



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 8 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ALEX MACHI RAUDO

BEATRICE NASIRUMBI SWADA.....ACCUSED

JUDGMENT

1. **Alex Machi Raudo** and **Beatrice Nasirumbi Swada** are charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

2. The particulars of the offence are that on the 9th day of March 2015, at **Bukalama** village in **Bukhayo West** location of **Busia** County, murdered **Tito Raudo Machi**.

3. The prosecution contended that on the material day the deceased spent the day in a chang'aa drinking den with his two sons. Alex Machi Raudo (accused 1) was connected to the death of his father by some blood on his pair of trousers while the tee shirt of Beatrice Nasirumbi Swada (accused 3) had also some blood. It was argued that there was bad blood between the deceased and his sons (accused 1) among them and their mother (accused 3) supported them against the deceased.

4. Alex Machi Raudo, in his defence contended that he went to his father's home at 9 p.m. on the day he died. He denied involvement in his death.

5. Beatrice Nasirumbi Swada in her defence said that she was the one who discovered her dead in his bed and had injuries. She equally denied taking any part in the death.

6. The issues for determination are:

- a. Whether it was proved that the deceased blood on the pair of trousers of first accused 1 could have resulted in his involvement in the killing of the deceased;
- b. Whether the blood on the tee shirt of the third accused proved involvement in the murder; and
- c. Whether the prosecution proved its case against the two accused persons.

7. One of the reasons why the first and the second accused, who has since been acquitted, were charged was an alleged existing grudge. Matthew Barasa Mwangi (PW1), was a cousin of the deceased. He testified that when the deceased stopped the first accused from selling a piece of land, the latter threatened to kill him (the deceased). The matter was deliberated on by the clan and was chaired by Kusimba Machi Mwangi, their clan chairman. Important as this threat was, none of those present were called to testify about this threat. I will at a later stage address the issue of the credibility of this witness. When the prosecution fails to call a material witness and the evidence on record is barely adequate, the court would make an inference that such evidence would have been adverse to the prosecution case. In **Bukenya vs. Uganda [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.

8. Since the first accused and the second accused were arrested for being with their father a good part of that day, it was important for the investigating officer to record the statement of the person who sold chang'aa to them. This was not done. This evidence could indicate whether some disagreement arose for we know that two cannot walk together unless they agree. The fact that the deceased and his two sons went to partake chang'aa together indicate that there was no animosity between them as Matthew Barasa Mwangi (PW1) would have wanted the court to believe.

9. Up to that point of my analysis of the evidence, we only find some scanty circumstantial evidence and evidence of suspicion. The court of appeal in the case of **Sawe vs. Republic [2003] KLR 354** stated:

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. ...

5. ...

6. ..

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

10. While acquitting the second accused, I did not deem it necessary to give reasons. Had I done so, I would have prejudiced this case in away. I have now done so and it is clear as to why I acquitted him at that stage.

11. The first and the third accused were further implicated in the offence by presence of some blood in their pair of trousers and tee shirt respectively.

12. Chief Inspector Jared Ndege (PW4) was the investigating officer. He testified that he recovered a pair of trousers of the first accused which had some blood stains. Interestingly, he never testified as to where he recovered it and whether he interrogated the accused about it. If the pair of trousers was hidden, it could have raised reasonable suspicion that he could have been involved.

13. We have evidence on record that the first accused and other members of the family visited the house where the body of the deceased lay after it was established he had died. When Elizabeth Waithera Onyienko (PW5) examined the pair of trousers, she made a finding that it had the blood stains of the deceased. The prosecution had a duty to prove beyond any reasonable doubt that the blood of the deceased did not find its way to the trouser of the first accused innocently given the circumstances and the evidence on record. It would appear that the investigating officer wanted to shift the burden to the accused.

14. The evidence of finding of the blood stained tee shirt of third accused and a shirt of the deceased under the mattress the deceased was lying on has contradictions as to who made the finding. According to the evidence of Matthew Barasa Mwangi (PW1), he was the one who made the finding with other family members. However, according to Chief Inspector Jared Ndege (PW4) it was him and his team who did it. He never testified that he was acting on information of PW1 or any family member. The Court of appeal in the case **Ndungu Kimanyi vs. Republic [1979] KLR 283**, (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates makes it unsafe to accept his evidence

15. In the instant case I find that either or both PW1 and PW4 have credibility issue and more evidence would be required before acting on their evidence.

16. The tee shirt of the third accused and the shirt of the deceased were found under the bed presumably and had blood stains. Though the investigating officer and PW1 testified that they were hidden, no evidence was adduced to establish this fact. There was no evidence to show that this was the tee shirt the accused had on that day and she only removed to conceal it on finding that it had blood. It is not lost that at times we remove clothes and toss them on our beds. Even if it was established that she was wearing that tee shirt in the day, more evidence would have been required to prove that the blood stains on it were not due an innocent contact with the body of the deceased after it was discovered lying lifeless.

17. It is evidently clear that the investigating officer was too casual in handling this case. The net result is that there is no evidence on record on which I can convict the two accused persons. I accordingly acquit each of them of the offence of murder and set them at liberty unless if

otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 24th day of March, 2020

KIARIE WAWERU KIARIE

JUDGE