



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 14 OF 2011**

**LESIT, J**

**REPUBLIC.....PROSECUTOR**

**-VERSUS -**

**LUTUYO SINDIYO .....ACCUSED**

**RULING**

1. The accused person **LUTUYO SINDIYO** is charged with the offence of murder contrary to **Section 203** as read together with **Section 204** of the **Penal Code**.

2. The particulars of the offence are that:

**“On the 7<sup>th</sup> day of July, 2005 at Jericho estate Nairobi within Nairobi province, the accused murdered JOHN MUTHIANI MUSEMBI.”**

3. The prosecution called seven (7) witnesses. The summary of the prosecution case was that the deceased person was living with his brother PW4 in Jericho Estate. On the 7<sup>th</sup> of July, 2005, the deceased made an arrangement to meet with his cousin Seroney, PW1 at Sports Club within Jericho shopping centre. At around 2 o'clock PW1 proceeded to the Sports Club. PW1 testified that as he walked there, he saw the accused person running towards Uhuru Estate. PW1 proceeded to the Sports club where he found a huge crowd of people outside.

4. PW1 said that from the crowd which had gathered there, he heard somebody called Gachoki say loudly that “Maasai” stabbed the deceased. PW1 said that he knew the accused person by the name “Maasai” saying it was his nickname because he was a watchman in the area. When PW1 entered the bar, he found his cousin the deceased lying in a pool of blood still alive. PW1 ran to a nearby clinic where he got a medical person to go and give First Aid to the deceased, only for the medic to declare him dead.

5. PW2 was a friend of the deceased for five (5) years. His testimony was that he knew the accused person by the name “Maasai”. He testified that on the 25<sup>th</sup> July, 2005 he met one Sabati who told him that “Maasai” stabbed the deceased at Sports bar. PW4 testified that he went to the bar two hours later and found police loading the body of the deceased onto their vehicle. PW2 obviously made a mistake of the date of incident in his evidence.

6. PW3 and 4 were siblings of the deceased. PW3 was called by their cousin and informed about

the deceased death. He later identified his body to the doctor for post mortem. PW4 on the other hand was in the house he shared with his brother the deceased at around 2pm when a neighbor knocked at his door. Upon opening the man asked him to follow him which he did. They proceeded to Sports club 100 meters away from his house where he found his brother dead lying in a pool of blood.

7. PW2 in the company of PW4 and others led police officers to the arrest of the accused five and a half years later. The accused was arrested at Donholm roundabout where he was found roasting maize.

8. PW5 was doctor Wasike who performed the postmortem on the body of the deceased. After the examination he formed the opinion that the course of death was hemorrhage following penetrating injury to the neck and the chest due to a sharp object. She had found that the deceased suffered a penetrating injury on the left anterior neck which severed the left neck vessels and the trachea and penetrated into the chest cavity perforating the right lung and causing haemathorax.

9. PW6 PC Ngatia arrested the accused person at Donholm roundabout as he roasted maize on the 17<sup>th</sup> January 2011. The accused was identified to him by PW2 in company with PW4 and others.

10. The investigating officer of this case was Senior Sgt. Mjomba. He carried out the investigations by recording witness statements and interrogating the accused person after which he charged him with this offence.

11. Mr. Konga for the prosecution maintained that the prosecution had adduced sufficient evidence against the accused, and that the accused person should be placed on his defence. Mrs Kinyori for the accused contended that the evidence adduced was hearsay and inadmissible. Counsel cited section 63 (1) of the Evidence Act and urged that oral evidence must in all cases be direct evidence.

12. I have considered the submission by counsels on 'no case to answer'. This case was heard in part by another judge who took the evidence of the first three witnesses, PW1 to 3. There was no direct evidence in this case. Those who testified came after the fact and did not witness the attack. From the record of proceedings in this case, I noted that the two witnesses who implicated the accused with this offence was clear that they were told by others that it was one "Maasai" who stabbed the deceased.

13. PW2 said that he got the name of the murderer from a person he knew by the name Sabati. PW1 on the other hand said that a person he knew as Gachoki spoke from a crowd outside the bar where the incident took place and said that one "Maasai" was the one who stabbed the deceased.

14. The evidence of PW1 and 4 implicating one "Maasai" with the incident presents two problems. The first difficulty is the fact that the people who gave them the name "Maasai" were themselves not called as witnesses. I noted that Gachoki was a potential witness as his statement is in the Police Bundle. He was not called. Being an alleged eye witness of the incident he was a crucial witness. He ought to have been called as a witness. Sabati, if he recorded a statement implicating anyone to the case should also have been called to testify. I am aware that there was a lapse of five and a half years between the date the offence was committed and the date of arrest. Even then some effort should have been made.

15. In **BUKENYA & OTHERS 1972 EA 549**, LUTTA Ag. VICE PRESIDENT considered the importance of the prosecution calling all the witnesses necessary to establish its case and held:

**"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**

**Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

16. The issue is whether the witnesses called by the prosecution were sufficient to establish the truth in the case. The answer is that the evidence adduced was that of hearsay, and the alleged eye witnesses

were not witnesses in the case. The failure to call crucial witnesses should lead to an adverse inference being drawn against the prosecution case to the effect that had the uncalled witnesses testified, their testimony would have tended to be adverse to the prosecution. I find this case fitting for an adverse inference being made.

17. The second problem faced by the hearsay evidence is the fact that a nick name and not a formal name was used to identify the alleged murderer. "Maasai", according to PW1 stood for a watchman. The difficulty is since PW1 for instance did not witness the attack, how is he sure that Gachoki meant the accused and not any other watchman in that area. It was important for Gachoki to show who he meant by the nick name Maasai. It could have been anyone as it is likely that many other people in the area were identified by the same name. there is therefore doubt who both Gachoki and Sabati meant by that name "Maasai"

18. I find that there is a lacuna in the prosecution case and therefore a serious doubt whether the accused was the one who committed this offence. I find that the prosecution did not establish a prima facie case against the accused. I give him the benefit of doubt at this stage and acquit the accused at this stage under section 306 of the Criminal Procedure Code.

**DATED AT NAIROBI THIS 14<sup>TH</sup> DAY OF MAY, 2015**

**LESIIT, J.**

**JUDGE.**