



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 34 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL BUNDI MUTWIRI.....ACCUSED

JUDGMENT

Samuel Bundi Mutwiri is charged with the **offence of murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on the night of 14/4/2012 at Nkandone Village, Keeru Sub-Location, Kithirune Location, Meru County, murdered **Elias Murithi Mutwiri**.

The accused denied the offence and the case went to full trial with the prosecution calling a total of 6 witnesses.

The accused testified on oath but did not call any other witness.

The accused was represented by Mr. Gichunge while the prosecution was led by Mr. Mulochi.

PW1 Phineas Mutwiri is the father of the accused person and the deceased. **PW2 Joyce Mthuura** is a step-mother to both accused and deceased. The two witnesses were asleep in the same house but in different rooms on the night of 14/4/2012 about 10.00 p.m. when Elias (the deceased) woke up PW2 to give him food. She gave him food and he said that he was going to eat in his house which was behind PW1's house about 30 metres away; that the deceased had to pass by Bundi's house (accused) before reaching his. PW1 said that he heard a bang and heard deceased say "**do not kill me my brother**"; that he knew that it was Bundi because Bundi replied that he would teach him (deceased) a lesson that day and he heard deceased being hit three times. He was afraid and did not go out. Later, he heard Bundi's wife calling the Chief telling him that Bundi had killed the brother. He later heard the Chief, assistant Chief and Sub-Area talking outside and that the Sub-Area called him but he did not respond; that the Police came to the scene about 2.30 to 3.00 a.m. but he never came out of the house. He later identified Elias' body at the mortuary for purposes of post mortem. He said that his two sons had been friends but admitted that they had once fought when the deceased removed the Accused's teeth.

PW2 Joyce Nthuura generally reiterated what PW1 told the court that after Elias left with food, she heard one sound and the noise of a person say that even if others came out, he would kill them. Like PW1, she never went outside the house even after he heard the chief talking. She said that the Accused and deceased loved each other.

PW3, Julius Kinoti, the Chief of Kithurine recalled that about 11.53 p.m. on 14/4/2012, he received a call from Peris Mwendwa (accused's wife) who informed him of there being a body near their house. He

called the Assistant Chief, the Sub-Area and they proceeded to deceased's home but they did not find anybody there. They then went to the accused's house where they found the accused and the wife. They were shown the deceased's body which was about 6-8 metres from the accused's house. They called the Police who came for the body. Contrary to what PW1 and 2 told the court, PW3 said that Bundi and Elias never related well and they had once fought when the deceased removed the accused's teeth and that deceased had been released from prison over possession of liquor, on that day he met his death.

PW4 Mercy Ncabira, a friend of the accused and the wife recalled that on 14/4/2012, the accused and his wife Peris went to her home at night and informed her that something had happened at their home and they wanted her to take care of their children. She went with them to their home and with use of a torch, saw Elias' body. She took the children. She saw PW2, the Assistant Chief and Sub-Area but did not see deceased's parents.

PW5 Dr. Irene Gichunuku, produced the post mortem report that was prepared by Dr. Kimani who performed post mortem on the deceased. The Doctor formed the opinion that the cause of death was head injury due to blunt force trauma.

PW6 Senior Sgt David Oliech, The Investigations Officer, received a call from PW3 informing him of the death of Elias. He went to the scene, drew a sketch map of the scene (PEX.No2). He preferred charges against the accused.

In his sworn defence, the accused stated that on 14/4/2012, he left home and went to do his business of selling cabbage, returned home about 1.00 p.m., went back to the market at Kiariene where he sold cabbage till 6.00 p.m.. He arrived home about 6.00 p.m., and went to bed about 9.30 p.m. He heard screams from outside and as he got up to find out, he saw his wife come into the house and did not know she had gone out. The wife informed him that somebody was lying outside their house, he went out, saw the person, noticed blood flowing from the person. He called his parents but they did not respond, the wife called the Chief Julius Kinoti (PW3). They also informed PW4 about what they had found at their home; that after the Chief came, he flashed a torch at the body and found that it was his brother Elias. The Accused denied that he had ever had any dispute with the deceased but that they related well and that he had only seen him that day after he was released from prison.

After the close of the defence case, Mr. Gichunge submitted that the prosecution had failed to prove their case to the required standard; that the case is based on circumstantial evidence; that PW1 and 2 claimed to have heard an altercation between the accused and deceased, then a scream, but they never came out of their house. He submitted that they are not credible witnesses; that they did not respond when the Chief called them; that they also failed to come out of their house when the Police came to the scene; that their evidence left many questions. He urged the court to acquit the accused.

