



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 113 OF 2014

REPUBLIC

VERSUS

DERRICK KIKUTWA.....ACCUSED

RULING

The accused **DERRICK KIKUTWA** 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 10th day of November, 2014 at Crater area in Rongai District within Nakuru County jointly with another not before court murdered JACOB KIPETWAN SANOE”

The accused pleaded ‘**Not Guilty**’ to the charge and his trial commenced before the High Court in Nakuru on 13/4/2016. The prosecution led by the learned State Counsel called a total of six (6) witnesses in support of their case.

PW1 SIMEON OLE SURURU told the court that he had employed the deceased ‘**Jacob Kipetwan Sanoe**’ as his herdsman. On 9/14/2014 the deceased sought permission from **PW1** to go to collect his clothes from his home in Crater. **PW1** granted the permission sought and the deceased left. He was due to return the next day. However on 10/11/2014 at 10.00am. **PW1** received a phone call informing him that his herdsman had been assaulted and killed. **PW1** rushed to Menengai Police Station and later he went to the scene, where he found the body of deceased lying dead. The accused who was found sleeping in a shelter near where the body lay was arrested by police.

PW4 JOSHUA KEREMA and **PW5 WILLIAM MUSEI** told the court that on 10/11/2014 **PW1** called them and informed them that his herdsman had been killed. Both **PW4** and **PW5** accompanied **PW1** to Nakuru. On the way they met one ‘**Ole Nchoe**’ in whose compound the deceased’s body had been found. They then went all together to Kiamunyi police station. They later went with police to the compound of ‘**Ole Nchoe**’ at Crater. There they found the badly injured body of the deceased lying outside. The accused who was found sleeping in a shelter within that same compound was arrested.

Police commenced investigations into the killing of the deceased after which the accused was charged with the offence of murder.

The prosecution having closed its case this court must now analyze the evidence on record, and make a determination whether a prima facie case has been established to warrant placing the accused onto his defence. In considering whether a prima facie case has been established the court must be satisfied that the evidence on record would be sufficient to support a conviction even if the accused person elected to keep silent in his defence.

In this case the fact of the death of the deceased is not in any doubt. All the prosecution witnesses testified that they saw the body of the deceased. **PW2 DANSON GIKANA** and **PW3 SOLOMON SANDE** who were brothers of the deceased told the court that they identified the body of the deceased at the mortuary before the autopsy was conducted. All the witnesses who knew the deceased well identified him as ‘**Jacob Kipetwan Sanoe**’.

Evidence regarding the cause of death of the deceased was tendered by **DR. TITUS NGULUNGU** a consultant pathologist who testified as **PW6** and who conducted the autopsy on the body of the deceased **PW6** told the court that he noted several cuts and bruises on the body, hands and head of the deceased. In his expert medical opinion the cause of death was ‘**severe head injury attended by scalp haematoma and epidural haematoma as a result of multiple blunt object trauma in keeping with homicide**’. The pathologist filled and signed the post mortem report which was produced as an exhibit **P. exb 1**. I am therefore satisfied that it has been proved that the deceased met his death due to a vicious assault on his person.

Having proved the fact as well as the cause of death the prosecution must go further and adduce evidence to prove that it was the accused who inflicted the fatal injuries on the deceased.

There was no eye witness to the events which led to the death of the deceased. All the prosecution witnesses told the court that they only went to the scene **after** the deceased had been killed. That being the case the prosecution seeks to rely on circumstantial evidence in order to implicate the accused in this murder.

Circumstantial evidence is that evidence which though not direct sufficiently points at an accused person as the perpetrator of an offence. In the case of **JUDITH ACHIENG OCHIENG Vs REPUBLIC [2009] eKLR** the Court of Appeal held as follows

“It is settled law that when a case rests entirely upon 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”**

Therefore the evidence available ought to be such as to point exclusively and unerringly at the accused as the person who fatally assaulted the deceased.

As stated none of the witnesses who were called to testify in this case witnessed the assault upon the deceased **PW2** who was a brother to the deceased told the court that he **‘heard’** that a fight had taken place at that compound. **PW2** did not himself witness any fight. He had no idea who were involved in that fight. Neither did **PW2** disclose to the court who had given him the information about this alleged fight. This therefore remains hearsay evidence which is not admissible as proof of any fact in issue.

PW1 and **PW4** told the court that the accused who was found sleeping in a house in that compound told them that it was he and another who killed the deceased. Such a statement if made would amount to a confession. The law governing the admissibility of confession is clearly set out in **Section 25A of the Evidence Act, Cap 81 Laws of Kenya**. Section 25A reads as follows

“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of Chief Inspector of Police and a third party of the person’s choice”.

No confession recorded from the accused in the above manner was produced as an exhibit in this case. No officer of the rank of Chief Inspector and above was called to testify that such a confession was recorded. This is despite the court having been told that the accused allegedly made a similar admission in the presence of the police. In the absence of a properly recorded written confession, statements allegedly made by the accused to civilian witnesses cannot be used to implicate him in this offence, and will not be considered by the court.

It is clear that the only reason why the accused was arrested was because he was found asleep in a house within the compound where the body of the deceased was found.

The fact that the accused was found sleeping in the same compound where the body of the deceased was recovered certainly raises the suspicion that he may have been involved in or at the very least had witnessed the attack on the deceased. However it is settled law that suspicion alone no matter how strong cannot form the basis for a conviction. In **SAWE Vs REPUBLIC [2003] KLR 364** the Court of Appeal held as follows:-

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt”

Aside from the fact that the prosecution case relies merely upon suspicion, the court was told that one **‘Ndungu’** was also arrested as a suspect in this case. The police later released this **‘Ndungu’** but the court has not been told why he was exonerated from blame, neither was this **‘Ndungu’** called as a prosecution witness.

With the evidence on record to place the accused on his defence would be tantamount to calling upon the accused to fill the gaps in the prosecution case. This would be tantamount to shifting the burden of proof. The accused has no obligation in law to explain himself.

I therefore find that the prosecution in this case have failed to prove a prima facie case. If the accused elected to keep silent in his defence the evidence on record would not be sufficient to support a conviction. Therefore I 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 and delivered in Nakuru this 29th day of September, 2017.

Mr. Ndicho holding brief for Mr. Nyagaka

Maureen A. Otero

Judge