



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 28 OF 2008

REPUBLIC.....APPELLANT

VERSUS

ANTHONY MUSEMBI KIVUVA ACCUSED

RULING

1. The accused, **Anthony Musembi Kivuva**, is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. Particulars thereof being that on the 23rd day of December 2007 at **Mbulutini village** in **Makueni District** within **Eastern Province** jointly with others not before court murdered **Lawrence Muteti Nzioka**.
2. To prove the case the prosecution called six (6) witnesses.
3. PW1 **James Makau Nzioka**, a brother to the deceased identified his mortal remains to the Doctor who conducted the postmortem. He also assisted in taking the accused to the police station.
4. PW2, **Eunice Mukonyo Kiugu**, stated that after her cousin's demise, a suspect one **Ndunda** was arrested. The suspect escaped from police custody. He was pursued by people who administered mob justice on him. He purportedly mentioned the name of the accused which prompted her to call the police. She led the police to his place of work and identified him. He was arrested.
5. PW3 **Jonathan Kimotho Mutiso**, got information about the body of the deceased having been found alongside the road. He moved to the area and found it. Acting on information received he caused the police to arrest one **Kyalo Ndunda** on suspicion of having murdered the deceased. He however escaped from police custody. Members of public pursued him. They beat him to death. In the prevailing circumstances the suspect mentioned some people's names the accused inclusive.
6. PW4, **Nicholas Kyalo Mwanja** was drinking alcohol with the deceased at a pub. According to him, the accused went to the same bar and had a disagreement with the deceased. The accused left them at the pub. They left the pub at 10.00 p.m., they passed through valleys, hills and streams on their way home. They encountered three (3) people. It was his evidence that the accused was one of them. They fought the three (3) men. He hit one of them and ran away. He hid at a neighbour's home until morning. The deceased was found dead in the morning. On cross-examination, however, he stated that in his statement to the police he said after the arrest of one suspect he identified him as a person he had seen at the bar and he did not see the person who killed the deceased. Admitting that he was the one who was with the deceased at the last moment he denied having killed him.
7. PW5 No. 231069 **Mr Wilfred Murege** investigated the case. It was his evidence that he did not

establish if the accused was with the deceased or if any relationship existed between them. On cross-examination he said PW4 did not tell him if he saw the accused at the scene of crime. He never told him if he met the accused with others who attacked them.

8. PW6 No. 65037 **P.C. Alex Kinyua** visited the scene. He found the body which had multiple injuries. He interrogated members of the public at the scene. He arrested a suspect who was subjected to mob justice and killed. In company of other officers, they collected two (2) dead bodies. Nobody volunteered to give them any information. The accused was arrested because he was allegedly named by the suspect who died. He witnessed the postmortem conducted. He produced the report thereof in evidence. On cross-examination he said he could not say with certainty if the accused murdered the deceased.
9. At the conclusion of the prosecution case it was evident that both police officers who investigated the case were in doubt as to the guilt of the accused. Both PW5 and PW6 said they were not certain if the accused killed the deceased. The cause of death of the deceased per the postmortem report was cardio pulmonary collapse secondary to blunt trauma as a result of mob justice.
10. PW4 tried to link the accused to the demise of the deceased. However, PW5 said when he interrogated him he did not tell him that he had seen the accused at the scene of the incident. It was the evidence of the witness that they drank alcohol about 10.00 p.m. They had to walk a distance to their home. They traversed through valleys and hills and they even crossed streams. He did not tell the court at what time exactly they encountered people they fought.
11. He claims to have seen the accused. He was able to tell it was the accused because there was moonlight and he heard their voices. Extra caution must be taken when it comes to evidence of visual identification especially when circumstances that prevailed did not favour correct identification. This position was well stated in the case of **Roria –versus- Republic (1967) EA 583** where **Sir Clement De Lestang Up** observed that:-

“...there may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine out of ten – if there are as many as ten – it is a question of identity.”

12. In this instant case the question to be posed is how bright was the moonlight? What was peculiar about the voice of the accused that made the witness identify him? What was the witness' state of mind as he had been drinking for more than four (4) hours. All these questions remained unanswered. To quote him he stated:-

“I could tell he was the one because there was moonlight and I heard their voices. We fought. I hit one of them and I ran off.”

The next question is there having been a confrontation between them, if at all it happened, how did he know it was the accused? It is surprising that he did not tell the investigation officer of his alleged encounter with the accused. Probably that is why no investigations were directed towards establishing if indeed he ran to a neighbour's place and stayed there until morning.

13. In this case in fact the last person to be seen with the deceased having been PW4, he should have been a prime suspect.
14. In the case of **Ramanlal T. Bhatt –versus Republic (195&0 E.A. 322** it was stated:-

“It may not be easy to describe 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.”

15. This is a case where the investigation officers were in doubt if indeed the accused could be

connected to the offence alleged and they charged him. An application of the principle in the case of **Bhatt** would mean that if this court required him to address it in defence it would be asking him to discharge a duty that ought to have been done by the State. In the circumstances, I find him not guilty at this stage and I acquit him pursuant to the provisions of section 306 (1) of the Criminal Procedure Code. The accused shall be set free unless otherwise lawfully held.

.....

L. MUTENDE

JUDGE

Dated and delivered at Machakos this 17th day of December 2013.

.....

L. MUTENDE

JUDGE