



REPUBLIC OF KENYA

High Court at Machakos

Criminal Case 25 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

1. PATRICK MASAKU MUTIE

2. JOSEPH MUTAVI NZAIKA.....ACCUSED

RULING

The accused were on 28th June, 2006 arraigned before this court on an information charging them with murder of one **Nthenge Ndambuki**. It was alleged that on 2nd September, 2005 at Nthungululu village in Mavoloni Location of Machakos District within the Eastern Province jointly murdered **Nthenge Ndambuki**, hereinafter "*the deceased*". They pleaded not guilty to the information. However, it was not until 12th May, 2009 that the hearing of the case commenced, which in itself is regrettable indeed.

PW1, **Joseph Mwatu Kilonzo** was a watchman at Matungulu Primary School. On 31st August, 2005 whilst on duty at about 11.30pm he heard people talking on the road nearby. After a short while he heard them running. He recognized the voice of one of those persons. It was the voice of the 1st accused. He knew his voice very well since he had known him from childhood. Before he heard people running, he had also heard something like someone being hit but there was no noise. In the morning, he came across the deceased. Though still alive, he could not speak. At the scene he saw the bark of a tree. The deceased had injuries to the head and there was a lot of blood. One, **Mulinda Munyao** told him that the assailants must have been people from nearby. He then saw a group of people walking towards the 1st accused's house. He was arrested whilst the deceased was taken to hospital. Besides the 1st accused, the crowd had also arrested the 2nd accused.

PW2, **Julius Mutiso**, the assistant chief of Kwa Ndolo sub-location on 1st September, 2005 at about 6am received information that a certain person was lying on a road with injuries. He proceeded to the scene and found the accused already apprehended by members of the public. He took them to Kisili Chief's Office and later to Kithimani Police Station. The scene indicated that there was a struggle and a lot of blood sprinkled all over. There were pieces of a stick and the deceased was injured on the head. He was not able to talk and was bleeding from the ears as well.

PW3, **Rosalila Kaluku Nthenge**, the wife of the deceased, received information about the deceased on 2nd September, 2005. The previous night he had gone to drink at Nthungululu shopping centre but did not return. At the scene, the deceased could not speak. She took him to Kisiiki Dispensary and later Thika District Hospital. He was unconscious throughout. The accused were arrested that night by the assistant chief and neighbours. They were locked up at Kithimani Police Station. The deceased later passed on at

Thika Dispensary Hospital at midnight. On 16th September, 2005 accompanied by her brother in law, she identified the body of the deceased at the city mortuary for purposes of most mortem.

PW4, **Stephen Musyoki Ndambuku** an elder brother of the deceased accompanied PW3 to also identify the deceased's body for purpose of a post mortem examination. He observed the deceased's body before the post mortem examination. It had injuries on the face. After the postmortem examination, the body was released to him for interment.

The last witness called by the prosecution was PW5, **Simon Kaseke Ndambuku**, yet another brother of the deceased. On 1st September, 2005 at about 11a.m whilst at Kisiiki Market he received information that the deceased had been assaulted and was unconscious. He proceeded to the dispensary where he found the deceased. He had injuries on the face and blood was oozing from the mouth and nose. He was unconscious. He made arrangements to transfer him to Thika District Hospital where he was attended to and admitted. At about 12.15 he was informed that the deceased had passed on. His body was then moved to Thika District Hospital Mortuary.

This was the long and short of the prosecution case, though they had intended to call 3 or so more witnesses before closing their case. I slammed the door tightly against the prosecution when they sought an adjournment to do so. This was born out of the realization that the case had been dragging in this court since August, 2006. The record did not reflect the prosecution in good light. There had been over 8 adjournments sought by the prosecution on account of want of witnesses.

With this kind of evidence, can it really be said that the prosecution has made out a case to warrant the accused being placed on their defences? I do not think so. With this evidence, even if the accused were put on their defence and elected or opted to keep quiet, no conviction would ensue. Indeed to put them on their defence would be tantamount to asking them to explain their innocence.

As already stated, the prosecution called a total of 5 witnesses. However, even their evidence is at variance with the information. Whereas the offence is alleged to have been committed on 2nd September, 2005, the evidence tendered shows otherwise. PW1 stated that it was committed on 31st August, 2005 at 11.30pm. On the other hand, PW2 stated that it was on 1st September 2005 at 6 a.m whereas PW3 stated that she received information about the deceased on 2nd September, 2005. The prosecution did not deem it fit to apply to amend the information and the particulars thereof before the close of the case. Accordingly, there is doubt as to when the deceased met his death. Such doubt must of course be resolved in favour of the accused.

There is no direct evidence linking the accused to the crime. It is only PW1, **Joseph Mwatu Kilonzo** who testified that he recognized the voice of the accused and alleged that he had known him from childhood. However, he did not state how the 1st accused's voice would have been different from anybody else's voice. He did not state the exact words that the 1st accused is alleged to have uttered that made him identify the voice. Again although PW1 claimed that there was moonlight, nevertheless he did not identify the assailants. It is also instructive that he did not inform anybody about the alleged incident not even to the location Assistant Chief when he came to the scene.

In the case of **Chogo vs Republic [1985] KLR 1** the Court of Appeal Stated thus on the question of voice recognition:-

“Evidence of voice identification is receivable and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused persons voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it...”

The evidence of PW1 fails far too short of the above threshold. It cannot therefore be believed and acted upon.

The remainder of the prosecution evidence is mere hearsay, save for the identification of the deceased's body at the morgue. Although a stick is alleged to have been used to inflict the fatal injuries on the deceased, the bark thereof collected and taken to the police station, was not produced in court nor any other possible murder weapon.

The prosecution closed their case without calling the investigating officer as well as the doctor who conducted the post mortem examination. By failing to call the investigation officer as a witness in this case, it follows therefore that no investigations were ever conducted, however shoddy they might have been. We will never know the circumstances leading to the arrest and subsequent prosecution of the accused. From the evidence, a member at the scene merely advanced the theory that the deceased must have been assaulted by people from nearby. Acting on that theory, a group of people went and arrested the accused. It would appear that the accused were arrested and prosecuted on mere suspicion. Suspicion alone however strong cannot form the basis of a conviction.

The prosecution too, failed to tender into evidence the results of the postmortem examination conducted on the body of the deceased. In the absence of such evidence, the death of the deceased and the cause thereof if at all is not established. It may well be that the deceased passed on as a result of natural causes. To rule out such possibility and provide the necessary nexus between the injuries and the death of the deceased, the postmortem report was a critical piece of evidence which ought to have been tendered in evidence.

On the whole, it is my finding that the prosecution has at this stage not made out case to warrant the accused being called upon to defend themselves. Accordingly, they are acquitted of the information.

DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day of OCTOBER 2012.

ASIKE MAKHANDIA
JUDGE