

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal case No. 32 of 2006

between

REPUBLIC PROSECUTOR

VERSUS

NDETO KIMEURESPONDENT

RULING

The accused, **Ndeto Kimeu** faces an information charging him with murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on the 25th April, 2006 at Kyanguli Village Machakos District within Eastern Province, the accused unlawfully murdered **Kimeu Ibake**. The accused denied the information.

In attempt to establish a case against the accused, the prosecution lined up a total of 6 witnesses. However, they were unable to call in the evidence of the postmortem. In other words, the postmortem report regarding the deceased was not tendered in evidence. In the circumstances the court had no benefit of the evidence of the postmortem that would have drawn the nexus between the injuries allegedly inflicted on the deceased and his death. In the absence of the postmortem report and or certificate of death it is hard to tell whether the deceased died as a result of the injuries inflicted on him. In the absence of this evidence, I do not see why the accused should be called upon to defend himself. There is no way, a court would convict the accused if he elected to keep quiet or not call evidence in rebuttal. In the circumstances, to call upon the accused to defend himself will be tantamount to calling upon him to prove his innocence. The accused has no such duty at this juncture.

Besides the foregoing, the prosecution case is full of gaping holes and it would be unsafe and indeed unjust to put the accused on his defence. The evidence before court is purely circumstantial as no one saw the accused inflict the fatal injuries to the deceased. The only reason the accused was suspected was because when called after the deceased was found lying on the path injured, he took some time to respond and when he did, he soon thereafter left. It appears though that the accused was drunk. It also appears that there was a rule in the family that no one should attend a family gathering when drunk. This may very well explain the conduct of the accused on the material day.

Teresiah Ndunda Kimeu , the deceased's wife claimed in her evidence that the deceased told her who was responsible for his condition. She alleged that the deceased told her that it was "**Ndeto**" who had injured him. The deceased told her so when they were left alone in the house. However, this evidence is seriously contradicted by PW1, **Musembi Kimeu** who categorically stated that when he tried to ask the deceased, who was his father as well, what had happened to him, he could not talk. Whereas PW5, **Mbwika Maska** nephew to the deceased was categorical that-

"... the deceased Teresia and Musembi were not alone since we came. We did not leave Teresiah and Musembi to talk to their husband and father".

Again, even assuming that indeed the deceased mentioned "**Ndeto**", which **Ndeto** was this? According to PW5, in the village there was **Ndeto Kioko**, there was also a lady called **Ndeto**. The accused is known as **Ndeto** so are his brothers and sisters. It is therefore impossible to tell which "**Ndeto**" the deceased was referring to if at all. In the circumstances, the evidence of PW3 and the alleged dying declaration should be treated with a lot of caution and circumspection. It is quite apparent that there is no love lost between the accused and her step mother, PW3. It is possible that the evidence was made up by PW3 to merely

ensnare the accused.

No motive was established by the investigating officer, who in any event never testified. PW2 was emphatic that ***“the accused and deceased used to go and drunk(sic) together and at the fateful right (sic) they were together. When they drunk together they were always fine (sic). The two families lived well...”*** It was only the investigating officer who could have shed light after investigations what could have led to the fatal assault if at all, hence the *mens rea* and or malice aforethought.

All said and done, I am satisfied that the prosecution has not made out a case to warrant the accused being called upon to answer to the crime. He is accordingly acquitted at this stage?

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of SEPTEMBER 2012.

ASIKE MAKHANDIA
JUDGE