



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 10 OF 2017

REPUBLIC.....PROSECUTOR

-VERSUS -

PAUL MUIRURI.....1ST ACCUSED

KA.....2ND SUBJECT

AK alias K.....3RD SUBJECT

RULING

1. The subjects in this case Paul Muiruri hereinafter the 1st accused, Kelvin Adula, the 2nd subject and Amos Kasyoki Kimeu the 3rd subject face a charge of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the charge are:

“The 3 subjects on the night of 1st and 2nd March, 2017 at Amboseli Area in Kawangware, within Nairobi County jointly with others not before court murdered Paul Sila Musyoki.”

2. The Prosecution has called a total of 10 witnesses.

3. The gist of the prosecution case is that on the 2nd March 2017 at around 7 a.m. the Prosecution witnesses PW1 and her husband PW8 were at home when they heard people saying that a person had been murdered.

4. Each went out on their own to a path between buildings under construction where they saw the body of the deceased lying dead in a pool of blood. Each noticed a two building stones near the head of the deceased one of which had blood.

5. Later that morning at around 10 a.m. the 2nd subject in this case went to the scrap metal stall where PW1 and 8 did their business and started saying that he had the sim card of the deceased. He also told them that the phone from which the simcard came from was with the 1st accused in this case.

6. PW1, 2 3 and 8 were all at the stall when the 1st accused and 3rd subject went there. That is when the 2nd subject was asked to say who had the phone from which he got the simcard. They stated that the 2nd subject implicated the 1st accused who immediately denied having any phone.

7. The witnesses stated that after an exchange between 1st accused denying having any phone and 2nd subject saying he had one, the 3rd subject reached out to the pocket of the 1st accused and pulled out a phone. The phone was identified as P.Exh.2.
8. According to PW1 and 8 when they asked the 2nd subject how they came by the phone and simcard, he told them that he, the 1st accused and 3rd subject were coming from having supper when they met the deceased. The 2nd subject then said that the 1st accused tripped the deceased who fell down after which he stole the phone from him.
9. PW1 and 8 testified that when 2nd subject told them about the tripping of the deceased, the 1st accused and 3rd subject were not there. The two witnesses stated that when the 1st accused and 3rd subject came, they posed the same question to the 1st accused.
10. In answer to the question the 1st accused told PW1 and 8 that he collected the phone on the ground near where the deceased was lying.
11. None of the counsels in this case, Ms. Onunga for the Prosecution and Mrs. Wangombe for the subjects made any submissions at the close of the prosecution case.
12. The 1st accused and the 2nd and 3rd subjects face a charge of murder contrary to **section 203** of the **Penal Code**. The prosecution had the burden of proof in this case to prove that the 3 subjects, by some unlawful act inflicted injury on the deceased out of which he died, and further that at the time they inflicted the fatal injuries on the deceased, they had formed the intention to cause either death or grievous harm to the deceased.
13. There was no eye witness called to say how the deceased met his death. The investigating officer in this case, PW10 was clear that he took statements from the 3 subjects and other witnesses before deciding to charge them with this offence. PW10 did not produce the statements by the subjects which can be interpreted to mean that the statements were not helpful to the prosecution case.
14. Having considered the prosecution evidence, it is clear to me that two facts were the reason of charging the 1st accused and the 2nd subject in this case. The first one is the phone P.Exh. 3 and the second the statements made by the 2nd subject to PW1, 8 and others. The simcard was not produced as an exhibit.
15. I will begin by considering the issue of the phone. Apart from adducing evidence to show that the phone was recovered from the 1st accused, the prosecution needed to adduce evidence to create a nexus between the subjects, that phone and the deceased death.
16. We had a Data from the phone produced as P.Exh.10 by the Investigating Officer PW10. It shows that at the period in issue the phone was paired with a mobile subscriber number registered in the deceased name. The Identity card of deceased was exhibit 11 and shows the name on it as name of subscriber of the mobile line panel with the phone at the period in question. That evidence created a nexus between the deceased and the phone. It however did not create any nexus between the deceased death and the 1st accused and the co-subjects in this case. The prosecution proved that the phone belonged to the deceased through IMEI phone data.
17. What the prosecution has done is to leave it to the court to make a conclusion based on conjecture. What the prosecution established was that he phone was recovered from the 1st accused. The 1st accused denied having taken it from the deceased. What he said was that he collected it from the ground near where the deceased was lying. He did not admit doing anything to the deceased that could have caused any harm. There is a word of difference between collecting an object from the ground and taking it from the possession of a person who is later found dead.

18. It was not enough to show the 1st accused was found with the phone. There had to be a nexus established between the possession of the phone by the 1st accused and the injuries which led to the death of the deceased. That is to say specifically that the 1st accused caused the deceased death in order to take possession of the phone. This was lacking.

19. The other issue has to do with statements attributed to the 2nd subject. It was the evidence of PW8 that the 2nd subject stated that the 1st accused and his co-subject in this case came into possession of the phone after the 1st accused tripped the deceased as a result of which tripping he fell down. The 2nd subject is said to have alleged that the 1st accused then stole from the deceased as he lay on the ground.

20. Dealing first with the issue of tripping and whether that could have caused the deceased death. The findings of Dr. Njeru who carried out the postmortem on the deceased found that the body had multiple abrasions on the face and scalp measuring between 1x1cm and 7x7 cm. The pathologist testified that internally there was a fracture of the skull extending to the base with bleeding into the substance of the brain and lacerations or tears of the brain matter.

21. Dr. Njeru testified that after her examination she was of the opinion that the cause of death was head injury due to blunt force trauma. Dr. Njeru ruled out a fall as the cause of the head injury explaining that the injuries the deceased had on the face and head were widely distributed, that was so much damaged on the brain which could not have been caused by a basic fall. Dr. Njeru testified that such injury could only have been caused by several falls, a fact she ruled out because a person with the kind of injury she noted on the brain could not have been able to raise up several times. The Report is P.Exh.5.

22. I have considered the doctor's finding at post-mortem against the rest of the evidence adduced before court. The doctor's finding are not in tandem with the statement by the 2nd subject that the deceased was tripped by the 1st accused directly leading to a fall. Dr. Njeru was clear that a single fall could not have caused the deceased the kind of head injury he suffered and which caused his death.

23. The doctor's findings can only mean one thing which is that even if the 1st accused tripped the deceased leading to a fall, such fall could not have caused the injuries the deceased was found to have suffered in this case.

24. I am disturbed by the poor level of investigation carried out in this case. Not only is the prosecution case an exoneration of the subjects as being the ones who caused the death. That notwithstanding PW10 went ahead to charge the subject children with this most serious offence. There was a level of indifference on the part of the Investigating Officer. The action he took was in defiance to the **Provisions of Article 53 of the Constitution** which requires that actions taken which affect a child must take into account the best interest of that child. The best interest of the children charged in this case was not considered and that is a travesty of justice. The decision to charge them was sadly made by a very senior police officer who should have known better. At the very most what the Investigating Officer should have recommended was an inquest into the deceased death.

25. I find that the prosecution has failed to adduce evidence to show that the deceased death was caused by acts of the subjects whether singly or jointly. The evidence points more to the death having been caused by the act of others not in court. There is no evidence adduced to show that those others were acting with a common intention with the subjects in this case.

26. I have come to the conclusion that the prosecution has failed to establish a prima facie case against the 1st accused and the 2nd and 3rd subjects to warrant the court place them on their defence. Accordingly I acquit them of the charge at this stage under **section 306 of the Criminal Procedure Code**.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF DECEMBER, 2017.

LESIIT J

JUDGE