



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 77 OF 2013

REPUBLIC PROSECUTOR

VERSUS

JAMES WATIRI WAINAINA... ACCUSED

JUDGMENT

The accused **JAMES WATIRI WAINAINA** 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 night of 6th and 7th August, 2013 at Mwiciringiri Village in Naivasha District within Nakuru county, murdered FRANCIS MAINAWAINAINA”

The accused entered a plea not ‘**Not Guilty**’ to the charge and his trial commenced on 17/3/2014 before my sister **Hon. Lady Justice Abigael Mshila**. The learned Judge heard the first four (4) prosecution witnesses. Upon her transfer to Nyeri High Court I did take over the case and I took the evidence of the fifth and last prosecution witness. **MR. NYAMWANGE** Advocate appeared for the accused. The brief facts of the prosecution case were as follows.

The accused and the deceased were brothers who lived in the same house within the compound of their mother. **PW1 MILKA WAITHERA WAINAINA** was the mother of both the accused and the deceased she told the court that on the night of 6/8/2013 at about midnight she heard a knock on her door. She heard her son (the deceased) calling out to her to open the door. **PW1** did not open her door. Sometime later she got up to go for a short call. She noticed blood at her door. She went to the deceased’s room and found him asleep his bed fully covered. Upon removing the bedcovers she saw that he was full of blood. The deceased was still alive though very weak – he could not talk. **PW1** noticed that the deceased had severe injuries on the back of his head. She woke up the accused who was sleeping in the next room and together they took the deceased to Naivasha Hospital. He was admitted there. The following day when **PW1** went to check on her son, she found that he had unfortunately died whilst undergoing treatment. The matter was reported to police who commenced investigations. Police later arrested the accused and arraigned him in court on the charge of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused gave an unsworn defence in which he denied any and all involvement in the death of the deceased.

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

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

Therefore in order to prove the charge of murder the prosecution must prove each of the following ingredients of the offence beyond a reasonable doubt

(i) The fact of the death of the deceased

(ii) The cause of that death

(iii) Proof that the death resulted from an unlawful act or omission on the part of the accused

(iv) Proof that said unlawful act or omission was committed with malice aforethought.

Regarding the fact and cause of death of the deceased there can be no controversy. PW1 the mother of the deceased as well as PW2 JAMES NJENGA KARANJA and PW3 JOSEPH WAINAINA KAMAU all confirm that the deceased who had been severely injured died in hospital whilst undergoing treatment. All the three witnesses who knew the deceased very well identify him as **‘Francis Maina Wainaina’**.

Evidence regarding the cause of death was adduced by PW5 DR TITUS NGULUNGU a consultant pathologist attached to Nakuru Provincial General Hospital. PW5 performed the autopsy on the body of the deceased. He stated that upon external examination of the body he noted bruises on the head and chest skull fracture with brain matter extruding and injuries to the spine. PW5 opined that the cause of death was **“severe head injury due to skull fracture due to multiple blunt trauma to the head”**

The witness filled and signed the post-mortem report which is produced as an exhibit in the matter **P. Exh 1**. Therefore I do find as a fact that the deceased met his untimely death as a result of a viscous assault to his person.

The key question then is who perpetrated this viscous assault leading to the death of the deceased – was it the accused as alleged?

There was no witness who saw the accused or any other person assault the deceased. Suspicion fell on the accused because he was found sleeping in the same house as the deceased. Thus the prosecution seeks to place reliance upon circumstantial evidence in order to prove the guilt of the accused. In order for circumstantial evidence to suffice as proof of guilt it must point exclusively at the accused as the perpetrator of the offence in question. In the case of **SAWE Vs REPUBLIC [2003] KLR 364** the Court of Appeal held as follows –

“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”

Thus all the evidence must point at the accused and at the accused alone as the perpetrator of this fatal assault.

As stated earlier the accused and the deceased were brothers who occupied the same house within their mother’s compound. On the material date PW1 who was their mother did not witness any fight and/or altercation between the brothers. She only stated that at about mid night the deceased came to her door and knocked requesting her to let him in. The deceased did not state why he wanted to be let into his mother’s house at midnight and PW1 declined to open her door for him. It was only much later when she came out to attend to a call of nature that she noticed a pool of blood at her door. By the time PW1 went to check on deceased she found him lying in his bed unconscious and badly injured. PW1 has no idea who inflicted the injuries upon the deceased. The accused was asleep in the next room apparently totally oblivious of what had befallen his brother. PW1 states that it was she who woke up the accused and together they rushed the deceased to hospital. PW2 and PW3 were both brothers of the accused and the

deceased. However, neither has any evidence of value to offer as they were both away from the home on the material night. They saw and heard nothing. They were both only called later by their mother and informed that deceased had been injured.

From the evidence it becomes clear that both accused and deceased were heavy drinkers. Indeed under cross – examination. **PW1** reveals that the reason she declined to open for her son that night was because he was drunk. **PW1** states that

“I was called but I didn’t open because he (the deceased) was drunk..... I don’t know where he incurred the injuries I don’t know who killed Francis (deceased). I saw nothing. That is all

If as is suggested by the prosecution it was the accused who assaulted the deceased then given the very viscous nature of the attack and the multiple injuries sustained by the deceased, there would have been a loud commotion and or altercation as such an assault could not have occurred quietly. Yet **PW1** saw and heard nothing. No blood was found inside the house where accused and deceased were sleeping. No blood stains were seen on accused’s clothes or his beddings. No weapon was recovered.

PW2 states that

“I saw nothing at the house to show the brothers had fought at home.....”

Under cross-examination **PW2** states

“I don’t know what happened. I am not sure who did the act of murder.....”

PW4 PC ALKANJERO MUTWIRI who investigated the matter informed the court that the report recorded in the OB at Naivasha Police Station was as follows

“Deceased was drunk on that day. He appeared at home having been beaten by unknown people” (my emphasis)

If the police report indicated that the deceased was beaten up by ‘**unknown people**’ then on what basis was the accused charged. Why did police not follow up on this lead an investigate to find out who the deceased could have been drinking with on the material night.

PW4 told the court that a blood stained rungu was recovered in the compound **P. Exb 2**. Neither **PW1**, **PW2** nor **PW3** mentioned about the recovery of any weapon. **PW4** told the court that this rungu was submitted to the government analyst to determine whose blood was on the rungu. No report prepared by the government chemist was produced in court. No government analyst was called to testify. This is a serious omission in the prosecution case as evidence of the blood analysis would have helped show if the blood on the rungu came from the accused, the deceased or a third party. Failure to adduce this evidence means that several loopholes remain in the prosecution evidence.

On the whole I find that there exists no tangible or concrete evidence linking the accused to the murder of deceased. Suspicion fell on accused only because he and deceased shared a house. Suspicion alone cannot form the basis for a conviction. The police were too lazy to fully investigate this case. The accused was merely the closest and most convenient suspect. The possibility that the deceased may have been assaulted **outside** the home by third parties has not been ruled out. The circumstantial evidence does not point exclusively at the accused. As such I find that the prosecution have failed to prove the charge of murder beyond reasonable doubt. 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 22nd day of July 2016.

Mr. Bichanga holding brief for Mr Nyamwange

Maureen Odera

Judge

22/7/2016