



REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL CASE NO. 38 OF 2006.

REPUBLIC.....PROSECUTOR.

VERSUS

SAMWEL NGOROK TILITAIACCUSED.

J U D G M E N T.

1. The accused person herein **Samwel Ngorok** was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars of the charge stated that on the 23rd day of January, 2006 at Paraywa Trading Centre in West Pokot District within Rift Valley Province, the accused person murdered Simon Muturi. The prosecution relied on evidence by a total of five (5) witnesses in their bid to prove the charge against the accused person. The deceased, SIMON MUTURI, was the Headmaster of Paraywa Primary school. He used to live alone in a rented house at the Paraywa Trading Centre. The said trading centre is about 50 metres away from the school.
2. PW1, WILLIAM KIBET TUIYOT, testified that on the material night, he was watching a football march on television at the Paraywa Trading Centre. He was in the company of many other persons, when they heard screams from the direction of the house in which the deceased was resident. PW1 went towards the direction from where the screams came from, and upon arrival, they found that the deceased had been shot with an arrow. PW1, together with the other people who had earlier been watching football, noted that the deceased was bleeding from his stomach. They then used a curtain to bandage the wound, to try and stem the bleeding. PW1 then telephoned PW2, FRED KIMUYI LOREMA, who was the Assistant chief of Paraywa sub-location. PW2 owned a vehicle, and he was requested to use it to take the deceased to hospital. Both PW1 and PW2 confirmed that he deceased was rushed to the Kapenguria District Hospital, for treatment.
3. The doctors at the Kapenguria District Hospital then referred the deceased to the Moi Teaching and Referral Hospital, Eldoret. The deceased was taken to Eldoret in an Ambulance. Meanwhile, as the deceased was being taken to the Kapenguria district Hospital, he told PW1 that it was the accused who had shot him with an arrow. It was the testimony of PW1 that the deceased had stepped out of his door, to throw out waste vegetables. Whilst outside his door, he was shot. And, as he had a torch, he lit it and directed the light towards the direction from where the arrow had been shot. It is then that the deceased is said to have positively identified the accused. That is what PW1 told the trial court, that he was told by the deceased.

4. PW2 testified about how he was asked to help take the deceased to hospital, in his vehicle. He also testified that he did question the accused about the incident in question. According to PW2, the accused did admit that on the night of 23rd January, 2006, when the deceased was shot with an arrow, he (the accused) was not at the school, at the material time.

PW2 also talked to the deceased when the latter was still admitted in hospital. It is then that he deceased explained to PW2 that he did not rhyme with the accused. Indeed, the deceased said that on an earlier occasion, he had suspended the accused from his duties as the watchman at the Paraywa Primary School PW3, P.C. PHILIPS RIPIS, testified that on the material night, at about 10.00 p.m, he was on stand-by duties at the Kapenguria police station. He received a call from PWE2 regarding the incident. PW3 recorded the incident in the Occurrence Book (O.B.) Later, PW3 received the broken arrow which had been used to shoot the deceased. He arrow had been removed by the deceased, and it was handed over to the Assistant Chief, who in turn handed it over to the police officer.

5. When PW3 interviewed the deceased, in hospital, he was told that it was the accused who had shot him. On 25th January, 2006, the accused was arrested. He was then charged with attempted murder. But later, when the deceased passed away, on 20th August, 2006, the charge was changed to one of murder. PW4, PROFESSOR VOLODIMIR KOSLOV, is a medical doctor and a lecturer at the Moi School of Medicine, Moi University. He testified that the deceased, when examined on 24th January, 2006, was found to have a wound in his abdomen. The abdominal cavity had 2 litres of blood and the intestines were damaged. Three days later, the patient developed wound sepsis. Thereafter, even whilst undergoing treatment, the edges of the wound separated, and the patient developed adhesions. As a result of all these developments, the patient was re-admitted to hospital on several occasions after being discharged. On 11th August, 2006, the patient was re-admitted after he developed Hepatitis (which is the inflammation of the liver), and partial obstruction of the intestines.

