



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 118 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH WARUI MWANGI.....1ST ACCUSED

JAMES MBUTHIA WARUI.....2ND ACCUSED

RULING

The 2 accused persons are jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read WITH SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

“On the night of 18th/19th December, 2013 at Subukia Trading Centre in Nyandarua County murdered JOHN KURIA GITITU”

Both accuseds pleaded ‘**Not Guilty**’ to the charge. The prosecution called a total of seven (7) witnesses in support of their case.

PW2 PC SAMSON CHEPRAMUT and **PW3 CORPORAL JAMES MUTHINJI** told the court that on 19/12/2013 they received information from the Assistant Chief of Subukia Location that a dead body was lying at the Subukia Trading Centre. The officers rushed to the scene where they found the body of the deceased lying dead with several bruises and injuries. Around the body police recovered a blood stained stone, and blood-stained clothes. The officers then went to the house where the two accuseds were sleeping and arrested them. Police also took the blood-stained mattress on which the two accuseds were sleeping.

PW6 CAROLINE KANYUA KARIMI, told the court that she runs a bar at Subukia. On 18/12/2013 the 2 accuseds were doing some minor construction work at her bar. At 11.30pm **PW6** closed her business and left for home. The 2 accuseds escorted her right up to her house and upon arrival there **PW6** prepared tea which they took together. Thereafter the 2 accuseds left.

The next morning at 5.00pm one ‘**Wanyoike**’ came to inform **PW6** that his motor bike was missing. Later an angry crowd came to the house of **PW6** looking for some suspects. The crowd beat and stepped on **PW6** and she fell unconscious. Police rescued **PW6** and put her in their vehicle. Inside the police vehicle **PW6** found the 2 accused’s who had also been arrested by police. They were all taken to the police station.

Later police showed **PW6** certain items of clothing which she identified as the clothes she had seen the two accuseds wearing the previous day while they were working in her bar. All the clothes shown to **PW6** by police were blood-stained. Eventually **PW6** was released by the police whilst the 1st and 2nd accused were both taken to court and charged with the offence of murder.

The prosecution having closed their case, this court must now analyze the evidence on record and determine whether it is sufficient to prove a ‘**prima facie case**’.

The definition of a ‘**prima facie**’ case was laid out in the oft-cited case of **RAMANLAL T. BHATT Vs REPUBLIC [1957] EALR**, where it was held

“..... it may not be easy to define what is meant by a ‘prima facie’ case but at least it must mean 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”.

In order to prove a charge of murder the prosecution must adduce evidence to prove the following ingredients of the offence beyond reasonable doubt

- (i) The fact as well as the cause of death of the deceased
- (ii) That the deceased met his death as a direct result of an unlawful act or omission on the part of the accused(s)
- (iii) That said unlawful act or omission was committed with malice aforethought.

In this case the fact as well as the cause of death of the deceased have been readily proved. **PW1 PAUL KINAGA** told the court that he went to Subukia Trading Centre on 19/12/2013, where he found the body of the deceased lying in a pool of blood. **PW2** and **PW3** are the police officers who attended the scene and removed the body to the mortuary. **PW1** who knew the deceased person gave his name as ‘**Samuel Kuria Gitutu**’.

PW5 DR. JOSEPH KINYUA produced the post-mortem report respecting the autopsy conducted upon the body of the deceased **P. exb 2**. Upon examination the deceased was found to have 3 stab wounds to the left temporal region as well as other bruises and injuries. The cause of death was opined to be ‘**severe head injury secondary to assault**’. This was expert medical opinion evidence which was neither challenged nor controverted.

Having proved the fact as well as the cause of death, the prosecution is required to go further and tender evidence to prove that it was the 2 accused persons who by some unlawful act or omission caused the death of the deceased. Specifically it must be proved that it was the 2 accused who fatally assaulted the deceased.

In this case there was no eyewitness to the assault on the deceased. Out of the seven (7) prosecution witnesses called to testify none told the court that they saw the 2 accuseds assaulting the deceased. **PW6** confirmed to the court that the 2 accuseds spent the entire day of 18/12/2013 doing minor works in her bar, and the 2 even escorted her to her home at 11.30pm when she closed her business. **PW6** prepared tea in her home which all three took together after which the 2 accuseds left and she retired to sleep. **PW6** has no idea where the 2 accuseds went after they left her home and she cannot tell if they fought with or assaulted the deceased. Indeed **PW6** specifically stated in her evidence that she did not see the 2 accuseds assault the deceased.

Given the lack of eyewitnesses testimony the prosecution seeks to rely on circumstantial evidence in order to implicate the 2 accuseds in the murder of the deceased. Circumstantial evidence is that evidence which though not direct tends to link an accused person(s) to the offence in question. In **KARIUKI KARANJA Vs REPUBLIC 1986 KLR**, it was held

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution”.

