CRIMINAL

- *Alibi – Whose burden is it to disprove.*
- *Identification under difficult circumstances.*
- *Does failure to produce post mortem report defeat prosecution's case.*
- *Does failure to produce exhibits defeat prosecution's case.*
- *Consideration of defence of intoxication in a murder trial.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 64 OF 2005

REPUBLIC ……..…….. STATE

VERSUS

JEREMIAH KATHURIMA ……. ACCUSED

JUDGMENT

The accused Jeremiah Kathurima was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of that offence are as follows:-

"JEREMIAH KATHURIMA:- On the 3rd day of September 2005 at Kibari village, Kithirune West Location in Meru Central District within Eastern Province, murdered Martin Mbaya."

Although the offence was committed on 3rd September 2005, and the evidence before court shows that the accused was arrested the same day, his trial did not start until 17th November 2009. I will deal with that issue later on. Prosecution began its case by calling John Mwongera David PW1. He said that he attend school with the accused. The deceased Martin Mbaya was his cousin. On 3rd September 2005 at 9pm, he was on his way home in the company of the accused, deceased, Mutuma PW2, Jacob PW3, Phineas and Kinyua. They were coming from Kithurine Market. The accused and the deceased begun to quarrel. They were abusing each other. PW1 did not know why they were abusing each other. During that time, PW1 said that he was on his mid-term school holiday. He also stated that he did not know who started the quarrel. The accused then left their group and went to his home 1½ km away. As he went away, he did not run but walked normally. He returned to their group with two knives. He was holding each knife on each arm. PW1 saw the accused stab the deceased on the neck. He saw the accused use the knife on his right hand to stab the deceased. Although the deceased was stabbed, PW1 heard him continue to talk. He heard both the accused and the deceased asking each other:-

"Why did you abuse me?"

PW1 did not see any weapon on the deceased. The deceased lost consciousness. They got a car and he was taken to Meru District Hospital after reporting the matter at Meru Central Police Station. The deceased was pronounced dead on arrival at the hospital. PW1 said that although the incident occurred at night, it was not dark and that there was sufficient light to enable him recognize the accused. He further said that he attended the same school with the accused for 8 years when they did their primary education. He stated that he proceeded to secondary education but the accused did not. After their primary education, he continued to see the accused. PW1 said that when the accused stabbed the deceased the accused was taken away by his brother and they went to their home. On being cross examined, he confirmed that he had seen the accused earlier on at Kithurine Market. He also confirmed that at 6pm that night, he saw the deceased in the company of the accused and the accused brother called Gitonga. On that night, both the deceased and the accused were seen by him coming from the bar. According to him, both of them were drunk although not too drank. PW1 on further cross examination said:-

"I would not say any of them intended to kill each other. It was quarreling (sic) which led to it."

PW2Peter Mutuma Mbogori said he knew the accused who was his neighbour since birth. On the date when PW2 testified that is, November 2009, he was 30 years old. He also confirmed that he was a neighbour to the deceased. He said he was a barber by profession and on that day he was coming from his place of business and it was 10.30pm. He met the deceased and accused and found them quarreling. They were 10 meters away from him. Before he reached where the accused and the deceased were, he saw others joining them and walking with them. Those other people separated the accused and the deceased who were quarreling. As PW2 approached his home, he heard some noise which made him to go back to that group of people. On going back, he found the deceased stabbed and saw that he was holding on his neck. He also noted that the accused was holding knives. Although it was night, he said that he knew the accused. He said that he also recognized the accused voice. PW2 was one of the people who took the deceased to hospital. He knew the accused and the deceased to be friends. He however noted that on that day both of them were drunk. He said that the accused and the deceased had been quarreling outside a bar. He further in cross examination said that when he reached at the scene where the deceased had been injured, he only found the accused and the deceased. But on being re-examined, he confirmed that PW1 was at the scene. PW3 Jacob Kaimenyi Mbogori is also a barber. He lives at Kithurine market. He knows the accused who is his neighbour. They have been neighbours since childhood. When he testified in November 2009, he was 34 years old. He said that the deceased was also his neighbour. On that night at 10pm, he was on his way home from his place of work. He met the accused at a junction near his home. The distance between the accused house and his house is 200 metres. That junction is used both by himself and the accused. He noted that the accused had two knives. He greeted the accused when they met with each other but the accused failed to respond. He said that the night was not dark and one could see someone. A short while later, he heard screams coming from where he had come from. He went to the scene in the company of the brother of the accused and the brother of PW2 who they met on the way. At the scene they saw the deceased was on the ground and was bleeding from the neck. He said that PW2 arrived at the scene before him. He too was amongst the people who took the deceased to hospital. On being cross examined, he re-emphasized that he knew the accused very well and that he was his friend. He said that the greetings he conveyed to the accused when he met him was:-

"Jambo Kenya."

