



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL (MURDER) NO. 13 OF 2010

REPUBLICPROSECUTOR

VERSUS

BENARD KOROSO MICHIEKA ACCUSED

JUDGMENT

1. The accused, **Bernard Koroso Michieka**, was charged together with another for the offence of murder, contrary to S. 203 as read with S. 204 of the Penal Code, in that on the 22nd January 2010, at Nyakononi – Masaba South District, jointly with others not before court murdered, Joel Nyandusi Siringi.

2. The case for the prosecution was that on the 23rd January 2010, the Chief of Nyakononi Location, **Robert Osiemo (PW 1)**, was notified by an assistant chief that there was a dead body at a river bed. He proceeded to the scene and found that it was the body of the deceased. He immediately reported the matter to the police at Ramasha Police Station.

3. On the same day (23rd January 2010), a brother to the deceased, **Simon Miromba Silingi (PW 2)**, identified the body for post mortem purposes. The post mortem was performed by a DR. Maurice Rauta, on the 2nd February 2010 and the necessary report (P.Ex 1) was produced in court by **DR. Samuel Onchara (PW 3)**.

4. On 28th January 2010, the Chief (PW 1) was informed by the Assistant Chief that the accused had been arrested after being found hiding in a maize store.

The Assistant Chief, **Jackson Ondari Nyambane (PW 5)**, received information on the 28th January 2010, that the accused was suspected of having killed the deceased. He was arrested and taken to the Chief where he was interrogated before being handed to the police.

5. It was during interrogation that he alleged that he was forced by a group of five people to take them to the deceased and call him out. He gave out the names of those people. These included his co-accused Alfred Nyakundi Ondara, whose house was searched by the police and a blood stained axe recovered.

6. On the material date of the offence (i.e 22nd January 2010) at about 10.00 pm, the deceased was at home with his son, **Daniel Nyandusi Araka (PW 4)**, when a group of people arrived there and called out the deceased. The son identified the accused by voice as one of those who called his father. His father opened the door and left with the group only for his dead body to be found near a river on the following day.

7. **PC Edward Nzau (PW 6)**, investigated the matter after the necessary report was made to them on the 23rd January 2010. In the process, he arrested the accused and his co-accused and later charged them with the present offence. He forwarded a blood stained piece of cloth and a blood stained axe to the Government Analyst for necessary examination. The Government Analyst, **Henry Kiptoo Sanga (PW 7)**, examined the items and prepared a report which he produced in court (P. Ex 4).

8. At the close of the case for the prosecution, accused was placed on his defence while his co-accused was found to have no case to answer and was acquitted accordingly.

In his defence, the accused denied the offence and contended that none of the witnesses saw him committing the offence. He denied that he was at the scene of the offence when it occurred and said that the blood stained items were not found in his possession.

9. The accused further stated that he was arrested together with other people who were released. He also contended that the deceased was his neighbour and friend and was informed that he was killed by unknown people on the 22nd January 2010, when he (accused) was at his house. He (accused) was arrested by the area chief on 28th January 2010, and told that he was required at the police station to record a statement but was instead charged with the present offence.

10. At the end of the trial, learned counsel for the accused, **MR. Ondari**, submitted that the prosecution did not prove its case against the accused beyond reasonable doubt. That, the prosecution witnesses relied on mere hearsay and out of the nine people arrested by the police only the accused and another were charged. That, there was no explanation by the police for the release of the other suspects.

11. Learned counsel further submitted that the accused was framed and that the evidence of the doctor (PW 3) being opinion evidence should be rejected by this court as the doctor did not see the deceased and therefore, the cause of death was not established. That, the accused was abducted and being a friend of the deceased was forced to wake him up. That, the blood stained axe was not linked to the accused at all.

12. In his rejoinder, the learned Prosecution Counsel, **MR. Ochieng'**, indicated that he was fully relying on the evidence on record. He therefore urged this court to convict the accused.

From all the foregoing submissions and the evidence in its totality, there can be no doubt that the deceased was murdered. He was forcefully and/or menacingly taken from his house in the night and taken to an unknown place where he was murdered and his body dumped in a river or in the vicinity of the river.

13. The post mortem report (P.Ex 1) indicated that the cause of death was cardio respiratory arrest due to severe haemorrhage meaning that the deceased was assaulted and fatally injured. Those responsible for this criminal act were definitely those who went for him in his house. They included the accused whose voice was heard and recognized by the deceased's son (PW 4).

He (accused) also indicated in his defence that he was at the home of the deceased when he was fetched from there. He however implied that he was there involuntarily as he was abducted by the actual offenders and forced to go there for purposes of waking up the deceased who was his friend.

14. The accused indicated that the offenders used him against his will to lure the deceased out of his house. He went further to give the names of those who went for the deceased. This was confirmed by the prosecution through the Chief (PW 1), the Assistant Chief (PW 5) and the investigating officer (PW 6).

It would therefore follow that although the accused was charged with the murder of the deceased there was no proper or credible evidence to show that he acted in concert and with a common intention with the actual offenders.

15. At most, the accused was merely suspected for the reason that he was with the actual offenders

when the deceased was removed from his house. However, the explanation given by the accused for being there was satisfactorily explained not only to the local administration officers but also the police. In fact, the accused played a great role in having the actual offenders or some of them arrested after he mentioned their names but surprisingly, only one was charged together with the accused. He was the accused's co-accused who was earlier acquitted by this court basically on technicality.

16. The rest of the arrested suspects were released without proper explanation from the police. Suffice therefore to say that the accused was used as a "fall guy" or a "red-herring" to justify the arraignment of any person for the murder of the deceased whether that person was or was not involved in the offence and with the full knowledge that the actual offenders who should have been in the dock were released.

17. In a criminal case the obligation to prove a charge against an accused person lays squarely on the prosecution. It is not for the accused to prove his innocence (see, **Chemagong Vs. Rep (1984) KLR 611**).

In the instant case, the commission of the offence was duly proved as there was no substantial dispute with regard to the cause of death. However, the involvement of the accused was not proved especially when it is considered that the prosecution acknowledged that he was "abducted" or "kidnapped" by the actual offenders who forced him to lead them to the deceased.

18. In the circumstances, the defence raised by the accused is hereby sustained. He is in the end result found not guilty as charged and is acquitted accordingly.

J.R. KARANJAH

JUDGE

[Delivered and signed this 21st day of June 2016]