



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL CASE 75 OF 2008

REPUBLIC.....PROSECUTION

VERSUS

JOSPHAT KIREMA.....ACCUSED

The accused person JOSPHAT KIREMA is charged with murder contrary to section 203 as read with section 204 of the penal Code.

The particulars of the offence are:

“That the 2nd day of October, 2008 at Kabiti Sub-Location, Minithu Location in Meru Central District of Eastern Province murdered Joseph Murangiri.”

The facts of the prosecution case are that the deceased and accused were sons of the same man but with different women. On the 2nd October 2008 the deceased went to his daughter Mary Kamba, PW2 in the case, at about 8 pm. The deceased requested his daughter to escort him back home because he felt his life was in danger out of threats the accused had made against him earlier in the day. PW2 escorted her father to his home. A few meters from his house, just before reaching the home they met Charity Kendi who was a wife to the deceased and a step mother of PW2. They walked together up to their house. Just before the deceased entered his house they heard one Miriti calling the deceased to help him against an attack by the accused. The deceased decided to go and check what was happening. He was accompanied by PW2 and Charity and walked between the two women. They walked together towards their gate to help Miriti. It is at the gate that they saw the accused emerge behind Miriti. He passed Miriti and went straight to where the deceased was and stabbed him across the stomach. According to PW2, Miriti was the first to run away followed by the accused.

PW3, a step brother of both the accused and the deceased said that he was in his house when he heard Miriti screaming and calling the deceased’s name for help saying that Kirema (the accused) was ‘hunting’ him down. He said that he went out of his house and stood at the fence which divides his compound from the deceased and saw the accused person hiding behind Miriti walking towards where the deceased, Charity and Mary PW2 were. He saw the accused person overtake Miriti and Mary and go straight to the deceased. PW3 said that the accused stabbed in the stomach. PW3 stated that when he asked the accused why he had stabbed the deceased, the accused that had started to run away turned against him and also stabbed him on the shoulder. He revealed a healed scar on his shoulder which was 4 cm long. PW4 a son of the deceased testified that at around 4 am the same night, a huge mob apprehended the accused when news reached the village that the deceased had died. PW3 and 4 in their evidence stated that the mob which beat up the accused person but and that they successfully persuaded them not to kill the accused. The two witnesses said that they were able to persuade the mob to take the accused to the authorities and that they all walked together to Kienderu Police Station where the accused person was locked up.

The accused person in his own defence denied the charge. He gave his version of the events of the material day. He stated that was at his house at 8 pm when somebody banged his door and entered his house. He said that the person was PW3. He said that PW 3 set on him with a panga hitting him on both hands and causing a fracture of his right arm. He said that he was cut on his hands. He showed the court his deformed right hand. He said that he cut him on the neck and showed the court an ugly scar on the neck. He said that he was also cut on both knees and showed healed scars on his knees. He says that the deceased went to his rescue and that is when PW3 pushed him out of the house with a panga stabbing him on the stomach. He said that he lost consciousness and woke up in hospital.

The statement of the accused was corroborated by his wife DW2. She testified that PW3 went to their home **“shouting today you are going to die”** She said that he kicked the door of their house entered and cut the accused on the forehead and then on the neck and on both hands. DW2 said that on seeing this she ran away screaming and that she met with the deceased who had responded to their screams. She said that she saw the deceased trying to lift the accused from the ground and then saw PW3 hit the deceased with the panga before running away.

DW3 was the area Chief who testified that the accused, deceased and PW3 were step-brothers. He said that he was aware the brothers were quarreling over land. He said that before the incident he sent the Assistant Chief to investigate and that he reported back to him that the brothers and the accused were quarrelling because the accused had been given a larger portion of land than any of his brothers.

I have carefully considered, analyzed and evaluated the evidence adduced both by the prosecution and the defence.

The accused is charged with murder contrary to section 203 of the Penal Code which provides:

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

The prosecution has the burden of proof to establish that the accused person with malice aforethought caused the death of the deceased. What constitutes malice aforethought is set out 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) 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.”**

Mr. Isaboke represented the accused in this case while Mr. Mungai prosecuted the case on behalf of the State. Mr. Isaboke raised issue with identification urging that from the evidence of PW2, she was walking ahead of the deceased and Charity Kendi and that Miriti was the one approaching her. Counsel wondered how PW2 could have been able to see the accused if he was walking behind Miriti. Counsel also raised issue with the fact that the murder weapon was not recovered and yet the accused was arrested the same night. Counsel also raised issue with the evidence of PW3 where he claimed that he was stabbed by the accused yet he never went for any medical treatment. He said PW3 was not credible

because his evidence was not clear since at one point he said the accused ran away after stabbing the deceased yet he claimed that the accused stabbed him. Mr. Isaboke raised issue with the fact that Charity Kendi and Miriti were not called as witnesses. I will deal with each of these issues in the judgment.

