REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 69 OF 2011

LESIIT, J

REPUBLIC…….…….....…...PROSECUTOR

V E R S U S

FRANCIS THURANIRA KATHONGE……. ACCUSED

JUDGMENT

1. The Accused **Francis Thuranira Kathonge** is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are;

> "**On the 1st day of December 2011 at Nkinyanga Location in Igembe South District within Meru County murdered Gilbert Gitonga**"

2. The prosecution called 7 witnesses. The facts of the prosecution case were that the deceased was found inside a water trench, seated with folded knees and had a severe cut on the neck. He was taken to hospital where he was given a paper and in answer to the question put to him of who cut him wrote "Francis" blood was oozing out. Later accused a man who had manned deceased niece was charged with this offence.
3. The other evidence against the accused was evidence of PW4 that he saw accused carrying a panga at Nkinyanga market at 8.30 pm on the material night. The other evidence against him was by PW3 the grandmother of accused wife that accused and his wife had chased PW3 from her home. PW3 explained that the reason the accused chased her away was because she had declined to transfer the land she intended to give to her granddaughter, accused wife, to the accused wife, to the accused.
4. The accused was placed on his defence. He gave a sworn defence and denied the charge. He stated that on the morning of 1st December 2011, he was sent for by PW3 and on going to her home, he found a quarrel going on between his wife Peninah, her sisters and PW3. The accused stated that because he was unable to calm them, he decided to leave. The accused stated that he did not spend that night at his wife's place, where he lived, but went back to his home.
5. The accused is facing a charge of murder. The offence of murder is defined under section 203 of the Penal Code as follows:

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

6. An important ingredient for this offence is malice aforethought which is described under Section 206 of the Penal Code as follows:

> **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. **...**

(d) ..."

7. The prosecution has the burden of proof. It should adduce evidence to prove that the accused by an unlawful act or omission inflicted an injury which caused the deceased death. The prosecution should adduce evidence to prove that at the time the accused inflicted the injury that led to deceased death, the accused had formed the necessary malice aforethought to cause either death or grievous harm.
8. I carefully considered the evidence adduced by both sides and I have analyzed and evaluated the evidence. The accused was represented by Mr.Nyeinyire while Mr. Murage, prosecution counsel represented the prosecution. I have considered submissions by both counsels.
9. The evidence against the accused is circumstantial evidence. What constitutes circumstantial evidence and the principles which should be applied while considering such evidence are well settled in case precedent. I will set out some of the leading cases on the issue of circumstantial evidence herein below;
10. In **SAWE –V- REP [2003] KLR 364** the Court of Appeal held as follows:

> **"1. In order to justify 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 hypotheses than that of his guilt.**

2. **Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**

3. **The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**
4. **...**
5. **...**
6. **..**
7. **Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

11. In the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** at page 5 where the learned Judges of the Court of Appeal stated:

> **"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."

12. The prosecution relies on the name on a piece of paper written by the deceased as evidence against the accused. The paper, Pexh 2, was identified by PW2 as one a doctor offered the deceased to record on when the deceased made hand signals asking for writing material. PW2 testified that he asked the deceased who cut him and that he wrote down the name "FRANCIS". PW2 testified that when he asked the deceased whether it was the Francis who had married Penina and that he did a thumb up.
13. I have considered that for the deceased to have known who cut him, he must have been able to see his assailant at the time he was attacked. There was no direct evidence and so we have no evidence to show what transpired before the deceased was found in a trench by PW5 and 2 others not called as witnesses, with a severed cut on his neck.
14. PW5 describes the time and conditions at the scene in his evidence. PW5 testified that it was raining heavily and that it was 8.30 pm or thereabouts. PW5 said he used a torch after hearing a cracking sound in order to find the deceased. That means it was dark at the scene. It also means that due to heavy rain the visibility at the scene was doubly reduced. The visibility at the scene was therefore very poor.
15. Given the conditions of the light at the scene where the deceased was found already injured, it will be safe to conclude that identification made in such circumstances is not positive for a correct identification of an assailant.
16. The prosecution did not adduce any evident to establish that the deceased was in a position to clearly see his assailant. PW7, the investigating officer alluded to fact PW2 had told him during the investigations that the deceased and accused walked away together at 8.30 pm. PW1 testified that PW2 had told him that the accused had called the deceased saying he had a matter he wanted to discuss with him.
17. 8.30 pm was the time the deceased was found by PW5 with the serious injury. PW2 in his evidence in chief did not give any evidence to effect the accused and deceased walked away together moments before the deceased was found injured. In fact, PW2's evidence is to effect he was chewing miraa at Nkinyange Market when a person informed him that the deceased had been cut. He did not say he knew accused and deceased had been together that evening.
18. PW1 who produced the paper Pexh2 to PW7 testified that at the time the deceased wrote the name Francis as of the one who cut him, PW1 asked him whether it was the Francis who had married Peninah and that he put his thumbs up. PW1 stated that at the time he asked accused whether by Francis he meant Peninah's husband, two other people were present. These were PW2 and one Jonah.
19. PW2 testified that he was present when the deceased wrote the name Francis. He said that on hearing that, he went out of the ward immediately. He did not say that he heard the deceased saying which "Francis" he meant had cut him. That presents a difficulty as to whether PW1 had asked deceased to specify which Francis had cut him.
20. That notwithstanding without evidence to show that the deceased had a good opportunity to positively identify his assailant, the evidence of who he meant cut him does not serve to corroborate the circumstantial evidence of name on the piece of paper Pexh2. The deceased writing on the paper P.exh 2 was a dying declaration as described in the case of **CHOGE -V- REP 1985 KRL** it was 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."

21. The paper was written at a point when deceased death was imminent. The deceased must have had no other intention but to disclose the person who injured him. Nevertheless as demonstrated

herein above, the circumstances under which the deceased saw his assailant is doubtful and therefore cannot be relied upon without other evidence which implicates the accused with this offence. There is no such other evidence of a cogent nature which implicates the accused with this offence.

22. The prosecution tried to establish a motive of accused attacking the deceased. The investigation officer stated that his investigations had shown that accused had a grudge against the deceased because he was opposed to his mother PW3 (deceased mother) giving any land to accused wife.
23. PW3 who testified in court regarding the land dispute was very clear that the only dispute there was, was between her on one hand and the accused and his wife on the other. PW3 said accused and deceased were good friends. PW1 and 2 also testified that the accused and deceased were friends.
24. The evidence of PW7 that his investigations revealed a grudge between the accused and deceased was not supported by the evidence of witnesses who were all related. PW1 was nephew of the deceased while PW2 and deceased were first cousins. Accused wife was niece of the deceased and a cousin of PW1 and granddaughter of PW3. They could not have been making any mistake in regard to the relationship between the accused and deceased.
25. The prosecution did not establish any motive for accused to cause deceased any harm.

I have considered this case and find that the evidence adduced by the prosecution did not establish the charge against the accused on the required standard. Consequently I give the accused the benefit of doubt and acquit him from this offence under section 322 of the Criminal Procedure Code.

DATED SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF October, 2014.

J. LESIIT

JUDGE