



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 27 OF 2011

REPUBLIC..... PROSECUTION

VERSUS

PIUS NDWIGA NDERI..... 1ST ACCUSED

ANTONY MURAGE..... 2ND ACCUSED

MARY MWENDE MUTEMBEI.....3RD ACCUSED

RULING

1. The three accused persons herein were jointly charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The Prosecution called a total of six witnesses. PW2 - Dr. Silvester Maingi confirmed the death of the deceased. The cause of death was subdural haemorrhage due to an assault. PW4 Dr. Joseph Thuo also examined the accused persons for mental assessment and found them fit to plead.
2. PW1 and PW5 are brothers of the deceased while PW3 is his mother. They say they witnessed the accused persons beating the deceased. PW1 was asleep in his house on the night of 12/11/2011 when he heard the 2nd accused's voice. On going out he saw the 1st and 2nd accused beating PW5 Benson Mwaniki Gichovi. He went to them and inquired but the 1st accused slapped him and he returned to the house.
3. After a while he went back and found them beating him still. He was again slapped by the 1st accused and he went back to his house and slept. Later he heard his brother Moses Munyi calling from PW5's house. He went there and found the 1st, 2nd accused and two others. They finally went to report to the police and also informed his sister. On their return they found the deceased unable to move. He was taken to hospital and he died. He said he was able to see the accused persons with the help of moonlight.
4. From this narrative the person PW1 witnessed being beaten was his brother Benson Mwaniki (PW5) and not the deceased. The deceased was Emilio Kariuki Gichovi.
5. PW3 - Salome Rwamba the mother of the deceased says she was asleep in her house when she heard screams and went outside. She found the deceased being beaten by the 1st, 2nd and 3rd accused and was being taken to the road. 2nd accused pushed her aside and she fell. She did nothing but went to her house to pray. She identified them by the use of moonlight, but could not see the weapons they had because she was in great shock.
6. PW5 - Benson Mwaniki Gichovi stated that he was attacked in his house at midnight by the accused persons and four others. Each of them had a torch which she/he flashed. They beat him and took him to Kangaru police post. The accused were then asked to go back the next day to record statements. On the way he heard the accused talking saying they were going for another one whom they were not going to take to the Station but that they would kill him.

7. PW6 - Cpl. Zakary Mburu, the investigating officer and others found the deceased's body along the road. The 1st accused was reported to have beaten PW5. He is the one who mentioned the 2nd and 3rd accused. At the scene he found about forty (40) members of the public but neither he nor the other officers interviewed them to know what had transpired.
8. Mr. Njage for 1st accused and 2nd accused extensively submitted on the lack of proof of a prima facie case against the 1st and 2nd accused. He referred the Court to the case of **RAMANLAL TRAMBAKLAL BHATT VS REPUBLIC [1957] EA** where the Court of Appeal explained what a prima facie case is by saying:-

“The question whether there is a case to answer cannot depend only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence”.

It further at page 334 paragraph H-I to page 335 paragraph A-B states:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one

“which on full consideration might possibly be thought sufficient to sustain a conviction”.

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as WILSON, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only openly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.

9. I would first of all wish to discredit PW3 as a witness whose evidence cannot be relied on by this Court. She was in her “shock” able to identify the attackers but at the same time she could not identify the weapons they carried because of the same shock. Of course this cannot be true. As has been noted on the record this witness could refuse to answer critical questions. In other words she chose which questions to answer and which ones not to answer. She cannot therefore be relied on as a witness by this court.
10. From the evidence of PW1 the person he saw being beaten was Benson - PW5 and not the deceased. He at no point states that he ever saw the deceased being beaten. He went to the scene twice and he never mentioned to anyone what he had seen. It is at the end of his testimony that he talks of the deceased.
11. This anomaly was never clarified by the prosecution in re-examination. Even if it is assumed that the person PW1 saw being beaten was the deceased, why did he choose to go back to his house instead of reporting it to the authorities or others in the homestead? Even the deceased's own mother (PW3) said after recovering from the shock she went to her house to pray instead of making a report even to her own husband who was at home.
12. PW5 did not witness anything save his own arrest and his being taken to the police station. His only important evidence is that he heard the 1st, 2nd and 3rd accused discussing things to the effect that they were going for another one whom they would not take to the police station but would kill him. This is a man who was taken to the police post by the accused persons. He was

- left in the hands of the police for safety. His answers in cross-examination reveal that he never told the police officers what he had heard the accused persons say as they took him to the police post.
13. Further, he did not put this vital information in his written statement. Had the accused persons said what he alleges they said he would not have hesitated to inform the police and/or record it in his written statement. My finding therefore is that PW5 did not hear what he alleges to have heard.
14. The Investigating Officer (PW6) had received a report to the effect that PW5 and the deceased had ambushed and robbed the 1st accused. PW5 was then taken to the police post and the report of the deceased's condition reached them later. PW6 went to the scene with other police officers. They found the deceased lying on the road and there were about 40 members of the public present. Only one of them was interviewed. PW6 did not explain what the one member of the public told them. He stated that him and the other officers were in a hurry to save the victim's life and so rushed to the hospital and had no time to interview the members of the public. One is left to wonder why they had gone to the scene in the first instance.
15. The investigating officer also appeared to be telling the court that he charged the 2nd and 3rd accused because they had been mentioned by 1st accused. It was his duty to investigate the claims and link them to the killing of the deceased. Which is this mob that had killed the deceased as is indicated in OB NO. 14 OF 12th November 2011 of Manyatta police station?
16. At this juncture this court is supposed to determine whether or not a prima facie case has been established against any of the accused or all of them. The Prosecution always has the burden to prove its case. It is not for the defence to fill in the gaps for the prosecution.
17. In the present case and from the analysis above the remaining question I ask myself is whether I could convict the accused persons on the evidence before the Court in the event that they all elected to remain silent in their defence. My answer would be NO. The reason being that the evidence on record has failed to link the accused persons to this offence.
17. For my part, I find all the accused persons not guilty and acquit them under Section 306(1) of the Criminal Procedure Code.

They shall all be released unless otherwise lawfully held under a separate warrant.

DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF JULY, 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Miiri for State

Mr. Njage for 1st & 2nd Accused

Mr. Njage for Ms. Njeru for 3rd accused

All accused

Njue/Kirong CC