



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MURDER CASE NO. 10 OF 2010

REPUBLIC.....PROSECUTION
VERSUS
NJERU NJEU ALIAS KIVINDU..... ACCUSED

RULING

The Accused herein was arraigned before this court on 17.05.2010. He is charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code. The particulars of the charge were that on 9.02.2010 at Kirigo, Ndurumori Location in Mbeere District jointly with others not before the court they murdered BERNARD SANKEI.

He pleaded not guilty and the state lined up a total of 7 witnesses in support of its case. Both counsel herein made oral submissions with Miss Kimani for the Accused urging the court to acquit her client at this stage. Mr. Wohoro who appeared for the state submitted that the state had established a prima facie case against the Accused and urged the court to place him onto his defence.

The thrust of the submission by the defence was that there was only 1 eye witness in the matter i.e. PW4. He did not know the Accused person before and the evidence on identification of the Accused was therefore wanting.

Counsel for the state, with respect, appears to have mixed up the witnesses. He submitted that PW4 knew the Accused person well as they were in a drama group together. The evidence on record however is that PW1 Richard Gitonga – is the one who knew the Accused well before and not PW4 – PC (Driver) ABDI JARSO. Gitonga on the other hand was not actually present when the deceased was shot with an arrow. PW4, the police driver is the one who testified to the effect that he saw the Accused shoot the deceased with the arrow as the deceased turned his back on him to run away.

PW4 did not actually know the Accused before that date as he clearly conceded in his evidence on cross-examination when he answered;

“That was my first time to see the Accused...the Accused was not arrested at the scene, he was arrested later. I identified him in the cells ...no ID parade was conducted.”

PW4's was definitely a visual identification and not recognition as submitted by the learned counsel for the state. The issue raised by counsel for the Accused is therefore a pertinent one. Is the visual identification of the Accused by PW4 sufficient to warrant this court to place him onto his defence?

I have carefully considered the evidence so far adduced along with the said submissions and the law applicable. As rightly submitted by counsel for the Accused, the arresting officer was not called to testify. The fact of the arrest is not disputed. It is noted however that the Accused was arrested about 2 months after the incident. Who identified him for purposes of arrest?

There is no evidence that PW4 gave the Accused's description to the police immediately after the incident. It cannot therefore be said with certainty that he saw him very clearly and was able to describe him later. It is also noted that no proper identification parade was carried out for pw4 to pick the Accused person. Identifying him in cells after he had already been arrested in circumstances that have not been demonstrated does not amount to a proper identification. A properly conducted identification parade was necessary in the circumstances of the case.

In the absence of such an identification, the identification of the Accused by PW4 becomes of very little probative value. The same is worthless. As succinctly stated by the court of Appeal in KIARIE VS REPUBLIC (1984) KLR 739.

“Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction”.

This leads me to the next question, would a court properly addressing itself to the above evidence convict the Accused person if he opted to call no evidence in his defence? My answer is in the negative.

My considered finding is that the evidence on record falls too short of the required standard to establish a prima facie case against the Accused person. I therefore find that he has no case to answer. I enter a finding of “Not Guilty” in his favour and acquit him under **Section 306(1) of the Criminal Procedure Code.**

W. KARANJA
JUDGE

Signed this 17th day of January 2011
Delivered and dated at Embu this 25th day of January 2011

H. OKWENGU
JUDGE