



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 83 OF 2004

REPUBLIC.....PROSECUTOR

VERSUS

CHARITY KARUKI KINOTI.....1ST ACCUSED

ISAAC MBWIRIA KINOTI.....2ND ACCUSED

LESIIT J.

JUDGEMENT

The accused persons are a mother and son. They are charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on the 9th September 2004, at Giuti Village they murdered JOSEPH KINOTI MUTONGA.

The evidence of the prosecution was that the deceased was walking home from the shamba with Mary Rumba Nkanatha, PW5 in the case when the former was attacked suddenly and he died. According to P.W 5 it was just after 6 pm and therefore in broad daylight. All PW5 said is that she saw the flask and other things which the deceased was carrying fall down. She said she immediately turned and saw the 1st accused running away carrying a panga.

PW2 another son of the deceased said that he arrived home at 9.00 from his uncles place where he had spent the day splitting wood. He found his younger sister NAITO and that following what she reported to him he proceeded to the scene where he saw dead body of this father.

PW4 another son of the deceased received the news of his father's death at a local centres at about 7.50 pm where he was hanging out after the day work at a construction site. He too saw the body of his deceased father on the road the same night.

PW3 the area Assistant Chief received the report of the death from the Sub Area (another name for village elder) one day after the incident. He too saw the body at the scene on 10th September 2004. He participated in a search in the 1st accused house where he recovered a stained panga. The panga was Exh.2.

Doctors finding at post mortem was that the cause of death was cardiopulmonary arrest due to head and neck injury caused by a sharp object. The Doctor, who was PW1, stated that the deceased had multiple deep cuts on the head and neck, three cuts on the left hand, and compound ovulated fracture of the back of the neck and deep lacerations to the brain tissue.

The first accused gave an unsworn defence in which she said that she knew of the deceased death one day after it occurred. She denied having any knowledge of how deceased death occurred.

The second accused was aged 17 years old at the time of the incident. He gave an unsworn defence in which he put forward an alibi that he was not present at the time and place where the deceased was murdered. His defence was that he spent the day in school on 9th September 2004 up to 5pm when he returned home. He said he did his homework up to 10.10pm when he went back and slept. He said that the next morning he went to school where he stayed until evening when he returned home to the news that his father had died and his mother, co- accused and two brothers had been arrested for the murder.

This case was heard by the aid of assessor. Both of them returned an opinion of not guilty.

The burden lies with the prosecution to prove its case against the accused beyond any reasonable doubt. The prosecution must adduce evidence to show that the accused, by some act or omission caused the death of the deceased with malice aforethought. Malice aforethought will be proved if evidence is led to establish that the accused intended to cause death or do grievous harm. It is the duty of the prosecution to demonstrate by way of evidence on a standard of proof beyond any reasonable doubt that the accused persons jointly committed the offence of murder.

There was an eye witness to the murder that is PW5. PW5 said she that she saw the deceased drop the things he was carrying before he fell down. She did not say that she saw anyone strike or inflict any form of injury on the deceased. All she saw according to her evidence was the 2nd accused moving away very fast while carrying a panga. PW5 did not even say she examined the body thereafter or whether she saw any injury it.

The doctor's evidence was that the deceased suffered multiple deep cuts on his head and neck, compound fracture of the neck and three cuts on the left head and laceration of the brain tissue. These are very severe injuries. In line with the doctor's opinion that the injuries were multiple, they could not have been accused by a simple strike, but by several strikes aimed at the various sections of the head where the deceased was injured.

The evidence of PW5 regarding how the deceased met his death was not consistent with the findings of PW1 at post mortem. The description PW5 gave of the attack on the deceased did not at all fit the nature and extent of injuries caused to the deceased. Her evidence was so shallow that it gave the impression that she was not present at the place and time of attack.

The evidence of PW5 did not, in the circumstance, sufficiently prove that the 2nd accused was the one who inflicted the injury that led to the death of the deceased.

PW5 did not implicate the first accused in her evidence. On the part of the 1st accused, there was circumstantial evidence against her, that a stained panga, suspected to have blood stains was recovered from her home. It was PW3 who recovered it from 1st accused house in the presence of PC Rose Ngugi PW6.

The prosecution has not adduced any evidence to show beyond any reasonable doubt that the panga, Pehx2, was the murder weapon. The prosecution could have established that quite easily had the panga been submitted for analysis to ascertain whether the stains seen on the panga were indeed blood stains.

This was not done.

The evidence of PW3 the assistant chief was that when the 1st accused was asked what stains were on the panga, the 1st accused said that she had used it to cut wood which had blood the day before. The prosecution adduced no evidence to challenge that of the first accused and the said accused is entitled to the benefit of doubt.

The evidence against the 1st accused, that the murder weapon was recovered in her house, was circumstantial evidence. That evidence does not satisfy the test applicable to evidence of that nature as it does not point irresistibly to the first accused person as the one who inflicted the injuries that led to the death of the deceased. There are no co-existing circumstances in the evidence which weaken or destroy the inference that the 1st accused caused the death of the deceased.

The first accused denied any involvement in the murder. The evidence of PW5 the eye witness supports that of the first accused that she was not there at the time of the attack. That evidence of PW5 also supports the alibi defence of the 1st accused that she was not present at the place of the attack. You will consider the defence by the end accused that he was not at the scene at the time and place the deceased met his death.

Regarding the alibi defence by both accused; a person who puts forward an alibi as his defence assumes no duty to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution when the prosecution case is not particularly strong an alibi may well raise doubts.

The Court of Appeal in the case of LEONARD ASENATH VS REP (1957) EA 206 adopted with approval an English decision, REP VS JOHNSON 46 CR. APP. R. 55 (1961) 3 ALL E.R 969 which held as follows:

“Though an alibi is commonly called a defence, it is to be distinguish from a statutory defence such as insanity or diminished responsibility and is analogous to a defence such as self- defence or provocation. A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer, and it is a misdirection to refer to any burden as resting on the prisoner in such a case.”

The first accused received support that she was not at the scene of the attack by the sole eye witness PW5. Even though I have my doubts that PW5 was present at the place and time of the attack, there was no to her evidence adduced to contradict that of the first accused. that evidence is unchallenged and has to be accepted.

The second accused defence that he was not at the place of attack was contradicted by PW5. The evidence was PW5 was however so scanty, devoid of detail and did not correspond that of the doctor, in the circumstances, the evidence of PW5 needed corroboration in some material particular implicating the second accused. I searched for such evidence in the prosecution case and found none.

Having come to the conclusion I have of the prosecution case, I find that the charge against both accused was not proved to the required standard. I therefore give both accused the benefit of doubt and acquit both of them under section 306 of the CPC.

Dated and delivered at Meru this 3rd day of February 2011.

LESIIT, J

JUDGE