REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL MURDER NO.43 OF 2008

REPUBLIC ……..……..…… PROSECUTOR

VERSUS

THOMAS BOKE BWIRU …….....…….. ACCUSED

JUDGMENT

Introduction

1. The accused herein Thomas Boke Bwiru is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on the 24th day of September 2008 at Nyabare village in Bugumbe East Location in Kuria District within Nyanza Province he murdered **Arnold Mugita** Nyamohanga. The accused pleaded not guilty and trial ensued.

The Prosecution Case

2. PW1 was Keziah Bwari Mogesi who knew the deceased as her brother in-law. She told the court that on the 24th September 2008 at about 7.30 p.m., while she was going home from the market, the deceased was a head of her. As she walked she heard noise from where the deceased was and on rushing there she found the deceased having a quarrel with Boke Bwiru and two other men. She testified that she knew Boke by appearance. The quarrel was brought about because Boke Bwiru was blocking the deceased's path as he spoke on his phone.
3. She identified Boke Bwiru in the dock as the accused and also stated that the accused was walking right in the middle of the path telling the deceased to walk in the ditch. She further told the court that when the deceased refused to pass through the ditch the accused kicked him and he fell off the bicycle. Apparently the deceased was carrying bananas on his bicycle which also fell off.
4. PW1 pleaded with the accused to leave the deceased alone. PW1 saw the accused leave the deceased before she walked away but after walking for about 5 meters she heard Boke (accused) telling his accomplices that they were seeing the deceased for the last time. The accused was accompanied by a man and a woman who were walking with him. She also told the court that she heard the woman tell the accused to leave the deceased alone but he (accused) remained adamant that he would kill the deceased.
5. PW1 testified that she had asked the deceased to walk with her lest he should be killed by the accused but the deceased did not answer her. On realizing that the accused was bent on carrying out his threat upon the deceased, she called her husband Thomas Mwita Chacha and informed him accordingly.
6. Before her husband could come out, PW1 said she heard the deceased screaming saying he had been stabbed. She added that her husband went to where the deceased was and the deceased told him that he had been stabbed by the accused person. She never talked to the deceased because he

fell unconscious immediately. She told the court that she did not see the accused stab the deceased. After the deceased fell unconscious she informed the chief of the area and the police about the incident. She followed the deceased to hospital and while on the way she got information that her husband had also been stabbed. She went back to the scene of crime and found her husband having been stabbed on the left hand by the accused. She however did not see the accused person stab her husband. She took her husband to hospital for treatment. The police took accused to Sirare police station and the deceased to the mortuary. She says that though the time was 7.30 p.m., there was bright moonlight on that night and that she was able to see everything clearly.

7. PW2 Mathias Makemba Mwita Chacha, PW1's husband told the court that on the 24th September 2008 at about 7.30 p.m., he was at home with his children. His wife was not at home at that time. PW2 heard his wife (PW1) calling him from afar, and on going out in response he was told by PW1 to go and see people who were fighting his brother Mugita the deceased.
8. PW2 rushed to the scene and found the deceased who was bleeding on his chest and he asked him (the deceased) who had assaulted him. In the meantime, about 20 meters away from the scene of crime he saw some young men walking down the road. He could see them with the help of moonlight. He followed them and met them. One of the young men was the accused Boke who he identified as the one in the dock and whom he knew before.
9. PW2 also testified that he asked the accused whether he was the one who had assaulted the deceased but instead of giving an answer, the accused stabbed him (PW2) on the left hand. PW2 showed the court the scar and the court noted that the scar on the left hand had healed. He added that he made noise as he chased the accused person who ran into PW2's sister's mother in-law's house and locked himself inside. People then came and knocked down the door of the said house and arrested the accused. The chief was informed and he in turn informed the police from Isebania police station who took the accused away with the knife. He thereafter went to the hospital. By that time the deceased had been taken to the mortuary.
10. PW3 Bernard Mugita told the court that on that night of 24th September 2008 at about 7.00 p.m. he was at home when he heard people talking loudly on phone in Kisii language. He was standing outside his house but could not see the people who were talking because of the trees surrounding his house. He heard the deceased asking to be allowed to pass. The deceased happened to be his cousin. He heard another person telling the deceased to pass on the side but he could not identify the voice of the second person.
11. Thereafter he told the court that he heard some commotion which made him rush to the road. On arrival, he saw the deceased's bicycle on the road and he also saw Thomas whom he identified as the accused sitting in the dock. He told the court that he knew the accused by face only. Furthermore, that he saw another man and a woman who were strangers to him. He said that he helped the deceased put his bananas back on the bicycle and then went back to his house.
12. After getting to his house PW3 said he heard the deceased calling him and telling him that he had been stabbed by those people. PW3 went back to the scene and found the deceased had fallen down but there were no other people. The deceased was bleeding from the breast. On seeing blood he screamed and people came. He put the deceased on the bicycle and took him to the local clinic where deceased was pronounced dead on arrival.
13. He told the court that PW2 was his neighbour whose home was 100 meters away from his (PW3's) home and near to where the incident took place. He did not see PW2 near the scene nor anywhere else that night.
14. PW4 Jacinta Matinde Mugita the mother to the deceased told the court that she identified the body of the deceased on the 27th September 2008 at Pastor Machage Memorial Hospital to the doctor for postmortem examination but she did not attend the actual postmortem.
15. The prosecution closed its case after the four (4) witnesses had testified. After carefully evaluating the evidence adduced by the prosecution witnesses, the accused was placed on his defence. After due compliance with **Section 306 (2)** of the **Criminal Procedure Code** the accused chose to give an unsworn statement. He called no witnesses.

