



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 92 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

JAMES KARIUKI NJOROGE.....1ST ACCUSED

JOSEPH MBURU NJOROGE.....2ND ACCUSED

RULING

The two accused person namely **James Kariuki Njoroge** hereinafter referred to as the 1st accused) and **Joseph Mburu Njoroge** (hereinafter referred to as the 2nd accused) were jointly charged before the High Court in Nakuru 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 19th day of December 2011 in Nakuru District within Nakuru County jointly murdered E K N.”

Both accused entered a plea of ‘**Not Guilty**’ to the charge. The trial commenced on 9/6/2014 before **Hon. Lady Justice Roseline Wendoh**. Following the transfer of the Hon. Judge to the Meru High Courts, I took over the matter. The prosecution led by **Mr. Chirchir** learned State Counsel called a total of six (6) witnesses in support of their case. **Mr. Mongeri** advocate acted for both accused persons.

The brief facts of the case were as follows:-

PW1, S N, PW2 S N K and **PW3 G M K** all of whom were minors told the court that on the evening of 19/12/2011 at about 6.00 p.m. they were in their home taking the evening meal. The deceased **E K N** who was the biological father to both **PW2** and **PW3** and was an uncle to **PW1** came home drunk. He began to complain that his two brothers (the 1st and the 2nd accused) had given the children too much milk to drink. A quarrel ensued which quickly degenerated into a fight. It is alleged that the 2 accused began to beat the deceased with a stick and a jembe. The deceased was hit and cut on the back of the head with a jembe. After the fight the protagonists separated and the deceased walked away. The next day the deceased was unable to wake up from his sleep.

PW4, Peter Ndirangu a nephew to both the two accused and the deceased told the court that he was called by his aunt **Joyce Muthoni** and informed that his uncle (deceased) had been beaten up by his brothers and was unable to wake up. **PW4** rushed to the home and found the deceased lying on a mattress on the floor. He hired a vehicle and rushed the deceased to Nakuru Provincial General Hospital. However, the deceased died on the way and was declared dead upon arrival at the hospital. Police took up the investigation of the matter. The two accused were arrested and were later arraigned in court on a

charge of murder.

At the close of the prosecution case this court must decide whether the prosecution has established a prima facie case to warrant the two accused being called upon to give their defence. The offence of murder is defined by Section 203 of the Penal Code as follows:-

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

This definition establishes four (4) crucial ingredients of the offence of murder all of which must be proved beyond reasonable doubt.

1. Proof of the fact of the death of the deceased;
2. Proof of the cause of that death;
3. Proof that the accused by an unlawful act or omission caused the death of the deceased;
4. Proof that the said unlawful act or omission was committed with malice aforethought.

On the fact of the death of the deceased there can be no doubt. **PW4** has testified how he tried to save the life of the deceased by rushing him to hospital but that he was pronounced dead upon arrival. The witnesses including the minors, all of who knew the deceased well identify him as **E K N**. Evidence on the cause of death is adduced by **PW5, Dr. Titus Ngulungu** a pathologist attached to Nakuru Provincial General Hospital. The 3 eye witnesses all testified that the deceased sustained a blow to the back of the head by a jembe. **PW5** the doctor confirmed having seen a laceration on the back of the head. **PW5** formed the opinion that the cause of death was **‘abdominal organs injury and head injury complicated by reactive peridontis due to multiple blunt force trauma to the head and abdomen.’** **PW5** filled and signed the post mortem report which is produced in court as an exhibit **PExh.1**. This finding on the cause of death is consistent with the evidence of the eye witnesses that the deceased was involved in a fight with the 2 accused.

Evidence that the 2 accused were involved in a fight with the deceased does not in any way absolve the prosecution from its legal burden of proof. There must be proof tendered that it was one or both of the accused who landed the fatal blow to the back of the head of the deceased. As stated earlier there were three eye witnesses to the incident all of whom were minors.

