the deceased and accused quarrelling. It was the testimony of PW1 that PW2 talked to the deceased after hearing accused threaten to stab him telling deceased to inform him (PW2) if the accused did anything to him. PW2 and his friend then went to their houses. Later, PW2 heard the deceased calling for help from the scene. He went there and found the deceased with a stab-wound. PW2 went to call the mother of the deceased to come at the scene as requested by the deceased.

PW1 further testified that she saw the accused come out of his house, pick the human faeces and asked the deceased to follow him to go and throw it away. The witness followed the two young men towards the river and saw them cross-over before she returned to her home. The deceased was to call for help almost immediately after PW1 left. The witness said that she has known the deceased since she was a young child and that they are neighbours at Kibarage slums. She was therefore familiar with his voice and heard him shout:

“Kujeni munisaidie” (come and help me)”

The evidence of PW1, PW2 and PW3 is that there was a quarrel between the accused and the deceased prior to the assault on the deceased and that the accused had threatened to stab the deceased with a knife as they quarrelled. The accused was the aggressor in that he threw human waste at someone's doorstep. The deceased took it upon himself to ensure the excreta was removed by the very person who had thrown it there. There is evidence that the deceased insisted that the accused removes the waste. PW1 heard and saw the accused invite the deceased to go with him to the valley to throw away the waste. PW1 did not lose sight of the two men as they walked together to the river and crossed over. The voice of the deceased calling for help was heard soon thereafter as he called for help. This was soon after the stabbing.

The accused said he was attacked by people he found standing on the road. This was at the valley which was the scene of crime. He was going to report a robbery case where he had been attacked by a gang. The court did not believe the accused that he was going to report a robbery case to the police when he was arrested. PW5 the village chairman testified that the accused was arrested from the thickets near the scene where he was hiding which confirms the prosecution's version of accused's arrest as true. This evidence as to the arrest of the accused was corroborated by PW2.

The prosecution's evidence on the chain of events which were not broken was credible and consistent. It explains the reason for hiding by the accused as having been to evade arrest by the slum residents for he had injured the deceased unlawfully. The defence of the accused does not explain what he was doing in the bush where he was arrested. The accused admitted being at the scene of crime around the same time the offence took place. The accused also admits an encounter and confrontation with the deceased before the time the offence occurred.

The prosecution places the accused at the scene of crime at the material time. The evidence of PW1 and PW2 from the time the quarrel commenced to the moment when the deceased was heard screaming for help was very consistent and corroborative. PW3's testimony provides further corroboration.

The evidence in this case is mostly circumstantial in addition to the dying declaration made to two witnesses. I will examine the two parts of the evidence separately.

PW2 in cross-examination said that the deceased said he had been stabbed by James Kamande. The deceased was holding the bleeding injury on his stomach. According to PW2 and PW4 the deceased told them to search for the accused because he had not gone far from the scene after inflicting the injury on him.

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

“Statements, written or oral, or 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.”

The deceased told PW3 that he had been stabbed by a neighbour of his but did not give the name. The dying declaration was made in presence of PW2 where the deceased gave the name “Kamande” as the person who had stabbed him. PW2 understood Kamande to be the accused whom he knew before the incident and whom he had heard threatening to stab the deceased with a knife a short while earlier. The statement was made by the deceased as to the cause of his injury which resulted in death. The statement was made at a time when there was expectation of death due to the severe injury suffered by the deceased. The injury resulted in the death of the deceased a few hours later. It was held in the case of **Pius Jasunga s/o Akumu vs. Republic [1954] 21 EACA 33** by the E. A. Court of Appeal:

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval..... It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R-v-Eligu s/o Odel & Another, [1943] 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused..... But 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.”

The Court of Appeal called for caution in admitting a dying declaration in evidence and also emphasized on the necessity for corroboration although it is not a legal requirement. The accused James Kamande was a neighbour to the deceased. The deceased told PW3 that his neighbour had stabbed him. PW4 the mother of the deceased said:

“My son told me that it is Kamande who had stabbed him.”

The dying declaration made at different times to two key witnesses (PW2 and PW4) was therefore well corroborated by the evidence of PW3 and by the evidence of PW1 who had seen the deceased and accused walk to the scene together. I find that the dying declaration meets the requirements of **Section 33(a) of the Evidence Act** and it is therefore admissible in evidence.

