



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL DIVISION
CRIMINAL CASE NO. 82 OF 2014

REPUBLIC.....RESPONDENT

VERSUS

MOSES MAKUMI MAINA alias

JOHN MWANGI alias MWASH.....1ST ACCUSED

DAVID NJENGA WANJIKU alias MUBATARI.....2ND ACCUSED

RULING

1. The accused persons **MOSES MAKUMI MAINA** alias **JOHN MWANGI** alias **MWASH** and **DAVID NJENGA WANJIKU** alias **MUBATARI** were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the night of 30th day of August, 2014 along Fundi Lane in Kirinyaga Road within Nairobi County murdered **JACKSON MWANIKI WAMBUI** alias **DICKSON MWANIKI WAMBUI**.

2. They both pleaded not guilty to the charge and to prove its case the prosecution called a total of six witnesses and upon the close of the prosecution case the parties were invited to make submissions as to whether the prosecution had made up a case to enable the court put the accused persons on their defence or to enable the accused persons be acquitted under the provisions of Section 306(1) of the Criminal Procedure Code.

3. On behalf of the 1st accused it was submitted that one of the key ingredients in a charge of murder that must be proved by the prosecution is the existence of malice aforethought and further that the accused did an act or failed to act resulting in the death of the person killed. It was submitted that the prosecution did not tender any evidence to prove the said two ingredients and reference was made to the case of **REPUBLIC v JOSEPH NDUNGU KIMATHI High court Criminal Case at Nyeri Cr. No. 31 of 2008**.

4. On behalf of the second accused it was submitted that the prosecution did not establish a prima facie case as per the case of **REPUBLIC v BERNARD OBUNGO OBUNGA (2015) eKLR**, it was submitted that the prosecution case was purely circumstantial and partly based on suspicion since there was no direct evidence identifying the accused person as the perpetrator and the following cases were referred to:-

(i) **REPUBLIC v BENSON OCHIENG OYUGI [2016] eKLR.**

(ii) **REPUBLIC v MICHAEL MURIUKI MUNYURI [2014] eKLR.**

5. It was submitted further that exhibits in respect of the prosecution case were not properly handled and cannot therefore be used to prove that the 2nd accused committed the offence. It was submitted that there was lack of evidence to show notice on preparedness to commit the offence on the part of the 2nd accused neither was there proof of common intention on the part of the 1st and 2nd accused.

6. On behalf of the prosecution it was submitted that there was a misunderstanding between the deceased and the 1st accused over a girl which led to the 2nd accused joining in the fight and the accused persons stabbed the deceased. It was submitted that the prosecution had proved a prima facie case against the accused persons.

PROSECUTION CASE

7. The prosecution case against the accused person was purely based on hearsay and circumstantial evidence. **PW1 BERNARD MUTURI** a brother of the deceased testified on oath that he was called by one Mwai and informed that he was wanted at home. He went home and met one Kimani his cousin who was living with the deceased who told him that the deceased had been stabbed with a knife by his friends whom he was staying with. The said Mwai was never called as a witness to corroborate the evidence of PW1.

8. **PW2 Corp. DANIEL NJUKI** was instructed to investigate the matter and established that the deceased who was a street boy was killed by fellow street boys who were known and that fellow street boys went to the homes of the accused persons in Banana and arrested them with the assistance of the AP. He together with Corp. Gatimi rearrested the accused persons and that the 1st accused had a cream jacket which was blood stained while the 2nd accused had a black jeans trousers and a T-shirt which were also blood stained. It was his evidence that on 1/9/2014 they went with the accused persons to their homes where in the house of the 2nd accused they recovered an American pen knife which was blood stained. It was his evidence that they went to the scene and established that the deceased had been stabbed with a knife by four (4) people three of whom were identified by the witnesses two being the accused persons.

9. It was his further evidence that there was a fight between the 1st accused and the deceased over a girl who was the girlfriend of the 1st accused, it was his evidence that he did not recover anything in the house of the 1st accused. He further testified that they went to the house of the 2nd accused without search warrant and recovered a pen knife under a cabinet.