The prosecution case is dependent on the eye witness accounts by PW2 and PW3 who were present at the scene when the attack took place. PW2 was a daughter of the deceased while PW3 was a step-brother of the accused and the deceased. The incident took place between 7.30 and 8 pm. According to PW2 and 3 there was bright moonlight at the scene. The evidence of these two witnesses is that it is the accused person who stabbed the deceased in the stomach and that it is as a result of that stab injury that he died. The post mortem report by Dr. Macharia, produced in court by Dr. Mutegi reveals that the deceased had penetrating abdominal injuries with small and large intestines protruding. There was also internal hemorrhage with damage to the abdominal aorta and perforation of the large and small intestines. The doctor's opinion on the cause of death was hemorrhage due to an assault. Dr. Mutegi stated that in his opinion the injuries were caused by a sharp object. The doctor's finding at postmortem are consistent with the evidence of how the deceased met his death as narrated by PW2 and 3.

The incident took place at night and the source of lighting at the scene was moonlight. Counsel for the accused person Mr. Isaboke has raised issue with the ability of PW2 and 3 to see and identify the person who injured the deceased. I do not consider that the accused was denying that the deceased was fatally wounded and in his presence on the material night. The only thing the accused is denying is that he caused the fatal wounds on the deceased. Identification is not in issue in the circumstances of the case. The accused in his defence contradicted the prosecution on how the incident took place. His case was supported by his wife who was DW2. The two, the accused and his wife, gave a totally different account of how the incident occurred. They claimed that the attack was inside the house of the accused person. They also claimed that it was PW3 who was armed with a panga and who caused the injuries to the deceased and also injured the accused.

I have tested the prosecution and defence cases against the entire evidence. The evidence of PW6, the Police Officer who received the first report in this case was that he received report from the wife of the deceased and others who accompanied her that the deceased had been stabbed by his brother. PW6 testified that the name of the brother who stabbed the deceased was given to him as Josphat Kirema, the accused. Even though Charity Kendi who gave the first report to PW6 was not called as witness in this case it is very clear that the report made to the police at 11.20 pm was that the accused was the one who stabbed the deceased.

I also considered the line of cross examination by the defence in respect of PW2 and 3, the eye witnesses of the attack. At no time was any question put to the two witnesses that they were not telling the truth in regard to the place of attack and secondly in regard to how the attack took place. No question was put to PW2 for instance to suggest that it was PW3 and not the accused who was armed. It was not also suggested to PW2 that the attack did not take place within the compound of the deceased as she had alleged in her evidence. In respect of PW3 it was not suggested to him that it was him and not the accused that attacked the deceased; neither was it put to him that it was him and not the accused that was armed with the murder weapon.

The accused in his defence suggested that the reason why PW3 attacked him was in order to recover fees ordered by the court in a case between PW3 and the accused. It was the accused case that the Chief had ordered PW3 to refund the money he had earned after renting half of the land belonging to the accused to one Mutembei. The defence did not cross examine PW3 regarding the alleged rental of half of the accused land to recover fees, neither was PW3 questioned regarding an intervention by the area Chief requiring PW3 to refund any monies to the accused.

The Chief was a witness. He did not make any reference to fees or to having made an order that any fees be refunded. In fact his clear evidence is that he was not directly involved with any matters concerning the family of the accused and the deceased. He stated that the murder took place just as he was planning to visit the home in response to the finding by his Assistance. It is my view that all the allegations against

PW3 by the defence were a made up story created as an afterthought.

Mr. Isaboke urged that there was contradiction between the evidence of PW2 and 3. I did not find any contradiction in evidence of PW2 and 3. However, there were some variations in their evidence. PW2 said that after she saw that her father had been stabbed in the stomach she got so shocked that she ran away from the scene and went back to her home and did not go back to the scene that night to find out what had happened to her father. She did not mention PW3 in her evidence. That is not surprising because from the evidence of PW3 he was standing alone inside his own compound which was near the compound of the deceased. He was quiet observing the events until after the accused had stabbed the deceased. PW3 spoke to the accused after the attack. PW2 testified that she ran away from the scene immediately her father was stabbed. It is possible that she left the scene before PW3 spoke to the accused. PW2 and 3 said that the accused started running away from the scene after stabbing the deceased. PW3 testified that the accused turned back and stabbed him when he questioned the accused why he had stabbed the deceased. The evidence is clear the accused person had started running away from the scene soon after the incident and that he turned back and stabbed PW3 because PW3 questioned his action. What PW3 saw at the scene immediately after the attack on the deceased was not testified to by PW2 and it is for the obvious reason that PW2 left the scene immediately after she saw her father wounded. The difference in the evidence of PW2 and 3 was neither a contradiction nor an inconsistency. It was a mere variation which is easily explainable from the evidence as is clearly demonstrated.

