REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 55 OF 2009

(Lesiit, J)

REPUBLIC……...PROSECUTOR

VERSUS

EDWIN MURITHI MUSANI…….....….....…ACCUSED

JUDGEMNT

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 31st May, 2009 at Kiego village Iriga Sub-Location in Maara District within the Eastern Province murdered Erick Kinyua Alias Mutune.
2. The prosecution called 7 witnesses. There was no eye witness for this incident. The prosecution case was that PW1, the Sub-Area where incident occurred, was attracted by screams made only five minutes after he heard a motor bike stop outside his house on the road and saw accused and another pass by his house. He went outside to see what was happening when he heard one Naftaly Mbaya say "Wachana Naye." That is "**leave him alone**."
3. When PW1 went out of his house he saw the accused running towards him. When he asked him what the problem was, the accused told him that it was Kasee who was cutting someone. Since accused continued running, PW1 had the accused apprehended. Eventually he was charged for this offence. The cause of death according to the doctor's report on post mortem was cardiac arrest due to head injury.
4. The accused gave a sworn defence in which he put forward an alibi as his defence. He said that he went to church at 7 am. At 9 am he proceeded to his employer's place where he watered the cows. At 11 am he proceeded to Iriga Market where he watched videos. At 1 pm he left the market to return to his employers place to milk the cows when PW1 and two others arrested him. He said that the reason the Sub-Area, PW1 gave him for arresting him is because one Blackie had murdered a person and that the accused was his known associate.
5. The counsel for the accused Mr. Kiogora Mugambi urged that the prosecution case depended on circumstantial evidence which was insufficient to sustain the charge of murder.
6. Mr. Moses Mungai, the Prosecution Counsel urged that the prosecution had proved the case against the accused for the offence charged beyond any reasonable doubt. The learned Prosecution Counsel urged that accused and his accomplices pretended to hire the deceased and that they attacked the deceased. Counsel urged that an alarm was raised following which the accused was arrested and his accomplice lynched.
7. The accused is charged with murder contrary to section 203 of the Penal Code. That section

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."

8. The prosecution must prove that the accused did an act or omission which led to injuries which resulted in deceased death. The prosecution must prove that at the time the accused did the act or omission the subject matter of the case, he had formed malice aforethought to either cause death or grievous harm to the deceased.
9. Section 206 of the Penal Code gives the circumstances which constitute malice aforethought as follows:

> **'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 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**.'

10. The prosecution case is that the accused was in company of an accomplice at the time of this incident. The prosecution must prove that the accused and his accomplice had formed a common intention to commit the offence. Section 21 of the Penal Code defines joint offenders and common intention as follows:

> **"21. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

11. I have carefully considered the evidence adduced by both the prosecution and accused defence. There was no eye witness of the attack on the deceased. The only available evidence is by PW1 which was circumstantial evidence.
12. In that evidence, PW1 said he first heard a motor bike then saw 2 people pass by his house. He then heard screams and a person saying "**Wachana Naye**." He then saw accused running towards him. He knew accused before. He said that when he asked the accused what it was, the accused told him that Kasee was cutting someone.
13. We have sufficient case law on the principles to consider when testing circumstantial evidence.
14. In **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** at page 5 the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

> **"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."

15. The prosecution must cogently establish the facts upon which the inference of guilt is sought to be drawn and the circumstances should unerringly point to accused guilt.
16. The issue is whether the prosecution adduced sufficient evidence to establish that the accused was acting in a common intention with his accomplice to prosecute an unlawful purpose.
17. The evidence we have is that of PW1. He said he heard a motor bike. That motor bike was Pexh3. Then he saw accused and another pass by outside his house. He then heard screams. He then saw accused running away alone. The accused told him that one, Kasee, whom PW1 said he knew, was cutting someone.
18. PW1 was clear of important facts. First he was clear that the accused was not on the motor bike that was exhibited in court. Second PW1 was clear the accused was unarmed both when he passed by his house and when he returned running back towards him. Thirdly PW1 was clear that he did not see Kasee, or Njagi Gitari as he described him, at any time that day.
19. The evidence adduced by PW1 does not establish any connection between the deceased death and the accused; whether alone or in conjunction with others. If anything the evidence of PW1 creates more questions than answers.
20. There is evidence that a person was lynched. The name of that person is not clear. PW1 referred to him as Kasee and Njagi Gitari. PW6 referred to him as Blackie. PW7 the Investigating Officer referred to him as Moffat.
21. More importantly however, is the fact PW1 knew him very well and he said he did not see him on that day. PW1's failure to see Kasee who was later lynched by members of public can easily be explained by fact PW1 did not go outside until he heard screams. It is possible Kasee was at the scene but PW1 did not see him for above reason.
22. PW1 said accused clothes had blood stains. The clothes were not produced in evidence. If there were blood spots on accused clothing, that was an important piece of evidence which the prosecution should have seized and preserved as evidence in this case.
23. There is evidence from PW1 that he heard one Naftaly Mbaya asking person(s) to "**Wachana naye**". That was just after PW1 heard screams. When PW1 went out he found deceased already severally cut on the head. It means Naftaly Mbaya was at the scene of attack earlier than PW1, and therefore saw more than what PW1 saw.
24. That man Naftaly was a more important witness than PW1. The fact he said "**Wachane Naye**" means he must have witnessed the assault on the deceased. That is so because soon after PW1 heard Naftaly utter those words, he found the deceased severally cut on the head. There was therefore a relationship between Naftaly's words and the injury on the deceased.
25. 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."

26. This case applies to the instant case. The prosecution called PW2, 3, 4 and 5 who were not helpful. The prosecution failed to call important evidence in their case and the evidence which they adduced was hardly sufficient to prove their case. I therefore make an adverse inference against the prosecution that the reason why Naftaly Mbaya was not called as a witness was because his evidence would have tended to be adverse to the prosecution case.
27. The accused put forward an alibi as his defence. He denied having been at the scene of incident. However, he was arrested at the scene as demonstrated by the evidence of PW1. The accused admitted PW1 was the one who caused his arrest. PW7 the Investigating Officer also confirmed

that PW1 arrested the accused. The accused alibi has been shaken by the prosecution evidence especially the fact the accused was arrested near the scene of deceased attack.

28. Is the evidence of Accused arrest near the scene of attack sufficient to connect him to the murder? There is no evidence to show either the accused cut deceased on his head or that the person who cut the deceased was executing a common purpose with the accused. Without evidence connecting the accused to the murder, the mere evidence of arrest is insufficient to sustain a conviction.
29. There was evidence by PW1 that he saw the accused struggling to remove the key Pexh1 from his pocket. That key was proved to be the ignition key for the Motor Bike Pexh.3.
30. The accused denied having the key in his possession. He also denied that the key was recovered from him. At the time PW1 said he recovered the key from the accused, he was with one Mawira. Mawira was not called as a witness.
31. The issue of the key being recovered from the accused was the word of the accused against PW1. That evidence could have served as support for other material evidence if any against the accused. Such material evidence is lacking. In the circumstances that evidence cannot on its own sustain a conviction for this serious offence.
32. I have carefully considered the evidence adduced by the prosecution in this case. I find that the evidence has fallen far below proof of any charge against the accused. Consequently I find that the evidence has fallen far below proof of any charge against the accused. Consequently I give the accused the benefit of doubt and acquit him of this offence.

DATED AT MERU THIS 15th DAY OF MAY. 2014

LESIIT J,

JUDGE.