



**KENYA LAW**  
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**REPUBLIC OF KENYA**

**High Court of Kisii**

**Criminal Case 78 of 2009**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**DANCAN MANDILA ..... ACCUSED**

**JUDGMENT**

1. On the 25<sup>th</sup> January 2010, the accused herein, Dancan Mandila appeared before Muchelule, J. and denied the information of murder that was preferred against him. The particulars thereof were that on the 29<sup>th</sup> November 2009 at Poroko village in Transmara District within Rift Valley Province, he murdered Anderson Talengo Kirwa.
2. During the hearing of the case, the prosecution called seven (7) witnesses. Briefly, the facts of this case are that on the 29<sup>th</sup> November 2009 the deceased was among many other local people who attended a circumcision initiation ceremony at the home of one Dominic Ole Tito. Also present was the accused. From no apparent cause, the accused confronted the deceased and hit him with a walking stick. A scuffle ensued. The accused removed a knife and stabbed the deceased in the stomach. The deceased was rushed to Transmara District Hospital and later transferred to Kisii District Hospital where he succumbed to the injuries some 3 days after the incident. The prosecution alleged that the accused premeditated the death of the deceased.
3. PW1 was Wycliffe Leman. He testified that on 29<sup>th</sup> November 2009, at about 10.00 p.m. he was at the home of Dominic Ole Tito attending an initiation ceremony. The people at the ceremony were drinking alcohol. There was moonlight, though it was not bright. He then heard shouts from outside. He rushed there only to find the deceased lying down. The deceased was then heard by PW1 (Leman) saying: **“he has stabbed me.”** The accused then ran away from the scene into a house but he was overpowered by the people at the ceremony and tied with a rope. Both the accused and the deceased were put in a vehicle and taken to the police station and hospital respectively. A double-edged knife was recovered from where Leman saw the deceased lying down. The knife was taken to the police and later produced as **P. Exhibit 1.**
4. When cross-examined, Leman told the court that the knife was found a few metres from where the deceased lay. He also said that though there were many people at the ceremony, only the deceased and the accused fought. He however only saw the accused running away from where the deceased lay.
5. Emmanuel Kirwa (Emmanuel) testified as PW2. By the time he went outside to see what was happening, the deceased was already lying down and bleeding from his side and mouth. Emmanuel who is brother to the deceased identified the deceased’s body for post mortem examination.

6. During cross-examination, Emmanuel testified that it was normal for Maasai men to carry knives, but he could not say who stabbed the deceased.
7. PW3 was Danford Lemiso Kisembe (Danford). He was also at the initiation ceremony when he heard the sound of sticks clashing. From a distance of about 10 metres, he saw the accused and the deceased fighting. As the deceased fell down, the accused ran away into one of the houses in the compound of Dominic Ole Tito but the witness said he heard the deceased say that he had been stabbed. The witness also said there was moonlight and that he had no torch with him that night. On cross-examination, Danford said that many Maasai young men carry knives with them and that on that evening alone, there were over 200 young men in Ole Tito's compound. He added that only old men were taking alcohol.
8. PW4 was Samson Kirwa (Samson), a cousin to the deceased. He only learnt of the deceased's death on 30<sup>th</sup> November 2009. He was one of those who identified the deceased's body for post mortem examination.
9. David Kanoi Ole Tele was PW5 (David). The deceased was his uncle. On the material night, David was at the initiation ceremony, but seated with the elders inside one of the houses in the homestead of Dominic Ole Tito. At about 9.30 p.m., he went outside the house and saw the accused running towards the elders' house. David restrained some five people from pursuing the accused further. During that time, David learnt that the accused had stabbed the deceased. David later saw the deceased lying down with a stab wound in the abdomen. On the following day the deceased died from the stab wounds while undergoing treatment at Kisii District Hospital.
10. In cross-examination, David testified that all the people who attended the initiation ceremony that night carried knives, but he could not say who stabbed the deceased.
11. Number 91578, Police Constable Thomas Mwanzi Mutua testified as PW6. On the 29<sup>th</sup> November 2009 while he was on duty at Kilgoris police station, together with police constable Nicholas Eshikuku, he received the accused herein from members of the public who were assisted by Administrative Police officers. He arrested the accused, interrogated those who had taken him to the police station and also received **P. Exhibit 1** which was said to have been used by the accused in stabbing the deceased. At the time, the knife was blood stained and had fresh human tissue on it.
12. During question time, PC Mutua said that **P. Exhibit 1** was handed over to him by NO.235283 AP Nellam Wanjala of Poroko A.P. Camp. AP Wanjala had received the exhibit from members of the public who had recovered the same from the accused. PC Mutua could not say whether **P. Exhibit 1** was ever taken to the Government Chemist for analysis.
13. PW7 was Alfred Kisasi (Alfred). He attended the initiation ceremony at the home of Dominic Ole Tito on that fateful night. He was a friend of the deceased and they were together during the ceremony. At about 10.00 p.m., the accused suddenly went to where Alfred and his friend were standing and stabbed the deceased on the right hand side of the stomach. As the deceased shouted that he had been stabbed, the accused took off towards the elder's house. After the accused was apprehended by members of the public, Alfred went away. Alfred also testified that the night was dark, though it was not very dark because there was moonlight. Alfred said that he could identify somebody with the help of the moonlight which was enough for such a purpose. Though Alfred knew both deceased and accused, he was not aware of any dispute between the two. He also said that the accused did not utter any word before stabbing the deceased. When questioned by the court, Alfred stated that he could see to a distance of about 10 metres away using the moonlight.
14. On cross examination, Alfred stated that though he was Maasai, and though the deceased was also Maasai, the two of them were not carrying any knives on them that night. He confirmed that there were more than 200 people present in Ole Tito's compound that night, with about 65 boys who were to be circumcised. He also said that there was plenty of beer and meat during the ceremony, and that it was real celebration time and that those who had knives were using them for eating the meat. Alfred also told the