6. It was the evidence of the doctor that the initial cause of all the complications which the deceased developed, was the injury caused by the arrow which shot him. PW5, DR. CHIRCHIR JOHN, was a medical doctor attached to the Kapenguria District Hospital. He produced the medical records of the accused. The said records showed that he accused was fit to plead to the charge, and to be tried by a court of law. The report had been prepared by Dr. S.K. Kemei, who had examined the accused. The foregoing is a summary of the evidence adduced by the prosecution.

7. Thereafter, the accused gave an unsworn defence. He said that he used to be a watchman at Paraywa Primary School. It was his evidence that the only tools or weapons that he used to have in the course of his duty, as the watchman, were a panga and a rungu. He denied ever having had any bow or arrows at the school. On the material night, the accused says that he stayed within the school compound the whole night. On the next morning, PW2 arrived at the school, as the accused was carrying on with his regular duties. According to the accused, the Assistant chief asked him if he had been at the Paraywa trading centre on the previous night. But the accused says that he told the Assistant Chief (PW2) that he had not been to the centre. The accused said that he was shocked to learn from PW2, that the deceased had been shot with an arrow. It was the evidence of the accused that the deceased had personally encouraged him to apply for the job of the watchman. In other words, it appears that the accused was refuting the assertion that he might have had a reason for wanting to attack the deceased.

8. This case is based on the dying declaration by the deceased which was recorded by PW3 while the deceased was in hospital. The statement which he recorded with the police, on 3rd August, 2006, was adduced in evidence, as Exhibit 3. In that statement, the deceased stated, inter alia, that:-

“I was having a torch on my left hand and the waste vegetable was on my right hand. I then lit a torch towards where the arrow was coming from and I saw the suspect while armed with arrows and a bow, leaving a small kitchen which was in front of my rented house. I identified him positively to be my watchmen by the name of SAMWEL RIAMANYANG NGOROK.”

9. However as at the time PW3 was recording the statement, he observed that the accused was speaking slowly, as he was suffering from pain in his stomach. It is also instructive to note that the accused was questioned by the assistant chief (PW2) on 14th January, 2006, and that on 15th January, 2006, the accused was arrested. By the time of the arrest, PW3 says that the deceased had told him that he had positively identified the accused as the person who attacked him. When I summed up this case to the assessors, all the three of them returned a unanimous verdict of not guilty.

10. I have evaluated the evidence in this matter which was heard and finalized by my predecessor Ochieng – J. except that he did not sum it up to the assessors, I agree with the verdict of the assessors for the following reasons:-

Firstly, the prosecution principally relied on circumstantial evidence that the accused person who was the watchman had an opportunity to commit the offence. Secondly, the a deceased told PW1 that he suspected the accused person because they were not getting on well and indeed the deceased recorded a dying declaration which was produced as exhibit No. 3.

11. The evidence of suspicion and the dying declaration have to be examined further because the deceased was attacked after 8.00 p.m. according to PW1 and PW2 who rescued the deceased and they took him to the hospital. The deceased said he used a torch to identify his attacker. There was no evidence to test the lighting that was emitted from the deceased’s torch, and even the distance from where the deceased was, when he was shot with an arrow. According to the principles set out regarding identification by a single witness, even if the deceased had seen the accused person he did not testify in court and his dying declaration ought to be corroborated by other evidence because there is a possibility that the deceased was mistaken.

12. What corroborates this evidence is circumstantial evidence that the accused person did not rhyme with the deceased. The accused person on the other hand, gave a sworn statement of defence. He testified that throughout the material night he was at the school compound guarding the school as a watchman. He denied that he visited the trading centre where the deceased was attacked. There is also no evidence on record from the prosecution witnesses that anybody saw the accused person at the centre on the material night. The arrow that was recovered from the deceased’s body was not linked in any way to the accused person.

12. Accordingly the circumstantial evidence that was meant to connect the accused person with the death of the deceased also falls on the way side. Taking the totality before the court there are serious doubts in my mind whether it is the accused person who shot the deceased. I find there is a possibility of mistaken identity because the circumstances for a positive identification were difficult as the offence took place at night. For the above reasons I concur with the assessors that the accused person is not guilty and I hereby acquit him of the charge of murder.

Judgment read and signed this 8th day of April, 2011.

M. KOOME.

JUDGE.

