



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 53 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH MUHIA MWAURA..... 1<sup>ST</sup> ACCUSED**

**PAUL MAINA MWAURA.....2<sup>ND</sup> ACCUSED**

**RULING**

The two accused persons **JOSEPH MUHIA MWAURA** (hereinafter referred to as 1<sup>st</sup> accused) and **PAUL MAINA MWAURA** (hereinafter referred to as 2<sup>nd</sup> accused) are jointly charged with **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.** The particulars of the charge were that

***“On the 10<sup>th</sup> day of November, 2012 at Kawa-kawa Village within Nyandarua County jointly with another not before court murdered SIMON MURAGU NGUGI”***

Both accuseds pleaded ‘**Not Guilty**’ to the charge and their trial commenced on 1/9/2016. The prosecution called a total of three (3) witnesses in support of their case.

**PW1 KIMANZI MBOYA** told the court that on 10/11/2012 he was with the deceased at Furaha Bar. The deceased had come running to **PW1** in a panic claiming that one ‘**John Mwaura alias ‘Kengei’**’ was out to beat him. The two stayed together and **PW1** even offered to walk the deceased to his home as the deceased feared to go alone.

At some point the said ‘**Kengei**’ appeared but **PW1** sent him away. The deceased and **PW1** then set off for home but on the way they stopped at a bar at Kawa-kawa a trading centre. There they met the 2<sup>nd</sup> accused. **PW1** entered the bar then he heard a voice calling his name. He stepped out only to meet ‘**Kengei**’ who hit him on the head. **PW1** retreated back into the bar and remained inside with the bar owner **DOMINIC WAMUGUNGA (PW2)** until the commotion outside died down. Later the body of the deceased was found lying half naked next to the bar. The body had injuries. The said Kengei was spotted a few days later and was killed by an angry mob. The two accuseds who were brothers to Kengei both vanished after the incident.

When the 2 accuseds returned to the village they were both arrested and charged. The prosecution having closed its case this court must determine whether the evidence on record has established a *prima facie* case to warrant calling upon the two accused persons to defence themselves.

From the evidence on record there was no eye-witnesses to the assault on the deceased. **PW1** and **PW2** who were with the deceased at the material time both state that they hid inside the bar and only came out after the commotion had died down. They therefore did not see what was happening outside the bar.

There is no evidence to show that it was either the 1<sup>st</sup> accused or the 2<sup>nd</sup> accused who fatally assaulted the deceased. All the key witnesses have mentioned the name of one ‘**Kengei**’ (now deceased) as the culprit. **PW1** told the court that it was this ‘**Kengei**’ who had been looking for the deceased and it was the same Kengei who slapped **PW1**.

In his evidence **PW1** says

***“I cannot tell whether it was Kengei or accused 1 or accused 2 who beat the deceased. I cannot confirm that it was the 2 accuseds who beat the deceased.....”***

In his evidence **PW2** was more categorical and says

***“It is Kengei who killed the deceased. It is not accused 1 or accused 2 who killed him. Kengei was later killed by a mob”***

**PW3 PC MICHAEL MULEI** who was the investigating officer also failed to implicate the two accuseds in this murder. **PW3** told the court that he found a blood-stained rungu in the house of ‘**John Mwaura**’ (**Kengei**). He did not bother to search the houses of the 1<sup>st</sup> and 2<sup>nd</sup> accused. Under cross-examination **PW3** stated

***“The other suspect John Mungai was later killed by members of public in Kipiriri. The public killed him because he was involved in the murder of the deceased....”***

It is quite obvious that the 2 accuseds were only arrested because ‘**Kengei**’ who was their brother was the chief suspect in this murder. This ‘**Kengei**’ was later lynched and killed by a mob in Kipiriri. There is absolutely no evidence linking either of the 2 accuseds to this murder. They cannot be held liable for the misdeeds of their brother. Vicarious liability is not applicable in criminal law.

I find that no prima facie case has been established and I acquit both 1<sup>st</sup> and 2<sup>nd</sup> accuseds of this charge of murder. Both accuseds are to be set at liberty forthwith unless they are otherwise lawfully held.

**Dated and delivered in Nakuru this 28<sup>th</sup> day of April, 2017**

Ms Mureithi for both accuseds

Mr. Chigiti for State

**Maureen A. Odero**

**Judge**