REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO 9 OF 2012

REPUBLIC……PROSECUTOR

VERSUS

DAVID MUTUA MWANIA…….....ACCUSED

JUDGEMENT

Background

David Mutua Mwania, referred to as the accused in this judgement, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on 6th day of January 2012 at Nzalae sub-location, Nguutani Location within Kitui County, murdered Florence Ndunge Kioko.

The plea was taken on 28th February 2012. Following a plea of not guilty the hearing proceeded to full trial. The prosecution called a total of ten witnesses in support of its case. The defence called four witnesses.

Facts

The facts in support of the prosecution case show that Florence Ndunge Kioko, referred to as the deceased in this judgement, was attacked and slashed with a panga as she went to draw water at a stream known at Kataa. The time was 5.00pm on 6th January 2012. She was in the company of her son K. K, also known as W. PW4, her son who was aged about three years at the time. They also had a donkey and jericans. The deceased died of the injuries she sustained from that attack. Her son, PW4, ran home after witnessing his mother being attacked and informed his sister M. M. K, PW5, who was at their home. PW5 accompanied her brother, PW4, back to the scene where she confirmed the attack. The two children informed Susan and Kavii, not witnesses, and also Syokau Kinuthia, PW2, about the attack. The matter was reported to the area Assistant Chief Dominic Nzove Lai, PW1, who reported to the police at Migwani Police Station. The accused was mentioned by PW4 as the person who had attacked the deceased and inflicted fatal wounds on her. He was arrested and later charged with this offence.

The defence

The accused testified about the good relations between him and the deceased who was his neighbour. He testified that he and his wife Elizabeth Mulee Mutua, DW2, had assisted the deceased to hospital to deliver baby W, PW4. He denied killing the deceased and stated that PW4 must have mistaken him for someone else. He said nothing was recovered from him or from his home. He testified of bad relations between the deceased and one Regina Mulili over claims that the deceased had bewitched Regina's husband. The accused testified further that he and Regina had been arrested as suspects in the killing of

the deceased and that Regina had stayed in custody for two months. He testified that he was released from custody but was re-arrested after the inquest into the death of the deceased was concluded at Mwingi Principal Magistrate's court.

He told the court that while in custody of the police he accompanied them to the home of Regina Mulili from where a *panga* with blood stained handle and a bloodstained truck suit were recovered.

Elizabeth Mulee Mutua, DW2, confirmed the evidence of the accused that they took the relationship between them and the deceased was friendly and that they had assisted the deceased to hospital to deliver PW3 using their ox-drawn cart.

Miriam Mwikali Munyasya, DW4, testified that Regina Mulili borrowed a *panga* from her on 6th January 2005 at 9.00am allegedly to cut wood to burn charcoal. DW4 testified that Regina used to borrow items from her including a *panga* and on that day she returned the *panga* at 7.00pm the same day; that DW4 refused to accept the *panga* back after advice from a relative because she had received information that the deceased had been hacked to death and that Regina had a grudge with the deceased.

The offence

Murder is defined under section 203 of the Penal Code as follows:

> **"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."**

This definition raises the issues for determination namely:

i. Whether death of the deceased occurred.
ii. By what means was that death caused?
iii. Who caused that death?
iv. Did the person who caused that death have a guilty mind?

Death of the deceased

Dr. Allan Owino testified as PW10. At the time of his testimony, he was based at Kitui General Hospital. On 13th January 2005 he was based at Mwingi District Hospital. On that day he performed post mortem on the body of the deceased. The body had undergone decay and was infested by maggots at the time of examination. He found three cut wounds on the head, one cut, measuring 10cm, extended from the right cheek to the neck. Another cut, measuring 10cm long, was found across the left ear and another cut measuring 5cm long was found on the left side of the head. The skull was fractured and both her legs were bruised. She had internal injuries on the brain below the skull fracture. The doctor formed the opinion that the cause of death was due to brain injury and shock as a result of the cut wounds. According to the doctor he did not know what had caused the bruises on the legs but they were not caused by cutting. The evidence of the doctor on the parts of the body that had cuts differs with that of the other witnesses and I will bring out these differences in this judgement.

From this evidence, I have no doubt in my mind that the deceased died and that death resulted from fatal cut wounds inflicted on her. The act causing the deceased's death was without doubt illegal. It was a vicious attack motivated by unknown reason.

The offender

Having settled the issue that the deceased died as a result of an illegal act, the next issue is who perpetrated this illegal act. Of all the ten witnesses who testified for the prosecution it is only little W, PW4, who gave direct evidence touching on who the offender was. The other witnesses relied on what PW4 told them according to the evidence. The relevant part of PW4's evidence is as follows:

> **"…… It was around 5.00pm. I was with my mother. We had a donkey and jericans of water. We arrived at the water point. We did not fetch water. We met Mutua. He was walking towards us. He cut my mother on the leg. I saw what he used to cut my mother. It was a panga. My mother fell and Mutua cut her again on the head. I was near my mother. I was about six metres from my mother. I ran home to call K. She is called M. I am related to M. She is my sister. I went to tell her that my mother had been cut by Mutua. We went back to the river."**(Full names of PW4's sister withheld).

