



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 7 OF 2006

REPUBLIC STATE

VERSUS

JOHN KAMAU WAINAINA 1ST ACCUSED

JOSEPH MAINA NDEGWA 2ND ACCUSED

PATRICK MUCHAI MUREITHI 3RD ACCUSED

RULING

The three accused persons **JOHN KAMAU WAINAINA** (hereinafter referred to as the 1st accused), **JOSEPH MAINA NDEGWA** (hereinafter referred to as the 2nd accused) and **PATRICK MUCHAI MUREITHI** (hereinafter referred to as the 3rd accused) are all charged jointly 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 27th and 28th of December, 2005, at Mairoinya Trading Centre in Nyandarua District within Central Province, jointly murdered ALI OSMAN DAHIR”

The three accuseds all pleaded ‘Not Guilty’ to the charge.

This is a case which has had a long and tortuous ten-year sojourn in the courts. The three accused persons were initially arraigned before the High Court at Nakuru on February 2006. Their trial first commenced before **Hon. Justice Luka Kimaru** in the presence of assessors who heard the first six (6) prosecution witnesses. Upon the transfer of ‘**Hon Justice Kimaru**’ away from Nakuru, Hon. **Lady Justice Mugo** took over the matter on 2/5/2008. The Hon Judge spent much time dealing with complaints which the accused persons had made to the court over the confiscation of some of their personal property by the police. Justice Mugo did not hear any prosecution witness.

On 9/2/2011 the three accused applied to have the case begin *de novo* on the basis that the assessors were delaying the hearing. By his ruling of 10/2/2011 the Honourable Judge dismissed this application and directed that the hearing proceed with the participation of assessors.

On 3/5/2010 **Hon Justice Anyara Emukule** proceeded with the hearing. The hearing proceeded again in the presence of assessors and the remaining four (4) prosecution witnesses testified. Thus a total of ten (10) prosecution witnesses testified in this matter in the presence of assessors.

On 22/11/2011 Hon. Justice Emukule ruled that all three accused persons had a case to answer and placed them on their defence. However before the defence hearing could proceed, Justice Emukule was transferred to the Mombasa High Court.

Hon. Lady Justice Wendoh took over the hearing. The accused persons through their advocate renewed their application for a *de novo* hearing. This application was argued in court and on 10/10/2012 Justice Wendoh directed that the case begin *de novo*. Subsequently Justice Wendoh was also transferred to the Meru High court.

I finally took up the conduct of this trial on 22/9/2015 almost nine (9) years after the trial had commenced. The trial began *de novo* before me. The prosecution called a total of six (6) witnesses in the trial before me.

PW5 ISSAC OSMAN DAHIR was the brother to the deceased. He told the court that the deceased who was a hawker went missing on 27/12/2006. **PW5** reported the matter to Mairoinya police station and together with police launched a search for the missing man. **PW5** suspected the 1st accused as he had earlier requested the deceased to deliver some clothes to his (1st accused's house).

The 1st and 2nd accused persons were found sitting by the road side and upon being pointed out by **PW5** both were arrested.

Police went to search the house of 1st accused where various items of clothing said to belong to the deceased were recovered. Upon searching a nearby toilet remains of a badly burnt body were recovered. The toilet was demolished and police recovered a burnt arm and leg **PW5** identified the remains as those of his late brother. Eventually the 3rd accused was arrested. Upon completion of police investigations all the three accused persons were charged with the offence of murder.

At this point the prosecution having closed its case this court must determine whether the evidence on record suffices to show a *prima facie* case sufficient to warrant placing the three accused persons onto their defence.

The definition of what constitutes a *prima facie* case was given in the oft cited case of **RAMANLAL T. BHATT Vs REPUBLIC [1957] E. A. 332** where the court opined that

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if at the close of the prosecution the case is merely one – which on full consideration might possibly be thought sufficient to sustain a conviction”

This is perilous near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill in the gaps in the prosecution case”.

Nor can we agree that the question whether there is a case to answer depends only on whether there is:-

“Some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”

The court in the **Bhatt Case** went on to hold that

“A mere scintilla of evidence can never be enough (to prove a prima facie nor) can any amount of worthless discredited evidence..... 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”

In any murder trial the primary ingredient requiring proof beyond reasonable doubt is the fact of the death of the deceased person. This required that evidence be tendered sufficient to prove that the person named in the particulars of the charge sheet is actually dead. In this case the name of the deceased was given as ‘**Ali Osman Dahir**’. He was said to have been a hawker plying his trade within Nyahururu who went missing on or about 27/12/2005.

PW6 CORPORAL PARTICIAH WAITHAKA told the court that after receiving the report about the missing man police launched a search for him. On 28/12/2005. **PW6** arrested the 1st and 2nd accused at Mairoinya Trading centre. They went to a house allegedly belonging to the 1st accused where they found blood stains on the floor. Upon checking the nearby toilet they recovered badly burned human remains including two hands and a leg. **PW5** identified those remains as his missing brother.

The question here is – can it be said with reasonable certainty that the leg and hands recovered were actually the remains of ‘**Ali Osman Dahir**’? Ordinarily identification of a corpse would be by the face. Under cross-examination by defence counsel **PW5** admits

“I never saw the face – it had been burnt”

It would be extremely difficult to identify a body by the hands or leg alone. **PW5** has not mentioned any distinctive mark which led him to positively identify those burnt remains as those of his missing brother.

PW2 SHEIKH MOHAMMED BOTA ALIO was an Imam at the Nyahururu Mosque. He told the court that the deceased was a fellow Muslim and an attendee at his mosque. **PW2** told the court that he was present when the toilet was demolished and the human remains recovered therein. **PW2** stated that he relied on the identification of the body parts by the relatives of the deceased. Apart from **PW5** the brother of deceased who did not provide clear identification, no other relative of the deceased was called to testify in court.