He said that those are greetings reserved for friends. He further responded to cross examination by saying that he could not have conveyed such greetings to someone he did not know. He too said that night was not too dark and he was able to recognize the person who passed him as the accused. He further stated that at the junction where they met there was electricity. He said that he was sure that the accused was carrying a panga (simis). Dr. Macharia who produced the post mortem report prepared by Dr. Mutugi Muriithi stated that the deceased suffered two stabbed wounds, one on the neck was measuring 5cms. Another was at the abdomen measuring 6cms. The cut at the neck damaged major arteries and major veins. The cause of death was shock resulting from severe bleeding on the neck and back. At close of prosecution's case, the court ruled that the accused had a case to answer. He testified under oath. He

stated on 3rd September 2005 at 9pm, he was at Kithurine Market where he was resting with his friends. They were drinking alcohol. Later his friends Kinyua peter, John Mwongera, PW1, Geoffrey Kithinji, Martin Mbaya, deceased and Peter Mutuma PW2 entered the bar. He continued to drink alcohol with those friends. Later, the deceased begun to fight with PW1. They were unable to stop them and so he and his friends left the deceased and Mwongera at the bar. The accused said that PW1 had lied in his evidence before court. On leaving the deceased in the company of PW1, the accused said he went home. He was arrested on that night at 2am and learnt the following day that the deceased had died. When he was cross examined, he said that the deceased and PW1 had earlier that evening walked into the bar together. He however did not know the cause of the dispute between them. The accused confirmed that PW1, 2 and 3 were his friends and he could not explain why they lied against him. The accused said that he was assaulted at the police station and was threatened by the police with death if he did not admit to the crime he is now charged with. Before the commencement of the trial, the counsel appearing for the accused informed the court that the accused was not 18 years when the offence was committed. He produced before court on 31st May 2006 the accused child's health card. Learned counsel submitted that the accused attained the age of 18 on 22nd April 2006. The offence was alleged to have been committed on 3rd September 2005. At the conclusion of the trial and during submission, learned counsel for the accused submitted that the prosecution's case must fail because the age of the accused was never ascertained. Those submissions in my view were in error because if the accused was a minor when the offence was committed, the issue of his age would only be taken into consideration if he is convicted. In other words, his age would only have been of importance during the sentence. The lack of knowledge of the accused exact age does not render the prosecution's case incompetent. The learned counsel for the accused further submitted that the alleged weapons used by the accused having not been produced before court the prosecution had failed in its case. I again disagree with that submission. The prosecution's case was that the accused and the deceased quarreled in the presence of PW1 amongst other people who did not testify. The accused left the scene according to PW1 and returned wielding two knives. PW1 saw the accused cut the deceased on the neck. The evidence of PW2 and 3 was that when they went to the scene they found the accused holding two knives and the deceased was on the ground bleeding. I find that in view of that evidence of PW1, 2 and 3 that although it was desirable to have before court the weapons used to kill the deceased, the failure however to produce them did not weaken the prosecution's case. The Court of Appeal in the case **Said Karisa Kimunzu Vs. Republic** Criminal Appeal No. 266 of 2006 had this to say when the exhibits were not produced:-

"It would have been much better if the exhibits were produced, but we agree with the learned judge that in the circumstances of this case, the failure to produce the exhibits did not affect the substance of the case put forward by the prosecution. There may, however, be cases in which such failure might well be fatal."

Although the learned counsel for the accused did not submit that the court needed to caution itself in respect of the identification of the accused under unfavorable circumstances, it is an issue that needs to be discussed in this judgment. The principles on the standard of evidence required in the case of identification were set out in the case **Cleophas Otieno Wamunga Vs. Republic** [1989] KLR 424 where the Court of Appeal stated thus:-

"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 a defendant depends wholly or to a great extent on the correctness of one or more identification 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 Widgery, C.J. in the well known case of R. Vs. Turnbull [1976] 3 ALL ER 549 at page 552 where he said:-

"Recognition may be more reliable than 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."

*"In the case of **Kamau Vs. Republic** [1975] EA 139 the East African Court of Appeal had the following to say:-*
"***The most honest of witnesses can be mistaken when it comes to identification."***

The accused on 3rd September 2005 was in the company of PW1 amongst other people as they went home. A quarrel broke out between the accused and the deceased. When the accused returned from his home with two knives, PW1 said that he saw him because it was not dark. PW2 and 3 also confirmed that that night it was not dark. In particular, the evidence of PW3 was that he met the accused at a place where there is electric light and he noted that the accused had knives with him. He recognized the accused and conveyed to him greetings only reserved for friends. After they passed each other, shortly thereafter, PW3 heard screams. At the scene he saw the deceased lying on the ground bleeding and the accused holding knives. There is no doubt from the prosecution's evidence that PW1, 2 and 3 knew the accused very well. PW1 went to school with the deceased for 8 years. He even recognized the accused by his voice. PW2 and 3 were neighbours of the accused. They knew the accused from childhood. This was therefore the case of recognition rather than identification. It was recognition by 3 people. In my view, the prosecution witnesses were not mistaken about the identity of the accused. In considering identification under difficult circumstances and what the court should do, the case that comes to mind is **Peter Musyoka Harun Vs. Republic** CRA No. 7 of 2007. The facts of that case are similar to the one before me and it is worthy to therefore quote what the Court of Appeal stated in that case.