The other witnesses, Dominic Nzove Lai (PW1), Syokau Kinuthia (PW2), Elizabeth Kavete Masai (PW3), M (PW5), PC James Gathere, PW7 all testified that they were told by PW4 that the accused is the person who had inflicted cut wounds on the deceased. PW4 is therefore the star witness in respect to the identity of the person who inflicted fatal cut wounds on the deceased.

On the day PW4 testified on 17th October 2012, this court conducted a *voire dire* examination on him in accordance with section 19 of the Oaths and Statutory Declarations Act, Cap 15. The court allowed him to testify under oath after confirming he understood the nature of oath.

PW4 did not know when he was born but he told the court that he was small at the time of his mother's death. According to PW5 his sister, PW4 was not in school yet because he was young. At the time of testifying in court, the court estimated the age of PW4 as eleven years. This was in 2012. His age would therefore have been three to four years in 2005 when this offence was committed.

What does the law say about evidence of minors? Section 124 of the Evidence Act provides as follows:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

The case before this court is not about a sexual offence so the proviso to section 124 of the Evidence Act is not relevant to this case.

Section 19 (1) of the Oaths and Statutory Declarations Act provides as follows:

> **"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75) shall be deemed to be a deposition within the meaning of that section."**

The Oaths and Statutory Declarations Act does not define "a child of tender years". However, the Children's Act defines it under section 2 to mean a child under the age of ten years. The courts have given the definition of "a child of tender years" to mean a child under the age of fourteen years, (See **John Otieno Oloo v. R (2001) 1 E.A 318** and **Kibangeny Arap Kolil v. R (1959) E.A 92**).

PW4 was a child of tender years going by the definitions in the Children's Act and the above cited cases.

In **Johnson Muiruri v. Republic (1983) KLRQ 445**, the Court of Appeal held that:

> **"Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroborations."** (The case was decided when assessors were part of our system.)

In John Otieno Oloo v. Republic (2009) eKLR, the court of Appeal had this to say on the same issue:

> **"In short, we are of the view that in law evidence of a child of tender years given on oath after *voire dire* examination requires no corroboration in law but the court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration for it. Evidence of a child of tender years not given on oath must be corroborated."**

PW4 is a child of tender years who gave sworn evidence after this court conducted the *voire dire* examination and found he understood the nature of oath. His evidence however requires corroboration. The reason for is that his evidence touched on the identification or recognition of the accused as this judgement will show.

On the issue of corroboration, in **DPP v. Kilbourne [1973] 1 All ER 440, Lord Reid** asserted that:-

> **"There is nothing technical in the idea of corroboration. When in the ordinary affairs of life, one is doubtful or not to believe a particular statement, one naturally looks to see whether it fits in with other statements or circumstances relating to the statement. The better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statement or circumstances with which it fits in...**
>
> **Any risk of conviction of an innocent person is lessened if conviction is based upon the test of more than one acceptable witness."**

I now turn to the evidence of PW4. He told the court that he knew the accused because they used to graze cattle at his place. He also said the two families, accused and PW4's, were friends. This evidence agrees with that of the defence case. PW4 was aged about four years at the time. I have critically read his evidence. It is brief and shows that the accused used a *panga* to cut the deceased on the legs and after she fell, the accused cut her again on the head. The boy did not explain how he and the deceased were walking, who was in front of whom and where the donkey was at the time of the attack.

What I find unusual is the alleged attack and the place of the body the deceased was allegedly cut first. It makes logic to attack someone who is walking or standing on the upper part of the body first not the lower part. To cut the deceased on the legs first when she was standing and walkking would mean that the accused bend low to do that. However, despite my theorization of what may have happened, this is a court of law and I must follow the evidence as given. In **Okethi Okale & Others v. Republic (1965) EA 555** the court held, *inter alia*, that:

> **"(i) in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial judge to put forward a theory not canvassed in evidence or in counsel's speeches."**

It is therefore not for me to theorize what is logical and what is not.

Recognition of a person is more reliable than identification. But even where a witness purports to recognize a witness, courts must be wary of such evidence and caution itself of the dangers involved in relying on such evidence. See **R v. Turnbull (1976) 3 ALL ER 549 at page 552 where Widgery, C.J**

said:

> **"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

I have stated above that all the other witnesses relied on what PW4 told them about the person who attacked the deceased. PW4 said he saw his mother cut on the legs first before she fell and was cut on the head. This is what was repeated by PW7 who based his evidence on what PW4 told him.

