



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 1 OF 2014

REPUBLIC.....PROSECUTION

VERSUS

LABAN MATE.....ACCUSED

RULING

1. This is a ruling on whether the accused person has a case to answer. The accused person faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. He pleaded not guilty to the charge.
2. The prosecution called eight (8) witnesses in this case. In defence he opted not to make any submissions at the close of the prosecution's case.
3. I have perused the evidence of the eight witnesses and noted that none of them witnessed the incident. There is only one witness who gave indirect or circumstantial evidence which I will evaluate in this ruling.
4. PW2 is the bar attendant of "Kwa Karetho" bar at Ishiara market where the accused person and the deceased were in the evening of 11/02/2014. The witness testified that she was on duty that evening and that at around 9.00 pm with several customers including the accused person and the deceased. The accused was whom she had known for about four (4) years was a regular customer.
5. The deceased was also a regular customer in the said bar and was known by PW2 for a long period, PW2 said that the deceased informed her that he had been at Ishiara market drinking with the accused and his brother and that he had differed with them over some issue resulting in the two men pouring alcohol on him.
6. At around that time, people were making noise and singing in the bar. The deceased left the bar for home and was followed by the accused and his brother all going towards the direction of Thuci river. The following day, PW2 learnt that the deceased did not reach home the previous night and that he had been killed and his body dumped in Thuci river.
7. PW8 the investigating officer was instructed to investigate this case by the Director Criminal Investigations, Mbere North. He took two suspects who were remanded at Ishiara police station. After recording statements of witnesses, PW8 found no evidence to connect one of the suspects. Namely Salesio Mwaniki and decided to treat him as a witness. He charged the accused with the offence.
8. Dr. Nkonge PW5 conducted the postmortem on the deceased's body. On examination he found that he had several injuries on the head and on other parts of the body. These included a head injury revealing a fracture of the skull.
9. He formed the opinion that the cause of death was a cardio-pulmonary arrest due to severe head injury.
10. PW6 Dr. Thuo found the accused person mentally fit to plead.
11. The only available circumstantial evidence that of PW2 consists of the following facts: -
 - i. That the deceased told her that he had disagreed over an issue with the accused and his brother while drinking in a bar at Ishiara market.*
 - ii. That the deceased left the bar near closing time and was followed by the accused and his brother.*
 - iii. That the deceased, the accused and his brother descended towards Thuci river from the bar.*

iv. That the deceased was found dead with multiple injuries and his body dumped in Thuci river.

12. It is important to look at the tests that guide the courts in dealing with circumstantial evidence.

13. It was held in the case of **NYAKUNDI VS REPUBLIC [2003] KLR 700** that: -

1. This court was not satisfied that the evidence of the only witness which the judge relied on to convict the appellant left no doubt in the entire case as to lead to a conclusion that the inculpatory facts were incompatible with the innocence of the appellant and incapable of explanation upon any other hypothesis other than that of guilt.

2. There was no proper evidence to conclude that the accused was carrying a panga with which he had killed the deceased.

14. In the case of **MSEMBE VS REPUBLIC [2003] 521** the court cited with approval the case of **Kipkering arap Koske & Another Vs Republic [1949] 16 EACA** where it was held:

“That 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 hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

15. The evidence of PW2 is that she was told that the deceased had disagreed with the accused; that they were in Karetho bar around the same time; that they left the bar following one another and went to the same direction where the body of the deceased was discovered the following morning.

16. The burden of proof in a criminal case is beyond any reasonable doubt and the prosecution have an obligation to discharge it. The facts drawn from the evidence of PW2 are not incompatible with the guilt of the accused person. There are possibilities that the deceased could have met his death in the hands of other people other than the accused. This evidence raises doubt as to who was responsible for the death of the deceased.

17. It is a principle of criminal law that other than convicting an accused on evidence with an iota of doubt, he should benefit from the doubt.

18. I reach a conclusion that the circumstantial evidence of PW2 does not pass the test laid down in the **Nyakundi** and the **Kipkering** cases (**supra**).

19. It is my finding that the evidence on record does not make up a prima facie case for the accused person to be called upon to make his defence.

20. I accordingly acquit him under Section 306 of the Criminal Procedure Code. He is set at liberty unless otherwise lawfully held.

21. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 26 DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for State

Ms. R. Njeru for accused

Accused present