REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 39 OF 2010

LESIIT, J.

REPUBLIC………….…..……….…….............PROSECUTOR

-VERSUS -

PETER KITHAKA KUGERIA……………….……........ACCUSED

JUDGMENT

1. The accused **PETER KITHAKA KUGERIA** is charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are follows:

> **"On the 2nd day of July, 2010 at Gatue location, Tharaka North District within Eastern Province murdered FABIAN KUGERIA."**

2. The prosecution called four witnesses. PW3 and 4, a sister and brother of the accused and deceased; PW1 a neighbour and PW2 Dr. Wambugu who produced the post mortem report in this case.

3. The facts of the prosecution case is that PW3, his two brothers, deceased and accused and others were at their aunt's place where traditional brew was being sold. PW3 drunk too much and she decided to sleep at the same place. That led to the accused hitting her with the flat side of a panga and telling her to go sleep elsewhere. The deceased questioned the accused for treating their sister in that manner. The deceased then escorted PW3 home. That was at about 8.00 p.m.

4. The prosecution case is that the accused woke up his youngest brother, PW4 at his home at midnight or 1am same night of the incident with PW3. PW4's evidence was that the accused confessed to him that he had killed their brother, the deceased. The accused also told him where the body was. PW4 confirmed the story the accused told him and was able to locate the body at exactly the same place the accused had described. PW4 then went to one of his neighbor's and not called as a witness and requested him to escort him to Gatuga Police Station. PW4 testified that the neighbor agreed to escort him to Gatuga Police Station the same night. They arrived at the Station at 4am and that he immediately reported the matter. The Police waited until day break before proceeding to the scene to collect the body.

5. According to the post mortem examination, the cause of death was severe hemorrhage resulting from deep cut wounds on the neck involving the jugular veins and other multiple cut wounds on all the limbs and the chest. The post mortem was produced as P. exhibit 1.

6. The accused in his sworn defence denied the offence. He stated that indeed he had been

with his sister PW3 and his brother the deceased and others at their aunt's place on the night in question. He admitted hitting his sister PW3 when she got too drunk and decided to sleep at the drinking den. He stated that the deceased admonished him for attacking their sister. The accused stated that after that the deceased left with PW3. The accused stated that he followed them later only to find his brother lying dead at a cross road junction. He then woke up his other brother, PW4, to tell him about their brother's death.

7. The accused faces a charge of murder. The burden lies on the PW5 to adduce evidence to establish beyond any reasonable doubt that the accused attacked the deceased inflicting multiple cuts on his neck, limbs and head causing him severe injuries which led to his death. The prosecution should prove that at the time the accused attacked the deceased and inflicted the injuries, he had formed the necessary intention to cause death or grievous harm to the deceased.

8. The essential ingredient for the offence of murder is malice aforethought. The circumstances which constitutes malice aforethought are described under **Section 206** of the **Penal Code** 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."***

9. I have carefully considered the evidence adduced by both the prosecution and the defence. Mr. Nyenjire for the accused and Mr. Mulochi Prosecution Counsel for the State gave no submissions in this case.

10. There was no eye witness in this case. The prosecution is relying on an admission by the accused to his youngest brother, PW4 that he had killed his brother.

11. The prosecution adduced the evidence of PW3 who placed the accused in the place where a traditional brew was being sold. The drinking den belonged to PW1 one Mugure who also happened to be an aunt to the accused, deceased, PW3 and PW4. PW3 stated that she was at the drinking den taking the local brew, and that both accused and deceased were present. According to PW3, the accused and deceased had an altercation because the accused assaulted her, their sister. The deceased was not happy about it and he escorted PW3 home.

12. The accused did not deny being at the drinking den. He also did not deny assaulting his sister, PW3, thus annoying the deceased. What the accused denied was that he assaulted the deceased causing him the fatal injuries. He stated that he came across the dead body of the deceased and proceeded to PW4's house to inform him about it. The accused made no reference to having informed PW4 that he caused their brother's death.

13. The issue is whether the statement the accused allegedly made to his brother, PW4 is an admission of the offence and if so, whether it is admissible in evidence. If the statement is

admissible the next question is whether the prosecution has established the charge against the accused and proved malice aforethought.

