



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL CASE NO.12 OF 2009

REPUBLIC..... PROSECUTOR

VERSUS

JOHN GIKUNYA MIANO ACCUSED

J U D G M E N T

1. **JOHN GIKUNYA MIANO** the accused herein stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars in the information presented to Court were as follows;

JOHN GIKUYA MIANO: On the 10th day of May 2009 at Ngomongo village in Kirinyaga District within Central Province, murdered STEPHEN MUBU NDAMA.

2. The accused denied the charge and the matter proceeded to full hearing with the Prosecution calling a total of eight (8) witnesses. The evidence of PW1 and PW3 is that on 10/5/2009 at 9.30pm they were outside PW3's house discussing family activities. While there they heard people chasing each other and started wrestling. They later heard the deceased ask "**John have you stabbed me?**". They ran to the scene but John the accused ran away and refused to stop when asked to. The deceased was bleeding. PW1 and PW3 informed others like PW2, PW4 and PW5 who came to the scene. They arranged and took the deceased to Kerugoya District Hospital after passing through Kutus Police Station to report. He was pronounced dead on arrival at the hospital. Doctor Wang'ombe who did the post mortem found the cause of death to be severe bleeding in the abdomen as a result of the stab wound (EXB2).
3. A mental assessment report (EXB3) confirmed that the accused was found fit to plead. The accused in his statement of defence denied the charge. He stated that on this day he was unwell and went to Kerugoya District for treatment. In the evening he was rushed there again by a taxi driven by DW1. He produced the treatment chit (DEXB2). He also said PW1 and PW2 had a grudge with him over his cow. They had sworn to do something to him. He produced a document to confirm that (DEXB1).
4. Mr. Nduku for the accused filed written submissions which he later highlighted. In the submissions he raises the issue of identification and lack of corroboration in the evidence of PW1 and PW3. It was the submission of the Prosecution that the case against the accused had been proved beyond reasonable doubt. The accused person faces a charge of murder contrary to section 203 as read with section 204 Penal Code. Murder is defined under section 203 as;

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

5. The two ingredients for establishment of a charge of murder are;
 - a. *Actus reus* (Killing)
 - b. *Mens rea* (malice aforethought or the intention to kill)
6. The Post mortem report by Dr. Wangombe (PW8) confirms the death and the cause of it. Besides the wound in the abdomen which caused a lot of bleeding the Doctor said the deceased had several cut and stab wounds on other parts of the body. This obviously confirms that the deceased was killed.
7. The next issue is who killed the deceased. The evidence linking the accused with this murder is that of PW1 and PW3. These two witnesses allege to have been together when this happened. They were outside PW3's house on the material night at 9.30pm. These two witnesses told the Court that they heard two (2) people chasing each other and then saw them fighting/wrestling/holding each other. The next thing PW1 heard was the deceased saying;

“John have you stabbed me?”

He identified the deceased's voice. On the other hand PW3 heard the accused say;

“I am going to show you”

He then heard the deceased say;

“John you have stabbed me?”

8. The two (2) witnesses say they were able to identify the voices of the accused and the deceased. They then reported to the village elder and others and they went to arrest the accused. Besides the voice identification the two witnesses claim to have seen and identified the accused that night. PW1 said after hearing the deceased talk about being stabbed they rushed to the place which was 15 which was steps away. PW3 had a torch with him which he flashed.
9. The light was bright and there was moonlight. They therefore managed to see the accused well. PW3 asked the accused to stop but the latter did not. PW3 however said he got into his house to get a torch and upon flashing it at the accused, the latter ran away. Upon his arrest a blood stained knife was recovered and produced herein as EXB1.
10. This incident occurred at night. The only source of light was PW3's torch. He said it was a torch which uses two batteries. Those fighting were 15 steps from PW1 and PW3. Besides the visual identification, PW1 and PW3 had identified the accused and deceased by their voices. They repeated before this Court what they heard the deceased and accused say.

PW1 in his evidence said he had known both the accused and the deceased well as they lived together. PW3 also explained saying;

“I know their voices as we have grown up together”.

