



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 72 OF 2007

LESIT, J

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES MWITI KINYUA.....1ST ACCUSED

JOHNSON MUTUA JAPHET.....2ND ACCUSED

PETER MURIITHI MWANGI.....3RD ACCUSED

RULING

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 25th day of September, 2007 at Chaaria in Kariene Location in Central Imenti district of the Eastern Province, jointly with others not before court murdered Jason Mbaabu Bernard.
2. This case was heard by Kasango J. and Apondi J. I took over the matter and heard only one witness in a trial within a trial to determine whether certain confessions made by the two of the accused persons before Mr. Mwicigi Magistrate were admissible. Thereafter I took the evidence of the last witness PpW11 who was a member of the investigating team which was investigating the disappearance of the deceased in this case. After that evidence the prosecution closed its case and I took the submissions by Mr. Mutwiri for the 2nd and 3rd accused Mrs Ntaragwi for the 1st and Mr. Moses MUngai for the state.
3. As I have already alluded to there were 11 prosecution witnesses in this case. The facts of the prosecution case were that the deceased opened his agro vet medicine shop at Nkubu Market on the morning of 25th May, 2007 in the presence of his employee Julius who was PW1 in this case. PW2 another employee of the deceased joined them later that morning. The accused then left the two working after they loaded his motor vehicle KAY 196 x with fertilizers and medicines the deceased was seen again at 6.30 with merchandise for the shop which was of loaded from his vehicle. PW1 and 2 left their boss at the shop at 6.45 pm.
4. He was then seen by his landlord who was PW3 in the case the deceased talked with him that evening and told him that he was very happy that day because he had made much money. PW3 testified that he advised the deceased to hide the money and then go to celebrate. PW3 SAW the deceased leaving his house in his vehicle the same evening.

5. PW4 had a hotel at Nkubu Town. He testified the deceased used to eat at his hotel. PW4 said that at about 7.30 pm ON THE 25th September 2007 he saw the deceased enter the hotel after which he ordered food and eat alone after spending about 30 minutes at the hotel PW4 saw the deceased leaving without saying anything.
6. PW1 and 2 did not see the deceased on the 26th September 2007. His phone also went unanswered. On the third day 27th September when the deceased did not come to work PW1 decided to inform the landlord who advised him to tell the relatives of the deceased. Eventually PW1 WAS able to get a brother of the deceased who was PW5 in the case and informed him about the disappearance of the deceased.
7. PW5 decided to go to the estranged girlfriend of the deceased one Diana to find out if she knew anything about the two of them went to the police where they reported the matter. Two weeks later PW5 and his sister PW6 were called and informed of the recovery of a headless and trunk less body which was recovered. Both PW5 and 6 were shown the body and they said they were able to identify it as the body of their late brother by the toe nails. PW5 described that his brother's toes had his were similar because they were short and they grew downwards and that he was able to identify the body through those toes. PW5 demonstrated in court how the toes looked like but unfortunately that was seen by my sister judge who was hearing the case at the time.
8. The post mortem on the body was done by Dr. Isaac Macharia. The doctor describes in his report the missing parts of the body which he noted that they were the most of the upper part of the body which included the head the upper limbs and the trunk up to the level of the lower limbs the internal organs missing included the heart the lungs and the windpipe. From the way the body looked all those parts were deliberately cut off. Also missing was the whole of the right leg. He said that he was unable to determine the cause of death because of the missing organs and parts.
9. Police Officers investigating this case included PW7 Chief Inspector Koya PW8 Cpl. Ngeno and PW11 PC Kipsang. PW7 circulated the information of the missing person and the missing vehicle. on 29th September 2007 he received a report from the Crime Prevention Unit from Nairobi who informed him that the vehicle had been recovered and that there was no one inside the vehicle.
10. PW8 was based in Nairobi Crime Prevention Unit at CID headquarters in Nairobi. He together with the other police officers received a report from Track It Controller that a vehicle KAY 196 x Isuzu Tougher which had been reported missing by Nkubu Police Station had been trunked by their personnel and that the signals were showing that the vehicle was in Nairobi. PW8 joined in the search for the vehicle with Trunk It and they were able to trace the vehicle in Embakasi Nairobi. It was parked near Mukuru slums next to Automobile Association of Kenya. PW8 said he interviewed a watchman nearby who informed them that the vehicle had been brought by two men and a woman. PW8 testified that the watchman said that he could be able to identify the 3 people if he saw them.
- 11.11. Cpl. Murithi PW10 who was from Crime Scene Support Services was called to do dusting of the vehicle at Traffic Headquarters Nairobi where the vehicle had been towed. He did dusting of the vehicle and was unable to get finger prints. He took photos of the vehicle Exhibit 5A and 5B. PW10 was also taken to the home of one Mutua where he took photographs of a scene where a roll of rubber was recovered. He also took a closer view of the same rubber rope as a police officer was holding it.
12. PW7 testified that on the 8th October, 2007 he received a report from Nkubu Police Station that a headless body had been recovered from the area. PW7 was the DCIO Meru Central. He organized for the family especially PW5 and 6 to identify the body at Meru Mortuary. The family identified the body on 9th October, and on the 10th October the post mortem was carried out by Dr. Macharia.
13. PW11 PC Kipsang gave evidence concerning the arrest of the first accused. His evidence was that he joined the Investigation Team of this case on the 23rd October 2007. He said that he learned of the recovery of the body of the deceased from Mariara River. He also knew of the recovery of the vehicle belonging to the deceased in Lunga lunga area of Nairobi. By the time he joined the investigation one Benjamin Kiarie Mwangi had been arrested. He was arrested and that all he knew was that the arrest was after the police tracked the mobile number of the deceased.
14. PW11 said that on the 1st November 2007 he together with all the teams comprising police

