



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 15 OF 2012**

**REPUBLIC.....STATE**

**VERSUS**

**JOSEPH MAINA NDUNGU.....ACCUSED**

**JUDGMENT**

The accused **JOSEPH MAINA NDUNGU** faces a charge of **MURDER CONTRARY TO SECTION 203as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

***“On the night of 3<sup>rd</sup> and 4<sup>th</sup> day of March 2012 at Tipis Centre Mau Narok Division, Njoro District within Nakuru County, jointly with others not before court murdered KONANA OLE KISAKA”***

The accused pleaded ‘**Not Guilty**’ to the charge and his trial commenced on 7/10/2015. The prosecution called four (4) witnesses in support of their case.

**PW1 KOLIAN NDAITA** told the court that on 4/5/2017 at 7.30 am he was alerted by police that there was a dead body at Tipis Centre. **PW1** went to the centre where he found the body of the deceased lying naked outside the house of one ‘**Paul Kool**’. **PW1** recognized and identified the deceased as his neighbor ‘**Kanana Ole Kiasaka**’. Next to the body **PW1** saw a can and shoes all which belonged to the deceased. He phoned the relatives of the deceased who went to the scene.

Later the crowd of villagers went to the house of accused where they found the accused and one Kadenga. Both men ran away. The mob gave chase and caught the accused while ‘**Kagenga**’ escaped and has not been apprehended to date.

**PW1** went on to state that inside the house of the deceased they recovered the top of Kaunda suit which was said to belong to the deceased. The accused was taken to the police station where he was placed into cells. The accused was eventually charged with this offence of murder.

The prosecution having closed its case, this court must now analyze the evidence on record to determine whether the evidence is sufficient to establish a prima facie case to warrant calling upon the accused person to defend himself.

In this case **PW2 KANONE KISAKA** a brother of the deceased formally identified the body of the deceased to the pathologist was called to testify. **PW1** also told the court that he knew the deceased well as the deceased was his neighbor. **PW1** confirms that he saw the body of the deceased at Tipis Centre. Both witnesses who knew the deceased well gave his name as ‘**KONANA KISAKA**’. I therefore find that the fact of the death of the deceased has been proved.

Evidence regarding the cause of death of deceased was tendered by **PW4 DR. TITUS NGULUNGU** a consultant pathologist based at PGH – Nakuru. **PW4** told the court that an autopsy was conducted on the body of the deceased on 5/3/2012 by his colleague ‘**Dr. Gikenye**’.

The body was found to have multiple bruises and lacerations on the head and neck as well as strangulation marks on the neck. The cause of death was opined to be ‘**severe head injury with strangulation leading to suffocation from pressure to the neck due to blunt force trauma**’. **PW4** produced as an exhibit the duly signed and filled post-mortem report **P. exb 2**.

From the evidence of the pathologist I am satisfied that the cause of the deceased’s death has been proved beyond reasonable doubt.

Having proved the fact and cause of death the prosecution is required to go further and prove the '*actus reus*' of the offence of murder. Evidence must be adduced to prove beyond reasonable doubt that it was the accused who unlawfully assaulted the deceased and caused the injuries that led to his death.

**PW1** told the court that he went to Tipis Centre where he found the body of the deceased. **PW1** himself has no idea who killed the deceased. He told the court that he saw the cap and shoes belonging to the deceased lying next to the body.

**PW1** told the court that he and other neighbours went to apprehend the accused and searched his house. Inside the house **PW1** claims they recovered the shirt of a Kaunda suit which was identified by deceased's relatives as belonging to the deceased. None of these recovered items was produced before court as an exhibit. Thus the court is left in doubt as to whether such items were ever recovered at all.

Whereas **PW1** claims that this Kaunda suit jacket was found in the house of the accused, **PW2** the brother of the deceased who was also at the scene gives an entirely different story. **PW2** says that when the crowd tried to apprehend the accused he took to his heels. The crowd chased and caught the accused and he was found wearing the jacket. In his evidence in chief **PW2** stated thus

*“When we caught the accused he was wearing the deceased’s shirt. I am sure he was wearing the shirt. I did not examine the shirt. I do not know if it has any stains”.*

The testimony of **PW2** contradicts that of **PW1** in several regards. Firstly **PW1** told the court that the shirt was found inside the house of accused. Whereas **PW2** claims that accused was caught wearing the shirt.

Secondly **PW1** told the court that the brothers of the deceased identified the shirt as belonging to the deceased. **PW2** who was a brother to the deceased told the court that he **did not** examine the shirt. If **PW2** did not examine the shirt how could he have positively identified it as belonging to the deceased.

Finally **PW2** said there were blood stains on the shirt whilst **PW2** said he saw no stains on the shirt. Thus these two witnesses who were at the scene gave diametrically opposed testimony regarding the recovery of a critical exhibit. As stated earlier shirt was never produced in court as an exhibit which was a serious omission in the prosecution case.

The evidence of **PW3 STEPHEN KANDET** who also claims to have been at the scene at Tipis Centre throws the whole issue into even greater confusion **PW3** stated that the black Kaunda suit jacket was found lying next to the body of the deceased. **PW3** also stated that he had seen one man known as '*Mkorino*' wearing that jacket. The court is not told who this '*Mkorino*' was. How could **PW3** be sure that it was the very same jacket. **PW3** further stated in his evidence that the crowd stated that the jacket belonged to '*Ndungu*' (accused). The names of the persons who said this, were not given neither were these persons called as witnesses. Kaunda suit jacket are common items of clothing in this country and look alike. How was **PW3** able to differentiate one from another. Thus this same jacket was apparently seen by three witnesses in three different locations. **PW1** saw the jacket inside the house of accused. **PW2** saw the jacket being worn by the accused whilst **PW3** saw the same jacket lying next to the body of the deceased. Given these material contradictions it is quite obvious that the three witnesses were not being truthful in their evidence. They cannot all have been telling the truth. These contradictions coupled with the failure by the prosecution to produce this all important witness severely weakens the prosecution case.

Aside from this fiasco concerning the exhibits it remains unclear why the accused was arrested in connection with this murder of the deceased. No person saw accused attack or assault the deceased at all.

**PW2** told the court that it 'was said' that accused and another had killed the deceased **PW2** did not specify the names of the persons who said this **PW2** further stated in his cross-examination that accused was arrested because the crowd said he was known thug in the area. **PW2** stated

*“The people at the centre said accused is a known thug”*

This cannot form the basis for implicating the accused in this murder. None of those who stated that the accused was a '*known thug*' in the area was called to testify. This remains a mere rumour with nothing to back it.

The prosecution failed to call the investigating officer to explain what link (if any) the accused had to the murder of the deceased. This court finds no evidence to prove much less to suggest that the accused was involved in the murder of the deceased.

I find that the prosecution case is weak and is full of inconsistencies and contradictions no prima facie case has been established against the accused. Accordingly 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 19<sup>th</sup> day of October, 2017**

Mr. Obutu holding brief for Mr. Magaka

Mr. Chigiti for DPP

**Maureen A. Odera**

**Judge**