



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINALCASE NO. 26 OF 2010

REPUBLIC PROSECUTOR

V E R S U S

NAFTAL NTHIGA NTHENGE ACCUSED

RULING

Naftali Nthiga Nthenge 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 9/5/2010 at Kenari village, Thuiti Location, Tharaka-Nithi District, he murdered William Nthenge.

He denied the offence and the prosecution proceeded to call 4 witnesses in support of its case. The question at this stage is whether the prosecution has established a prima facie case against accused to warrant him to defend himself.

The first witness is PW1 Zablon Kimathi, aged 12 years, a son to the accused. He testified on oath after the conducted a voire dire examination and was satisfied that he understood the meaning the oath and was intelligent enough to testify. He told the court that on 8/5/2010 about 5.00 p.m., the deceased who was his grandfather sent him to Mukuthima market to buy for him medicine. He left the grandfather with his younger siblings aged 4 and 2 years and upon returning about 6.00 p.m., he found his grandfather outside. He touched him, saw blood oozing from the leg, and noticed that he was not alive and there was nobody around the home, even the children. He screamed and went to tell his aunt Lilian Muthoni (PW2). PW1 denied having left his father at home but that when he screamed and people came, they started beating the father (accused). He denied seeing the person who killed the grandfather.

PW2 identified the accused as her brother and the deceased was her father. She told the court that while at her home on 8/5/2010 at about 8.00 p.m., PW1 and other children went to inform her that their grandfather had died. The children informed her that it is Naftali the accused, who had murdered the deceased; that Naftali, accused also went to her home whilebeing drunk and told her that he had found their father dead, and wanted her to look after his youngest child who was aged about 2 ½ years. PW2 further said that accused used to be mentally unstable and on that day, he was very drunk and said he had killed the father. She denied seeing the person who murdered the father.

PW3 CIP Robinson Mwangi, then Officer Commanding Station (OCS), Subuiga Police Station told the court that he was the Investigating Officer in this matter. He received a report that there was a murder at Mukuthima area where he proceeded and found the body of Nthenge, the deceased at his home. He interrogated those present at the scene and one Gitonga, a grandchild of the deceased, told him that it is

his father who attacked the deceased with a stone, *jembe* and stool and found accused already arrested. He observed a deep cut on left cheek of the deceased, the forehead and nose. He recovered a *jembe*, stool and stone at the scene and both were blood stained and all were produced in court as Exhibits (PEx 1-3).

PW4 Dr. Brian Bett produced the post mortem report which had been authored by Dr. Wainaina who was no longer based at Meru Level 5 Hospital. The findings of the Doctor were that the deceased had 3 fractures on the skull, one on the frontal bone and 2 on the right parietal bone and he formed the opinion that the cause of death was penetrating head injuries.

Having carefully considered the prosecution evidence, there is no doubt that the deceased was murdered. He had just been alive about 5.00 p.m. when he sent PW1 to the shop but one hour later, he was dead with cut wounds on his head and face. The only question is who caused the death?

PW1 denied seeing who caused the death of the grandfather. He told the court that on returning home from Mukuthima market about 6.00 p.m. he found the deceased dead. He denied seeing any body at homestead at that time including the young children he had left at home. He then said that he screamed, people came and started beating his father, (the accused). I find there to be a missing link because, where did PW1's father come from, if there was nobody at the home? It seems PW1 did not tell the court all that he knew.

PW2 was not present at the scene. She was only informed by the children who included PW1 that accused had murdered the deceased. But in court PW1 denied witnessing the murder.

PW2 also told the court that accused told her that he had murdered the deceased but that has not been supported by any other independent admissible evidence.

The Investigating Officer told the court that the deceased's child who claimed to have witnessed the murder was called Gitonga. The court has not been told who Gitonga was or why he did not testify. It seems some of the vital witnesses did not testify. The murder suspect having been a family member of the deceased, it seems the key witnesses decided to withhold the truth from the court.

As a result, I find that the accused is a prime suspect in the murder of his father. However, the standard of proof in criminal cases is that of proof beyond any reasonable doubt. The court is required to prove two ingredients:

1. That accused committed the unlawful act;
2. That he possessed the necessary malice of aforethought.

Section 206 of Penal Code defines malice aforethought as intention to do grievous harm to any person; or having knowledge that the act or omission will cause death or do grievous harm. So far none of the above are proved as against the accused.

A conviction cannot be based on mere suspicion, however strong. For the above reasons, the court finds that there is not sufficient evidence adduced to warrant the accused to be placed on his defence. If he were to be put on his defence and he remained silent, the court would have to return a verdict of not guilty. It is not for the accused to fill in the gaps left in the prosecution case. I therefore acquit the accused of the offence as charged, under Section 306 of Criminal Procedure Code.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JUNE, 2015

R.P.V. WENDOH

JUDGE

PRESENT

Mr. Mulochi for State

Mr. Nyanyire Holding Brief for Riungu for Accused

Faith, Court Assistant

Accused, Present