There was an issue of the weapon used in the murder. Mr. Isaboke raised doubt that the accused was the one who committed the offence because in his view he was arrested soon after the attack and yet the weapon was not recovered. The evidence of prosecution was that the deceased was stabbed at 8 pm. The first report was made to PW6 at 11.20 pm at Meru Police Station. According to PW 3 and 4 the accused was arrested by members of the public at about 4 am when news reached the village that the deceased had died. There was a lapse of time of 8 hours between the time of the attack and the time of the arrest of the accused. The arrest was not immediate. I find that there was sufficient time for the accused person to get rid of the murder weapon. The fact the weapon was not recovered is not significant considering that PW6 visited the scene of the attack to look for the murder weapon one day after the said attack.

The area Chief testified for the defence as DW3. His evidence was that he was aware the accused and his brothers were quarrelling over land inherited from their father. He said that he received that report when his Assistant Chief whom he had sent to investigate the matter. The Chief testified that the family wanted a re-distribution of the land. With due respect to this witness, his evidence was hearsay as he had no personal knowledge of the quarrel if any, or reason for the quarrel. None of the family members spoke about any land dispute in the family. It is only in the evidence of PW3 that he stated that the accused and the deceased insulted each other often when drunk. PW2 on the other hand said that her father was worried that evening just before the attack because his life had been threatened by the accused. The cause of the threat is not known but it is clear from the evidence especially of PW2 that the accused and the deceased had confrontation earlier that day in which the accused threatened the life of the deceased.

This brings me to the issue of motive and malice aforethought. I find that the accused person had planned the attack on the deceased. Having threatened the deceased earlier on the same day the prosecution has established that the attack on the deceased by the accused was both planned and well executed. I also find that Miriti may well have been an accomplice and part of the scheme by the accused to lure the deceased to his death. It was evidence of PW2 and 3 who were not standing together at the scene that one Miriti shouted calling the name of the deceased and asking him to help him because the accused was **“hunting him down”**. It is as result of calls for help by Miriti that the deceased walked towards the gate where he was attacked. PW2 and 3, looking from different directions testified that they saw the accused person hiding behind Miriti as he advanced towards the deceased, who was at the time behind PW2. That is how he was able to attack the deceased. Since the deceased was behind PW2 he may not have seen the accused. Whether Miriti was acting in agreement with the accused is not very clear. However, I do find that the accused took advantage of the scenario to walk behind Miriti so as to reach the deceased unnoticed.

In respect of Miriti and Charity Kendi not being called as witnesses in this case PW6 testified that he took a statement from Kendi but none from Miriti. The issue is whether the court should make an adverse inference against the prosecution for the failure to call the two. 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.”

Am guided by the above case. An adverse inference in criminal cases can be made where the prosecution fails to avail witnesses that are necessary to establish the truth and where the evidence availed is barely adequate. The prosecution in this case called adequate witnesses to establish the truth in the case. The mere fact they were all members of the same family is not material for reason the accused and deceased were relatives and those present at the scene were also relatives. For Miriti it is likely he was an accomplice and his evidence would not have added any value to the case.

The accused person displayed many healed scars on his hands, head, neck and knees and claimed that it was PW3 who injured him and that he lost consciousness after the attack. The Prosecution case was that the accused was attacked by a mob who injured him severely and whose intention was to lynch him if it was not for the intervention of PW4 the son of the deceased and PW3 the brother of the accused.

PW6 the Investigating officer of the case testified that he received the accused from Kienderu Police Post and that at the time he was received he had serious injuries. He said that the accused person was admitted at Meru General Hospital for some time. It was the evidence of PW6 that the accused was a victim of mob justice. He also told the court that he tried to get statements from members of public regarding the case and the assault on the accused and none were willing to come forward. I noted that the defence did not cross examine PW3, 4 and 6 regarding mob justice and neither was it suggested to them that there was no incident of mob justice against the accused. It is my view that the accused defence that it was PW3 who attacked him and not a mob as the prosecution contended was an afterthought and that is the reason the prosecution witnesses were not cross examined on that point. I find that the evidence adduced in this case proves that the accused was attacked by a mob and that the attack was after the deceased was confirmed dead.

Having considered the entire evidence adduced in this case I find that the prosecution has proved that the accused attacked the deceased outside his house on the material day; that he stabbed him on the stomach perforating his intestine and aorta, the main blood vessel as a result of which the deceased died.

I find that the prosecution proved that the accused action to stab and fatally wound the deceased was motivated by malice aforethought. The prosecution has proved the charge of murder against the accused beyond any reasonable doubt. I reject the accused defence as untenable. I find the accused guilty of the offence of murder as charged and convict him accordingly

DATED SIGNED AND DELIVERED THIS 11th DAY OF OCTOBER 2012

LESIIT, J.

JUDGE