court that after being stabbed, the deceased cried “**umenidunga**” IN Kimaasai without naming names, but he said he saw the accused remove the knife from the deceased’s stomach and run off with it towards the elder’s house.

15. The prosecution closed its case without the evidence of the doctor who performed the post mortem examination and without the evidence of the investigating officer. The above notwithstanding, the accused was put on his defence after a spirited fight by the defence to have the accused acquitted under **section 306 (1)** of the **CPC**. The accused elected to give an unsworn statement. He told the court that he was arrested from his home at about 10.00 p.m. on 30<sup>th</sup> November 2009. After being arrested by a village elder with the help of 2 neighbours, he was thrown into a waiting matatu and driven to Kilgoris police station. At the station, he was informed that he was under arrest in connection with a charge of assault. He was taken to Kilgoris court on 31<sup>st</sup> November 2009 (there is no 31<sup>st</sup> day in the month of November!) and charged with the offence of assault. On the 30<sup>th</sup> December 2007, he was arraigned before the High Court on a charge of murder. He denied any knowledge of the allegations made against him. He also denied any knowledge of **P. Exhibit 1**.

16. At the close of the case, Mr. Sagwe appearing for the accused made submissions to the effect that the prosecution had not proved its case beyond any reasonable doubt to warrant a finding of guilty by this court. His main line of contention was that though the prosecution had adduced evidence from lay people to show that the deceased died, it had failed to prove the cause of the said death by appropriate evidence. It was also submitted that there was no evidence placed before this court to confirm when the deceased died and that for these reasons, the court should find the accused not guilty and to acquit him accordingly.

17. Having now analyzed the evidence that is on record, the two issues that fall for determination are **(a)** whether the deceased was murdered and **(b)** whether he was so murdered by the accused. Murder is the taking away of one’s life with malice aforethought and through an unlawful act or omission. **Section 206** of the **Penal Code, Cap. 63 Laws of Kenya**, defines malice aforethought in the following words:-

**“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.”**

18. Although no medical evidence to that effect was placed before the court, it is not in doubt that the deceased died. All the prosecution witnesses testified to that effect. There is also evidence to the effect that the deceased was stabbed by someone from among the more than 200 strong congregation that was gathered at the home of Dominic Ole Tito for the initiation ceremony on the night of 29<sup>th</sup> November 2009. According to Alfred, the accused is the one who inflicted the fatal stab wound on the deceased. Alfred said he was standing together with the deceased when the accused suddenly emerged from the crowd, went to where Alfred and the deceased were and without uttering a word, stabbed the deceased in the stomach. Alfred testified that with the help of the moonlight which though was not very bright, he was able to clearly see the accused as he came forward from the crowd and stabbed the deceased. Leman also said that there was moonlight that night, although it was not bright.

19. Danford also testified that on that fateful night, there was moonlight, that he saw the accused and the deceased fighting and that thereafter he saw the deceased fall down. The accused ran away. Alfred did not say that the accused and the deceased fought but that the accused attacked and stabbed the deceased for no apparent reason. As to what the accused did after the deceased had been stabbed, Leman, Danford, David and Alfred all testified to the fact that after the deceased fell down, the accused ran away towards the elder's house. David added that he was the one who restrained some five young people who were pursuing the accused.

20. Being aware that the incident took place at night, and that it involved people who were well known to all the witnesses, except PW6, the question of recognition arises. According to the witnesses, the night was dark, but not very dark because there was moonlight. When questioned by the court about the intensity of the moonlight, Alfred stated that it was enough for him to see an object situated up to a distance of 10 metres.

