



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL CASE NO. 5 OF 2008**

**LESIT, J.**

**REPUBLIC.....PROSECUTOR**

**-VERSUS -**

**JAMES MURIUKI WERU.....ACCUSED**

**JUDGMENT**

1. The accused **JAMES MURIUKI WERU** 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 17<sup>th</sup> of February 2007 at Sirimon village, Ontilili location of Meru Central District within Eastern Province murdered **MICHAEL MWANGI KAMAMIA**.
2. Before I go any further in this judgment I must mention that the Hon. Kasaango, J. heard the evidence of PW1 to 5 before she was transferred out of the Station. I took over the case under section 201(1) of the Criminal Procedure Code and heard the rest of the case to conclusion.
3. The prosecution called seven (7) witnesses. The summary of the prosecution case is that on the material day the deceased, a prison warden, went to the house of one Lucy to have an alcoholic drink called changaa. PW3 found the deceased in Lucy's house which also served as a changaa den. Also present in the house was one Luka and one Kaimenyi. It was around 8.00 p.m. A person PW3 had not seen before was selling the changaa to them.
4. Shortly after PW3 joined the other three to take changaa, the accused, who was a neighbour to all of them and who also sold changaa entered. He had a panga sharpened on both sides. He went straight to the deceased and told him that he wanted his 200/=. PW3 saw the deceased stand, put his hands in his trouser pockets and say that he had no money and then sat down.
5. The accused then swung his panga and cut the deceased on the forehead. The deceased then put his hand in his breast pocket which had money. PW3 saw the accused swing his panga again to hit the deceased and instead he hit the lantern lamp which was lighting the room. The lamp went off. It was at that point that PW3 ran out of the house and ran away.
6. In the meantime PW2, an uncle of Lucy and also her neighbour received a text message in his phone from his brother. The message was for Lucy. PW2 went to look for his niece in her house. He said that he found many people taking changaa in Lucy's house. PW2 called Lucy outside and told her to go to his house. PW2 returned to his house to wait for Lucy.
7. PW2 testified that Lucy went to his kitchen where his sister was cooking instead of going to his house where PW2 was. PW2 said that while still waiting for Lucy, he heard the voices of two people talking outside. He went out of his house to listen. PW2 testified that he recognized both voices very well. One was the deceased who was asking "**why are you cutting me?**" The other was the accused who was saying "**you will give me my money**". He said that he saw that the accused was cutting the deceased as they exchanged those words. PW2 decided to run to the sub-Areas house which was 1½ kilometers away.

8. PW2 returned with the Sub Area, who was PW4 in the case. The two of them found the deceased on the road covered with blood and they assisted to organize transport to take him to hospital.
9. PW4 confirmed the evidence of PW2 that he was called to the scene of incident. PW4 stated that on seeing the deceased on the road side bleeding profusely, he called police who came to the scene before the deceased was taken to hospital.
10. PW7 was a taxi driver. He testified that at 7.30 p.m. he was in his house when two of his neighbours visited him. The two were Lucy and Wangari. They informed him that Mwangi, and Muriuki, both of whom he knew as neighbours, had fought and Mwangi was seriously injured. The two ladies asked him to help take Mwangi to hospital. PW7 stated that he carried the two ladies to the road and then told the ladies to carry Mwangi to the road as he could not drive into the maize plantation where they said Mwangi was.
11. PW7 testified that as he waited in his car by the road side, Muriuki the accused in this case emerged. The accused demanded to be driven to Nanyuki and threatened PW7 that if he, PW7, did not take him there, he, accused, would cut him the same way he did Mwangi. PW7 stated that he ended up driving away with the accused before Lucy and Wangari returned due to the threats. PW7 testified that he dropped the accused at Total Petrol Station in Nanyuki, and that the accused did not pay him for the fare. PW7 stated that he decided to sleep in Nanyuki that night.
12. The court invoked Section 150 of the Criminal Procedure Code and called a witness to produce the post mortem report on the deceased. The post mortem report was produced by the OCS, Timau Police Station, one Chief Inspector Alexander Shikoli.
13. The Post Mortem Report shows that the cause of death was severe anaemia due to extreme hemorrhage due to brain injury. The body of the deceased had deep cuts on the left mandible injuring the external carotid artery and vessels, mutilated left hand, extensive vascular injury and a deep wound on frontal region of the head with injury to the skull. The body also had a cut right wrist, collis fracture and bruise of left external canthus.
14. The accused person was placed on his defence and he gave a shown statement. He called no witnesses.
15. The accused stated that on 17<sup>th</sup> February 2007 he left his home at Sirimon and travelled with one Ngari to his rented shamba at Timau Mia Moja. He stated that he stayed there for 3 days working on his land. That on evening of 20<sup>th</sup> February 2007 he returned to Sirimon to learn of the deceased death. He stated that he proceeded to his wife's place (PW1) who confirmed that the deceased had been murdered. The accused stated that PW1 told him that those who murdered her husband were unknown.
16. The accused stated that Lucy was his estranged wife and that he left her when he found her with PW3 in a compromising position. The accused denied being taken to Nanyuki by PW7. The accused stated that PW3 lied that it was the accused that attacked the deceased and explained that it was because PW3 took his wife from him.
17. I have carefully considered the entire evidence adduced in this case by both the prosecution and the defence. I have also considered the submissions by both counsels.
18. The prosecution has the burden to prove the case against the accused person beyond any reasonable doubt. Section 203 of the Penal Code which creates the offence of murder stipulates as follows:

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

19. The prosecution must adduce evidence to prove that the accused person by some unlawful act or omission caused injury to the deceased as a result of which he died. The prosecution must prove that at the time the accused caused the said injury he had formed the necessary malice aforethought to cause either death or grievous harm to the deceased. 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) ...**

**(d) ....”**

20. Ms. Nelima, the counsel for the defence has raised two issues in this case. The first one is that of identification and credibility of the witnesses. The second one is failure to call vital witnesses.

21. Regarding identification Ms. Nelima submitted that PW2 who said he recognized the voice of the accused and deceased was 30 to 40 meters from the house of Lucy and could not have identified the voices. Regarding PW3 who was in the same house where the incident occurred, counsel urged that PW3 was drunk at the time and his evidence was not credible. Counsel urged that lighting in the house was from a lantern whose strength was not described and further that from where PW3 sat according to his evidence, he could only see the back of persons entering the door.

22. Mr. Mungai urged that the prosecution had proved its case to the required standard. Mr. Mungai urged that the accused was well recognized by PW3. He also urged that the prosecution had proved the motive for the attack on the basis of accused disappearance from the area for one year after the offence was committed. Mr. Mungai urged the court to consider the totality of the evidence and come to the conclusion that there is no other conclusion to reach except the guilt of the accused. Mr. Mungai urged the court to dismiss the accused defence as a bare denial.

23. The prosecution adduced the evidence of two witnesses who were at the scene of incident, PW2 and 3. PW2 testified that he first heard voices of two people and he went outside to listen. It is when he went outside that he recognized the voices as that of the accused and deceased. He was able to know what each of them was saying to each other and he stated to court exactly each of the two said. Contrary to what counsel for the accused submitted, PW2 testified that he was able to both hear and shortly later see both the accused and the deceased. PW2 testified that he saw that the accused was cutting the deceased and it was for that reason that he ran one and a half kilometer to PW4's home to call him.

24. The evidence of PW2 was that of recognition of voice. In **Choge v Republic [1985] KLR 1**, the Court of Appeal held:

**“Evidence of voice identification is receivable and admissible in evidence and it can’ depending with the circumstances, carry as much weight as visual identification. In receiving such evidence care would be necessary to ensure that it is 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 said it. In the instant case, it was not safe to say that Okumu’s identification of the 1<sup>st</sup> appellant’s voice was free from all possibility of error”**

25. PW2 testified that he knew the accused for five years and the deceased for three years. The accused and the deceased were outside when he went out to listen to their voices. From his evidence PW2's house was 30 to 40 meters from Lucy's house where both had been before moving outside the house as the accused assaulted the other. That is a near distance. The lighting condition outside where PW2 says he heard and saw the accused and deceased is not described from PW2's evidence. No reliance can be placed on the evidence of visual identification.