"On our careful scrutiny of the entire evidence on record we find that there were circumstances which go to show that the deceased could not have been mistaken in his identification of the appellant. First, the deceased and the appellant were from the same village and had known each other prior to the attack. Secondly, the deceased's shop was lit with a light from a lantern which was placed on the counter. Thirdly, the naming of the appellant to the four witnesses was immediate to the attack. Fourthly, the appellant confirms what the deceased had said that he, the appellant, had been to his shop looking for some medicine placing him at the scene of the killing at about 8.00pm."

It is in my view clear that the prosecution witnesses identified positively the accused as the person who stabbed the deceased. The witnesses knew the accused as stated before. It would seem that PW2 and 3 who knew the accused from his childhood were older than the accused and lived close to the accused. It is for this reason that I find that I am in agreement with the finding of the case **Peter Musyoka** (supra) that with respect to the circumstances in that case which showed that the prosecution's witnesses could not be mistaken in the identification of the accused. The fact that the offence occurred at night between 9.30 and 10.30 does not affect the recognition of the accused. It is also not material that some of the witnesses talked of 9.30pm whilst others talked of 10.30pm. The proximity of those two hours removes any doubt of their credibility. PW4 Dr. Macharia was granted leave by the court to produce post mortem report of the deceased on the submissions by the learned state counsel that Dr. Macharia worked with Dr. Murithi. It was submitted that Dr. Macharia was familiar with the writing and signature of Dr. Murithi. Dr. Macharia on being cross examined however by the learned counsel for the accused responded thus:-

"Post mortem was dated 5-9-2005. By then, I had not worked with Dr. Murithi."

Having made that statement, it becomes clear that Dr. Macharia was unfamiliar with the writing and signature of Dr. Murithi because they never worked with each other. The question that arises is, does that anomaly affect the prosecution's case? I would respond in the negative. This is because there is clear evidence that PW1 witnessed the accused stab the deceased. PW2 and 3 immediately thereafter came onto the scene. All three of them took the deceased to hospital and he was pronounced death on arrival. There is no evidence before me of an intervening act which could have caused death of the deceased other than the act of the accused. The Court of Appeal in the case **Columbus Lekikunit Vs. Republic** CRA. No. 27 of 2006 stated that the production of post mortem report adds no value if death was instant. This is what they stated:-

"The postmortem report was not produced, however its production might not, in the circumstances, have added anything of value to the prosecution case as the deceased died instantly."

The fact that PW4 produced a post mortem report whose writer he was unfamiliar with does not affect the prosecution's case. The accused in his defence stated that at 9pm on 3rd September 2005 he was at Kithirune market. He was drinking alcohol with friends. Other friends joined him in the company of the deceased. The accused stated that when he left the deceased fighting with PW1 in the bar, he did not learn of his death until the following day when he was arrested. The accused raised a defence of alibi. It is now accepted by the court that an accused when he raises the defence of alibi he assumed no burden to prove the same. This was stated in the case **Kiarie v. Republic** [1984] KLR.

"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."

In my view, the prosecution adequately discharged that alibi defence. The evidence of PW1, 2 and 3 place the accused at the scene at the time when the deceased was stabbed. Additionally, PW1 witnessed the accused stab the deceased on the neck which was the main cause of death of the deceased. Although the alibi evidence of the accused was only raised at the defence herein, the court still has an obligation to weight that defence with the prosecution's evidence. This was clearly stated in the case **Gerald Theuri Muchemi vs. Republic** Criminal Appeal No. 194 of 2003 where the Court of Appeal quoting from another case had this to say:-

"*In the case of* ***Ngeiywa Vs. Republic*** *2 KLR 152 in which this Court said at page 157:-*
The defence of alibi was first raised in the appellant's defence and not when he was called up to answer the charge. In that case it is sufficient for the trial court to weigh the alibi against the weight of the prosecution case – see Wangombe Vs. Republic [1980] KLR 149.

By accepting the evidence of the identification of the applicant, the superior court in effect rejected the defence of alibi."