11. The case of ***MAGHENDA –V- REPUBLIC CR. APPEAL NO.55/86 [1986] KLR 255*** can be contrasted with this present one. In *Maghenda's* case the evidence of voice identification was found to be wanting because the words uttered by the accused at an identification parade were not shown to have been uttered at the time of the offence.
12. The witness therein did not also state whether his identification of the accused was based on the words at the identification parade. The present case is different. PW1 and PW3 have stated what they heard the two fighting people utter. They have explained for how long they had known the accused and the deceased. On the issue of identification there is little that the evidence of PW2, PW4 and PW5 can assist the Court with as they were not at the scene. They only received report after the incident.
13. An analysis of the evidence of PW1 and PW3 reveals that at the time they heard two people chasing each other there was actually no form of light to enable them identify them. Though PW1

talks of moonlight PW3 is silent on this. PW1 also states that at that time PW3 had a torch which he flashed at the people. PW3 says he went to his house to get a torch after he heard the deceased say he had been stabbed by John. So it cannot be true as PW1 says that PW3 had a torch outside and flashed it at the persons fighting. It has also come out from their evidence that when they flashed the torch the person they say is the accused ran away. Were they therefore able to identify him?

14. PW1 in cross-examination says;

“I SAW THE ACCUSED WELL. I DID NOT SEE HIS FACE. I HAD KNOWN HIM FOR LONG AS WE LIVE TOGETHER. SAME TO THE DECEASED”.

If PW1 did not see the accused's face, how was he able to identify him?. PW1 and PW3 have well explained that the accused ran away when the torch was flashed, and that he refused to stop. As much as the two witnesses have insisted that they saw the accused on this night they have not demonstrated how they did it and at which hour of the night.

15. In the cases of;

1. ***WANJOHI & 2 OTHERS –V- REPUBLIC [1989] KLR 415***
2. ***WAMUNGA –V- REPUBLIC [1989] KLR 424***

The Court of Appeal found that recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made. The Court must therefore be satisfied about the correctness of this visual identification. PW1 and PW3 have failed to satisfy the Court that indeed they were able to identify the person who ran away from the scene, that night.

16. The other evidence connecting the accused is the voice identification and the blood stained knife. PW1 and PW3 have again said they heard the two people fighting and the two people uttered certain words which they attributed to the accused and the deceased. The Court of Appeal in the case of ***CHOGE –V- REPUBLIC [1985] KLR 1*** stated this on voice of identification;

“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 that it was the accused person's voice, that the witness was familiar with it and recognized 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 had said it. In the instant case, it was not safe to say that Okumu's identification of the 1st Appellant's voice was free from all possibility of error”.

17. This Court in evaluating this evidence must be sure that the words ***“I am going to show you”*** were stated by the accused as testified by PW3. PW3 was not alone when these words were allegedly uttered. He was with PW1. In cross examination PW1 stated this;

“The two people were chasing each other saying, “wait for me I show you”.

18. PW1 does not attribute these words to any of the two fighters. Did PW3 really hear the accused utter the above words? The words that followed were uttered by the deceased saying;

“JOHN IT IS ME YOU HAVE STABBED? OR JOHN YOU HAVE STABBED ME”.

19. If indeed the deceased uttered these words the most reasonable question to ask would be which John was he talking about? Was the accused the only John in Ngomongo village? Would anyone reading the above statement by the deceased without any other evidence assign the name John to the accused? It's not possible.

20. This voice identification by PW3 does not pass the test in the ***Choge case (Supra)***. Another piece

- of evidence was that of the arrest of the accused later in the night while in possession of a knife with blood stains. This knife (EXB1) as clearly stated by PW6 was brought to the station by members of the public. PW6 (Corporal John Ndungu) was the investigating officer and he stated that he did not carry out any investigations on the knife and the blood on it.
21. A DNA ought to have been conducted on the blood stains on the knife if indeed the knife had blood on it. Therefore besides the finding of the knife there is no other evidence to prove to this Court that EXB 1 was the murder weapon.
 22. The accused person denied the charges saying he was quite sick on this day and had to go to the hospital twice for treatment. He produced a treatment card (DEXB2) showing he attended the hospital twice on 10/5/2009 and it showed he was sick.
 23. He called one witness (DW1) who stated that he had been called by Wanjohi now deceased (DEXB3) to take the accused to the hospital. The Prosecution did not rebut the evidence of DW1 nor the evidence contained in DEXB2. If indeed the accused was sick as DEXB2 shows, was he the John who had stabbed the deceased?
 24. As stated earlier the evidence on identification was questionable. The evidence by the defence has even dislodged it more. The burden of proof in criminal cases is always on the Prosecution. It never shifts save for a few instances where the law places such a burden on the accused. And in any event even where the law places such a burden on the accused the standard is lower than that of ***“beyond reasonable doubt”***.

For my part I do find that the Prosecution has failed to prove its case beyond reasonable doubt. I find the accused not guilty and acquit him under section 322(1) Criminal Procedure Code.

The accused to be released unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED AT EMBU IN OPEN COURT THIS 5TH DAY OF MAY 2014.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ingahizu for State

Mr. Nduku for accused

Accused

Njue – C/c