Likewise in **JUDITH ACHIENG OCHIENG Vs REPUBLIC [2009]eKLR** the Court of Appeal sitting in Kisumu held as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests

(i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established

(ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”

In this case the prosecution sought majorly to rely on the evidence of the Government Chemist to link the two accuseds to the murder of the deceased **PW7 CORPORAL COSMAS NGUMBI** the investigating officer told the court that upon arrival at the scene he collected the following blood-stained items next to the body of the deceased

- A stone – P. exb 7
- Yellow striped T-shirt - P. exb 8
- Black jacket – P. exb 9
- Kitenge shirt – P. exb 4
- Blue jeans – P. exb 5

Later when police went to the house where the 2 accuseds were sleeping, they found the 2 lying on a mattress which had blood stains. A piece of that mattress was also produced as an exhibit **P. exb 10**.

PW7 told the court that when he arrested the 2 accused persons he noted that the 1st accused had injuries on his mouth and hand. This led to the police to conclude that the 2 accuseds had been recently involved in a fight. However there is no evidence to show that it was the deceased whom they fought with. The possibility that the 2 accuseds may have fought each other has not been ruled out.

PW4 HENRY KIPTOO SANG was the Government Analyst. He told the court that he received the blood-stained exhibits together with blood samples of the deceased and both accused persons for analysis and possible matching **PW4** examined all the items and he produced the report of his findings dated 6/7/2013 **P. exb 1**. I have carefully perused this report.

It indicates that the items of clothing recovered at the scene as well as the stone were all stained with blood of human origin.

The DNA profiles generated from the blood stains on the trouser, jumper, stone and kitenge shirt were all found to match the DNA profile generated from the sample of the deceased's blood. Does this implicate the accuseds in the murder I think not. It is important to critically analyze how these exhibits have allegedly been identified as the property of the 2 accuseds. **PW6** identified the items of clothing as the ones the 2 accuseds had been wearing when she saw them on 18/3/2013. There was nothing special or exclusive about the clothes. A T-shirt, jeans or a kitenge shirt are all very common items of clothing, which can be found on any person in Kenya. There was no exclusive mark on the clothes to identify them as belonging to the 2 accuseds and nobody else. The obvious question would be how **PW6** who according to her own evidence only saw the 2 accuseds allegedly wearing these clothes on one occasion could positively identify the recovered clothes as the ones she had seen them wearing. **PW6** did not reside with any of the accuseds. She cannot claim to have regularly over a period of time seen any of them wearing those clothes. She was not in a position to identify or to state with certainty whom the recovered blood-stained items of clothing belonged to. These clothes were found out in the street in a public place. They were not recovered on the persons of the two accuseds or in the house in which they were found sleeping. It has not been proved that the items of clothing exhibited in court belonged to either the 1st or 2nd accused and to nobody else.

The evidence purportedly linking the 2 accuseds to the blood-stained clothes recovered at the scene was not in my view water tight nor was it persuasive. In the absence of conclusive proof that these items of clothing belonged to either of the two accused persons, there remains nothing to connect them to the scene of the murder.

The other shirt, the stone and the piece of the mattress were all found to be stained with blood which matched the DNA sample of the 1st accused. Given that **PW7** confirmed that when he arrested the 1st accused he was wearing the T-shirt and lying on the mattress this finding is not surprising. This finding does not in any way link the 1st accused to the murder of the deceased.

All it proves is that the 1st accused was also injured on that day. The question of how he sustained those injuries has not been proved. The suggestion is that 1st accused may have been involved in an altercation with the deceased. This has not been proved at all. The presence of traces of the 1st accused's blood on the stone implies that this stone was used to assault him. The question of who assaulted the 1st accused also remains unanswered.

PW6 in her evidence told the court that when the angry mob descended on her house they were searching for persons called '**Wanyoike**', '**Karanja**' and '**Martin**'. There is a real probability that these 3 persons may have been involved in the altercation with the accused persons and/or the deceased. The police failed to exhaustively investigate this angle and none of the three men mentioned were called as witnesses.

All in all the prosecution case fails way below the threshold required in law. The court is merely being treated to rumours suggestions and innuendo. There is no tangible and/or direct evidence to link either of the 2 accuseds persons to this murder. The prosecution evidence lacks cogency and can only be termed as evidence of suspicion. It is well established principle that suspicion no matter how strong cannot form the basis for a conviction.

I find that the prosecution have failed to establish a *prima facie* case. I therefore enter a verdict of '**Not Guilty**' and I acquit each of the accused of this charge of murder. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered in Nakuru this 23rd day of June, 2017

Mr. Ombati holding brief for Mr. Tombe

Ms Nyakira for DPP

Maureen A. Odera

Judge