- officers and others who were investigating the case were able to track the 1st accused in the case using Safaricom who trunked down the one who was using the sim card and mobile phone of the deceased. He was trunked at Nkubu where Cpl. Ochieng not a witness called the sim card number 0722389823 and that when it rang the 1st accused picked it and they arrested him. They also recovered from him an Alcatel phone which was exhibit 8. The phone had a sim card No. 0725903335. PW7 was not sure whether that sim card was recovered from the phone or from the house of the 1st accused. He also said that they recovered sim card No. 0722389823. He was not clear whether it was in the phone or in the house of the 1st accused. He produced several other sim cards which were recovered from the house of the 1st accused together with other documents and items whose relevance to the case was not perceived or disclosed. All the items recovered from the 1st accused were exhibits 8 to 15.
15. The 1st accused led the police to the 2nd accused and he was arrested. The reason for his arrest was not disclosed in the evidence of PW11. PW11 testified that later both 1st and 2nd accused led to the 3rd accused who was also arrested. From the 3rd accused two bags of fertilizer, 10kg and 5kg; 200ml empty paper of wipe out herbicide, exhibits 16 and 17 recovered from him. In re-examination PW11 contradicted himself when he said that he recovered the fertilizer and herbicide from the 2nd accused.
 16. That was the prosecution's case.
 17. I will start by disclosing the reason for the ruling rejecting the admission of the statements taken from the 1st and 2nd accused. There are many things wrong in the manner in which the statements were taken. The most fatal is the fact the statement was taken in open court in the course of hearing other matters before the trial magistrate, with the police prosecutor, members of public and others who had no business sitting in as the statements were made. A confession taken from a suspect should be taken by persons named under section 25A of the Evidence Act. it should be taken in court by a judicial officer hearing the case. Otherwise a magistrate or police officer of the rank of a Chief Inspector. In the latter two scenarios, the suspect should be left in the company of the officer taking the statement and a person of suspect's choice if any.
 18. Presence of other persons puts to question whether the suspect had ease or was subjected to intimidation or fear or other undesirable feelings which may negatively influence his ability to have a clear undisturbed mind from outside influences at the time he made the statement. The presence of others must be controlled as no one would know what emotions their presence may stir in the suspect. Therefore in this case, the accused persons were not left at ease to make their statements to the magistrate who took the same from them.
 19. I have considered the evidence adduced by the prosecution. The evidence against the 1st accused was the fact he was found in possession of an Alcatel phone and a sim card for a line 0722389823 which belonged to the deceased. The evidence of recovery was given by PW11. PW11 was one of the investigating officers in this case. His evidence needed to be supported by evidence of persons who knew the hand set phone the accused owned before he died and the mobile phone number he was using at the time he disappeared.
 20. There was no such evidence adduced. PW5 and 6 the siblings of the deceased were neither shown the phone or sim card. Neither did they talk about the deceased phone or mobile number in their evidence. PW1 and 2 the employees of the deceased may also have known his phone hand set and line. They too did not speak about them in their evidence.
 21. Mr. Makori who took the evidence of PW11 before me at one time asked to call Safaricom mobile provider representative to testify. That was declined because there was no statement by any such witness. even if they testified, that could not have solved the question of which phone hand set and line the deceased owned before he died.
 22. There is confusion regarding the evidence against the 2nd accused. PW10 testified that he was led to the home of the 2nd accused where he took a photograph of a roll of rubber. Exhibit 6(a) was the roll of rubber. PW10 was the scene of crime officer. He did not know the relevance of the roll of rubber nor its importance to the case. Some other witness should have been called to show three things at least. One what the significance of the roll of rubber to the case was. Secondly how it was connected to the deceased death and thirdly how the 2nd accused came into the picture. There was no evidence in answer to all these issues.

