



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 54 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

KELVIN KARIUKI GITHINJI.....ACCUSED

RULING

Kelvin Kariuki Githinji is accused of killing Richard Okara Ochoki contrary to section 203 as read with section 204 of the Penal Code on the night of 17th November 2017 at about 2200hrs at Soweto Estate within Nairobi County. He has denied committing this offence. The prosecution called a total of 10 witnesses to testify against him. These witnesses are: Dr. Joseph Maundu (PW1) who examined the accused and certified him fit to stand trial; Caroline Wambui (PW2) the wife of the deceased who testified to the attack that led to the death of her husband; Lukas Bosire Kibagendi (PW3) a neighbour who assisted to take the deceased to hospital; Joseph Ngatia (PW4) from Soweto Police Station who received the report of the murder; Geoffrey Ochoki (PW5) brother to the deceased; IP Abel Onyapidi (PW6) a gazetted scenes of crime officer who developed and printed photographs of the scene taken by PC Maurice Munovi (PW10); Indira Nyaboke (PW7) a neighbour to the deceased; Dr. Peter Muriuki Ndegwa (PW8) the pathologist who examined the body of the deceased and SGT Optat Nyange (PW9) from Soweto Police Station who received information about the murder and visited the scene of the crime on the night of the crime. At the conclusion of the case for the prosecution, both the prosecutor and defence counsel informed the court that they did not wish to make submissions at this stage of the trial.

It is a requirement of the law and procedure under Section 306 of the Criminal Procedure Code for the trial court, at the conclusion of the prosecution case, to examine the evidence adduced by the prosecution witnesses and determine whether it makes out a case against the accused person or not. If it does make out a case against him/her, then the court shall call upon the accused to make his defence and if it does not make out a case against the accused, then the court shall record a finding of not guilty and acquit the accused person.

At the conclusion of the case for the prosecution, there must be on record evidence that is sufficient enough for the court to rely on. The accused is not required under the law to fill gaps left by the prosecution case. The case for the prosecution, at the conclusion of its case, must be one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence (see **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332**).

I have read all the evidence on record. I have noted that of all the witnesses for the prosecution it is only Caroline Wambui, PW2, who was at the scene of this crime at the time of the attack. She is the wife of the deceased. The other witnesses including Lukas Bosire, PW3, neighbour, Geoffrey Ochoki, PW5, brother to deceased and Indira Nyaboke, PW7, neighbour, arrived after the attack had taken place. Caroline told the court that on 17th November 2017 at about 10.00pm, she and the deceased started preparing to close their shop. Her husband, the deceased, and Caroline operated a shop selling foodstuff and gas. They had a temporary shed outside their shop where they stored their wares during the day. The deceased was carrying the items stored in the shed back into the shop in preparation to closing while Caroline was inside the shop with their 3 year old baby when the attack happened. According to Caroline some young men attacked her husband and pushed him into the shop. She said she saw three (3) people but her neighbours told her that the attackers were seven (7). She said that she went out of the back door to call neighbours to help and that she heard her husband say: "Kariuki usiniue". She said that when she returned into the shop still using the back door she found the deceased at the place where he used to keep the money. She said that the small child told her that Kariuki was 'playing' with his dad (meaning the deceased). It was not explained what was meant by 'playing'.

Caroline went on to testify in chief that she was able to identify Kariuki because she knew him as a neighbour and she had known him for over 4 years. She said that the other attackers wore masks but Kariuki had not covered his face. She said that he was wearing a cap. She identified the accused as the Kariuki she was referring to. On cross examination, Caroline told the court as follows:

"I saw 3 people holding my husband. My neighbours said they were 7. I saw them come in. They had black masks and I could not manage to see their clothes. One had a grey sweater. I cannot remember if it was sweater or jacket. He had either a grey or creamish jacket and trouser. When I saw them pushing my husband telling him to go in I ran out through the back door. I cannot remember who was telling him to go in. I cannot remember how they were..... I saw 3 people pushing my husband telling him to go in. Kariuki had a grey jacket. I did not differentiate the colours. I cannot say whether it was it was grey or cream. I saw Kariuki at the shed. He wore similar colours from top to bottom. The cap was same colour with sweater."

Caroline further told the court that she did not see the attackers stabbing the deceased.

