



REPUBLIC OF KENYA

High Court at Meru

Criminal Case 35 of 2005

REPUBLICPROSECUTION

VERSUS

JAMES KIMATHI MATHEW ALIAS KASLE.....ACCUSED

J U D G M E N T

The accused **JAMES KIMATHI MATHEW ALIAS KASLE** is charged with murder contrary to S.203 as read with s.204 of the Penal Code.

The particulars of the charge are that the accused on 8TH day of February 2005 at Maua Location in Meru North District within the Eastern Province murdered Charles Murithi

The facts of the prosecution case are that the deceased by his color. The accused took a mobile phone and money from the deceased before stabbing him on the stomach and shoulder. The accused is said to have been seen by PW1 stab the deceased. The accused then entered a residential plot where dw4 and 5 were seated next to their houses. The two witnesses saw the accused with a blood stained knife. He asked both women for changaa and when none was offered he jumped over a fence and disappeared into the night. According to the post mortem report PExh1, the deceased died of cardio respiratory failure due to stab and cut wounds.

The accused has denied the charge and has put forward an alibi as his defence. He said he was at Muringene flying miraa (kaat), 70/- fare distance from where incident in question occurred. The accused also said that he was arrested on 9th February 2005 for the offence of assault. On 24th February 2005 he was arraigned in court for offence of grievous harm and robbery with violence against one Lydia Kirimi placed in cells. I have carefully analyzed and evaluated the evidence adduced by both the prosecution and the defence in this case. The accused faces a charge of murder section 203 of the Penal Code stipulates.

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

Malice aforethought is an important ingredient for the charge of murder. Section 206 of the Penal code sets out circumstances which constitute malice aforethought in the following terms.

“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.”

The prosecution has the burden of proof to cogently establish facts which prove that the accused, acting with malice aforethought inflicted injuries on the deceased which led to his death.

The prosecution has called seven witnesses. There was only one eye witness for this offence. PW1 Serah Mbula. It was her evidence that she was seated near the Town Centre at 8 pm selling vegetables when she saw the accused hold the deceased whom he met with in the street, rob him and stab him. The first issue in regard to this evidence of PW1 is that of identification the court in the celebrated case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

In the case of **Cleophas Otieno Wamunga Vrs. Republic 1989 KLR 424**, the Court of Appeal stated (which reinforces our finding) as follows:-

“The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery C.J. in the well known case of R. VS Turnbull 1976 (3) All E.R. 549 at pg 552 where he said:

‘Recognition may be more reliable that identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’ ”

The circumstances of identification are quite clear. The incident took place at 8 pm. It was on a street according to PW1 the building near the road had fluorescent lights along the corridor. PW1 said the lights were quite bright and they they lighted the area quite well. PW1 was 15 meters from the scene.

I considered the events leading to the attack as narrated by PW1. The victim and attacker were walking alone towards each other when the former was held on the collar by the latter. The evidence of PW1 describes an attack which was both sudden and swift. PW1 said upon witnessing the attack, she immediately picked her wares and left the scene. I find that PW1 had a fleeting glance at the attack. Given the obvious fact that PW1 did not know that such an attack would occur as the two people met, she

could not have been to observe the identity of the two parties. The evidence being that of a single eye witness made in difficult circumstances required corroboration. The next issue is the credibility of witnesses. These were PW4 and 5. Their evidence could provide corroboration through in circumstantial evidence. In the case of In **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** at page 5 the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

“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.

The evidence of the two witnesses is that the accused found them in a residential place where they lived holding a blood stained knife, they even went further to claim that the accused prided of killing someone that night. They said that after the accused left then they could not provide the changaa brew he was looking for; they locked themselves in one house and slept.

Mr. Kariuki for the accused urged the court to find two witnesses, PW4 and 5 unreliable and disregard their evidence. Counsel urged that the defence had proved that both of them had been arrested by the police for some offence. In regard to PW4 she was a wife of the accused six months before the incident counsel relied on the case of Rashid Thomas Vs Republic CA 442 OF 2007 where the court held:

“With respect we would agree. It is trite law that if a witness is so discredited as not to be worthy of any belief, which is the end of his evidence, and unless there is some other independent corroborative evidence, the prosecution must fail. See Ndungu Kimanyi v. R [1979] KLR 282. It is also a firm rule of practice that the evidence of an accomplice witness requires corroboration and that the court may only and in appropriate circumstances convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the court duly warning itself and the assessors, where the trial is held with the aid of assessors as was done in this case, on the dangers of doing so. See Kinyua vs Republic [2002] 1 KLR P256.”

Mr. Mungai for the state urged the court to find the prosecution witnesses were credible. He also urged that PW4 was never a wife of the accused and relied on the evidence of PW5 who said the two had merely a relationship which was broken. Counsel urged that the evidence of PW4 and 5 provided corroboration to the prosecution case.

The issue is whether the evidence of PW4 and 5 was discredited. PW4 denied that he had any relationship with the accused. PW5 on the other hand said that the two had had a relationship but had broken up few months earlier. Even if PW5 talked with that of the accused in his defence. PW4 was therefore not a credible witness.

PW 4 and 5 were arrested for the offence of murder of the deceased. No investigating officer testified in this case. The conviction between the two and the murder was not disclosed and remains a mystery. PW4 on the other hand was treated as a victim and the accused was even charged with grievous harm and robbery with violence in her regard.

I find that the credibility of PW1,4 and 5 was questionable. It is not clear whether their evidence was reliable or credible in light of the unclear circumstances surrounding their arrest in respect of PW1

and 5; and reasons PW4 was treated as a victim. It was therefore necessary for their evidence to receive corroboration of some material particulars implicating the accused. I find no such evidence in the prosecution case.

The accused put forward an alibi as his defence. Mr. Kariuki for the accused relied on Ssentale V. Uganda 1968 EA 365 where the court held:

“An accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer; and it is a misdirection to refer to any burden resting on the accused in such a case”.

The accused also adduced evidence to show that he was arrested on 9th February 2005, one day after the murder of the deceased. At time of the arrest, the victim was heard as PW4 and the charge against the accused was Robbery with violence and grievous harm. He also adduced evidence to show that two months after his arrest, on 1st April, 2005, he was charged with the murder of the deceased.

I agree with the defence that an accused who puts forward an alibi as his defence has no burden to prove it is correct. There are various issues which arise from this case which leaves more questions than answers. I have already stated that failure to call the Investigating Officer of this case was a serious omission. It is not clear why accused was arrested for robbery with violence and grievous harm against PW4. Accused alleged that PW4 was his wife. That does not explain the framing and eventual dropping of the two charges.

The other question is why did it take two months for the police to charge the accused with the murder of the deceased yet he was arrested one day after the murder? Could it be a frame up as the accused alleged in his defence. Those questions remain a mystery for lack of evidence especially that of the investigating officer.

I am aware that the defence did not question PW1, 4 and 5 on alleged frame-up, the alleged charges of grievous harm and the reason for release of PW1 and 5 from the murder charge. That omission is not material. It is more critical that the prosecution proves its case against the accused beyond any reasonable doubt. The prosecution in this case did not succeed in doing so.

Having carefully analyzed and evaluated the evidence adduced in this case, I find that the prosecution failed to prove its case against the accused on the required standard of proof beyond any reasonable doubt. Accordingly I find the accused not guilty of the offence charged and acquit him under section 306 of the Penal Code.

DATED, SIGNED AND DELIVERED AT MERU THIS 11th DAY OF OCTOBER 2012.

**J. LESIIT
JUDGE**