23. The 3rd accused was said to have been found with fertilizer and herbicides exhibit 16 and 17. From the evidence, the deceased dealt in agricultural and veterinary products. PW1 and 2 who worked for him did not refer to the two items recovered from the 3rd accused. All they said is that they loaded products from the deceased shop into his vehicle the night the deceased was last seen alive. Even if the deceased was shown to have had similar goods in his vehicle when he disappeared, it can hardly be convincing that products not shown to have distinctive markings, and which are readily available in the market could be said to have been the ones in his vehicle when he disappeared.
24. The last observation I wish to make about the fertilizers and herbicides is the obvious confusion PW11 had in his evidence of whether it was the 2nd or the 3rd accused from whom the two items were recovered.
25. There was the issue of the vehicle produced in photographic evidence as exhibit 6. That vehicle was not recovered from anyone. It had been abandoned. However watch men who were at the scene where it was recovered said he could identify the people, a woman and two men who left it there. Amazingly, the police did not mount an ID parade at least in respect of the accused to find out whether the said watch man could identify either as those who abandoned the vehicle. That was very crucial evidence left out and one wonders whether it was a mere oversight.
26. The one single reason why I find the prosecution case falls in shambles is the botched identification method adopted by the prosecution. The body in this case was identified by means of toe nails on one leg. The body had only one leg, the left one. The right one was missing. PW5 and 6 identified the body as that of their late brother by two nails. It is amazing that in the digital age as we live in, DNA, the almost 100% means of identifying a person even if minimal parts of the body have been recovered was ignored all together. Identification of toe nails is not a fool proof method of identification. If it was the face, or the entire body one would be content with the identification. The doctor's finding that the body had decomposed to some degree adds to the uneasiness in the evidence of identification.
27. PW1 and 2 purported to identify the clothes found on the body as those the deceased was wearing when he disappeared. However in cross-examination both owned up and said that they were not 100% sure the clothes were his. Identification of the clothes posed a problem because there were no unique marks that enabled identification. The identification was disowned by the witnesses rendering their evidence on that point worthless.
28. The doctor described the body in this case as headless, trunk less except for lower ribs, part of the lower body and the left leg. The rest of the body was missing. In fact Dr. Macharia who conducted the post mortem was unable to tell the cause of death due to the excessively many missing body parts. He however concluded that the trunk had been deliberately severed. He did not say whether that was before or after death. He did not also say whether the severance could have been caused by an accident or foul play. That evidence was not conclusive to establish that the body had been murdered.
29. I think I have said enough in this case to show that the investigations carried out in this case were wanting at the most or incomplete at the least. Too many questions were left unanswered. The evidence adduced in the case could not establish that the person named in the information was the deceased as described by PW1, 2, 5 and 6 in their evidence. There is no known cause of death. There is no iota of evidence to establish a nexus between the deceased death and the accused persons in this case, whether jointly or individually.
30. I find that the prosecution has not established a prima facie case against the accused persons to warrant the court to place them on their defence. Consequently I acquit the accused persons at this stage under section 306 of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT MERU THIS 10th DAY OF DECEMBER 2013.

LESIIT, J.

JUDGE