



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 8 OF 2010

REPUBLIC.....RESPONDENT

VERSUS

COLLINS O. ZEDEKIA.....ACCUSED

JUDGMENT

The accused **COLLINS ONYANGO ZEDEKIA** has been charged with the offence **MURDER CONTRARY TO SECTION 203** as read with **SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 8th day of April, 2010 at around 10.00 p.m. at Links Road in Kisauni District within Coast Province murdered SABIANO ODIRA WAGAI.”

The accused entered a plea of ‘*Not Guilty*’ to the charge and his trial commenced before me on 8th September, 2010. The prosecution led by learned state counsel **MR. ONSERIO** called a total of eleven (11) witnesses in support of their case. **MS. MUNYARI** advocate appeared for the accused.

Briefly the facts of the prosecution case were as follows. On 8th April, 2010 at about 10.00 p.m. **PW9 FRANCIS SHISALI** and **PW10 JAMES KAWEMBE NDOLE** both guards employed by Group 4 security were on mobile patrol within the Nyali area of Mombasa. As they drove along Links road they came across a Toyota Funcargo vehicle white in colour registration number **KAK 816H** parked with its doors wide open by the side of the road. They noticed a man inside the vehicle wiping down the dashboard. They stopped to check. Upon stopping they ordered the man (accused) to get out of the vehicle. Accused came out dressed in a vest and a pair of jeans and holding a cream coloured mask in his hands. Upon being questioned the accused told them that their vehicle had hit a pedestrian who had been rushed to hospital by his boss. **PW9** and **PW10** were not satisfied by this response and continued to search the area. They discovered the dead body of a man with stab wounds to the neck and face lying in the nearby flower-bed. They apprehended the accused. They checked inside the vehicle and found blood stains in the interior of the vehicle. They also recovered various items of clothing including

- Red cloth
- Brown/cream stripped shirt
- White checked shirt

all of which had fresh blood stains. A blood stained knife was also recovered in the bushes nearby. The two witnesses called for police who came and re-arrested the accused and took him to the police station for further investigation. The body was taken to mortuary. The deceased was later identified as ‘*Saviano Odira Wagai*’ a taxi driver who lived in Kisumu Ndogo in Mombasa. The family of the deceased were alerted. They attended the post-mortem and later took the body back to their rural home in Migori District for burial. Upon completion of police investigations the accused was arraigned in court and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed upon his defence. He elected to give an unsworn defence by which he totally denied any involvement in the murder of the deceased. It is now upon this court to determine whether the evidence adduced is sufficient to prove the charge of murder beyond a reasonable doubt.

The offence of murder is defined in 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.”

Therefore in order to satisfactorily prove a charge of murder the prosecution must adduce evidence sufficient to establish the following three ingredients:

1. The fact and cause of death of the deceased.
2. That the death of the deceased resulted from an unlawful act or omission on the part of the accused.
3. That said unlawful act or omission was done with malice aforethought.

In this case the fact and cause of death of the deceased are not in any doubt. **PW9** and **PW10** both told the court that they came across the dead body of a male African adult lying beside Links road in the Nyali area. **PW11 CHIEF INSPECTOR SAMSON CHELUTO** confirmed that upon being called to the scene he saw the dead body having been dumped inside some plants by the side of the road. **PW11** removed the body to the mortuary. **PW1 JULIUS WAGAI** a brother to the deceased and **PW2 JACKLINE ANYANGO ODIRA** the wife to the deceased both told the court that they saw the body of the deceased at the mortuary and identified it as that of ‘*Sabiano Odira*’. All the witnesses talk of having seen cuts and wounds on the face and neck of the deceased. Evidence on the cause of death was tendered by **PW6 DR. K. N. MANDALYA** who conducted the autopsy exam on the body. **PW6** told the court that he noted a deep cut on the base of the neck as well as multiple cuts on the head. Internally he noted a fracture of the cervical spine. In his opinion death was caused by “*intra cranial haemorrhage due to head and spinal injuries due to cut wounds.*” He filled and signed the post mortem report which is produced as an exhibit **Pexb1**. This is expert medical evidence which has neither been challenged nor controverted by the defence. I therefore find as a fact that the deceased met his unfortunate death as a result of being cut on the head and neck.

