



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 43 OF 2012

REPUBLIC PROSECUTOR

VERSUS

JOHN MWAURA MASHUA 1ST ACCUSED

HENRY KARANJA NJOROGE 2ND ACCUSED

RULING

The two accused persons namely **JOHN MWAURA MASHUA** (hereinafter referred to as the 1st accused) and **HENRY KARANJA NJOROGE** (hereinafter referred to as the 2nd 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 4th day of June, 2012 at Kihingo Location Stoo – Mbili Village in Njoro Districk within Nakuru County murdered JEREMIAH KAMAU MUTHONI”.

Both accuseds pleaded ‘**Not Guilty**’ to the charge. Their trial commenced on 23/3/2014 and the prosecution called a total of four (4) witnesses in support of their case.

The deceased was a biological brother to the 1st accused. **PW1 JOSEPH KAGO KAMAU** an uncle to the deceased told the court that on the evening of 4/6/2012 the family were engaged in making funeral arrangements for a relative who had died. The deceased had been sent to purchase kerosene. He left with the 2nd accused.

Shortly thereafter **PW1** stated that he heard the deceased screaming. **PW1** rushed to check and found the deceased lying dead in a pool of blood on the ground. Next to the body were planks of woods which were blood stained and three caps. He went to report the incident at Ndege Police Station. Police later came and removed the body of the deceased to the mortuary.

PW2 PETER MASHUA testified that on the material day at 11.00pm he was engaged in funeral arrangements for this late father. **PW2** stated that he received news that deceased had died. He too rushed to the scene. He found the body of deceased lying next to a plank of wood with three caps nearby. Police were called in and they came and took the body to the mortuary.

At the close of the prosecution case this court must make a determination as to whether the evidence on record is sufficient to prove a *prima facie* case to warrant placing the two accused’s on 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 it was held that

“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 tribunals properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”

The two accused persons face a charge of murder. In order to prove a charge of murder a basic prerequisite is that the fact as well as the cause of death of the deceased must be proved beyond reasonable doubt. In this case the fact of death of the deceased is not in any dispute. Both **PW1** and **PW2** confirm that they saw the body of the deceased lying in a pool of blood. Both witnesses who are relatives of the deceased identify him as “**Jeremiah Kamau Muthoni**”.

Evidence on the cause of death is critical as it must be shown that the deceased met his death due to culpable homicide and not due to illness or other natural cause. Ordinarily the cause of death is sufficiently proved by way of a post-mortem examination by a qualified medical officer. In this case although the witnesses have testified that an autopsy was conducted on the body of the deceased, no evidence has been tendered by the doctor who conducted that autopsy and no post-mortem report has been produced as an exhibit in the case.

In the case of **CHENGO NICKSON KALAMA Vs REPUBLIC [2013]eKLR** the Court of Appeal sitting in Malindi held as follows

“The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post mortem examination report of the deceased...”

In this case failure to produce a post mortem report is fatal to the prosecution case. The court is left in the dark as to what exactly led to the death of the deceased.

Even if the cause of death had been proved the evidence on record still falls short of establishing a prima facie case. No witness saw the two accuseds assault the deceased. **PW1** in his testimony stated that he received information that the two accused’s were the perpetrators of the murder. **PW1** does not say from whom he received this information. His informant(s) have not been called as witnesses. This amounts to hearsay evidence and is inadmissible against the accused.

PW3 JOEL MWANGI KIBAKI told the court that on 4/6/2012 at 9.00 pm he heard shouts near his house. He went out to check. He found the deceased and the two accuseds quarrelling. **PW3** stated that he heard the deceased threaten to slap the 1st accused again – this implies that deceased had already slapped the 1st accused once. **PW3** said he did not bother with the boys as he took it to be a childish altercation and he returned into his house.

PW3 did not see either 1st or 2nd accused lay a hand on the deceased. Indeed from the evidence of this witness, it would appear that it was the deceased who was the instigator of the altercation by slapping the 1st accused.

Both **PW1** and **PW2** mentioned that 3 caps were recovered at the scene. However, neither witness is able to state with certainty that any of those caps belonged to the 2 accused persons. Under cross-examination by defence counsel **PW1** says

“I cannot remember what they (the 2 accuseds) were wearing and I cannot say to whom the caps belonged.....”

PW4 SERGEANT JOHN GITHINJI was the officer who visited the scene and collected the body. He

told the court that he recovered a red jacket, white cap, black cap, and a white clothed cap at the scene. He also recovered broken pieces of cypress wood. **PW4** told the court that all these items were forwarded to the Government Chemist for examination and analysis. The government chemist was not called to testify regarding his findings and no report was produced as an exhibit. This is a serious omission in the prosecution case.

On the whole I find that the prosecution case lacks cogency. The cause of death has not been proved. There exists no direct or tangible evidence to link the 2 accused's to the death of the deceased. I find that no prima facie case had been shown. I enter a verdict of '**Not Guilty**' and I acquit both the 1st and 2nd accused persons of this charge of murder. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated in Nakuru this 21st day of December, 2016.

Ms Chemgetich holding brief for Ms Wanjiru

Mr Motende for DPP

Maureen A. Odero

Judge