



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 23 OF 2010

REPUBLIC.....PROSECUTOR

V E R S U S

ISAIAH NABEA KAURAACCUSED

JUDGMENT

By the information dated 27/11/2010, **Isaiah Nabea Kaura** was charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the charge are that on 29/1/2010 at Antuanduru Location of Tigania East District, jointly with another not before the court, murdered **Barnabas Lebig M'iphili**. He denied the offence and the case proceeded to full trial with the prosecution calling a total of 7 witnesses. The prosecution was led by Mr. Mungai, Counsel for the State. When he was called upon to defend himself, accused testified on oath. His Counsel was Mr. Kaimenyi.

PW1 Kinyua M'Rwito recalled that on 29/1/2010 about 5.00 a.m., he went to get grass for his cattle from the forest in company of one John Manyara (PW3). They heard screams emanating from Mungathia's land; they went to see who was screaming. They found Mungathia who he identified as accused and one Reuben Kiunga beating Barnabas Libii, the deceased, with walking sticks. He heard Barnabas pleading with them not to beat him as he would pay for what he had stolen; that both him and PW3 pleaded with the accused and Reuben to stop beating deceased but accused told them to mind their own business. PW1 said he went to call the children and relatives of the deceased and went back to the scene with them but they found deceased was already dead and that the body had been dragged to an adjoining farm. He said he was able to see well as it was after 5.00 a.m. and that it was not dark. He confirmed that he has known accused since childhood as Isaiah Mungathia but did not know his other names. In cross examination, he denied that there existed any land dispute between him and accused's family.

PW3 John Manyara confirmed that he was with PW1 on the said morning, going to look for fodder when they heard screams only to find that Barnabas was being beaten by Reuben Kiunga and Isaiah Mungathia – accused. He knew all of them since his childhood. He said that the two alleged that the deceased was a miraa thief. He left to look for fodder and later learnt of the deceased's death. He denied that deceased was beaten by a mob but by two people. He also denied having had any dispute with either deceased or the accused before. PW3 was later recalled for further cross examination by the

defence counsel when he gave a very confusing tale of what he saw that morning. In one breath, he saw accused with one Reuben beating the deceased then again denied seeing accused at the scene. He also claimed to have stood far off and did not see the perpetrators.

PW4 Batista Gitonga testified that on 29/1/2010 morning, M'Mboi informed him that his in-law had been murdered. He informed the Chief who was already aware of the murder. He reported at Ngundune Police Station and was accompanied by the police to the scene where they found the body had been pulled to the farm of one Mwora; that they followed the trail left by the pull marks from Mungathia's (accused's) farm to Mwora's. The body was taken by the Police and the broken walking sticks that were found at the scene.

PW5 Veronica Nkatha, a niece to the deceased heard of the deceased's murder about 8.00 a.m., went to report to Station with deceased's son Gitonga, went with police to the scene to collect the body. She also stated that she noted that the body had been pulled from Isaiah's (accused's) land as the grass was disturbed. She also identified the walking sticks that had been left at the scene.

PW6 Gideon Gitonga, a son to the deceased was with PW5 when they went to the scene. He reiterated what PW5 told the court. He was also present and identified the deceased's body before post mortem was done.

The post mortem was performed on the deceased by Dr. Simba and Dr. Maingi while Dr. Mohamed Ahmed (PW2) produced the post mortem as an exhibit. The Doctors observed that the body had multiple external injuries, fractures of the tibia, fibula, clavicle proximal humerus, injuries to left and lower limbs, chest cage and bruises, internally there was extensive bleeding in the skull. The Doctors formed the opinion that the cause of death was head injuries secondary to assault with blunt objects.

PW7 PC George Mutemi was assigned this case by the OCS of Tigania Police Station to investigate. He went to the scene with the OCS, found deceased's body in a coffee plantation that was bushy; that the body had injuries all over, and there was a walking stick besides the body and that there was evidence that the body had been dragged to the place; that they traced the drag marks from a miraa farm about 30 metres away belonging to Isaiah Mabea (accused); and there was evidence of a struggle at the said scene. They did not get accused at his home, neither did they get Reuben Kiunga as both had been mentioned as suspects; that after three months, the APs and Chief helped trace accused who was arrested and charged.

In his defence, the accused stated on oath that on the material day, he left home at 8.00 a.m., did his errands and on returning home at 7.00 p.m. he was informed that Barnabas had been killed at his shamba and he was being sought by Police; that he was arrested on 12/4/2010 yet he was at home for all that time and nobody had ever arrested him. He said that PW1 lied to the court because the deceased was his in-law. He also said that PW3 lied that he saw him beat the deceased. He denied seeing Kiunga, who was his neighbor on that day.

At the close of the defence case, Mr. Kaimenyi, Counsel for the accused submitted that the prosecution had not proved their case beyond a reasonable doubt; that PW1 never recorded a statement but his brother did and that he is Mboi, not Kinyua; that PW3's evidence is doubtful because he did not say how he was able to identify the accused; that PW3 and deceased were related by marriage; that the accused raised an alibi which has not been dislodged by the prosecution evidence.

In reply, Mr. Mulochi, Counsel for State urged that PW1 and 3 were eye witnesses to the offence; that the allegation that PW1 did not record a statement was not substantiated and that the alibi did not at all

dislodge the prosecution case. They admitted as much.

Having considered all the evidence on record, I have no doubt that the two key prosecution witnesses, PW1 and 3 are not strangers to both accused and the deceased. They are people who knew each other well before this incident.

