REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO.76 OF 2012

LESIIT, J.

REPUBLIC……...PROSECUTOR

VS

JACOB KITHAKA……..…….ACCUSED

JUDGEMENT

1. The accused is charged with two counts of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars of the offence are that on the night of 2nd November, 2012 at Kasarani Village, Ibote Sub-Location, Karoch Location, in Tharaka South District, within Tharaka-Nithi County, he murdered Japheth Makembo. In the second count the particulars of offence are that on the 2nd November, 2012 at Kasarani Village Ibote Sub-location Karocho Location in Tharaka South District within Tharaka-Nithi County, murdered John Kithaka.

2. The prosecution called five witnesses. The facts of the case are that the accused person went to his father's house, which was within the same compound as his. His father is Japhet Makembo the deceased in count 1. The accused quarreled with his father asking him why he was complacent by allowing the cows of his brother, PW2 to enter into his shamba. When PW2 told the accused to leave their father alone as he was unwell that day, the accused left his house. He proceeded to his own house and before entering his father's house the second time the accused's son intercepted him and also shouted to warn PW2 and the deceased that the accused was returning carrying a knife. The accused then entered his father's house where he cut his father on the head. The accused's son, one Joseph, who was not a witness in this case, was also cut by the accused on his left hand.

3. After the accused left the scene his brother, PW2, who had escaped screaming to call neighbors returned to find his father seriously injured. Among the neighbors to arrive at the scene was Mwiti, PW4 who reported to PW2 that there was their neighbor John Kithaka with a serious cut on the stomach and who was on the road outside the accused home.

4. The matter was eventually reported to the police. PW5 Corporal Namanda said he received the first report of the incident from one Kimathi, a son to the accused, and the report he received was that Kimathi was trying to separate his father and the accused in this case, from his grandfather, the deceased in count 1, as the two fought and that in the process the accused cut him on his hand. PW5 arrested the accused the same night after laying an ambush on the road.

5. The accused defence was that as he went to work on the material morning, he found his brother's, PW2's cows inside his shamba having destroyed his crops. He said that he removed them from the shamba and returned them to PW2 who he warned not to allow them into his shamba again. He said that he went to work and returned at 7.30pm. The accused stated that after taking tea he headed to his father's house with an intention of telling him not allow cows to eat his shamba. The accused said that while in his father's house his brother, PW2 came with a panga. The accused stated that he and his father tried to disarm PW2 but that because he was younger and stronger, PW2 overpowered the two of them and then cut his father on the head. The accused stated that on seeing what PW2 had done, he ran away from the scene in order to report to the police and get help. The accused stated that he never saw John Kithaka, the deceased in the second count anywhere that night.

6. I have carefully considered the evidence adduced in this case, both by the prosecution and the defence. I have also considered the submissions by both counsels in this case. The accused faces a charge of murder. The burden of proof lies squarely with the prosecution to prove the case against the accused on the required standard of proof of beyond any reasonable doubt. The prosecution must adduce evidence to show that the accused caused the deceased persons severe injuries as a result of which they succumbed leading to their death. The prosecution must prove that at the time the accused caused the injuries which led to the deceased persons death, he had formed the necessary malice aforethought to cause either death or grievous harm on the deceased persons. Section 203 of the Penal Code under which the accused is charged provides as follows:

> **"203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."**

7. The circumstances which constitute malice aforethought is set out under section 206 of the Penal Code in the following terms:

> "**206. 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 willprobably 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) …**
>
> **(d) …**"

8. The prosecution called direct evidence which shows that the accused went to the house of Japhet to discuss the destruction of his crops by cows belonging to PW2. It is not clear why Japhet, who was the father of both the accused and PW2, was held responsible by the accused for the actions of PW2. According to PW2 the accused went back to his house and returned with a panga with which he first cut his son Joseph on the hand who was preventing him from going to Japhet. The accused then cut Japhet on the head before leaving the compound.

9. The accused in his statement in defence accused PW2 of being the one who cut their father Japhet on the head. The accused stated that he was unable to prevent PW2 from cutting their father because he was stronger as a result of which he ran away leaving PW2 and the father behind.

10. The evidence regarding the attack is basically the word of PW2 against that of the accused

because they were the two persons that were present at the scene when the incident occurred and who testified in the case. The statements by PW2 and the accused are so divergent that it is difficult to reconcile however, there is some other evidence which is not direct evidence which may help to resolve the divergent evidence of these two persons. The evidence of PW3 was to the effect that her brother Joseph Kimathi went to her with an injury on the hand and reported that the accused who is their father had cut him and had also cut their grandfather Japhet. PW5 the Investigating Officer in the case received the report from Joseph Kimathi at the Police Station on the same light. According to PW5 Joseph Kimathi reported to him that his father the accused cut him on the hand as he Joseph tried to separate his father from his grandfather Japhet. Joseph Kimathi was not called as a witness however, there is consistency in the statements he made to the Investigating Officer and also to his sister PW3. This witness ought to have been called to testify as he was an eye witness of the incident. The question is whether or not calling him adversely affects the prosecution case.