On the injuries sustained by the deceased, witnesses stated that she had cuts on the legs and head. PW1 stated that **all hands, head and legs had been cut.** PW2 said she found the deceased having been **cut on the two legs, one hand and on the neck.** PW3 told the court that the deceased **had been cut on the neck, hand and two legs**. PW5 said she **saw a cut on the neck and leg.** PW8 said the **body had cut wounds on the leg and neck.** (Emphasis is mine).

All these witnesses said they saw cuts wounds on the neck and legs. Some said there were cut wounds on the hand. I emphasized their evidence to bring out the differences between this evidence and that of PW10, the doctor who performed the post mortem on the body of the deceased. PW10 found 3 cuts wounds on the head. The legs had no cut wounds but bruises according to him. On cross examination, PW10 told the court that the bruises on the legs did not tie up with the cut wounds and he could not determine what caused the bruises on the legs!

I have keenly read 'exhibit 2', the post mortem report. In it the doctor, PW10, refers to "**Gnawed wounds on both legs posteriorly just above the ankles**". He did not elaborate what this means in his evidence save for stating that he could not determine what caused the bruises on the legs.

Simply defined in the Merriam-Webster Free Online Dictionary, to "gnaw" means to bite or nibble persistently. Examples are given of a dog gnawing a bone. PW10 was not cross examined or re-examined on this evidence and the question I pose is: what gnawed at the deceased's legs?

PW2 told the court that when she reached the scene in company of the children of the deceased, PW4 and PW5, she found a dog licking the blood from the body of the deceased. PW5 too, told the court that she found the deceased lying on her stomach with a dog licking the blood. The evidence is also clear that the body of the deceased was not collected on the day she died but the following day. Without evidence as to what may have gnawed at the legs of the deceased, this issue is left unresolved and this court can only speculate that it could have been the dog that was found licking the blood. One thing is for sure, the bruises on the legs were not caused by a cut from a *panga* or any other weapon.

The expert evidence on the issue of injuries sustained by the deceased casts doubts into the evidence of PW4, especially what he witnessed on that day. It also casts doubts on the evidence of the witnesses who said they saw cut wounds on the legs of the deceased. What they saw was obviously not cuts but bruises from gnawing by something, probably an animal like the dog found licking the blood.

Did PW4 clearly see or did he know the person who inflicted those fatal wounds on the deceased? Was his memory clouded by length of time it took to charge the accused and bring him to trial? Did anyone interfere with PW4 in respect to the person who attacked the deceased? I must admit that the evidence does not provide the answers to these questions.

It is not lost to this court that another suspect, Regina Mulili, had been arrested in respect of this case. It is not lost to this court that the said Regina stayed in custody for some time and that a *panga* with blood stained handle was recovered from Regina's home according to defence evidence. This was not tendered in evidence in this case despite the evidence by defence that it was produced during the inquest at Mwingi. This court did not benefit from expert evidence in regard to the identity of the blood stains found on the panga. The alleged blood stained truck suit recovered from under the bed in Regina's house was also not produced in evidence. It did not form part of prosecution case but defence case. It is not lost to

this court that the said Regina Mulili has since the death of the deceased moved from that neighbourhood to unknown place. The prosecution did not trace her to summon her as a witness. She may have held some valuable evidence which could have benefited this trial.

I have considered all the evidence in this case. I have considered the evidence surrounding the identity of the accused as the person who inflicted fatal cut wounds on the deceased; I have cautioned myself about the evidence of PW4 who was a child of tender years at the time; I have noted that at the time PW4 was testifying, he was aged about eleven years and not a child of tender years anymore and I have considered the stages this matter has been subjected to and the length of time it has taken to bring the accused to court to face murder charges. I have also cautioned myself of the dangers involved in relying on the evidence of a child of tender years at the time the offence was committed and I find that I am not able to make a finding that the accused is the person who attacked and cut the deceased. In my considered view, it would be unsafe to rely on the evidence available more so when evidence of recognition of the accused is doubtful as shown in this judgement. I have confirmed from the available evidence that there is no other evidence tending to corroborate the evidence that the accused is the person who attacked the deceased. There exist doubts in my mind on this matter as explained in this judgement especially after considering the prosecution and the defence evidence. With existing doubts as to whether the accused is the one who attacked the deceased and caused fatal injuries on her, this curt will not proceed to consider whether he had a guilty mind for doing so would only be an academic exercise.

In conclusion, I find the evidence on record does not prove beyond reasonable doubt that the accused is guilty of the murder of Florence Ndunge Kioko. I do hereby order his immediate release from custody unless for any other reason he is held in custody. I make orders accordingly.

Dated, signed and delivered this 11th March 2014.

S.N.MUTUKU

JDUGE