26. However the evidence of voice identification was reliable and credible. PW2 went out to listen and heard the two people saying the same thing repeatedly as accused assaulted the deceased. These were people he knew well before and lived near them. the conditions at the scene at the time did not obstruct or create any confusion as to who were involved given PW2's and 3's evidence that only the two were involved in the scuffle. In a way, the accused was trying to force the deceased to pay him his money by cutting him and repeating that he must pay him his money.

- Indeed the doctor's finding at post mortem was that the deceased had multiple deep cuts on various parts of the body including a fracture on the face and frontal region of the head and mutilated hand.
27. PW3 was inside the house of Lucy where the attack began. He said that he saw the accused enter and walk right into the house. He recognized the accused because he knew him as his neighbor. In addition to this, the accused also spoke before he commenced the attack and PW3 knew him very well prior to this.
  28. PW3 described the size of the house where he and the deceased, Kaimenyi and Luka were seated as a 4 by 5 meters divided into two. It means that the area of the room where they sat was a 2 by 2 meters. He described the source of light in the room as a lantern lamp. The light was in my view clearly sufficient to light up the room as it was a fairly small space. I also find that the area was so small there is no way that PW3 could have missed to see the assailant enter. Besides, PW3 testified that the accused entered the room and went straight to where the deceased was seated. PW3 saw where the accused struck the deceased and described it as the forehead. The evidence of PW3 is corroborated by the doctor's evidence who reported that he found the body of the deceased with among other injuries a deep cut on frontal region of the head with skull injury.
  29. Ms. Nelima for the accused stated that PW32 was not credible as he was too drunk. I noted that PW3 was not challenged concerning the possibility of not perceiving due to high level of drunkenness. That notwithstanding, PW3 admitted he was drunk and that he was aware of it and that it was the reason he took his drink of one glass for over half an hour. PW3 stated that he was not so drunk as not to know what was happening around him. I am satisfied that PW3 was not so drunk as not to perceive things, that he saw and recognized the accused and that the lighting conditions in the house where he saw the accused were conducive to a correct identification. The doctor's finding further confirms that PW3 saw clearly and was able to see and recognize where the deceased was struck first by the accused. The evidence of PW2 and 7 lends credence to PW3's evidence. I believe the evidence of PW3 as credible and reliable.
  30. The evidence of PW1 establishes a possible motive for the attack by the accused against the deceased. PW1 testified that the accused and deceased were good friends but that a month to the incident, the accused had hit the deceased with the back side of a panga because of a debt the deceased owed him. The debt, according to PW1 was 2500/- from alcohol the deceased bought from him but had not paid for. At the time. PW1 paid the accused and the matter ended. On the day of incident, according to PW3, the first words uttered by the accused to the deceased was that he must pay him his 200/-. There is therefore evidence of a motive for the attack, even though the sum owed was not anywhere near proportionate to the force applied by the accused.
  31. There was also circumstantial evidence against the accused. That was in the evidence of PW7. PW7 testified that as he waited for Lucy and Wangari to bring the deceased so that he could take him to hospital. The accused emerged from the maize plantation and demanded a lift from PW7. The accused even threatened him that if he did not carry him to Nanyuki, he would cut him the way he had cut the deceased. That incident between PW7 and the accused took place soon after the incident. The accused was therefore running away from the scene after committing the offence. That is evidence of conduct of one with a guilty mind. The threat to PW7 is circumstantial evidence against the accused that he was confessing to the assault on the deceased which had also just taken place.
  32. Regarding failure to call vital witnesses, I agree quite a few witnesses were left out. These included Lucy in whose house incident begun, and Wangari who accompanied her to call PW7 for help. There was also a person whose name PW3 did not know who sold the changaa to him, Kaimenyi and Luka who drunk together with him and the deceased. 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.”**

33. The test is whether the witnesses called by the prosecution were sufficient to establish the truth in

the case. The question is not whether all those who witnessed the incident have been called. In this case the prosecution called one of the four people who drunk together inside Lucy's house. They then called PW2 who was not drinking with the rest. Lucy and Wangari were not called. At least Lucy was an important witness to call as the incident begun inside her house. That notwithstanding I am satisfied that the evidence adduced by the prosecution was sufficient to establish the truth in this case. I find that this is not an appropriate case in which to make an adverse inference against the prosecution.

