



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NUMBER 68 OF 2004

REPUBLIC PROSECUTOR

VERSUS

MUTHUI KILONZO ACCUSED

RULING

The accused was charged with the murder of **Kongo Kiima** vide information dated 29th June, 2004 and filed in court on 1st July, 2004. It was alleged in the information that on 29th February, 2004 at Matooni Village, Ngaiye Sub-location, Kyuso Location Mwingi District within Eastern Province he murdered **Kongo Kiima** "*the deceased*". He pleaded not guilty to the information and he was tried in earnest.

The trial was initially presided over by **Sitati J.** who indeed took the evidence of 3 prosecution witnesses. The judge later left the station on transfer. The case was subsequently taken over by **Lenaola J.** who had replaced her. **Lenaola J.** presided over the evidence of 9 prosecution witnesses. However, before he could conclude the case, he also left the station on transfer. Thereafter, I took over the case with the consent of the parties who also agreed that I proceed with the case from where **Lenaola J.** had left. I took the evidence of one prosecution witness. Thereafter the prosecution sought an adjournment to call 4 remaining formal witnesses which application I turned down considering the age of the case and because no valid reason(s) had been advanced for their absence. The prosecution was then forced to close their case. Parties then agreed to put in written submissions, on no case to answer. As it turned out, however, only the accused ended up putting in his written submissions. The State unilaterally opted out of the agreement.

Briefly, the facts which informed the prosecution case are that, the accused violently and fatally attacked the deceased because of his money. Apparently on the material day, the deceased had sold his three bulls for KShs.48,000/-. On his way back home, from the market, near a seasonal river he was suddenly, and viciously attacked by three men, among them the accused. The motive of the attack was to rob the deceased of his hard earned cash. Three days after the passing on of the deceased, some items were recovered from the accused's house, among them KShs.42,000/- recovered inside a long trouser which had been cut into a short trouser. The short trouser too had blood stains. Again when the accused was arrested at Kyuso market taking beer at Serule bar he had in his possession KShs.3,640/-. It was the case of the prosecution that this money was part of that which was stolen from the deceased on the fateful night. However, the said money was not tendered in evidence. From the scene of the crime, the police recovered blood samples which were submitted to Government Chemist together with the accused, torn

blood stained cut long trouser. Again the evidence of the Government Analyst and or his report was not tendered in evidence. Before the body of the deceased was released for burial a post mortem was conducted on the same on 4th March, 2004. However, the results thereof were not tendered in evidence. In a nutshell, the prosecution closed its case without calling this vital evidence.

In his written submissions on no case to answer, the accused has submitted forcefully that the prosecution had totally failed to establish a prima case against him to warrant him being put on his defence. The witnesses who testified were in agreement that they did not know who had killed the deceased and or how the deceased met his death. The prosecution too, at the close of their case failed to call the material witnesses in the case. They failed to avail the doctor who performed the post mortem and therefore no post mortem report was produced in court. It follows therefore, that there was no medical evidence as to the death of the deceased and the cause thereof. They also failed to tender the evidence of Government Analyst with regard to blood specimens taken from the deceased, accused and the cut long trouser. Perhaps this evidence would have linked the accused to the crime.

I entirely agree with the submissions of the accused. I have no doubt at all in my mind that the prosecution has miserably failed to established a prima facie case against the accused to warrant him being placed on his defence I am of course cognizant of the fact that and as stated by **Sir Newham Worley P.** in the case of **Ramanlal T. Bhatt Vs. R. (1957) E.A. 332.**

“..... the court is not required at this stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define 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”.

The evidence on record so far left alone and without rebuttal from the accused cannot even find a conviction. Why do I say so?

As already stated a total of 13 witnesses were called by prosecution. However, the prosecution was unable to call the doctor who performed the post mortem on the body of the deceased to testify and tender in evidence the post mortem report. In other words the prosecution closed its case without calling this key witness.

It is trite law that in an information of murder, the prosecution must not only prove that the accused killed the deceased but that he did so with malice aforethought. In the circumstances of this case there is no prove that the deceased died and that he died as a result of the actions of the accused. No post mortem report, death certificate and or even a burial permit was tendered in evidence to establish the fact of the death of the deceased. In other words, no medical evidence was tendered to establish or confirm that a person known as **Kongo Kiima** was murdered by the accused on 29th February, 2004. It is trite law that the standard of proof in any criminal case is beyond reasonable doubt. Thus it behoves the prosecution to prove beyond reasonable doubt and with evidence beyond pre-adventure that the deceased in fact died. That fact cannot be left to suppositions, speculation and assumptions. Nothing stopped the prosecution from tendering in evidence the aforesaid documents to establish the fact of the death of the deceased. Ordinarily, a dead person would be buried or cremated. As such there would be evidence of such burial or cremation. There would be a witness or witness who attended the burial or cremation. In this case no evidence was led by the prosecution as to the burial or cremation if at all of the deceased. None of the witnesses attested to that fact. So that if indeed the deceased died, remains speculative.

Besides lack of proof of such death, the prosecution is also required to place the accused at the scene of crime through watertight direct or circumstantial evidence. The cause of death must bear direct linkage to the activities of the accused. There must be a nexus between the actions of the accused and the death of the deceased. Such nexus can only be established by the doctor’s opinion as to the cause of death in his post mortem report. In the absence of such evidence how can we be sure that the death of the

deceased if at all had a direct relation to the actions of the accused. The deceased could as well have died of other causes or complications unrelated to the assault allegedly administered on him by the accused. He could as well have been killed by other persons and not necessarily the accused. There is no room for speculation in criminal proceedings. The doubts created as to the death of the deceased if at all and the cause of such death must in the end be resolved in favour of the accused.

Of course, I am aware of the case of **Republic –vs- Cheya and Another (1973) E.A. 500** in which the judge rendered himself on the above issues thus:

“..... However, the absence of medical evidence as to death and the cause of it is not fatal because as I said at that stage post mortem reports primarily are evidence of two things; the fact of death and the cause of death. Therefore it was open to the prosecution to produce and rely on other evidence to establish these facts.....”

I do not wholly agree with this position. Luckily it is a decision of the High Court of Tanzania that is not binding on me. I must repeat that there was no medical evidence to support the contention by the state that the accused can be said to have caused the deceased’s death within the meaning of section 203 of the Penal Code or that the specific injuries inflicted on the deceased in the course of the attack resulted in his death. It is instructive that though the accused raised these issues in his submissions, the state did not see the need to respond or rebut the same. Indeed the State failed to file submissions in rebuttal. But again even if I was to accept the above position, I will still find it difficult to attribute the death of the deceased to the accused. There is no evidence proving that the deceased died and that he died as a result of the activities of the accused. Perhaps the evidence of the blood samples and the money recovered on the accused soon after the death of the deceased could have linked him to the crime. But the same was never tendered.

In the absence of such crucial evidence, I am left with no other choice but to hold that nobody by the names of **Kongo Kiima** was murdered by the accused as alleged in the information. Since the prosecution has failed to establish a prima facie case against the accused to require him to be put on his defence, he stands acquitted of the information. It is so ordered.

Ruling dated, signed and delivered in Machakos this 15th day of February, 2012.

ASIKE-MAKHANDIA
JUDGE