The prosecution is required to tender sufficient evidence to prove that it was the accused who cut up and killed the deceased. Out of the eleven (11) witnesses called by the state none was an eye witness to the events that led to the death of the deceased. By the time **PW9** and **PW10** arrived at the scene the deceased was already dead. There being no eye witness the prosecution seeks to rely upon circumstantial evidence to link the accused to this crime. Circumstantial evidence is that evidence which not being direct evidence suffices to link the accused to an offence such as to lead to an irrebuttable conclusion that he committed the offence in question. In the case of **TEPER – VS – REPUBLIC 1952 AC 480** it was held:

“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.”

Thus the circumstantial evidence must point **exclusively** to the guilt of the accused and leave no room for

any other possible explanation.

In this case both **PW9** and **PW10** place the accused at the scene. They both testify that whilst on regular patrols within Nyali they came across the accused sitting in a white motor vehicle which had been parked by the side of the road. Both **PW9** and **PW10** identify the accused as the man who they found in Toyota Funcargo whose registration number was given by **PW7 PC JOEL MUGAMBI** as KAK 816H. In her evidence **PW3 IRMA LEMZIN** told the court that she is the owner of the motor vehicle KAK 816H and that she often used to give the deceased who was a family friend the said vehicle to use as a taxi. **PW3** said that she allowed the deceased to use her vehicle on humanitarian basis to enable him raise money to fend for his family. In his defence the accused denies having been found seated **inside** that vehicle. He claims that **PW9** and **PW10** merely apprehended him as he was walking home from work along Links road and thereafter handed him over to the police. The accused further alleges that it was the police who decided to frame him claiming that he was a thug. His defence is not persuasive for two reasons. Firstly no such issue was raised during the cross-examination of the two witnesses. At no time did defence counsel put it to either **PW9** or **PW10** that they had arrested the accused while he was walking home. Secondly, no reason is advanced as to why the police officers more pertinently **PW7** and **PW11** who did not know the accused before this incident would seek to frame him for murder. Clearly this defence is merely an afterthought and I do reject it as such.

I am mindful of the fact that this incident occurred at night and it was obviously dark. However the two eye witnesses both state that they were able to see the accused well because the headlights of the stationary vehicle and the headlights of their own vehicle were on. Further, the accused emerged from the stationary vehicle in their presence and they immediately apprehended him and kept him in their custody until the police came. At no time did they lose sight of the accused. Given these circumstances, there is very little possibility of a mistaken identity. Having found that accused was actually found in the motor vehicle parked by, the side of the road, I will proceed to analyze the other circumstantial evidence on record.

Aside from being found inside the vehicle which was being driven by the deceased the evidence from both **PW9** and **PW10** is that upon looking into the said vehicle they noted that it had blood stains on the seats. Similarly when they examined the clothing worn by the accused a white vest and a pair of blue jeans both eye witnesses noted that his clothes were blood-stained. The story the accused gave them in order to explain the presence of blood on his clothes was that the vehicle had hit a pedestrian and that the blood got onto his clothes as he carried the injured person onto a motor-cycle which took him to the hospital. **PW9** and **PW10** did not believe this story on account of the presence of blood stains **inside** the vehicle. Further **PW9** in his evidence said

“I did not believe the story which the man [accused] was telling us. I saw drag marks from the pool of blood in front of the car to the flower beds next to the road.....”

These drag marks led to the recovery of a blood-stained knife and the recovery of the body of the deceased. In addition **PW9** and **PW10** told the court that the accused emerged from that vehicle holding a bag. Inside the bag were two caps and a small bible. A yellow/cream mask **Pexb6** and a red cloth **Pexb7** were also recovered inside the car

The obvious question that would arise is whether any nexus has been shown to exist between the blood-stains inside the vehicle, the blood-stains on the accused's clothes and the blood of the deceased. Evidence in this regard was tendered by **PW8 LAWRENCE KINYUA MUTURI** who is a Government Chemist based in Mombasa. He told the court that he received several items from the scene from the police and was requested to carry out an analysis of the samples presented to him. **PW8** recorded his findings in his report dated 11th March, 2012 which report was produced as an exhibit. A careful examination of this report reveals the following:

- The blue jeans and white striped shirt were moderately stained with human blood.
- The beige woollen head mask and red cloth were both heavily stained with human blood.