11. According to PW5 he received two knives from the OCS in connection with this case. PW5 testified that the OCS recovered the two knives and handed them over to him so that he could investigate where or from whom the two knives were recovered. The OCS herself was not called as a witness. Most importantly however the two knives which were produced as exhibit 3 in the case were not identified by any witness and especially PW2 who was present at the scene at the time of the incident. The OCS ought to have been a witness. In **BUKENYA & OTHERS** 1972 EA 549 LUTTA Ag. VICE PRESIDENT held:

> **"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
>
> **Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

12. The prosecution failed to call Joseph Kimathi and OCS as witnesses in this case. The evidence relied on of PW2 who witnessed the attack on Japhet was challenged by the accused in his statement in his defence. I have however found that the statement made by Joseph Kimathi to his sister PW3 and the Investigating Officer PW5 soon after the attack was consistent and supportive of the evidence of PW2.

13. The other evidence adduced of PW1 and 4 was of persons who came to the scene after the incident had occurred. Their evidence was not helpful as far as the attack on deceased (Japhet) was concerned.

14. The prosecution has not adduced any evidence to show how the deceased John Kithaka (in count II) met his death. The only evidence before the court is by PW2, 3 and 4 to the effect that the deceased was heard saying that it was Ntabundi had cut him. Nobody witnessed the incident in which John Kithaka was injured. Worst still there was no evidence adduced to show the connection if any between the attack on Japhet and the attack on John Kithaka.

15. I noted from the statement of the Investigating Officer that he had other information regarding how the deceased John Kithaka was murdered. There was no evidence to support his allegation that John Kithaka, Japhet Makembo and the accused who were all related were fighting over land. Even PW2 who was at the scene at the time did not mention that John Kithaka was present when the deceased Japhet was injured. According to PW2 the whole issue arose because the accused felt that Japhet their father was supporting PW2 to destroy the accused land by feeding his cows in it. The dispute was never about land per se but was about destruction of crops on the accused land. PW5 did not say who gave him the information that John Kithaka was part of a fight with the accused and Japhet over land.

16. Having analyzed the entire evidence by prosecution and defence, I am satisfied that the prosecution has been able to show that it was the accused who attacked and fatally wounded the

deceased Japhet. As regards malice aforethought the prosecution has been unable to establish this. On the one hand the reason for the attack on Japhet were cows which fed on the accused land earlier in the day. That does not quite make much sense because if the accused attacked Japhet purely because of those terms he should have done it in the morning when the matter was still fresh.

17. There was evidence from PW3 the daughter of the accused that his father usually became wild especially after either drinking alcohol or smoking bhang. No one testified as to whether the accused was drunk or high at the material time. His conduct of cutting his son and then cutting his father can only be explained as being unusual and can only be understood on the basis that the accused must have been drunk or high at the time of the attack. That would explain why the accused attacked his father over an issue that happened many hours earlier and in such an aggressive manner. The only explanation that he must have been on some influence of either alcohol or bhang as testified to by PW3, which affected his mind and his capacity to reason and recognize the seriousness of his action.

18. Regarding John Kithaka the evidence against the accused was that of a dying declaration in which John was heard saying that Ntabundi was killing him. Ntabundi is the other name by which the accused is known in the village. The statement was made by John Kithaka after he was injured in the stomach and was heard by PW2, 3, and 4. As to whether it qualifies as a dying declaration I am guided by

REP –V- PETER MBURU MUTHONI NRB HCCR CASE NO. 27 OF 2004/ [2005], e KLR, where OSIEMO, J. referred to **CHOGE -V- REP** and observed as follows:

> **"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. See** CHOGE –V- R [1985] KLR 1."

19. 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.**

20. Two issues arise in the case of the dying declaration. The first one is the circumstances of identification and whether John Kithaka may have mistaken the identify of his attacker. All the witnesses said that the incident took place at 7.30 pm which was after dusk. All the witnesses also are in agreement that John Kithaka was found on the road near the home of the accused and the deceased Japhet and also within the area he comes from. The important thing was that it was on the road far from any electricity or lighting of any kind. I am therefore not fully satisfied that at the time John Kithaka was injured he was in a position to positively see and identify his attacker without the possibility of an error or mistake.

21. Secondly the distance between the road where the deceased was found and the home of Japhet where the attack took place was not described and for that reason it looks a bit remote to connect the attack on the deceased to the incident in which Japhet was injured.

22. Having considered the entire evidence I find that the prosecution has established that the deceased Japhet Makembo was attacked and severely injured by the accused and that those injuries were the cause of his death. The prosecution was however unable to establish beyond any reasonable doubt that at the time the accused hit Japhet he had formed the necessary malice aforethought to either cause death or grievous harm to the deceased. For that reason I will substitute the charge facing the accused in count I from murder contrary to section 203 of the Penal Code to manslaughter contrary to section 202 of the Penal Code. I find the accused person guilty of the substituted charge of manslaughter and convict him accordingly in count I.

23. For count II I find that the prosecution was unable to prove the case against the accused person to the required standard of beyond reasonable doubt. Consequently I give the accused the benefit of doubt and acquit him under section 322 of the Criminal Procedure Code.

DATED SIGNED AND DELIVERED THIS 3RD APRIL, 2014

LESIIT J

JUDGE.