<u>The Defence Case</u>

16. In his defence, the accused denied the charges and contended that the evidence given by PW1 as

to his arrest was untrue. He also attacked PW2's evidence terming it as untrue and he contended that he was nowhere near where PW2 said he saw him nor did he stab PW2 and if that were true, PW2 should have reported him to the police.

17. Furthermore, the accused attacked PW3's evidence based on the fact that when he (PW3) was asked whether he knew the accused, he said he knew him when he came to court and contended that this only meant that what he recorded in his statement with the police was a lie. In addition to this the accused said that the case against him, being supported by only family members should not be believed.
18. In addition the accused contended that on 18th May 2008 he went to the market to buy some cattle, where he managed to buy 4 cows and 2 oxen, PW2 and PW3 were cattle drivers and on that day he gave his 3 head of cattle to the said witnesses to drive them to Nyabohanse but instead they took one of his 3 head of cattle and sold it and pretended that it had been lost. Thus allegations that he sold a cow to PW2 were false as in reality PW2 stole his cow.
19. The accused also testified that on discovering the theft of his cow, he reported the matter to community policing who immediately arrested PW2 and PW3. The said witnesses were then beaten thoroughly by community police after which a cow was recovered from the home of PW2. Upon their release, both PW2 and PW3 swore to teach the accused a lesson hence this case against him.
20. Lastly the accused contended that the arresting officer and the doctor never came to testify and as such he did not know why he was arrested and who the deceased was. He asked the court to acquit him.

Issues for Determination

21. The offence of murder is defined in **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."**

The issue that arises for determination therefore is whether the accused

person herein of malice aforethough caused the death of the deceased

by an unlawful act or omission.

Findings

22. In **Republic –vs- Abdikadir Ahmed Mohamed [2013] e KLR** Mutuku J. held

and I agree with the learned Judge that:-

> **"The law places the onus of proving a criminal case on the prosecution. This never shifts unless where the law specifically provides so."**

In the instant case the prosecution has to prove three things:-

1. **That Arnold Mugita Nyamohanga died;**
2. **That his death was caused by the accused person before the court;**
3. **That the accused caused that death unlawfully and with malice aforethought.**

23. Malice aforethought is deemed to be established when there is evidence which proves an intention to cause death of or to cause grievous harm to any person whether that person is the one who actually dies or not (see **Karani & 3 others –vs- Republic CA No.71 of 1989 [1991] KLR 622** (unreported). In the same case, the court stated that the nature of the injuries caused and the

weapon used may prove an intention to cause the death or attest to intention to cause grievous harm.

24. In the instant case, the prosecution called 4 witnesses. PW1 attested to the fact that there was a quarrel between the deceased and the accused because accused was blocking the deceased's path as he spoke on his phone. She then testified that when deceased refused to pass through the ditch as demanded by the accused, the accused kicked him and he fell off the bicycle. She pleaded with accused to leave deceased alone and accused obliged. However, on walking away for about 5 metres she heard accused telling his accomplice that they were seeing the deceased for the last time. At that time, the accused was in the company of one man and one woman. The woman told accused to leave deceased alone but accused was adamant saying he could not go home until he had killed the deceased who was a student.
25. On realizing that accused was bent on carrying out his threat, PW1 called out to her husband Thomas Mwita Chacha to come out. Even before her husband left their compound she heard the deceased screaming and saying he had been stabbed. She said she was able to see the accused well through the moonlight which was bright.
26. PW2 who happens to be PW1's husband told the court how he heard PW1 calling for him. A few minutes later, he went out of the gate, met PW1 who told him to go and see some people who were fighting the deceased who was his brother.
27. On arrival, he found deceased lying on the side of the road and there was blood on his chest. He then saw some 2 young me walking down the road 20 metres away. It was 7.30 p.m. and there was moonlight. He decided to follow the two men with the intention of meeting them face to face. On meeting them he identified one of the 2 men as the accused whom he knew previously. He asked him whether he was the one who had assaulted his brother but before he could complete his question to the accused, accused removed a knife from his left side and stabbed him on the left hand. He showed the court a scar which had healed on his left hand. He also told the court that he stabbed him just once and then ran away and that if he had not blocked the knife with the hand, he would have been stabbed in the heart.
28. Thereafter, he made noise as he chased the accused towards his sister's home which was about 700 metres away. That as he chased him, the accused entered his sister's mother in-law's house and locked himself inside. People came, knocked down the door and arrested accused. The chief was informed and in turn he called the police at Isebania. The police took him. He also saw the knife the accused had used to stab him. The knife was hidden in the grass thatch of the roof of the house.
29. PW3 Bernard Mugita stated the following during evidence in chief:-