Lukas Bosire was at his brother's shop nearby when he heard screams from Caroline. He told the court that he saw 3 young men leaving the scene. He described the 3 as wearing white clothes and had their heads covered. They were carrying a gas cylinder. He tried to follow them but he feared for his life. He ran towards the deceased's shop. He found the deceased lying down bleeding from a stab wound on the leg. Lukas told the court that he assisted to take the deceased to Dewopa Hospital where he was pronounced dead. Lukas told the court on cross-examination that the attackers had covered their heads with masks and that they were wearing long white robe. He said he could not identify them. He said he did not see the accused.

Indira Nyaboke testified that she was at her home near the shop of the deceased when she heard Caroline screaming that her husband had been killed. Nyaboke went out to her balcony and saw 3 people carrying shop goods. She did not know them. She said that one of the three wore whitish clothes and others wore black clothes. She said that Caroline mentioned that Kariuki had killed her husband.

SGT Joseph Ngatia, the first police officer to receive the report of the attack told the court that Caroline reported that a gang of three people went to their shop and forced the deceased into the shop and stabbed him on the right thigh. She reported that one of the attackers was known to her as Kariuki. On cross-examination SGT Ngatia told the court that Caroline said she was present when Kariuki stabbed the deceased. He further stated that Caroline did not describe the clothes Kariuki was wearing. The other police officers including the Investigating Officer relied on the statements made by witnesses more so the statement of Caroline.

Evidence shows that the accused was arrested by members of public and that he was assaulted almost to an extent of being lynched. He was arrested from their home which this court was told is near the home of the deceased where the shop was situated. Despite the police receiving a report of a suspect named Kariuki, if their evidence is to be believed, they did not look for him that night until the following day when he was arrested by members of the public. Evidence shows that he was arrested from home. There is no evidence either from the members of public or from the police that anything was found on the accused or inside their house.

I have taken time to carefully read, consider and evaluate all the evidence. While I find sufficient evidence that the deceased died as a result of exsanguination due to injuries caused by sharp force trauma, the evidence on the identity of the person or persons who attacked and stabbed him is not sufficient. The evidence of Caroline on the identity of the accused as one of the attackers is weak. She is on record saying that the accused had a bad record and that he had attacked her shop in the past and broken the shop mirror. Lukas in his evidence referred to the incident when the mirror was broken. He told the court that the accused had been fighting with some other boys and in the course of that fight the accused threw a bottle which hit the mirror and broke it. He also said that the mirror was paid for by accused's father.

Further I have considered the evidence that the 3 year old child is alleged to have told Caroline that Kariuki had been playing with the deceased. This child did not testify and there is no evidence confirming to this court that the Kariuki being referred to is the accused in this case. This is not good evidence. It would be prejudicial to rely on it given that it was from a minor who has not testified and who did not identify the accused in an identification parade. It would be prejudicial for this court to assume that the Kariuki allegedly mentioned by the deceased and referred to by the child is the accused without other evidence corroborating this. It is clear to me that from the conflicted evidence by Caroline on the identity of the attackers, this court has doubts that she did not positively identify the accused at the scene. Given her evidence describing the attackers and the way they were dressed, to the extent of contradicting her evidence that she was not able to identify the attackers because their heads were covered with masks, it is my finding that the identity of the attackers is in serious doubt. It would be unsafe and extremely dangerous for this court to rely on such shaky evidence on the identity of the accused as one of the attackers.

The effect of placing the accused on his defence with this kind of evidence would be, in my view, tantamount to expecting the accused to fill the gaps left by the prosecution evidence. There is no corroborating evidence on the identification of the accused as one of the attackers. Caroline is on record telling that court that she did not see the deceased being stabbed. Her description of the accused and how he was dressed leaves doubts in my mind and therefore I make a finding that it is not safe to rely on this evidence and further that the evidence on record falls short of establishing a prima facie case against the accused person to warrant his being placed on his defence. It is a principle of law that the accused does not bear the burden of proving his innocence. If he were to opt to remain silence after being placed on his defence, this court would still rely on the same shaky evidence which this court finds insufficient to support a conviction.

Section 306 (1) of the Criminal Procedure Code requires of the trial court as follows:

When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

In compliance with this section and having found the evidence insufficient it is my finding that the accused has no case to answer. I therefore enter a finding of not guilty against him and order that he be acquitted. He shall be set at liberty forthwith unless for any other lawful reason he is held in custody. Orders shall issue accordingly.

Delivered, dated and signed this 28th March 2019.

S. N. Mutuku

Judge.