



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO 42 OF 2013

REPUBLICPROSECUTOR

VERSUS

FESTUS KIPLETING BITOK ACCUSED

JUDGMENT

1. **FESTUS KIPLETING BITOK** (the accused) faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that on the night of 21st /22nd April 2013 at **MWANZO** estate in **ELDORET**, within **UASIN GISHU** County, he murdered **CHRISTOPHER MOGAKA** (the deceased). The accused who is represented by Miss Ruto, denied the charge.

2. The evidence presented by **ALFRED NYONGESA (PW1)**, whose work as a supervisor at **BRAVO AGENCIES** was to assign guards to their duty stations, told this court, that at about 7.00pm, he realized that the accused had not reported on duty, so he assigned his standby (the deceased) to **MWANZO** at the place accused ought to have been guarding. Shortly at 9.45pm, PW1 got a call from the accused who said he had gone to his place of work and found that someone else had been assigned there. PW1 advised the accused to remain with the deceased until morning.

3. In the morning at 7.50am, one **MUSUNGU** (a builder within **MWANZO** estate) called PW1 and reported that the deceased was lying on his stomach, and not responding. PW1 proceeded to the scene, and found a crowd which had gathered around the deceased who lay dead. A report was made to the police who collected the body and took it to the mortuary. On cross examination, PW1 stated that police saw blood on the ground, and it appeared that the body had been dragged along the ground. He also noticed that a marvin which was normally worn by the accused, had blood stains and was on the ground at the gate.

4. Chief Inspector **JAPHETH OGAMBA (PW2)** who was the investigating officer, visited the scene where the deceased lay dead, and in his opinion the body had been moved about 50 metres away from the suspected scene. He also found a blood stained blue marvin (suspected to belong to the accused), which was between the body and the suspected scene. On cross examination, PW2 stated that it was PW1 who told him the marvin belonged to the accused, although he was not shown any records to confirm that it belonged/or had been issued to the accused claim, nor was any forensic examination done on the same. However, it is the marvin which led to the accused's arrest, and PW2 believed the accused was the one who committed the offence.

5. **DR. WEKESA NALIANYA (PW3)** who conducted a post-mortem on the deceased formed the opinion that the cause of death was severe head injury due to blunt trauma, and the abrasions on the body suggested that the body was dragged along a rough surface but there was no evidence of a struggle. The body was identified by the deceased's son one **NEMWEL MUGUNDE MOSES (PW4)**.

6. The Operations Manager at **BRAVO SECURITY AGENCY**, namely **FRANCIS ODHIAMBO MEMBO (PW5)** told this court that the information he was given was that the accused and the deceased had been jointly assigned duties at **MWANZO** flats. On cross examination, maintained that the deceased was not assigned work because the accused had failed to report, saying that all night assignments have two guards on duty. He also stated, that contrary to practice, the accused did not sign out in the morning, so when the accused reported on duty in the evening, he was taken to the police station for interrogation.

7. In his sworn defence, the accused stated that he reported at his place of work at 6.30pm and clocked in. He then proceeded to Mwanzo for his assignment, arriving there at 7.00pm, and was surprised to find the deceased at the location, so he rang their supervisor, to find out what was going on. The supervisor advised him to sleep at the location until morning. He did not talk to the deceased, but noticed that the latter was talking to a guard from the next estate.

The accused slept inside a store near the gate until 6.00am when he woke up and left. He did not see the deceased (whom he had last spoken to just before going to sleep) and did not notice anything odd. He then walked to the company offices that morning, and it was only in the evening when he went to clock in that PW5 instructed him to accompany him to the police station.

8. It was his evidence that when he got to the assignment, he saw the deceased who was wearing his uniform and a blue marvin over his

head. On cross examination, the accused admitted that he was late in reporting to work, so the deceased was assigned to stand in his place. He however denied suggestions that he feared that the deceased had taken over his work and maintained that he had no grudge against the deceased.

9. On cross examination by the court, the accused confirmed that if one is late for duty and someone else is assigned in place, then the company makes a deduction from his pay.

10. The defence counsel submits that the prosecution has failed to discharge the legal burden of proof, as the investigating officer could not explain how the marvin was linked to the accused, and no one witnessed the accused either fighting the deceased or even attacking him.

Further, no murder weapon linked to the accused was found at the scene, and this court is urged to acquit the accused for lack of sufficient evidence.

11. The prosecution did not make any submissions, there is no dispute that the deceased met his death in a violent manner while at his place of work, where he had been assigned to stand in for the accused who had failed/ been late in reporting to work. The main issue for determination is who inflicted the injuries. There is suspicion that it may have been the accused, courtesy of a marvin said to belong to him. However, no tangible or unique character of the marvin was singled out, as to lead to the probability that it belonged to the accused. PW5 claimed that the accused did not clock out, but no duty register was presented to this court to confirm that. Indeed, PW5 appears to either be guessing matters or he was simply out to exaggerate, to the extent that he ended up contradicting his own supervisor in many critical aspects.

12. What was the act or omission on the part of the accused? What was the motive? Although the prosecution did not seriously lay out this, I think the theory that was being propounded is that the accused was angered by the fact that the deceased having been assigned his duties, in effect was the factor that would adversely affect his monthly income, but this was not adequately established. As for the actus reus, none of the prosecution witnesses saw who inflicted the injuries, and the circumstantial evidence pegged to the blood stained marvin which was never subjected to forensic examination, is too weak that it cannot sustain a conviction.

Consequently, the charge against the accused has not been proved beyond reasonable doubt, and I return a finding of **NOT GUILTY** in favour of the accused. He shall be set at liberty forthwith, unless otherwise lawfully held.

DELIVERED AND DATED THIS 17TH DAY OF MARCH 2021 AT ELDORET

H. A. OMONDI

JUDGE