It must be noted that this incident occurred at night. It was dark. In the circumstances how much could the three children have seen? There is no clear evidence of the source and/or quality of light available at the scene. This was a fight between adults. The normal reaction of any child to such a situation would be to run away or to hide so as to protect themselves from any injury. **PW4** under cross examination by defence counsel stated that:-

“It was dark. There was a fire in the middle of the house.”

PW1 does not explain how big the fire was or the quality of light it emitted. On his part **PW2** states:-

“On 19th it was dark. There had a torch. There was fire in Kariuki’s house.”

PW1 made no mention of any torch at the scene. **PW2** does not explain who had this torch. Was it the 2 accused or the deceased? **PW2** goes on to state:-

“Because it was dark I could not see well.”

Here **PW2** admits that visibility was poor. This witness goes on to admit:-

“I did not see what was happening I did not see Mburu (2nd accused) hit the deceased with the stick. I did not see Kariuki (1st accused) hit the deceased with a jembe on the head. It is because it was dark.”

PW3 who was also present at the scene introduces a new dimension to this question of light when he states under cross examination that:-

“There was a light in the house. It was like a fire – the lamp. The lamp was near the fire. It was not very light. I could see.”

This is the first time the existence of a lamp is being mentioned. Neither **PW1** nor **PW2** both of whom were present at the scene made any mention of any lamp. In any event even **PW3** admits that this lamp did not emit much light.

PW6 Corporal Jackson Kongo the investigating officer further confuses matters when he states under cross examination:-

“There was no electricity. There was a lantern. Nobody told me this. I assumed they had a lantern. I did not enquire if there was a lantern.”

Thus **PW6** is inviting the court to make a finding of fact i.e. that there was a lantern based on an **assumption** made by himself. **PW6** admits that no witness mentioned the existence of a lantern. The court cannot rely on assumptions – the court can only rely upon tangible evidence. There exists no evidence to prove the existence of a lantern at the scene.

Given the circumstance it was dark, with only a fire for light, it is questionable as to how much the three children could have seen. It is unlikely that they had a clear view of the events. Indeed **PW2** admitted that they were peeping from the door i.e. they were hiding. Again this would limit how much they could have seen. The evidence of the three children is inconsistent and full of contradictions. The court cannot place much reliance on their evidence.

PW4 claimed in his evidence in chief that when he rushed to the scene, the next day the deceased spoke to him. **PW4** states:-

“I found him (deceased) lying on a mattress on the floor and (he) could not get up. He was talking. I found he had a cut on the back of the head. He was bleeding. I asked who cut him and he said it was Mburu (1st accused) and Kariuki (2nd accused).”

Given that the deceased died shortly after naming the persons who had assaulted him then this would amount to a **‘dying declaration.’** However, under cross examination by defence counsel this witness admitted that he did not record in his statement to police the fact that the deceased had spoken to him and named his assailants. Why would **PW4** have omitted such a crucial and relevant piece of information in his statement which he made shortly after the incident only to recall it months later when giving his evidence in court. It is unlikely that such a conversation ever took place. I have no doubt that this is merely an afterthought and an attempt by **PW4** to bolster the prosecution case. I reject the notion that any dying declaration was made by the deceased to **PW4**.

The question of the recovery of the assailant weapon also remains uncertain. **PW1** in his evidence told the court he saw the jembe being taken to the police station. However **PW2** contradicts this and states that police did not take the jembe, **PW6** the Investigating Officer told the court that police did not recover any weapon at the scene. It remains unclear whether or not the weapon/implement used to hit the deceased was ever recovered.

Finally there is evidence that the deceased sustained the injuries in the course of a fight. There is evidence that the deceased had arrived home drunk on that day. He was staggering and falling. The very real possibility that a fall may have caused his injuries has not been excluded. The evidence adduced in this case lacks cogency and is inconsistent. It has not been proved beyond reasonable doubt that it was the 2 accused who inflicted the fatal injury on the deceased. The **‘actus reus’** of the offence of murder has not been proved. As such I enter a verdict of **‘Not Guilty’** and I acquit each of the two accused of this charge of murder. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated this 26th day of October 2015.

MAUREEN A. ODERO

JUDGE

Mr. Mongeri for the accused

Ms Nyakira for the DPP