The said incident, according to PW1 and 3 occurred early in the morning after 5.00 a.m. and there is overwhelming evidence from PW1, 4, 5, 6 and 7 that the deceased's body was pulled or dragged from accused's farm to the neighbour's farm. PW1 said that when he went to call deceased's relatives, he came back and found the body had been removed and dumped in Mwora's farm. PW4, 5, 6 and 7 all testified to seeing the drag marks and trail of blood from accused's farm to Mwora's farm. I find as a fact that the deceased was assaulted in accused's farm but the body was dragged to the neighbours's farm.

PW1's testimony was clear that he was with PW3, when they responded to the screams of Barnanbas, and they went to see what was happening. They said it was after 5.00 a.m. PW3 later stated that from 5.00 a.m. he had taken 25 minutes to walk there and that they were able to see the people well as there was light. In fact, PW1 said that they had conversation with accused beseeching him to stop assaulting the deceased but he dismissed them to mind their own business. PW1's evidence was consistent and even PW7 who later received the report visited the scene and confirmed that accused and another person had been named as the culprits but he could not trace them on the same day. In cross examination of PW1, the defence seemed to be suggesting that there was a land dispute between accused's family and that of PW1's which PW1 vehemently denied. In his defence however, accused confirmed that there was indeed no bad blood between him and PW1. However, the accused seemed to raise a new issue that deceased was an in-law, something he never put to PW1 during cross examination. Even if PW1 was an in-law to deceased, that was no reason to frame accused.

Accused also alleged that PW1 never recorded a statement with Police but his brother did. Even after PW1 was cross examined further by defence counsel, there was no evidence that PW1 did not record the statement shown to him in court. That allegation by accused remained unsubstantiated. The Investigation Officer was in court and that allegation was never put to him. I am satisfied that PW1 was a credible witness and he did witness the accused injure the deceased and recorded a statement to that effect.

PW3 had testified that he was with PW1 on the said morning and they witnessed the accused and another assault the deceased. He was later recalled and at first, he alleged that the accused was present and was one of those who assaulted deceased. At one time he was uncooperative and refused to answer questions. He was stepped down for a while and when he came back, he claimed that he could not even recall what he had told the court in his earlier testimony and that accused was not at the scene of the murder but that he only saw Kiunga. From the manner in which PW3 behaved, he had obviously been influenced to change his mind about what he had seen on that material day. With this shifty testimony he cannot be said to be a credible witness. He was obviously trying to shield somebody from blame. Despite his recanting what he had told the court earlier, it is evident that PW3 was at the scene of the murder together with PW1. In his first testimony, he was cross examined at length and his testimony remained unshaken. His statement to police was recorded when the incident was fresh. In cross examination he did admit that indeed his late brother had been married from deceased's family. A fact which accused says is true. That confirms this court's belief that PW3 had first told the court the truth but seems to have been influenced to come to this court later to change his testimony and retract what he had told the court.

Even in accepting PW1's testimony, I do warn myself of the unfavourable circumstances surrounding

the identification. It was said to be after 5.00 a.m. at daybreak. Both PW1 and 3 said it was bright enough for one to see another. In my view, PW1 recognized the accused whom he knew well. In the case of **Wamunga v Rep (1989) KLR 424 (430)** the court stated as follows with regard to conviction based on identification:

“Whenever the case against a 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”.

I am also guided by the case of **Anjononi v Rep (1980) KLR 59** where the court stated:

“This was a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on personal knowledge of the assailants in some form or other”.

In my considered view, accused was well known to PW1 and they conversed and I am satisfied that he did recognize accused's voice. To confirm that PW1 was able to see well, he also saw the deceased who is the one who went to call deceased's relatives i.e. PW4.

The accused raised a defence of alibi, that he was not at the scene but in his house on the said morning and that next day at 8.00 a.m., he went to run his errands. As was held in the Ugandan case of **Sekibbako v Uganda 1967 EA 351**, the general rule of law is that the burden of proving the guilt of a person beyond any reasonable doubt never shifts whether the defence set up is an alibi or something else. Firstly, I must point out that the accused never raised this defence early enough. It is an afterthought. Further weighing the evidence of the prosecution against that of the defence, I am satisfied that the accused was identified as the person seen assaulting the deceased. The reason for the assault was that the deceased was stealing accused's miraa. It is no wonder the assault took place in accused's own miraa farm. To try and conceal the murder, the accused dragged the deceased's body to the neighbour's land, soon after the assault. Accused said that upon returning home that day at 2.00 p.m. he learnt of deceased's death and heard that the police were looking for him. PW7 testified that he went to both accused's home and that of Reuben, accused's accomplice, on same day but did not find either of them and that accused was not arrested till April. If accused was truthful, that he was just at his home, having heard that police were seeking him, he would have presented himself to the police on the same day. Instead, he kept away. I will prefer the testimony of PW1 and 7 that accused was not found anywhere till after 4 months. His conduct of disappearing from his home goes to point to his guilt. There is no reason why the people who arrested accused could not have arrested him earlier. He was not arrested before April because he was on the run. All this evidence put together cumulatively point to accused as the perpetrator of the offence. The defence does not in any way dislodge the prosecution evidence.

After carefully considering the prosecution evidence and defence, I am satisfied that the prosecution has proved the two ingredients required to establish a charge of murder beyond any doubt. The accused and another were seen assaulting the deceased. The deceased was found to have suffered injuries all over the body (see post mortem report). The multiple injuries can only be translated to mean that the assailants wanted the deceased dead and that is proof of malice aforethought. Whether or not the deceased had stolen, the accused had no right to take the law into his own hands but should have arrested the offender and handed him over to the police.

I find that the prosecution has proved its case to the required standard. Accused is found guilty of

the offence as charged and is convicted accordingly.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF DECEMBER, 2015.

R.P.V. WENDOH

JUDGE

10/12/2015

PRESENT

Mr. Mulochi for State

Mr. Kaimenyi for Accused

Ibrahim/Peninah, Court Assistants



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