



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 93 OF 2009

REPUBLIC.....PLAINTIFF

-VRS-

PHENEAS KINYUA NTUKU.....1ST ACCUSED

PIUS KIMATHI KAIBI.....2ND ACCUSED

RULING

1. The accused persons **PHINEAS KINYUA NTHUKU**, the first accused and **PIUS KIMATHI KAIBI**, the 2nd accused are charged with murder contrary to section 203 of the Penal Code. The particulars of the charge are; that on the 6th day of September 2009 at Mutuati Market, Naathu Location in Igembe District within the Eastern Province jointly murdered Solomon Karwigi.
2. The prosecution called three witnesses. PW1 was the wife of the deceased. Her evidence was that her husband knocked on their door at 3am on 6th September, 2009. He had been assaulted on the head and leg and was bleeding from the head and ears. PW1 testified that deceased told her that one Mwiti and one Kimathi had assaulted him.
3. PW2 was the employer of the deceased. He testified that on the 6th September, 2009 he proceeded to a Disco Hall where he had organized a disco. The deceased was his gate man. PW2 testified that at 1am he proceeded to the disco and met the deceased manning the entrance gate. He relieved him of gate duties and stationed him inside the hall after the deceased complained to him that one Nthuku, the 1st accused had hit him with a hammer on his mouth.
4. PW2 testified that at 3am the wife of the deceased called him from his house. PW2 stated that he proceeded to deceased home where he found the deceased lying outside his house with cuts on the head and all over the body. PW2 testified that wounds he saw on the deceased were new injuries and not the ones he had seen on the deceased earlier that night. PW2 helped take the deceased to the hospital where he was stitched and discharged.
5. PW2 said that he learned of the death of the deceased at 7pm same day after he helped return the deceased to hospital at 8am that same morning.
6. PW3 identified the body of the deceased who was her brother to the Doctor, for post mortem. The examination was carried out on 14th September 2009 at St. John's of God Hospital.
7. Mr. Mbaabu for both accused did not make any submissions on no case to answer reserving them for a later stage.
8. I have considered the evidence adduced by the prosecution in this case. The question is whether the prosecution have established a prima facie case against the two accused persons to warrant the court to place them on their defence.
9. The prosecution needed to adduce evidence, whether direct or circumstantial that would be able to

- connect the accused persons to the deceased death. The nexus between the accused and the death of the deceased should be real, not imagined and must be strong enough to sustain a conviction, if upon placing the accused on their defence they opt to say nothing in their defence.
10. There is no direct evidence adduced against the accused persons in this case. The evidence relied upon are statements made to PW1 and PW2 by the deceased. I will examine them in order to determine whether they irresistibly point to the accused persons as the ones who committed the offence. I will also consider whether these statements by the deceased qualify to be treated as dying declarations.
11. Dying declaration were considered by the Court of Appeal in **CHOGE VRS REPUBLIC 1985 KLR** where the court held:

“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

12. I will begin with the statement by the accused to PW2. According to PW2, he found the deceased with a swollen jaw, manning the entrance to the disco PW2 had organized. At that time the deceased was okay apart from the swelling jaw. At the time, PW2 testified, the deceased complained that it was the 1st accused who had assaulted him.
13. The statement by the deceased to PW2 is not a dying declaration as it was not made at the time when death can be said to be imminent. The deceased was whole. The injuries he attributed to the 1st accused are definitely not those which led to the deceased death on the evening of the following day. I will come to this later.
14. PW1 said it was 3am when the deceased knocked at their door. He was severely injured so much that she immediately went to PW3 and other neighbours to seek assistance to take the deceased to hospital.
15. PW1 testified that when she asked the deceased what happened to him, the deceased told him that one Mwiti and one Kimathi had inflicted the injuries he had on him. PW1 stated that the deceased was so seriously injured that he was hardly audible.
16. I am satisfied that at the time the deceased told PW1 who inflicted injuries on him that the deceased death was imminent and that in his mind the deceased was moved with the greatest consideration to tell the truth of how he was injured. The statement to PW1 by the deceased of the culprits who caused his injuries does qualify to be a dying declaration.
17. The persons implicated by the deceased were Mbithi and Kimathi. PW1 stated that she did not know the two persons implicated by the deceased. PW1 could therefore not say who it was the deceased meant when he gave the names of the two persons who assaulted him to her.
18. The identity of those implicated with this offence has not been established. The deceased gave only one name for each of his assailants. The names Mbithi and Kimathi are common names. It was therefore not enough for purposes of identification to rely on single names.
19. There was a need for cogent evidence to demonstrate the identity of the two persons implicated with the offence. PW1 was very honest. She said that she did not know the personalities behind the two names her husband mentioned to her.
20. Looking at the two names, none of the accused before court goes by the name Mbithi. Clearly, the prosecution has not adduced any evidence to show who Mbithi was.
21. The 2nd accused in this case bears the name Kimathi as his middle name. What the prosecution needed to prove is that by the name Kimathi the deceased meant that it was the 2nd accused who together with Mbithi had assaulted him. There is no such evidence.
22. The 1st accused had been implicated by the deceased as one who hit him with a hammer in the mouth. The injury implicated then has not been shown to have caused or contributed to the deceased death. The injury the deceased complained had been inflicted on him by the 1st accused was a minor injury. When PW2 considered it, he told the deceased to continue working.
23. This was 2 hours before the deceased was seriously injured and as a result of which injuries he

- was admitted in hospital. There is therefore no nexus proved between the injury the accused inflicted on the deceased and the deceased death. Further I find that there was no connection between the 1st accused and the injuries which led to the deceased admission in hospital.
- 24.The Doctor who performed the post-mortem did not testify. The post mortem is however annexed to witness statements in the court file. The Report shows that the deceased had suffered deep cuts on right parietal region and mid frontal regions of the head which caused death. It is clear that whatever injuries the 1st accused the deceased caused were not the ones which led to the deceased death.
- 25.After considering the evidence adduced by the prosecution I find that there was no evidence connecting the two accused persons with the infliction of the injuries which led to the deceased death.
- 26.The injuries were inflicted between 1am and 3am. It was at night. Even if the deceased dying declaration was shown to have to have well established and proven, the identity of those who injured him, the dying declaration would require corroboration. This is because there was no evidence to show where the incident occurred, the conditions of lighting at the scene of attack and whether the deceased had a clear view of his attackers to rule our error or mistake in the identification of the culprits.
- 27.The circumstances of identification were such that other evidence connecting those implicated with the offence in the dying declaration would have been required to found a conviction.
- 28.In this case, the identity of the two persons who implicated deep cuts on the deceased remained unknown at the close of the prosecution case. Consequently I find that the prosecution failed to establish a prima facie case against either or both of the accused persons.
- 29.In the result, I decline to place the accused persons on their defence and instead I acquit both accused of murder contrary to section 203 of Penal Code at this stage under section 306 of the Criminal Procedural Code.

**DATED AT MERU THIS 22ND DAY OF SEPTEMBER,
2014**

LESIIT J

JUDGE