



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

HCCR NO. 19 OF 2006

REPUBLIC.....PROSECUTOR

VERSUS

STANLEY NKONJA MUTHORI.....ACCUSED

LESIT J.

R U L I N G

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 21st day of October 2001 at Naathu Location, Nchilu village in Meru North District within the Eastern Province, jointly with others not before court murdered Peter Kaliunga M'Birithia.

The prosecution court called 5 witnesses. The first two witnesses are the arresting officers. PW1 Corporal James Mungai told the court that he was on normal patrol duties on the 2nd April 2006 when they arrested the accused together with many others in a drinking den. PW2 Joseph Mutuma the Sub Area of Inorio Village was the one who led Cpl. Mungai and other police officers to the drinking den where the accused was arrested. PW2 stated that when they arrested the accused he knew he was wanted for a murder case which had taken place almost six years earlier on the 21st October 2001.

PW3 Grace and PW5 Sabina testified that on the 21st October 2001 each of them were in their respective houses when they heard something. According to PW3 it was at 9pm when she was at her house that she heard some men talking along a path outside her house. She told the court that she recognized one of those two voices as the deceased. She did not recognize the other voices. She said that she heard the deceased saying "**You Nkunja I will kill you.**" She said that she heard another voice answering back "**what do you demand from me.**" PW3 said that while the deceased spoke many words and therefore she was able to recognize his voice, the other person did not say much and therefore she did not recognize his voice. She testified that she then heard a sound like one made when a cow is hit and then she heard footsteps of many people running away into the distance. PW3 said that she then slept and she did not think much about it. She said that the next morning is when she came across the dead body of the

deceased.

PW5 told the court that she was in a house at about 11pm sleeping when she heard people quarrelling along a path outside her house. She heard the deceased saying “**Nkunja you come. You either kill me or I kill you**”. She says that on hearing that she called out Kaliunga that is, the deceased, and asked him why he was quarreling. PW5 said that she advised the deceased that if they had fought they should let the matter end there and advised them to go home and sleep. PW5 said that she then heard someone pass near the roof of her house and she called out Nkunja three times but there was no response. Then she heard a voice asking “**are you ready**”? Then she heard another voice say “**Yes I am ready.**” PW5 said that she did not recognize any of those voices because they were a bit far from her house. PW5 said that there were many people known by the name Nkunja in the area she named 4 i.e. the Sub-Area called Nkunja, Nkunja wa Kanini, Nkunja Muruki and Nkunja Mugoiri.

According to PW3 her house is opposite that of PW5 and that there is a path between the two houses and that is where the quarrelling was.

PW4 one Mary Njeri was a sister of the deceased. Her testimony was that on the morning of 22nd October 2001 she was going to draw water when she went by a kiosk owned by Mutuma. She said that she found something unusual going on because one Mutuma, the owner of the kiosk was hurriedly closing down his kiosk in the company of Julia Sololo, the mother of the accused, and Sabina Karimi. She said it was unusual because the kiosk is never closed. PW4 said that they looked worried and anxious. Among the group she saw Nkunja, the accused person before the court running away with two others. That it was at that point that her niece came running to report to her that the deceased had been found dead. She found the body lying on a path which was 500 meters from the house of the accused. She says that the hand had been chopped off and was missing. PW4 said that she followed blood stains up to 5 meters within the house of the accused. It was found in a bushy farm. PW3 said that beside the body of the deceased was found a wedge which is an object which looks like a panga but which is much heavier than a panga.

That was all the evidence the prosecution adduced in this case. The prosecution did not adduce any evidence from the doctor to show the cause of death of the deceased. There was also no evidence from the investigating officer. This case was started de novo before me. It had previously been heard in part by my predecessor of this court. Before my predecessor the post mortem report had been produced which indicated the cause of death was cardiac arrest due to massive haemorrhage, severe head injuries and amputation of the left hand.

The burden lies on the prosecution to prove the case against the accused person beyond any reasonable doubt. At this stage the prosecution ought to have established a prima facie case against the accused to enable the court place the accused person on his defence. The prosecution had the burden of adducing evidence to create a nexus between the accused and the death of the accused. The prosecution had to adduce evidence to show that by some act or omission by the accused person done with malice aforethought the death of the deceased was caused.

The evidence before the court falls short of establishing any prima facie case against the accused. There was no eye witness of the incident. The two key witnesses who came before court heard different things and at different times according to their testimony. PW3 heard the deceased threatening somebody she identified as Nkunja that he would kill that person any time from then. It was nine pm. She did not hear anything else. PW5 who lives near PW3's house also heard the deceased that night. She heard him at 11pm and recognized the voice as that of the deceased, threatening to kill one Nkunja. Both these witnesses did not implicate the accused, as being present when the threats in question were made. PW5 in particular said that it was difficult to know which Nkunja the deceased was talking about because there were four different people also known as Nkunja apart from the accused, who also come from the same area.

Having carefully considered the evidence adduced in this case. I find that there was no iota of the evidence against the accused person which could warrant this court to place him on his defence.

The evidence of PW4 that of circumstantial evidence that on the morning the body of deceased was

discovered, she saw the accused running away with others. PW4 also said that the chopped hand of the deceased was found in a shamba which was within 5 meters from the accused house.

SAWE –V- REP [2003] KLR 354 , the Court of Appeal held as follows:

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2.Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3.The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. ...

5. ...

6. ..

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

The evidence against the accused by PW4 is merely that of suspicion. PW4 did not disclose on whose land the hand of the deceased was found. PW 4 did not disclose the owners of the land within the area where the body of the deceased was found. The mere act of running away is not sufficient evidence to prove that the accused person’s conduct was that of a person with a guilty mind. Neither does the evidence establish inculpatoryfacts which are incapable of an innocent explanation. Those facts do not establish facts which irresistibly points to the guilt of the accused. That evidence is therefore worthless.

Having come to this conclusion of this case I find no basis upon which to require the accused to answer the charges against him. I acquit the accused person of the charges against him under section 306 of the Criminal Procedure Code.

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

LESIIT, J

JUDGE