



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 88 OF 2010

REPUBLIC PROSECUTOR

VERSUS

ROY ITOTIA WAIRIMU 1ST ACCUSED

LABAN KAMAU MUHIA 2ND ACCUSED

MOSES NJAU WAIRIMU 3RD ACCUSED

RULING

The three accused persons **ROY ITOTIA WAIRIMU** (hereinafter referred to as the 1st accused) **LABAN KAMAU MUHIA** (hereinafter referred to as the 2nd accused and **MOSES NJAU WAIRIMU** (hereinafter referred to as 3rd accused) are jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

“On the night of 24th and 25th of December 2009 at Maryland Village Nyandarua District within the Central Province, jointly with others not before court murdered JOSEPH MWANGI WAMBOI”

All the three accused persons entered a plea of ‘**Not Guilty**’ to the charge. Their trial commenced before **HON JUSTICE WILLIAM OUKO** (as he then was) on 18th May, 2011. The learned Judge heard the evidence of six (6) prosecution witnesses. Following the transfer of ‘**Justice Ouko**’ (as he then was) from Nakuru **HON LADY JUSTICE HELEN OMONDI** took over the case and heard two (2) prosecution witnesses. Following the transfer of ‘**Lady Justice Omondi**’ to Bungoma High Court, I took over the hearing of the case. No witness testified before me and the prosecution eventually closed its case on 7th October, 2015 – a full three (3) years after the trial started.

The brief facts of the prosecution case are as follows: **PW1 MERCY WARIARA KIGERA** was the wife to the deceased. She told the court that on 24/12/2009 at 7.00pm she and the deceased were at home together. The 2nd accused came and called the deceased from outside. The deceased left with the 2nd accused. The deceased did not return home that night. **PW1** assumed that he had gone to attend a prayer vigil ‘**Kesha**’ with one ‘**Jimmy**’. The next day 25/12/2009 at 2.00pm she asked ‘**Jimmy**’ if he had seen the deceased but the said ‘**Jimmy**’ denied that he had attended the ‘**kesha**’ with the deceased.

PW5 MONICA WANJIRU told the court that on 24/12/2009 ‘**Kamau**’ the 2nd accused came and told her that ‘**Mwangi**’ the deceased wished to see her. **PW5** went to where the deceased was. The deceased requested her to accompany him to a bar. Since it was late the deceased then suggested that the two (apparently they were lovers) go and spend the night in the house of 3rd accused since the deceased had a key to that house. **PW5** and deceased went to the house of 3rd accused and retired to sleep. At about 11.00pm the 3rd accused came and called the deceased from outside. The deceased left and never returned. The following day at 6.00am **PW5** woke up and left to go back to her home. Later that day on 25/12/2009 the naked body of the deceased was found lying dead inside a toilet in the compound of the 3rd accused.

PW8 P C MICHAEL KURIA an officer from Ngano police station told the court that on 25/12/2009 at about 4.00pm he was on duty at the police station when ‘**Njau**’ the 3rd accused came and reported that whilst going to answer a call of nature he found a naked dead body lying inside his toilet. The 3rd accused led police to said toilet where they recovered the body of the deceased.

PW8 arrested the 3rd accused and placed him in cells as a suspect. The police continued with investigations. The 1st and 2nd accused persons were also arrested in connection with the incident. Eventually all three accused persons were charged with the offence of murder.

The prosecution having closed its case this court is obliged to analyze the evidence on record and make a determination as to whether any or all of the three accused persons have a case to answer. It is important to record at this point that the 3rd accused ‘**Moses Njau Kuria**’ unfortunately passed away during the course of the trial. His death was proved by production of a Death Certificate Serial No. 116747 issued by the Registrar of Births and Deaths in Nakuru. As such the trial against the 3rd accused abated on account of his death and the court will therefore make no finding in respect of this 3rd accused.

In order to show a *prima facie* case to warrant the placing of the 1st and 2nd accused’s on their defense, the evidence on record must point inexorably at the two as the perpetrators of the offence. In the case of **RAMANLAL T. BHATT Vs REPUBLIC [1957] E. A 332** a prima facie case was defined 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”

The offence of murder is defined by Section 203 of the Penal Code as follows-

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”

The question of the fact and cause of death of the deceased person are not in any doubt. Several witnesses have testified that the naked body of the deceased was found lying inside a toilet. All these witnesses who include **PW1** the wife of the deceased knew the deceased well and identify him as ‘**Joseph Mwangi Wamboi**’.

PW8 DR. BEATRICE CHESIRE a medical practitioner based at the Nyahururu District Hospital produced the post mortem report in respect of the autopsy conducted on the body of the deceased. **P. exb1**. She testified that upon examination the body was found to have “**bruising on the left cheek and a penetrating head injury exposing brain matter**”. It was also noted that the body “**had a depressed skull fracture and there was bleeding into the cerebral cavity**”

The doctor who performed the autopsy opined that the cause of death was “**severe head trauma secondary to penetrating head injury**”. This was expert medical evidence and was neither challenged nor controverted by the accused persons. I therefore find as a fact that the deceased met his unfortunate death as a result of being struck on the head.

