



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 73 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

HARUN EKWAM ROCHWER.....ACCUSED

JUDGMENT

Harun Ekwam Rochwer was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on 31/5/2008 at unknown time at City cotton Village in Laikipia West District in Rift Valley Province, murdered Paul Eiyalan Tiwai. The accused denied the offence. The case proceeded to full trial and the prosecution called a total of six (6) witnesses in support of their case. When called upon to defend himself, the accused gave sworn evidence denying the offence and called no other witness.

Peter Epur Tiwai (PW1) was a minor aged 13 years. After a voire dire examination was conducted by the trial court, it was satisfied that he understood the meaning of the oath and was intelligent enough to be sworn. PW1 was a younger brother to the deceased. He said that on 31/5/2008, he left their place of residence at City Cotton in Rumuruti with the deceased, in company of Francis Edung, Francis Longolei and James Dongoi to look for fruits in the bush. On their way back home they passed near the accused's home and the deceased said he was going to accused's house to ask for his money from accused to whom he had sold a hare. PW1 said that he knew accused very well as he once lived in their home and they also used to go to his home for casual jobs. As the deceased entered deceased's home he told his brothers to wait for him along the road ahead. They waited for him till 7.00 p.m. but he did not show up and they decided to go home but the deceased had not reached there. Next morning his big brother, Joseph went to look for deceased at accused's home, but came back and reported that accused and the wife had denied seeing the deceased. They went to search for deceased at their relative's home but did not get him. On Monday when he went to school a fellow student informed him that the deceased's shoe had been seen in a field near accused's home. He went where the shoes were seen and found that they had a lot of blood while some blood was on the ground near where the shoe was. He identified the shoes as the deceased's and went to inform his brothers and they reported at Rumuruti Police Station but the police told them to go and arrest accused. Later, the deceased's body was recovered in the bush with his head severed from the body. The body was about 2 hours walk from accused's home. When they went to arrest accused, he shot at them. They managed to arrest him hut on the way to police station, he ran but was caught.

Pauline Arwai is the mother of the deceased. She was at work away from home when she was informed on 2/2/2008 that the deceased had gone missing. She was informed of deceased's having gone to get his money from the deceased but never returned. On 13/6/2011, she went to identify the body of the deceased at the mortuary before post mortem was performed.

PW3, Philip Tiwai is an old brother of the deceased. He testified that he was aware the accused owed the

deceased Kshs.30/-. The deceased left home with his brothers to go and get the money and at 6.00 p.m., Epur (PW1) came back home without the deceased and informed him of deceased having entered the accused's home and not come out. He went to accused's home next day at 6.00 a.m. to look for deceased but found nobody at the home. He searched for deceased amongst relatives but did not get him. On Tuesday, Epur informed him that he had found accused's shoes and blood and he reported at the police station. He went with his brothers to accused's home and heard accused tell the wife where they would meet. Accused noticed them and shot at him. He tried to escape but they managed to arrest him and took him to the police station. Thereafter they found the body of the deceased severed from the body head.

Joseph Ethiron Tuwai is an older brother to the deceased. On 31/5/2008, he came back home and was informed that the deceased was missing. They started to search for him. His brother informed that he had been seen entering accused's home but never came out. He helped arrest accused and in the recovery of the deceased's body from the bush.

PW5, Joseph Lare is the Assistant Chief of Rumuruti Township. He received information of a missing person on 5/6/2008 and mobilized people to start a search for the deceased and the body was found about 1 kilometer towards the forest. They first found the head then the body a kilometer away.

The post mortem on the deceased's body was conducted by Dr. Korias. Because Dr. Korias could not be traced without unreasonable delay, instead Dr. Kenneth Kipkoech Korir (PW6) produced the post mortem report. The doctor had found that the head had been decapitated at the neck and severed off the body. The doctor formed the opinion that the cause of death was cardio pulmonary arrest secondary to severe asphyxia (lack of oxygen to the body and haemorrhage caused by a sharp object. Accused was also examined and found fit to stand trial (P3 form PEx.2).

Accused in his sworn statement stated that before his arrest, he was a businessman buying and selling goats. He denied killing the deceased. He said that on 30/5/08, he was at Jackson Eketi's home till 6.00 p.m. Next day on a Sunday, he left home at midday. On 4/6/2013 is when people went to his home, threw stones at it, he shouted for help, neighbours came and intervened. They left and came back next day at 8.00 a.m. and it is then they agreed to go to the police station. His house was searched but nothing was recovered. He denied that the deceased ever went to his house on 31/5/2008.

I have considered the evidence adduced by both the prosecution and defence. The prosecution evidence turns on circumstantial evidence. This is because nobody witnessed the deceased's murder. The last person to see the deceased is his younger brother PW1. PW1 said the deceased entered the accused's compound where he went to ask for his money that accused owed him. The deceased was never seen alive again. The accused lived in the compound with the wife and children. It is not known how old the children were. There is no evidence to show that the deceased found the accused in his home or whether he may have left accused's home and met somebody else who committed this heinous crime. Nothing was found on accused or in his home that connects him to this offence. For circumstantial evidence to found a conviction, it must meet the threshold that has been set in many judicial precedents. In **Peter v R (1952) AC 489** where Lord Marned said:-

“circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

Again in **Rep. V Kipkering Arap Koske & Another (1949) 16 EACA 15**, the East African Court of Appeal held that for circumstantial evidence to found a conviction:-

“the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

The evidence adduced does not point to the accused person as the person involved in the murder to the exclusion of all others. Although the accused did not account for the happenings of 31/5/2008, he has no

duty to prove his innocence. The burden always rests on the prosecution to prove its case beyond any reasonable doubt. In this case, that duty has not been discharged. No malice aforethought has been established and what we have against the accused is mere suspicion which is not sufficient to found a conviction. For the above reasons, the accused is given the benefit of doubt and acquitted of the offence of murder under **Section 322** of the **Criminal Procedure Code**. He is set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 28th day of August, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Kanyi holding brief for Ms Ndeda for the accused

Mr. Marete for the State

Mr. Mwangi – Court Clerk