



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 17 OF 2013

REPUBLIC RESPONDENT

VERSUS

ROBERT NJOROGE KAMAUACCUSED

RULING

The accused **ROBERT NJOROGE KAMAU** faces a charge of **MURDER CONTRARY TO SECTION 203 as read WITH SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

“On the 8th day of December, 2012 at Highlands Bars at Mununga Trading Centre Naivasha District within Nakuru County murdered PAUL KARANJA WAMBUGU”

The accused pleaded ‘**Not Guilty**’ to the charge and his trial commenced before **Hon. Lady Justice H. Omondi** on 30/10/2013. The Honourable Judge heard the evidence of the first six (6) witnesses after which she was transferred to the Bungoma High Court. I then took over the hearing and heard the remaining two (2) witnesses. A total of eight (8) witnesses testified on behalf of the prosecution.

PW1 FRANCIS NJOROGE MAINA told the court that on 8/12/2012 at about 8.30 pm he was at Highlands Bar. The deceased ran into the bar and went directly to the counter. He lifted up his shirt and said ‘**nimedungwa**’ ie ‘**I have been stabbed**’. **PW1** looked up and saw that the deceased was bleeding from a stab wound on his back. The deceased collapsed immediately thereafter bleeding from his nose and mouth. **PW1** and the other patrons in the bar raised the alarm when they realized that the accused was already dead.

PW2 JOHN KAMONYA GIKERI was a village elder. He told the court that on the material day he went to meet the deceased inside the Highlands Bar to discuss some issues. They did not hold any discussion as the deceased was drinking and **PW2** left the bar.

Outside the bar **PW1** met the accused who reported to **PW1** (as a village elder) that he had various complaints against the deceased. **PW2** told accused to call the deceased in order to discuss those grievances. The accused went into the bar but apparently the deceased declined to come out. **PW2** then left to go to his home leaving the accused standing outside the bar waiting for the deceased.

After a while **PW2** was called to go back to the scene and found that the deceased had been stabbed and killed **PW2** found the mob had lynched a certain boda boda rider on suspicion that he had killed the deceased. **PW2** told the crowd that the accused was the one he had left ‘**timing**’ the deceased. The charged crowd then went and burnt down the accused’s house.

PW8 DAVID KIMANI told the court that on 8/12/2012 at 6.00pm he went to buy supplies at the centre. On his way home he met accused standing with **PW2** outside Highland Bar. **PW8** said he heard **PW2** send for the deceased to come outside. The deceased said he was busy so **PW2** left.

PW8 told the court that at that point he also left to go home and was accompanied by the accused. They went together to the home of the accused where a meal was prepared and they took supper together. Whilst taking their supper **PW8** heard a commotion from the centre. He assumed it was the noise of the fans who were watching a football match and paid no heed. Later as **PW8** left the accused’s home he saw some smoke.

The next day at 6.00pm **PW8** went back to the centre where he was told of the murder of the deceased. He was also that a boda boda rider had been lynched and his house burnt down on suspicion of having killed the deceased. The mob also later burnt down the house of the accused.

After this incident the accused left the area. **PW5 FRANCIS MBUTHIA KARANJA** an uncle to the deceased told the court that on

16/2/2013 he received information that the accused had been spotted in Voi Town. **PW5** went to Voi and alerted the police. The accused was arrested and taken to Voi Police Station. Later on he was transferred to Naivasha Police Station and was eventually charged with the murder of the deceased.

The prosecution having closed its case this court must now examine the evidence on record and determine whether a prima facie case has been sufficiently established to warrant calling upon the accused to defend himself.

The definition of what constitutes a prima facie case was set out in the case of **RAMANLAL T. BHATT Vs REPUBLIC [1957] EALR** where it was held as follows

“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 this case the fact of the deceased death cannot be in any doubt. **PW1** told the court that deceased collapsed and died before his very eyes from a stab wound to the back. **PW5** the uncle to the deceased told the court that he identified the body of the deceased to the doctor who performed the autopsy. All the witnesses who knew the deceased well gave his name as ‘**Paul Karanja Wambugu**’.

PW7 DR. TITUS NGULUNGU testified regarding the cause of death of the deceased. He told the court that an autopsy was conducted on the body of the deceased on 13/12/2012. The doctor noted that the deceased had a stab wound on the back left side of his chest. The cause of death was opined to be ‘**a penetrating chest injury attended by left side haemothorax due to sharp force trauma**’. The duly completed and signed post mortem report was produced in court as an exhibit **P. exb 1**.

Having proved the fact as well as the cause of death the prosecution must go further and tender evidence to prove that it was the accused who unlawfully stabbed and killed the deceased. There was no eyewitness to the actual stabbing of the deceased. **PW1** said that he only saw the deceased **after** he had been stabbed. The deceased did not at any time mention the name of his assailants. **PW1** under cross examination said

“I did not hear the deceased mention the name of his assailant”.

PW3 JOSEPH MUGO MWANGI who was also a patron in the bar told the court that when the deceased came into the bar he raised his shirt to show the stab wound on his back. **PW3** states under cross-examination

“The deceased did not say who had stabbed him”

The only witness who has sought to implicate accused in this murder was **PW2** who was a village elder. However even **PW2** admits that he did not witness the actual stabbing. **PW2** told the court that the accused had made complaints against the deceased. **PW2** told the accused to call the deceased out of the bar for a discussion. The deceased declined to come outside saying that he was busy. **PW2** then left to go back to his home leaving the accused outside the bar. Later when **PW2** was called and informed that the deceased had been stabbed he suspected the accused because the accused had made complaints against the deceased. In his evidence when recalled to testify **PW2** said

“It is accused who had a problem with the deceased so I suspected him...”