34. Regarding malice aforethought, in **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

**“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”**

35. In **MORRIS ALOUCH VS REP CR. APPEALS NO 47 of 1996 (UR)** the court of appeal stated as follows:

**“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later.”**

36. The evidence before the court is clear that the accused repeatedly inflicted deep cuts on the deceased, causing him mutilation on one hand, fractures on the head and severe bleeding as a result of which the deceased died. The evidence is clear that the accused cut the deceased causing severe injuries which were intended to cause grievous harm or the death of the deceased. I have no doubt that the accused had formed the necessary intention to cause death or grievous harm to the deceased. I am satisfied that the prosecution proved malice aforethought.

37. The accused put forward an alibi as his defence. The test is whether the alibi raised any doubt in the mind of the court as to the veracity of the prosecution case. In **KIARIE V. REPUBLIC (1984) KLR 739** where it was held:

**6. “An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.”**

38. In the instant case, the accused has stated that prosecution witnesses lied. In the case of PW3, the accused stated that he took his (accused) wife, one Lucy from him and so had a grudge against him. The accused stated that he found PW3 and Lucy in a compromising position and so he left his wife as he could not share her with others. Regarding meeting Lucy and PW3 in a compromising position or having a love affair, I noted that PW3 was not cross examined on that point. It does appear that the issue was an afterthought to make a story against PW3 in order to discredit him.

39. Lucy was not a witness in this case. However one of his close relatives was. PW2 was Lucy's paternal uncle and a neighbour where Lucy lived. When he was cross examined as to Lucy being accused wife, PW2 stated categorically that Lucy was never married to the accused. PW2 also said that Lucy and accused each had their own houses in the same place and that they did not share the houses. PW2 should know since he was an uncle to Lucy and also a neighbour. There is no evidence to show that PW2 would have a reason to lie about Lucy and accused relationship.

40. PW3 was also asked by the defence whether the Lucy was ever married to the accused. He too denied it and said that Lucy was never the accused wife. I find that there was consistency in the evidence of the prosecution that accused and Lucy were never married.
41. The accused claimed that PW7 never carried him to Nanyuki on the material day and that PW7 lied about it. He did not deny that PW7 knew him very well. I noted that the defence did not pose that question to PW7 in cross examination. More importantly no suggestion was made that PW7 had any reason or motive to lie against the accused. I noted however that PW7 did not report the matter to the Police on that day. That is not fatal to the prosecution case as PW7 later volunteered his information to the police, albeit too late as the accused went into hiding for a whole year. The reason it is not fatal is the fact PW7 had been told that the deceased was injured but alive. It was therefore not important for PW7 to tell the police at the time that he had transported one who had assaulted someone.
42. The accused stated in defence that he visited PW1, wife of deceased, three days after the incident and that she told him that the deceased had been murdered by unknown persons. I noted that the defence did not suggest to PW1 that accused had visited her soon after deceased death. I also noted that no question was put to PW1 that she ever told the accused, or anyone else for that matter that the murderer of the deceased was unknown. I find the accused statement that deceased murderer was unknown to PW1 was an afterthought meant to mislead. There was never such a moment when PW1 was not aware of the one who attacked her husband. Her evidence was clear that on the same night of the attack, a neighbour called her to tell her that the accused had attacked the deceased.
43. I have carefully considered the entire evidence adduced in this case. I find that from a consideration of the evidence in totality that there is no other conclusion one can arrive at except that the accused attacked the deceased, cutting him severely and severally, causing him deep cuts which led to severe bleeding and death. I am satisfied that at the time the accused inflicted the said injuries he was motivated by malice. I am satisfied that the prosecution has proved its case against the accused person on the required standard of proof beyond any reasonable doubt. I reject accused alibi defence, find him guilty of murder contrary to section 203 as read with 204 of the Penal Code and convict him accordingly.

**DATED AT MERU THIS 4<sup>th</sup> DAY OF DECEMBER, 2014.**

**LESIT, J.**

**JUDGE.**