21. The tricky question of identification/recognition has been the subject of discussion by the hitherto superior courts of this land. the

Court of Appeal dealt with the issue in the case of Wamunga –vs- Republic [1989] KLR 424 by stating as follows:-

**“We now turn to the more troublesome part of this appeal, namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them .... What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. 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 a case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged 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 CJ in the well known case of Turnbull –vs- Republic [1976] 2 All ER 549 at page 552 where he said:-**

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

22. In the instant case, I have looked at the evidence of each particular witness, and especially the evidence by Alfred and I am persuaded that there was no mistaken identity about the person who stabbed the deceased. It was the accused who did so. Otherwise, why would he want to run away and hide in the elder's house? The conduct of running away by the accused was not consistent with innocence. He knew that he had done something bad and that if he stayed on around the scene, he would draw the wrath of those who were gathered at the ceremony. And those people were many, over 200 plus the 65 initiates. I have considered the accused's defence of alibi by which he denies that he was present at the home of Dominic Ole Tito on the night the deceased was fatally stabbed. In the case of **Karanja –vs- Republic [1983] KLR 501**, the Court of Appeal considered the defence and meaning of alibi and when a defence constitutes an alibi. In the case, the appellant was charged, convicted and sentenced for murder contrary to **section 203** as read with **section 204** of the **Penal Code (Cap 63)**, and was sentenced to death. The appellant appealed against this conviction on the grounds that the evidence did not point at his guilt, the direction of circumstantial evidence had been such as to transpose the burden of proof and that the prosecution and defence cases had been treated in isolation. The court held as follows at holdings 1 and 2:-

**“1. The word “alibi” is a Latin verb meaning “elsewhere” or “at another place”. Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, i.e. when he was initially charged.**

**2. In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.”**

23. In the instant case, the accused raised the alibi only during the time he was making his unsworn testimony. There is no suggestion at all during cross-examination that the accused was not present at Ole Tito's home. In my view therefore, the accused's alibi is an afterthought.

24. The question that follows is whether the offence was murder. To prove murder, the prosecution must not only prove the fact that the accused did the deed, but that he did it with malice aforethought. **Section 206** of the **Penal Code** clearly defines the situations that amount to malice aforethought and one of those situations is where the person who causes the death knows that the act or omission causing the death will probably cause the death or grievous harm to someone whether the person is actually the person killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused.

25. In the instant case, the accused knew or ought to have known that a stab in the stomach would probably cause the death of the deceased. It does not matter that he may have wished that death may not result. For this reason, I am satisfied that the accused had the necessary *mens rea* and *actus reus* to cause the death of the deceased and I so find.

26. The final issue for determination is whether the prosecution's failure to call the doctor who performed the post mortem examination on the body of the deceased was fatal to its case. It was submitted on behalf of the accused that this omission was fatal since the court has not been told by the prosecution what the cause of the deceased's death was.

27. That argument by the defence was vehemently opposed. Mr. Nicholas Mutuku, the prosecuting counsel submitted that the failure by the prosecution to call the doctor was not fatal. Counsel submitted that as long as there is other evidence to prove the fact of death and that that death was caused by the act or omission of the accused, this court should proceed to make a finding that both the fact and cause of the deceased's death in this case has been proved. Counsel submitted that there was overwhelming evidence from Leman, Danford, David and

Alfred that the deceased died and that it was the accused who caused that death by stabbing the deceased in the stomach. Counsel also submitted that there was sufficient light from the moon on that night and that with the said light all the witnesses clearly saw the accused, both as he stabbed the deceased and as he tried to flee from the scene.

28. As stated earlier, I have accepted the evidence of all these witnesses that the accused was present at the ceremony and that he stabbed the deceased in the stomach while well knowing that such a stab was likely to result in the death of the deceased. I am therefore in agreement with prosecuting counsel that there was other sufficient evidence to point to the fact and to the cause of death of the deceased. See the case of **Republic –vs- Cheya & another [1973] EA 500**. Though the said case was decided by a court of concurrent jurisdiction, the law as stated therein is correct and I agree with it.

29. Consequently, I am persuaded that the prosecution has proved its case beyond any reasonable doubt. I find the accused guilty of the murder of Anderson Talengo Kirwa on the 29<sup>th</sup> November 2009. I accordingly convict him of the offence under **section 322 (1) of the Criminal Procedure Code**.

30. Lastly, the delay in delivering this judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9<sup>th</sup> July 2012.

31. It is so ordered.

**Dated and delivered at Kisii this 4<sup>th</sup> day of October, 2012**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Mutai (present) for the State

Mr. Kaburi for S.M. Sagwe (present) for the Accused

Mr. Bibu (present) - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**