14. The Evidence Act provides for extra-judicial statements taken from an accused person. Section 25A provides as follows:

"(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

15. Section 26 of the Evidence Act provides as follows:

> ***"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him".***

16. In the Court of Appeal case of **KANINI VS REPUBLIC CA No, 238 of 2007,** the court observed:

> "In our opinion, extra judicial confessions are those made outside the trial court, while judicial confessions are those made before the trial court and which amount to pleas of guilty. A confession made before a judge or a magistrate under section 25A who is not the trial judge or magistrate is still an extra-judicial confession and its admission is subject to all the safeguards prescribed by the law. ***BLACK'S LAW DICTIONARY,* 8th Edition, 2004** defines an ***"extrajudicial confession*** "as ***"a confession made out of court and not as a part of a judicial examination or investigation***" and a "***judicial confession***" as ***"a plea of guilty or some other direct manifestation of guilt in court or in a judicial proceeding."***

17. The same court continued to consider statements made by an accused person to various persons and observed as follows:

> "**A chief was regarded, for purposes of statements made to him by an accused person, as a person in authority in *REX VS ERIYA KASULE & OTHERS (1947-1949) EA 148*, while in *GOPA S/O GIDAMEBANYA & OTHERS VS REGINA (1952-1953) EA 318*; a headman was treated as a person in authority. In an Africa context like that in which the appellant found herself, we would be slow to say that clan elders are "not persons in authority" in this case. On the evidence, the elders and the family of the appellant brought pressure to bear upon her to make the confession and to open negotiations with the family of the deceased so as to avoid evil of a temporal nature, namely further deaths in the family believed to be caused by the *Kithutu* oath. To that extent, the appellant's statement was one extorted from her either by fear of prejudice to her family or hope of the advantage of preventing further deaths in the family. We would add even sheer terror of the oath."**

18. The admission made to PW4 by the accused is an extra-judicial statement. It was not made to a judicial officer or a police Officer as prescribed under section 25A of the Evidence Act. It was not made to a person in authority as PW4 was a brother to the accused and has no position in the society. The statement could not be subjected to the admissibility test as provided under section 26

of the Evidence Act. The accused in his statement in defence made no reference to having made such a statement to PW4 which in itself amounts to a denial. The admission is in all the circumstances of this case inadmissible and cannot be considered against the accused.

19. There was no other evidence against the accused person. There was other evidence alluded to by PW4 but which was not adduced in this case. According to PW4, he took Police Officers to the scene where the deceased body was and that they found the accused at the scene still holding the murder weapon with blood stains. The accused did not mention admitting to causing the deceased death or having the murder weapon in his possession.

20. There were several witnesses who should have been called to testify. This included the neighbor who escorted PW4 to Gatuga Police Station to report the matter. At least that neighbor could have stated whether the accused was at the scene where the body was found when PW4 and the neighbor arrived with police officers. PW4 alluded to fact the deceased was always harassing members of the family including the parents and the deceased. The parents could have provided support to PW4's evidence as to accused person's previous treatment of the deceased. Such evidence could have provided a motive for the attack which is missing in this case.

21. The Police Officers who visited the scene and recovered the deceased body, or at least one of them or the Investigating Officer should have testified. Their evidence was critical to shed light on whether the accused was found at the scene still armed with the murder weapon. Without that evidence, the evidence adduced by PW4 implicating the accused for being found at the scene where the body of the deceased was found, still armed with the supposed murder weapon, is the word of PW4 against that of the accused.

22. Considering the circumstances of this case, I find that the failure to call the parents of the deceased, PW4's neighbor and the Investigating Officer was fatal to the prosecution case and is fitting for an adverse inference being made against the prosecution as all these witnesses were vital witnesses in the case. For this finding, I am guided by the case of **BUKENYA & OTHERS Vs. Uganda 1972 EA 549**where 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."***

Indeed an adverse inference is fitting to be made against the prosecution case to the effect that the reason why the prosecution failed to bring all these witnesses was because their evidence would have tended to be adverse to the prosecution case.

23. Quite apart from failing to bring crucial witnesses, there were halfhearted investigations conducted in this case. The reason for this conclusion is that despite bringing the alleged murder weapon as an exhibit, no analysis were carried out through the Government Chemist to determine whether the weapon had any blood on it and if so whether the blood belonged to the deceased. The doctor who produced the post mortem form did not say that any blood sample was asked for or supplied to the police. That blood sample was imperative in testing the blood found on the weapon produced in court if at all any was found.

24. Having carefully considered the evidence adduced in this case, I find that the prosecution failed to establish that the accused caused the death of the deceased or that he had motive or any malice aforethought to commit the offence. Having come to that conclusion, I give the accused the benefit of doubt and acquit him for this offence.

DATED SIGNED AND DELIVERED AT MERU THIS 12TH DAY OF NOVEMBER, 2014

LESIIT, J.

JUDGE.