Upon conducting a DNA typing of the exhibits and sample the results found were that:

- The DNA profile generated from a black/brown shirt [belonging to the deceased], the knife, blue jeans [belonging to the accused], the beige head mask, red cloth and white/striped shirt [belonging to the accused] all matched.

The conclusion is that blood containing DNA profile of the deceased was found on the shirt and trouser worn by the accused, as well as the knife, cloth and mask recovered at the scene. What explanation could there possibly be for the blood of a dead man being found on the clothes of the accused. The only logical conclusion is that the accused at some stage came into contact with or handled the dead body.

The case at this stage would appear '*open and shut*' however upon careful scrutiny certain anomalies arise. Firstly the report made by **PW8** indicates that the blood sample taken from the deceased failed to generate any DNA profiles. In his evidence **PW8** explained that this was because the blood had decomposed (probably due to poor storage) and thus was contaminated. Thus no comparison of the DNA profile of the deceased could be made. A brown/black shirt was said to belong to the deceased. There is no concrete evidence that this shirt actually belonged to the deceased. Neither **PW9** nor **PW10** spoke of this brown/black shirt at all. Similarly **PW11** the Investigating officer only spoke of a white striped shirt which he said he **suspected** belonged to the deceased. **PW2** the wife of the deceased did not identify this shirt as the property of the deceased neither did the housemaid **RHODA AKINYI PW4**. In addition no witness claimed that the body when recovered was dressed in a black/brown shirt. **PW11** in his evidence said:

The body was shirtless but had on a trouser without shoes."

There appears to have been an **assumption** that the shirt belonged to the deceased but a court of law cannot rely on assumptions. The law requires that **each** element of an offence be proved beyond a reasonable doubt. The DNA profile of the blood-stains found on this mysterious brown/black shirt did match the DNA profile of blood-stains found on the accused's clothing. The million dollar question is whose shirt was it? No concrete evidence has been adduced to show any nexus between this shirt and the deceased. In his evidence **PW11** states that the black/brown shirt was recovered inside the vehicle. He states as follows:

"On the front seat I found two shirts. One was black/brown/cream striped and was wet with blood. This is the shirt MF18. I later came to learn that it belonged to the deceased"
[my emphasis]

PW11 does not explain how he came to '*learn*' that the shirt belonged to the deceased. It is strange that **PW11** the investigating officer would be the one to identify the shirt of the deceased yet the wife and housemaid of the deceased who were better placed to identify the deceased's clothing did not do so. Why was this shirt not put to either **PW2** or **PW3** as they testified to enable them to identify it as belonging to the accused and so remove all doubt on this score? **PW8**, in his notes refers to the shirt as belonging to the deceased. **PW8** only received exhibits in his laboratory. He did not visit the scene and thus had no way of knowing who that shirt belonged to. Therefore whilst it has been proved that the DNA profile generated from this shirt matched the blood stains on the accused's clothing, there is absolutely **no evidence** to prove that this shirt belonged to the deceased. There is therefore a missing link in the prosecution evidence. The chain of evidence is not complete. This missing link creates grave doubt about the circumstantial evidence. A very real possibility exists which has not been excluded by the prosecution that this shirt could have belonged to a third party who may have left the scene before **PW9** and **PW10** arrived there. Circumstantial evidence may only form the basis for a conviction where no other logical explanation is possible. This is **not** the case here. In the absence of any DNA profile generated from the blood sample of the deceased the court must award the benefit of doubt to the accused. As such I enter a verdict of '*Not Guilty*' and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Mombasa this 8th day of August, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Mokaya h/b Ms. Mnyari for Accused

Mr. Mungai for State

Court Clerk Mutisya