10. **PW6 CORP. WELDON KIPYEGON** corroborated the evidence of PW2 and stated that they started their investigation by recording statements for witnesses who told them that the accused persons had been arrested at Banana who were brought to Central Police Station and their clothes removed from them which were forwarded to the Government Chemist. He confirmed having recovered a pen knife in the house of the 2nd accused on 1/9/2014.

11. **PW3 DR DOROTHY NJERU** produced a post mortem report on behalf of Dr. Ndegwa and confirmed that the cause of death of the deceased was loss of blood due to stabbed wound. **PW4 LAWRENCE KINYUA MUTHURI** carried out analysis on the items forwarded to the government chemist and confirmed that the DNA profile from the jeans trouser of the second accused and the knife recovered from his house matched the blood sample belonging to the deceased and that the blood stains on the jumper and the T-shirt belonging to the 1st accused matched his DNA profile. It was further his evidence that the DNA profile on the jacket of the 1st accused was of unknown male.

ANALYSIS AND DETERMINATION

12. The fact and the cause of death of the deceased is not in dispute. **PW3 Dr. Dorothy Njeru** produced a port-mortem report confirming the death of the deceased and the cause thereof to be loss of blood due to stabbed wound. PW1 a brother of the deceased identified the body at the mortuary. The only issue in dispute is whether the prosecution has proved a prima facie case as per the celebrated case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC [1957] EA 332.**

13. The only evidence connecting the accused persons to the offence herein is the hearsay evidence of **PW2 Corp DANIEL NJUKI** and even in that said evidence he stated that the deceased was alleged to have been stabbed by four (4) people when there arose a fight between HIM and the 1st accused over a girl. No eye witness was called to confirm the said allegation and there is no evidence tendered by the prosecution to show that the said fatal stab was caused by either of the two accused persons and not any of the two who have not been charged. I would agree with the submission by the 2nd accused person that the prosecution failed to prove a common intention between the accused persons and the two unknown persons to cause the death of the deceased.

14. The accused persons were allegedly brought to Central Police Station by a group of street boys who had followed them and arrested them at Banana but none of the said street boys were called as witnesses. The only other circumstantial evidence linking the 2nd accused to the offence herein is the recovery of a pen knife in his house which was blood stained and which blood matched that of the deceased but as submitted by the advocate for the second accused the recovery of the said knife was not properly handled. There was no inventory of the said exhibit and no evidence was submitted as to whether it was only the 2nd accused who had exclusive control and entry to the said house where the knife was recovered.

15. Whereas there is strong suspicion that there was a fight involving the street boys leading to the death of the deceased, since there is no evidence linking the accused persons directly to the death of the deceased and taking into account the fact that the clothes of the 2nd accused had blood stains which matched his DNA and that the stains on the clothes of the 1st accused had a DNA of unknown male it is clear to my mind and I find that the prosecution has failed to establish a prima facie case against the accused persons as it has failed to prove that the accused persons herein to the exclusion any other persons caused the death of the deceased by unlawful act or omission with malice aforethought.

16. Based upon the evidence on record it is clear that should the accused persons opt not to offer any evidence and without any further evidence for the prosecution the court directing its judicial mind properly cannot convict the accused persons on the basis of mere suspicion which as was stated by the Court of Appeal at Nairobi in **MUSILI TULO v REPUBLIC CR. Appeal No. 30 of 2013:-**

“Suspicion alone, however high, has never sustained any conviction for a criminal offence.”

17. By reason of the matters stated herein I find the accused persons not guilty of murder of the deceased and hereby **acquit** both accused persons under the provision of **Section 306(1)** of the **Criminal Procedure Code**, unless otherwise lawfully held the accused persons should be released from custody forthwith so that they can arise and shine knowing that the law is there to protect all including street boys but they should now be wiser and leave street life lest something worse happens to them in the future taking into account the fact that their friend died under their watch.

DATED, DELIVERED and SIGNED at Nairobi this 25th day of July, 2017.

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J. WAKIAGA

JUDGE

In the presence of:-

Ms Wegulo for the State

No appearance by Mr. Wahome for the accused

Both Accused persons present

Tabitha court clerk