



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

CRIMINAL CASE NO. 69 OF 2008

REPUBLIC.....PROSECUTOR

versus

BENSON MWANGI MBURU.....1ST ACCUSED
MERCY WANJIRU NDUNGU.....2ND ACCUSED
MARTIN KANGETHE MWANGI.....3RD ACCUSED

RULING

Benson Mwangi Mburu, Mercy Wanjiru Ndungu and Martin Kangethe Mwangi alias Ng’ethe Wakari alias Ng’ethe Mwangi Katonye, the 1st, 2nd and 3rd accused persons herein, are before this court on the information of the Honourable Attorney General, duly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 23rd November 2008 at Muthithi Location in Murang’a South, within Central Province the trio, jointly with others not before court murdered John Ngugi Mwaniki. The prosecution tendered the evidence of eight (8) witnesses in support of the case against the accused person. At the close of the prosecution’s case learned counsels from both sides were invited to make submission on whether or not a case has been made out against the accused persons under Section 306(1) of the Criminal Procedure Code. This ruling is the outcome of those submissions.

Mr. Kimani Njuguna, learned advocate for the 1st and 2nd accused persons urged this court to find that the prosecution had not made out a case to warrant his clients being placed on their defence. The learned advocate pointed out that Mercy Wanjiru Ndungu the 2nd accused person was not placed at the scene of crime. He invited this court to consider the evidence of P.W.7 and P.W.8 who according to him conceded that the 2nd accused was not present when the deceased was being assaulted. Mr. Kimani further pointed out that there are contradictory evidence in the testimonies of P.W.3 and P.W.5. It is said that there was no clear evidence as where the deceased was assaulted. Some doubt was also raised as to whether or not

the deceased was assaulted. Mr. Kimani was of the view there was no shred of evidence to link the accused with the offence.

Mr. Mwangi, learned advocate for the 3rd accused adopted the evidence of Mr. Kimani. He lamented that the prosecution's case was full of contradictions. It was pointed out that there was no evidence to show how the 3rd accused person was arrested.

On his part, Mr. Kagai, learned provincial state counsel was of the view that the prosecution had established a prima facie case to place the accused persons on their defence. It was argued that the evidence of P.W.3 – P.W.5 placed the accused persons at the scene of crime. It is said that the deceased was arrested as a suspect for theft hence he was assaulted by a mob commonly referred to in the local dialect as Mungiki. Mr. Kagai pointed out that the 2nd accused was the principal offender hence she is guilty by the application of the principle of common intention.

I have anxiously considered the rival submissions. At this stage the court is called upon to consider whether the prosecution has made out a case which the court can call upon the accused persons to answer. In other words if the accused persons elected to keep quiet, will the evidence tendered so far sustain a conviction? I have examined the evidence tendered by the prosecution. It is trite law that the court is not bound to go in depth analysis of the evidence adduced so far because it may at the end influence the line the defence is likely to adopt if the accused persons are placed on their defence. Upon a critical analysis of the evidence I am convinced that the evidence of P.W.3, P.W.5 and P.W.6 put the three accused persons at the scene of crime. The evidence of P.W.4 and P.W.7 explains how the 1st and 3rd accused persons were arrested. The evidence of P.W.3, P.W.5 and P.W.6 also implicate the three accused persons as having participated in assaulting thus inflicting injuries on the deceased. In short, I am satisfied the prosecution has established a prima facie case thus it is necessary to place each of the accused persons on their defence which I hereby order. It is now upon them to do the following:

- (i) ***State whether or not they would personally testify?***
- (ii) ***If they are going to testify, to state whether or not give Sworn testimony***
- (iii) ***Whether or not they would be summoning Independent witnesses?***

Dated and delivered this 8th day of July 2011.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Kimani & Gichohi for the accused persons.

Kimani: Our clients will give sworn testimonies. No witnesses to call.

Court: The case is fixed for Defence hearing on 19/9/2011.

J.K. SERGON

JUDGE