The accused during his trial raised an objection to the trial proceeding on the basis that he was held in the police custody for a period in excess of 14 days provided in the former Constitution of Kenya. According to my calculation, the accused was detained for 11 days over and above the 14 days provided under section 72 (3) (b) of the former Constitution. The investigating officer who would have given explanation why the accused was detained for 11 extra days at police station had been interdicted from the police force when the case was heard. The prosecution faced difficulty to trace him and to have him come to court. The deceased died on 3rd September 2005. The post mortem was performed on 5th September 2005. The accused was first brought before court on 29th September 2005. As per the evidence of the prosecution's witnesses which was supported by the accused, the accused was arrested on 4th September 2005 at 2am. It is clear to me that the police needed to carry out investigation which included obtaining witness statements and included getting the accused examined by a psychiatrist to ascertain his mental health. Having carried out those obligations, the police then had to obtain authority from the attorney general's office to charge the accused. All that in my view, having been accomplished within 11 days would adequately explain the delay of producing the accused before court. Kenya is a developing or a third world country. There are impediments that police face due to lack of equipment and funding to carry out their investigations which the courts cannot ignore. I find that the delay of 11 days did not lead to a violation of the accused constitutional right. The court of Appeal in the case **Daniel Kioko Mbuva Vs. Republic** Criminal Appeal No. 65 of 2008 in quoting from one of its decisions had this to say:-

*"As a parting shot we reiterate this court's sentiments in Eliud Njeru Ng'ang'a Vs. **Republic** Criminal Appeal No. 182 of 2006 (unreported) in which it was stated, inter alia:-*

"While we would reiterate the position that under the fair trial provisions of the Constitution, an accused person must be brought to court within twenty four hours for non-capital offences, and within fourteen days for capital offences yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal."

In the case **Julius Kamau Mbugua Vs. Republic** [2010] KLR as reported by Michael Murungi of the Kenya Law Reports stated:-
"The court further noted that even if unlawful pre-arraignment incarceration is shown to have a direct bearing on the subsequent trial, nevertheless, to acquit or discharge the accused person would be a disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised. If by the time an accused person makes an application to the court the right has already been breached, the only appropriate remedy under section 84 (1) of the repealed Constitution was an order for compensation for such breach. The court agreed with Justice A. Emukule in Republic V. David Geoffrey Gitonga that a breach of section 72 (3) (b) entitled the aggrieved person to monetary compensation only."

It follows that even if the accused constitutional rights were violated by the alleged prolonged incarceration in the police station, the accused rights lie in monetary compensation. This relief is provided under Article 23 (3) of the Constitution of Kenya 2010 where a party alleging that he is fundamental rights and freedoms had been breached can be granted reliefs which are as follows:-

"23 (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-
a) a declaration of rights;
b) an injunction;
c) a conservatory order;
d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
e) an order for compensation; and
f) an order of judicial review."

The prosecution had to prove in this case that the accused had committed murder beyond reasonable doubt. The totality of the prosecution's evidence was that it was the accused who fatally stabbed the deceased. It should however be considered that the accused and the deceased on the night in question were said to have been drinking alcohol. This is what PW1 said:-

"Accused was also drunk but was in control. He (accused) was even walking unaided."

The accused in his defence stated that he had been drinking alcohol on that night at a bar. On being cross examined by the state counsel he stated:-
"I am telling the court what happened. I was drinking various alcohol, chang'aa, whisky all of them. Yes, I was a drunkard. I got to know the deceased was killed the following day."

On the issue of drunkenness, the Court of Appeal in the case **Said Karisa Kimunzu Vs. Republic** (supra) stated:-
"Drunkenness as such is not a defence to a charge of murder but section 13 of the Penal Code provides as follows:-

"13. (1) save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and:-

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person, or.

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purposes of this section "intoxication" includes a state produced by narcotic or drugs."

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"In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

The accused undoubtedly was drunk on the night he committed the offence. I take into account that fact and find the accused was incapable of forming an intention to kill the deceased which is one of the ingredients of a murder charge. It is called, malice aforethought. It is for that reason that I proceed to convict the accused of manslaughter contrary to section 202 as read with section 205 of the Penal Code. The accused at the beginning of his trial raised an issue that was not resolved one way or the other. It was submitted on his behalf that at the time when he committed the offence he was 17 years old. It is for that reason that I form the view that it is necessary for the age of the accused to be determined before sentencing. Before receiving mitigation in this case, I request the in-charge of Meru G.K. prison to arrange for the accused to be escorted to Meru District Hospital to enable a doctor to carry out tests to determine the age of the accused and more precisely to give the age of the accused as at 3rd September 2005. I direct that the order directed at the in-charge of Meru G.K. Prison be extracted for service upon him so that this matter can be concluded. I also request the probation officer to carry out a probation report to assist the court in sentencing. At the reading of this judgment, a date will be given for the court to receive the age assessment report the probation report and for sentencing.

Dated, signed and delivered at Meru this 3rd day of March 2011.

MARY KASANGO

JUDGE