



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 47 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

BENSON MAINA KAMANJA.....ACCUSED

RULING

The accused person herein, **Benson Maina Kamanja**, is before this court on the information the Hon. Attorney General dated 9th September 2009 to face a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 27th August 2009 at Mungaria Village of Nyeri South District within Central Province, jointly with others not before court, the accused murdered **James Matu Mwangi**. The Prosecution summoned seven (7) witnesses in support of the case against the accused.

At the close of the prosecution's case and pursuant to the provisions of **Section 306** of the **Penal Code**, this court invited learned counsels appearing in this case to make submissions on whether or not the prosecution had made out a *prima facie* case necessitating this court to make an order placing the accused on his defence. Mr. Muhoho, learned advocate for the accused, filed written submissions while Mr. Njue did not file nor submit any submissions at this stage. I have carefully considered the evidence of the seven(7) prosecution witnesses. Francis Nderitu (P.W.1) stated that on 27th August 2009, he was at home together with his mother and sister when at 2.00pm three people came to their home asking for James Matu Mwangi (deceased). P.W.1 said he managed to recognise a Mr. Mwangi to be among those people who visited their home. He also stated that Mr. Mwangi was not charged before court. Those people took the deceased to Thiongo's farm where they senselessly beat him up using whips after which the gang took the deceased towards Muthangati as P.W.1's father closely followed them.

Joseph Thiongo Mwangi (P.W.2) stated that on the material date and time he was at his farm when five people came and asked for his brother, the deceased. He sent a small girl to call him. When the deceased came, P.W.2 said, the group beat him up when he refused to accompany them. P.W.2 further said, he was prompted to sent someone to inform their father (P.W.3) to come and rescue the deceased. P.W.2 visited Muthangati where he found the deceased lying down unconscious with serious injuries. A good samaritan offered to take the deceased to hospital where he was pronounced dead upon arrival. P.W.2 said he saw the accused for the first time at the police station.

Mwangi Githamu (P.W.3) said he tried to stop the group from assaulting the deceased in vain. P.W.3 also said that he followed them closely and when they reached Muthangati, the gang intensified beating up the deceased because he denied to give them some information the gang wanted from him. P.W.3 said he reported the incident to the area chief who came and together with a good samaritan the deceased was

taken for treatment where he passed on. P.W.3 confirmed, he only met the accused at Gichira Police Station while the accused was reporting an assault case against the deceased. PC James Kilot (P.W.4) stated that on 27/08/2009 at 2.00pm he booked a report of assault from the accused at Gichira Police Station.

The accused had reported that he had been assaulted by the deceased and was then issued with a note to go for treatment at Gichira Health Centre. P.W.4 said that the accused came to collect a P3 form at 5.00pm and at the same time, P.W.3 is said to have arrived at Gichira Police Station whereupon he reported that his son, the deceased had been assaulted by people unknown to him. P.W.4 alleged that, when P.W.3 saw the accused, he alleged he was among the people who had assaulted the deceased and that is how the accused was arrested. P.W.4 confirmed that the police did not investigate the accused's complaint. I.P Kadei (P.W.5) stated that he was based at Nyeri Police Station when P.W.3 reported to him that the deceased had been attacked by six people and that he was able to recognise the accused as amongst those assailants. P.W.5 however, told this court that none of the witnesses whom he recorded their statements named the accused as the culprit. Sgt Stanley Mongera (P.W.6) stated that the accused was arrested as a suspect for assault against the deceased.

That charge was later withdrawn and substituted with that of murder when the report of the deceased's death was made to the police. P.W.6 further stated that P.W.3 had alleged that the accused was the one who assaulted the deceased. P.W.6 also stated that none of the witnesses whom he interviewed identified the accused. Sarah Wambui (P.W.7) produced the postmortem report on behalf of Dr. Karianjai who was unavailable to testify. The pathologist formed the opinion that the cause of death was cardio-pulmonary arrest due to massive external haemorrhage. At the close of the evidence, Mr. Muhoho, learned advocate for the accused filed written submissions in which he urged this court not to place the accused on his defence because the prosecution had not made out a *prima facie* case. Mr. Muhoho argued that the evidence of P.W.5, P.W.6 and P.W.7 which purported to link the accused with the offence were not sufficient to set up a *prima facie* case to enable this court place the accused on his defence.

After a careful consideration of the evidence and the written submissions, I have formed the following opinion of the case. The only evidence which attempted to link the accused to this offence is the evidence of P.W.3 who claimed that on the material date he saw the accused as among the six people who had visited his homestead to take away the deceased. However, this piece of evidence was contradicted or weakened by the evidence of P.W.5 and P.W.6 who categorically stated that none of the witnesses named the accused in their witness statements as the deceased's assailant. According to P.W.5, the accused was identified by P.W.3 when they both reported a complaint of assault at Gichira Police Station. None of the prosecution witnesses stated having seen the accused assault the deceased. What appears to have linked the accused to the offence is the fact that it is said he had gone to report to the police that he had been assaulted by the deceased. Unfortunately, that complaint was never investigated by the police. The police seemed to have taken P.W.3's report as the gospel truth thus brushing aside that of the accused. After cumulatively taking into account the evidence and the submissions, I have come to the conclusion that the prosecution has not made out any *prima facie* case against the accused. Consequently, I will not place the accused on his defence but instead I proceed to dismiss the charge of murder and order that the accused namely: **Benson Maina Kamanja** be acquitted. He should be set free forthwith unless lawfully held.

Dated and Signed this 21st day of February 2014.

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J.K.SERGON

JUDGE

Delivered in open court this 21st day of February 2014 by Hon.....

In the presence of:

..... for Director of Public Prosecutions

..... for Accused