



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR NO. 22 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS MWINGIRWA.....ACCUSED

LESIIT J.

RULING

The accused person was charged with murder contrary to section 203 as read section 204 of the Penal Code. It is alleged that on the 20th February 2008 at Gakurine Village, Kithoka Location, in Meru Central District murdered Robin Gatwiri.

The prosecution called three witnesses. PW1 was father in law of the accused being the father of PW2 accused wife. He was deceased a hostile witness having materially deviated from his statement to the police in his initial evidence PW1 said on 19th February 2008 his daughter PW2 came home having quarreled with her husband PW1 then said that the house burnt on 20th February 2008 because of a jiko burner and a tin lamp used in the kitchen.

It transpired that in his statement to the Police PW1 had stated that it was the accused who at 3 pm on 20th went into his house, poured petrol and lit a match stick which burnt the whole house. PW1 stated that it was the accused who at 3 pm on 20th went into his house poured petrol and lit a match stick which burnt the whole house. PW1 stated that they all went out but that one child was forgotten.

PW2 wife of accused was stood down by the court on grounds that under the provisions of s.127(2) of the Evidence Act she was not a competent witness.

PW 3 Nancy Kendi was a niece of PW2, wife of the accused. PW3 was also declared a hostile witness for reason she materially deviated from her statement to police. Her initial evidence was doing homework when she heard a bang on the door and that when she went out, she saw a house burning.

In her statement to police, PW2 had stated that at 6 p.m. on 20th accused had gone to their home and had threatened her grandfather, PW1 that his (accused) property which was in that house and PW1's house would perish that night.

The prosecution applied for adjournment after the testimony of its key witnesses acting belief that the rest of the remaining witnesses would definitely turn hostile. Mr. Oluoch, the prosecuting counsel informed Hon. Emukule, J who heard the case that he needed to reconsider the probative value of the evidence that far adduced.

When I finally took over the case Mr. Kimathi, who took over from Mr. Oluoch indicated that he had two found witnesses to call. These were the investigating officer and the post mortem examination Dr. since no explanation were given why the two were not in court ready to testify, adjournment was rejected.

That was the totality of the prosecution case. The prosecution has the evidential burden to prove its case against the accused on the standard beyond any reasonable doubt. The prosecution has to adduce evidence to prove that by some act and or omission, done with malice aforethought. The accused caused the death of the deceased.

PW1 and PW3 were declared hostile witnesses. That reduced the probative value of their evidence. Since evidence requires to be corroborated by either in defendant evidence in material particular. The evidence which itself requires corroboration cannot be used to corroborate evidence. That therefore means that neither the evidence if PW1 or that PW2 can provide corroboration to each other. There was need for other evidence to corroborate the testimony of these two witnesses. Since prosecution did not call any other witness any hope of evidence to corroborate that of PW1 and 3 is lost.

Even if the evidence of PW1 & 3 did not turn hostile, It is unlikely that it could have sustained a conviction for the offence charged. Both witnesses avoided to discuss the deceased or how he met his death. There was no evidence adduced to connect his death to any act or omission by the accused. The prosecution failed to adduce any evidence to show the circumstances under which the deceased died. In short the evidence of PW1 and 3 was worthless in establishing the course of the deceased death.

There is no evidence to show what was the cause of the deceased death. The doctor who performed post mortem was not called as a witness. The investigating officer was not called either.

I must hasten to add that it is my believe that even if the doctor and investigating officer testified in this case, I do not think their evidence could have improved the state of the prosecution case.

Having considered the evidence before court, I find that the prosecution failed to establish the charge against the accused person.

I find no evidence upon which I could require th accused to answer the charge against him.

Consequently I acquit the accused for the charge against him under s. 306 of the Criminal Procedure Code.

Those are my orders.

Dated Signed and delivered at Meru this 10th day of February 2011

LESIIT, J

JUDGE