> **"After the commotion stopped, I helped accused to put his bananas back on the bicycle. The accused and his 2 colleagues were standing there. After that the accused and his colleagues went towards their house.**
>
> **…… After I got home I heard the deceased calling me. He told me that he had been stabbed by those people. I went back to the road and found deceased had fallen down. There were no other people. The accused was not there. The deceased was not talking now but was bleeding from the breast.**
>
> **……. People came among them Gesiri. We put deceased on the bicycle and took him to our home clinic. At the clinic we were told deceased had died."**

30. PW4 the mother of the deceased only confirmed the fact that she identified the body of the deceased for purposes of postmortem examination though she did not attend the same.
31. By the close of the prosecution's case, both the investigating officer and the doctor who conducted the postmortem examination on the body of the deceased had not testified. The accused in his defence denied the charges facing him and accused PW2 and PW3 of framing him because of a grudge they had with him over the accused's stolen cow.
32. From the evidence adduced by PW1, PW2 and PW3 the accused has been placed at the scene of the crime. Both PW1 and PW2 stated that the accused was not a stranger to them although PW1 stated she knew accused by face only. They also alleged they were able to identify him by the

help of moonlight which was very bright.

33. In **Nairobi High Court Criminal Appeal No.409 of 2006 – Stephen Njenga Wairimu –vs- Republic** (unreported) the court held:-

> **"Although the complainant said in his evidence that there was moonlight, he did not specify how bright that moonlight was. If it was a new moon, its light would probably not have been as bright as that of a full moon. In the absence of any evidence as to the quality of the moonlight, one cannot be certain that the attacker was properly identified beyond a shadow of doubt."**

34. In the instant case, I can distinguish the **Stephen Njenga Case** (supra) with this case because the accused herein was not only recognized by PW1 but by PW2 and PW3 who attested to the fact that he was not a stranger to them. Secondly, when PW2 asked whether accused was the one who had stabbed the deceased, the accused turned on PW2 and stabbed him on his left hand. The witness (PW2) showed this court a long healed scar attesting to the fact that he had indeed been stabbed, PW2 told the court that he had to block the accused with his hand since accused was aiming for his chest.

35. Although none of the prosecution witnesses saw the accused actually stabbing the deceased, the fact that he was heard swearing to finish the deceased by PW1, he was seen with the deceased by PW1 moments before the deceased was stabbed and that he actually managed to stab PW2 who was the deceased's brother moments after deceased was stabbed all seem to point to the fact that the accused may actually have stabbed the deceased.

36. In the case of **Sawe –vs- Republic [2003] KLR 364** the Court of Appeal held as follows:-

> **"i) In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.**
>
> **ii) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**
>
> **iii) The burden of proving facts which justify the drawing of the inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. The burden always remains with the prosecution and never shifts to the accused.**
>
> **iv) Suspicion however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

37. In the instant case, the court has some doubt in its mind as to whether indeed the accused is the one who stabbed the deceased. The accused is said to have been in the company of two other people. PW1 alleged to have heard the accused swear that he had to kill the deceased that night, yet there is no concrete evidence by PW1 that she knew and recognized the accused's voice. She infact told the court that she knew the accused person by face only. Thus though PW1, PW2 and PW3 all said they knew the accused, their conclusion that the accused stabbed the deceased may

have been based on mere suspicion.

38. Further this court notes that the prosecution did not adduce evidence from the investigating officer and the doctor who conducted the postmortem examination on the body of the deceased. Can it be said that the kick and the possible stab of the deceased by the accused caused the deceased's death?

39. As noted hereinabove, the postmortem report was never produced as an exhibit in this case. It is unfortunate that there is no evidence to link the accused's unlawful act to the death of the deceased. In as much as we know through the evidence of PW4 that a postmortem examination was actually conducted on the deceased's body, I am not able to link the deceased's death with the actions of the accused without a doctor's postmortem report. What this court has at this point is a strong suspicion that the actions of the accused may have caused the death of the deceased but as was held in the **Sawe case** (supra) suspicion no matter how strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

40. In the circumstances I find that the prosecution did not prove its case against the accused person beyond any reasonable doubt and as such the murder charge facing the accused cannot stand. He is accordingly acquitted of the same under **Section 322 (1)** of the **Criminal Procedure Code**. Unless he is otherwise lawfully held, the accused person shall be released from prison custody forthwith.

Dated and delivered at Kisii this 12th day of June, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Shabola (present) for State

Miss Kusa (present) for Accused

Mr. E. Mongare - Court Assistant