In regard to circumstantial evidence, I rely on the Court of Appeal case of **Sawe vs. Republic [2003] KLR 364** where it was held:

“1. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

2. *The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of incidence is on the prosecution and never shifts to the accused.*"

Similarly, in the case of **Abanga alias Onyango vs. Republic criminal case no. 32 of 1990 (UR)** it was held by the learned Court of Appeal judges that:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) 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."

The case before me is not entirely based on circumstantial evidence. However, it is important to examine whether the circumstantial evidence herein passes the laid down test. The accused and the deceased quarrelled before the deceased was found with a stab wound in the stomach. PW1, PW2 and PW3 were present when the quarrel took place. During the quarrel the accused threatened to stab the deceased with a knife if he continued pressing him to remove the dirt outside his (deceased's) brother's house. The deceased walked behind the accused from the house to the river. PW1 said she saw them cross over and did not see them again until the deceased called for help. By inviting the deceased to go with him to the valley away from the residential slum dwellings, the accused must have been creating a conducive atmosphere to kill the deceased without any interference. There was no other person or persons within the vicinity of the scene present at the material time. The accused went into hiding after deceased was stabbed until later in the night when he was arrested from the bush near the scene. If the accused had not assaulted the deceased, what reason did he have to hide in the bush? Although PW1 did not see the accused carrying a knife or any other sharp object, she recalls seeing the accused cutting grass outside his house using a knife at the time of the quarrel. There is a great probability that the same knife was used to kill the deceased. The doctor found the cause of death to be the stomach stab wound caused by a sharp object. The recovery of the murder weapon by the mother of deceased PW4 a few days after the incident was not properly handled by the police. PW4 said police told her to go and look for the weapon. It was the duty of the police to conduct investigations in the matter and not send a witness to do their duties. This court notes with concern that the police did not cause any analysis to be done on the blood of the accused in order to identify his blood group. This was despite the glaring evidence that the accused person had visible injuries inflicted on him by the mob on arrest. The trouser the accused wore was found to have blood of the deceased. In the absence of the identification of the blood group of the accused, and in view of the fact that the accused had bleeding injuries as confirmed by Dr. Z. Kamau, it becomes impossible to ascertain whose blood was found on the trouser worn by accused. The issue is complicated further by the mystery surrounding the recovery of the knife. For these reasons, I come to a conclusion that the forensic evidence does not add any value to this case.

In my considered opinion, the circumstances established by the prosecution point the guilty to the accused in exclusion of all other persons. I find no other co-existing circumstances which would weaken or destroy the inference in accordance with the guiding principles laid down in the decisions of **Sawe and Abanga alias Onyango**. These cases which were cited with approval by the Court of Appeal sitting in Meru in the cases of **Stephen Muturia vs. Republic Appeal no.305 of 2011** and that of **GM1 vs. Republic Appeal no. 308 of 2011**. It is my finding therefore, that the prosecution have proved to the standards required that the accused inflicted the injury which led to the death of the deceased.

The court will examine the evidence to determine whether malice aforethought has been established. The

accused made a threat during the quarrel that he would stab the deceased with a knife if he continued with the offending subject. The deceased did not give up the fight for sustainable sanitary standards in the slum dwelling area. It is the accused who gave in by picking the human waste and saying he was going to throw it away. He invited the deceased to go with him probably to confirm that the waste was indeed disposed of at the right place and in the right manner. The deceased innocently followed the accused not knowing what he was up to. By inviting the deceased to go with him, the accused prepared for a conducive environment to commit the offence in a secluded place. By making a threat to deceased that he would stab him with a knife, which later took place, was evidence of premeditation by the accused. Stabbing the deceased with a knife in the stomach which is a delicate organ cannot be taken to mean that the accused intended to discipline the deceased and leave him alive. It must have been intended to bring to an end to deceased's life. The injury was so severe that the deceased died a few hours later. The severity of the injury and the sharp weapon used on a sensitive part of the body is evidence of intention to kill on the part of the accused.

I find that the accused had the intention to kill the deceased when he stabbed him in the stomach given the manner and the extent of the injury. The accused is hereby convicted of the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

F. N. MUCHEMI

JUDGE

Judgement dated and delivered in Nairobi on the **11th** day of **February 2014** in the presence of the accused, Mr. Wamwayi for Mr. F. N. Njanja and Ms Ikol for Karuri for the State.

F. N. MUCHEMI

JUDGE