The crucial question then is whether there is evidence to point at either the 1st and/or 2nd accused as the person(s) who so assaulted and killed the deceased. There was no eyewitnesses to the murder. The prosecution relies on circumstantial evidence in order to implicate the accused persons. In order for circumstantial evidence to suffice it must point exclusively at the accused persons as the perpetrators of the offence. In the case of **SAWE Vs REPUBLIC 203 KLR 364** the Court of Appeal sitting in Nairobi held that

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

In this case as stated earlier no person saw any of the accused persons lift a hand against the accused. **PW1** stated merely that on the night in question the 2nd accused came and called the deceased from their home. The deceased voluntarily and willingly left to go with the 2nd accused. He was not forced or compelled to. **PW1** has no idea what transpired after the two left together. She had no idea where they went, who they met with or what could have happened to her husband. The mere fact that the 2nd accused left the house with the deceased on the material night cannot lead to the imputation of any guilt on his part. **PW1** does not mention having seen the 1st accused at all on that day.

PW2 GITHUA WAMBUI was a brother to the deceased. He only talks of having seen the deceased with the 3rd accused. Like **PW1** he had no idea what happened after he left them and went to his home. **PW2** states that the deceased informed him that he would be going to church, with the 2nd accused but under cross examination at page 18 line 4 **PW2** confirms that

“I never saw the 2nd accused”

PW3 MARY NJERI WANJIRU was an in-law to the deceased. She told the court that sometime in April 2010 (about four (4) months after the death of the deceased) she saw the 1st accused using a mobile phone allegedly which belonged to the deceased. This mobile phone was never produced in court as an exhibit for **PW1** to identify. I find it strange that police failed to produce the mobile phone to enable **PW1** the wife of deceased (who would be better placed to identify the deceased’s properly) to identify said phone. Whereas **PW3** claims in her evidence that the deceased’s mobile phone was of a make ‘**Symdon**’, she admits under cross-examination that in her statement to police she recorded the make of the phone as ‘**G-Tide**’. It is clear that **PW3** has no idea what type of a phone the deceased had, how then can she claim to have seen deceased’s phone in possession of the 1st accused. In any event the fact that no mobile phone was recovered on the 1st accused, and no mobile phone was produced in court places grave doubts on the veracity of this claim. It remains but a mere allegation.

The evidence tendered by **PW4 JOHN KIMIRI MUHIA** an elder brother to the 2nd accused was totally valueless. **PW4** stated at page 21 line 3

“On 24/12/2009 I was at my shamba. Later I went home. I saw the 2nd accused leave my mother’s house at 3.00pm. I do not know where he went. I saw him the next day at 8.00am as I left him and I was returning home from the trading centre”

PW4 never saw the 2nd accused in the company of the deceased. He has no idea where 2nd accused went to or with whom. There was absolutely no point in putting this witness on the stand as he had no information whatsoever regarding the death of the deceased.

PW5 told the court that the 1st accused called her on behalf of the deceased. She met with deceased who was her lover and they decided to spend Christmas Eve night together in the house of the 3rd accused. Later 3rd accused called the deceased out of the house. **PW5** remained inside the house until the next morning. She has no idea where the two went, or what happened. **PW5** was clear that she heard no

commotion. She has no idea how the naked body of deceased came to be inside the toilet. **PW5** makes no mention of having seen 1st or 2nd accused that night. Indeed under cross-examination by counsel for the accused **PW5** confirms at Page 33 line 15

“The deceased was my boyfriend. I was at the police station for 3 weeks. I was a suspect. I do not know how the deceased was killed. I do not know Roy 1st accused. I have just seen him today”

PW8 who was the arresting officer confirms that it was the 3rd accused who came to report the finding of a dead body inside his toilet. **PW8** went to the scene and recovered the body. **PW8** states in his evidence that

“I booked the report, but I suspected Njau to be the culprit as he appeared unsteady, he was shaking and could not look me in the eye....”

This statement if not so absurd would be laughable. There exists no basis for suspecting the 3rd accused other than his appearances. For one to find a naked dead body in ones toilet would in my view lead to a certain amount of anxiety. **PW8** said he saw signs of struggle close to the scene but he cannot tell who were the persons who engaged in a struggle there. **PW8** stated that 3rd accused told police that he spent the night in his mother’s house (which would make sense since deceased and **PW5** had decided to spend that night in his house) yet police did not bother to interview his mother to confirm if this was true.

The above is the sum total of the prosecution case. It is pathetic. No meaningful investigations were conducted into this matter at all. The accused persons were only arrested because at some point one or other was seen in the company of the deceased. No concrete evidence is tendered as to what role if any they may have played in the death of the deceased. The police clearly had no clue who the culprit was. This is shown by the fact that they made various erratic arrests in connection with this matter. **PW2** told the court that the 2nd accused was arrested then released then arrested again. What evidence connected the 2nd accused to the murder of the deceased – it is not revealed at all. There are several gaps in the prosecution case which also lacks cogency. No investigating officer was called to testify to explain why he decided to charge the 2 accused persons.

PW5 told the court that she too was arrested as a suspect, detained for 3 weeks then later released. The police were clearly groping in the dark. The evidence against the 2 accused persons cannot even be said to amount to suspicion much less qualify as circumstantial evidence. If the 2 accused persons elected to keep silent in their defence this court could never render a conviction on the basis of the evidence on record. There is nothing to link either of the 2 accused persons to the death of the deceased. There is no *prima facie* case against them. I enter a verdict of ‘**Not Guilty**’ and I acquit both 1st and 2nd accused of this charge of murder. The 2 accuseds are set at liberty forthwith unless they are otherwise lawfully held.

Dated in Nakuru this 22nd day of July, 2016.

Maureen. Odera

Judge