Mr. Mulochi on the other hand urged that the prosecution had proved its case beyond any doubt; that PW1 was able to identify the voice of the accused; Counsel relied on the decision of ***Gilbert Murithi Kabiru v Rep CRA 37/2013*** for the proposition that recognition of an assailant is more satisfactory and assuring than identification of a stranger; that there was bad blood between the accused and deceased and that PW1 even heard the deceased plead with the accused not to kill him. Counsel urged the court to find that all the ingredients of the offence of murder had been proved.

Nobody witnessed the murder of the deceased. The incident took part about 10.00 p.m. in the night and therefore this case turns on circumstantial evidence and voice identification. The guiding principles when relying on circumstantial evidence have been espoused in many decisions. In ***Abang'a alias Onyango v Rep CRA 32/1990*** the Court of Appeal set out the principles to apply in order to determine whether circumstantial evidence can be a basis for a conviction. The Court said:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i). the circumstances from which an inference of guilt is sought to be drawn, must be

cogently and fully established;

(ii). These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(iii) the circumstances taken cumulatively should form a complete claim so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”

After analysing all the evidence, the court will have to consider whether the above stated principles have been met.

Post mortem was conducted on the body of the deceased by Dr. Kimani and the report produced in court by Dr. Gichunuku, PW5. The findings were that the deceased sustained several head injuries including fractures and the Doctor formed the opinion that the cause of death was head injury due to blunt trauma. The death of the deceased is not in dispute. The accused claims to have been one of the first to discover the body.

PW1 and 2 were in the same house on the said night. According to the two, the deceased had just taken some food from their house and was walking to his house when he was attacked. PW1 said he heard a bang, then he heard the deceased say in *Kimeru* “**please do not kill me my brother**” and that the accused answered that he would teach him a lesson. On the other hand, PW2 told the court that she only heard a sound then heard somebody say that even if the rest of them come out, he would kill them. She never heard anybody plead with the brother not to kill him. The evidence of the two witnesses is totally at variance as to what they heard. If indeed they heard the accused and deceased speak, one would have expected some of the words to be the same or even if the message was same but paraphrased, it would have been acceptable. The evidence of PW1 and 2 cannot be said to have been that of recognition of the accused’s voice. I appreciate that the accused is their son and it would have been easy to identify his voice but there should have been similarity in what they heard.

The evidence of PW1 and 2 is also questionable because of their conduct on that night. Despite the fact that they claim to have heard a cry and noise outside, they never went out. The Chief came to their home, he called PW1 but he failed to respond. The Police also arrived at the scene but they never came out of their house. Their conduct was abnormal so as to suggest that there is some information they did not disclose to the court.

To confirm that PW1 and 2 were not very credible witnesses, during cross examination, when their statements to the Police were referred to, it transpired that PW1 and 2 told the Police that they were scared of the accused because the accused used to threaten PW1 over land yet in their testimonies in court, the two (PW1 and 2) had insisted that they related well with the deceased. Could that be the reason they acted as they did, fear of the accused?

The only other evidence tending to link the accused to the offence is when PW2 said that the accused’s wife called the Chief and informed him that the accused had killed his brother. However, in court, PW2 said that the accused’s wife called the Assistant Chief and informed him that they had found a body near their home. That evidence was inconsistent.

According to PW1 and 2, they identified the accused’s voice from what he stated. Voice identification has been said to be more reliable than visual identification but the court has to take care that there is the possibility of error.

In *Maghenda v Rep (1986) KLR 255*, the court stated as follows:

“Identification by voice can be a sound and reliable method of identification... It can be equally safe and free from error, more so if the identification takes place at night” because there is no noise at the time.

In **Mbelle v Rep (1984) KLR 626** the court said:

“In relation to identification by voice, care would obviously be necessary to ensure:

(a) that it was the accused person’s voice;

(b) that the witness was familiar with it and recognized it, and

(c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who said it.”

In this case, the evidence of PW1 and 2 is contradictory as to what they heard on the fateful night and it cannot be said with certainty that what they heard was the accused’s voice. Of course, the accused is a prime suspect. He claims to have been in his house near where the body was found and the wife was the first to call the Chief to inform him of the death. It is evident from PW3’s testimony that the accused was not on very good terms with the deceased because they had fought before and deceased injured the accused. That was a possible motive for seeking revenge. In the end, I find that the circumstantial evidence is weakened by the doubts noted in the evidence of PW1 and 2 and cannot be relied upon to found a conviction. The evidence of PW1 and 2 is not watertight and required corroboration which is lacking. Suspicion, however strong, can never be a basis for conviction. For the above reasons, I find that the prosecution has failed to prove beyond any doubt that it is the accused who caused the death of the deceased but he is a prime suspect. I therefore give him the benefit of doubt and acquit him of the charge of murder under **Section 322 of PC**.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF OCTOBER, 2016.

R.P.V. WENDOH

JUDGE

25/10/2016

PRESENT

Mr. Mulochi fro State

Mr. Gichunge for accused

Ibrahim/Peninah, Court Assistants

Present, Accused