Under cross-examination by defence counsel **PW2** admits

“I cannot confirm that the human leg belonged to the deceased”

PW2 goes on to admit that

“There was no mark on the leg. I did not know the deceased well...”

In the Nigerian case of **UKWA GUBE ENEGWOH Vs STATE 1990 NWIR 469** the court held that

“Unless the death of a person in respect of whom the accused was charged is proved beyond reasonable doubt the accused may be convicted for the murder of a person yet alive. This should be avoided”

The prosecution seeks to rely on circumstantial evidence to link the body parts recovered in the toilet to the missing man. It was stated that the clothes allegedly belonging to the deceased were found in the house adjacent to the toilet. Those clothes so recovered were never produced as exhibit in the trial before me. As I indicated earlier this was a re-trial of a case that had started way back in February 2006. The exhibits which had been produced in the initial trial had gone missing and could not be traced for production in the second trial. Indeed on 28/7/2016 **MS RUGUT** Prosecution Counsel informed the court that

‘Ms Rugut – The exhibits were produced in the first trial but we have been unable to retrieve them back from the court’

Despite a summons being issued to the officer in charge of the stores at the Nakuru Law Courts these exhibits were never retrieved and were never produced in the trial before me.

As such there were no clothes to be identified by **PW5** or **PW2** as belonging to the deceased, more particularly none of the witnesses stated that any item of clothing belonging to the deceased was found **still attached** to the bodily remains. There is no clear nexus between clothes allegedly found **inside** the house and the burnt body parts recovered in an adjacent toilet.

Still on the issue of the identification of the recovered body parts I will turn to the evidence of **PW4 JOHN KIMANI MUNGAI** Government Analyst based in the Government Chemist Department in Nairobi. **PW4** told the court that certain exhibits which included the bodily charred pieces of flesh were delivered to him for examination and analysis. **PW4** stated that he compared the DNA profile generated from the burnt remains to the DNA profile generated from a blood sample taken from one '**Osman Dahir**' (said to be the father of the deceased) **PW4** concluded that the human remains **could have** originated from a son of Osman Dahir "....." (own emphasis).

However, under cross examination by defence counsel **PW4** goes on to admit that

"I could not establish scientifically that the pieces of flesh belonged to Ali Osman Dahir"

From the above analysis it becomes very clear that grave doubt remains regarding the origin of the charred bodily parts recovered in the toilet. It has not been proved beyond reasonable doubt that these bodily parts belonged to the deceased '**Ali Osman Dahir**'. In the absence of this proof of identity, a charge of murder cannot stand.

Even assuming that the charred body parts did in fact belong to the deceased the prosecution must tender evidence to link the three accused's to the disappearance and murder of the deceased. It is alleged that the 1st accused requested the deceased to go to his house to deliver some clothes. No witness has testified that he was present when the 1st accused so invited the deceased to his house. None of the accused persons were arrested at the house in question. **PW6** the arresting officer said he found the 1st and 2nd accused sitting by the roadside at Mairo Inya Trading Centre and arrested them there.

PW6 claims that the accused's then led him to a house adjacent to the toilet in which the body parts were recovered. It is alleged that certain clothes belonging to the deceased were found inside that house. As stated earlier no clothes were exhibits in court. **PW6** claimed that he prepared an inventory of the clothes and other items recovered inside that house. The witness was unable to provide that inventory to the court. This leads to doubt as to firstly whether such an inventory was ever prepared as claimed and secondly whether any of the items alleged to have been recovered in that house were in actual fact recovered there. The fact that **PW6** could lie to the court about preparing an inventory leads this court to doubt his veracity as a witness.

There is no proof at all that this house belonged to any of the accused persons **PW6** first claims that 1st accused gave him the keys used to open the house. Under cross-examination **PW6** admits that he did not include this important fact in his statement. After claiming that the house belonged to the 1st accused **PW6** later retracts and states that it was actually an abandoned house which 1st accused occupied. No evidence is adduced to prove that the 1st accused occupied that house. No neighbour was called to confirm who lived there.

Police further sought to link the 1st accused to the Offence by claiming that some blood stained clothes, blood stained axe were found in the house of his estranged wife '**Caroline Wanjiru**'. Although **PW6** confirmed that this '**Caroline Wanjiru**' was arrested by police she was later released under unclear circumstances. She was not called to testify as a witness, thus it is not proved that it was the 1st accused who took the bloody clothes and axe to her house. The court can only draw an adverse inference from the failure of the prosecution to avail this witness.

In his testimony **PW5** stated that he found 1st accused wearing a pair of shoes belonging to the deceased. However under cross-examination **PW5** admits that he did not record this fact in his statement. Such a crucial fact if true would not have been omitted by **PW5** in his statement to police. I find this to be but a

desperate attempt by **PW5** to link the 1st accused to the murder of his brother.

Much of the evidence centers around the 1st accused. No mention is made of the 2nd or 3rd accused's and no link is shown to exist between them and the disappearance or murder of the deceased.

On the whole I find that the evidence on record falls far below the threshold required to prove a *prima facie* case. The evidence adduced does not in my view suffice even to establish suspicion that the 3 accused's were involved in this offence. If the accused's elected to keep silent in their defence no conviction could be rendered. I therefore enter a verdict of '**Not Guilty**' and I acquit each accused of this charge of murder. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated in Nakuru the 16th day of December, 2016.

Mr. Mongeri for Accuseds

Mr. Motende for DPP

Maureen A. Odero

Judge