In his evidence **PW2** claimed that he saw the accused holding something in his hands. When he was recalled for further cross examination **PW2** said

“I saw the accused holding a long black item like a stick or a Somali sword....”

PW2 is not even sure of what he saw. He is not able to state with certainty that what the accused was holding was a sword.

The incident occurred at night thus the question that immediately arises is whether there was sufficient light enough to enable **PW2** see anything at all. **PW2** in his evidence insists that visibility was good as ‘**there were security lights outside the bar**’. If the light was sufficient then court wonders why **PW2** had difficulty in identifying exactly what it was the accused hold in his hands.

PW3 who was also at the scene contradicts the evidence of **PW2** regarding the lighting outside the bar. **PW3** states categorically

“There are light inside the bar. Outside it is dark. There are no lights outside the bar”.

Under cross examination **PW3** reiterates

“There is no bulb outside the bar”.

I am more inclined to believe **PW3** because the fact that it was dark outside explains why **PW2** was not able to state clearly what the accused was holding. It was dark and he could not see well.

There is evidence that before **PW2** came back and implicated the accused members of the public had lynched another boda boda rider on suspicion of having stabbed the deceased. In his evidence **PW2** says

“I got there to hear that Kamau the boda boda rider had been beaten as the one who killed Karanja. I told them they were making a mistake because the person who I left at the scene and who was timing Karanja (the deceased) was Njoroge” (accused).

Thus it was actually **PW2** who diverted the attention of the crowd away from this boda boda rider, towards the accused as the suspect. This led to the burning down of the accused’s house by the irate crowd. It was extremely irresponsible of **PW2** who was an elder to implicate the accused when he was not sure of the facts. **PW2** did not see the accused stab the deceased. **PW2** was not even sure whether or not the item which the accused had in his hands on the night in question was a sword. He only **suspected** the accused of having stabbed the deceased. Yet based on this suspicion alone **PW2** went ahead to announce to all and sundry that accused was the suspect.

The evidence of **PW8** directly contradicts that of **PW2** and places grave doubts as to whether the accused actually stabbed the deceased. **PW8** told the court that he too was outside the bar with **PW2** and the accused. He heard **PW2** call for the deceased to come outside for a discussion. The deceased declined to come outside. Then **PW2** left to go to his home. **PW8** told the court that as soon as **PW2** left the scene he too left accompanied by accused. They went together to the home of the accused where a meal was prepared and they took supper together. **PW8** states that he heard a commotion from the centre but he assumed that it was the noise of fans who were watching a football match. **PW8** in cross examination categorically states

“I was told the man (deceased) had been stabbed at 8.00pm. by that time accused and I were on his father’s house....”

The evidence is that the deceased was stabbed at about 8.30pm. At that time **PW8** says he was with the accused taking supper in the accused’s home. **PW8** stated that after they finished the meal he went home and left the accused at his home. The next day **PW8** learnt that the accuseds house had been burnt down by an angry mob on suspicion that accused had killed the deceased. The accused cannot have been in two places at the same time. He could not have been in his father’s home taking supper with **PW8** yet at the same time be at the centre stabbing the deceased. The evidence of **PW8** effectively excludes the accused as a suspect in this murder.

It is clear that the police did not bother to conduct any meaningful investigations into this matter. **PW8** was a prosecution witness therefore his statement was available to the police. In the light of the testimony of **PW8** this court is left to wonder why police proceeded to charge the accused.

PW7 CORPORAL NICHOLAS KOGO was the arresting officer. He admits that the deceased did not name his assailant before he died. **PW7** under cross examination stated that the village elder **[PW2]** told him that the accused had been looking for the deceased while aggressive. **PW7** goes on to state

“The village elder did not say he saw the accused and deceased quarrelling. No one witnessed accused meeting the deceased but they said accused had been agitated while looking for deceased”

The fact that the accused was said to have been agitated can only lead to a ‘**suspicion**’ that he may have killed the deceased. It is not proof that the accused stabbed the deceased. It is trite law that suspicion alone no matter how strong cannot form the basis for a conviction **[see SAWE Vs REPUBLIC [2003] KLR]**.

It would seem that the police preferred to rely on the suspicions of **PW2** rather than on the hard evidence provided by **PW8**. It is clear from the facts that nobody knew who stabbed the deceased. As stated earlier a boda boda rider was also lynched on suspicion for the same murder. The court is not told how or why the police decided that this boda boda rider was not implicit in the offence. The police relied wholesale on the suspicion of the elder.

On the whole the case against the accused is based solely on the suspicious of **PW2**. Those suspicions in my view have no basis and were effectively negated by the testimony of **PW8**.

The law requires that the prosecution prove its case beyond reasonable doubt. To call upon the accused to defend himself on the basis of the evidence on record would be tantamount to shifting this burden of proof and requiring of the accused to prove his innocence. If the accused elected to keep silent in his defence the evidence on record would not lead to a conviction. I find that no prima facie case has been established. I therefore enter a verdict of ‘**Not Guilty**’ and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 22nd day of August, 2017.

Mr. Nyambati holding brief for Mr. Maragia.

Maureen A. Odera

Judge