



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL CASE NO. 3 OF 2012

REPUBLICPROSECUTOR

VERSUS

IBRAHIM NABWAYO.....ACCUSED

JUDGEMENT

The accused is charged with the offence of Murder contrary to Section 203 of the Penal Code. The particulars of the offence are that the accused on the night of 8th and 9th January, 2012 at Muriaga Village, Bumini Sub-location, Malaha Location in Mumias District within Kakamega County murdered ALI KWEYU KULO.

The prosecution called four witnesses. PW1 MWANAJUMA MWENYA WASIA is a brother to the deceased. She was notified of her brother's death on 9th January, 2012. She lives in Bungoma and travelled to Mumias where her brother was living with the accused. PW1 further testified that the accused was at home but ran away when he saw her. The following day she identified the deceased's body at Mumias Hospital. The accused is an uncle to the deceased and they lived together.

PW2 JUMA KUNDU Is the accused's son. He is five years old. His evidence is that the deceased was removing husks from maize. His father came and slaughtered his grandfather. It was at night. The deceased sent the accused to go and buy paraffin.

PW3: DR. MAWASE KIPSANG ROTICH conducted the postmortem on the deceased on 12th January, 2012 at St. Mary's Hospital, Mumias. Externally, the body had multiple cuts on the face. There was a cut on the neck that affected the major blood vessel. He concluded that the cause of death was shock due to hemorrhage.

PW4: PC. ALFRED KIVYASO was based at the Mumias Police Station. He investigated the matter. He went to the scene on 9th January, 2012 and saw the accused had been arrested by members of the public. He saw the deceased's body. The deceased had cuts below the mouth and throat. The body was taken to St. Mary's Hospital. The accused was taken to Mumias Police Stanton and was released with instructions to return the following day but he did not do so. The accused was arrested on 19th January, 2012 in Bungoma. The accused informed him that he had gone to Bungoma as he feared he would be killed had he returned home. The accused was living in the same compound with the deceased. PW4 confirmed that the accused could have been killed by members of the public had the police not arrested him on 9th January, 2012.

The accused was put on his defence. In his sworn evidence he testified that the deceased was his uncle, a

younger brother to his deceased father. On 9th January, 2012 he went to the deceased's house and found the door locked. The deceased had no wife. He opened the door and saw the deceased's body. The legs were facing the door. He went to notify the village elder who is a lady. She in turn notified the area chief who went to the scene. The chief called the police. He went with the police to Mumias Hospital mortuary and he was told to go home. He called his auntie and notified her about her brother's death. His auntie, PW1, came at 3.00pm and the following day they went to the mortuary.

It is the accused's further evidence that the deceased was buried on the 3rd day as they are muslims. He went to his uncle's place in Bungoma to look for food for a ceremony. He was arrested and taken to Mumias Police Station. According to him, PW2 is his son and was living with his auntie. He was living with him. He had not disagreed with the deceased. It is his evidence that PW2 was coached by PW1 so that PW1 could take the land.

The main issue for determination is whether the accused killed the deceased. Mr. Onsando, Counsel for the accused submitted that the prosecution did not prove its case and that there was no eye witness as PW2 was not staying in the same compound. Mr. Oroni, State Counsel, submitted that no evidence was adduced by the defence to prove that PW2 was not living in the same compound.

From the evidence on record, it is established that the accused was living with the deceased on the same land. From the evidence of PW4, it is clear that the two were not living in the same house. Each had his own house. The only person who allegedly saw the accused killing the deceased is PW2. PW2 is a minor and his evidence required corroboration under Section 124 of the Evidence Act. The corroborating evidence must implicate the accused person. I do not find that the medical evidence on the injuries on the deceased's body is corroboration evidence. The injuries could have been inflicted by another person. In his evidence, PW2 also testified that he did not see his father (accused) doing anything to Babu (deceased). Although PW2 testified that it is the accused who killed the deceased, I do find that there was need to have that evidence corroborated by other evidence. The prosecution had to prove its case beyond reasonable doubt. The accused did not run away from home as alleged by PW1. The accused in his defence went with the body together with the police and he was released. He participated in the burial of the deceased and went to Bungoma as he feared for his life. This evidence is corroborated by that of the investigating officer. There is no evidence of animosity between the accused and the deceased. Being a criminal case, the court has to be satisfied beyond reasonable doubt that the accused committed the offence. The evidence of PW2 cannot be the basis of a conviction as PW2 also testified that he did not see the accused killing the deceased while at the same time testified that it was the accused who killed the deceased. Such evidence raises doubt in my mind as to whether it was the accused who killed the deceased. PW2 also testified that when he was asleep he heard motor bikes passing. This shows that the deceased's home was located near a road.

Given the evidence on record, I do find that the prosecution failed to prove its case beyond reasonable doubt. The accused is hereby acquitted of the offence of murder as charged and shall be at liberty unless otherwise lawfully held.

Dated signed this 9th day of January, 2015

Said J. Chitembwe

JUDGE

Dated, delivered and countersigned this 29th day of January 2015.

Ruth Sitati

JUDGE