



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 36 OF 2009

LESIT J.
REPUBLIC.....PROSECUTOR
V E R S U S
MOHAMMED KOOME.....RESPONDENT

R U L I N G

The accused Mohammed Koome is charged with murder of one Patrick Kangura contrary to section 203 as read with section 204 of the Penal Code. It is alleged that the accused murdered the deceased on the 21st March, 2009 at Muringene Location Igembe District.

The prosecution called two witnesses. PW1 Cpl. Maxwell Mwenda told the court that he was on duty at Maua Police Station on 22nd March 2009 when one Juliane Kabura reported that the accused had stabbed the deceased at 8 pm the previous day. PW1 also stated that he re-arrested the accused the same day of the report from the chief of Muringene Location.

PW2 was Ezekiel Muongera, Chief, Muringene. His evidence was that on 21st March 2009 he received three calls from a taxi driver, one Kobia Kithera. The taxi man reported that he had taken the deceased who had been stabbed by the accused. PW 2 testified that he advised the taxi man to take the deceased to the police station before taking him to hospital. The second call informed PW2 that the deceased had died. The third call informed PW2 where Kobia the taxi man had spotted the accused. PW 2 arrested the accused at 5.30 am on 22nd and took him to Maua Police Station where PW1 re-arrested him.

There was no eye witness evidence in this case. PW1 produced a statement of one Joyce Nankui. In that statement an incident is narrated in which one Joanina Kabura purchased charcoal from her and that soon after she left, Joyce heard a commotion outside the gate. Joyce stated that she rushed outside and witnessed as follows:

“I rushed there only to find one male on the ground. I asked Joanina who was among the people there what was going on. She told me that the person had been stabbed by one Mohammed. I did not know the person and I had never seen him again.”

The prosecution has the burden of proof to establish by evidence, that the accused, by some act of omission, caused the death of the deceased. The prosecution can discharge that legal burden either by direct eye witness evidence or by circumstantial evidence.

The evidence before the court is neither direct nor circumstantial. Joyce, whose statement was produced in court as evidence, was not present when the deceased was stabbed. She came after the fact.

It could have been circumstantial evidence if the said Joyce found Mohammed at the scene may be holding the murder weapon or in some telling position in relation to the deceased. Joyce's statement makes no claim that she ever saw Mohammed. Neither does she claim in that statement to have known who Mohammed is.

The statement of Joyce, Exh. 6(b) is worthless as it does not disclose any evidence which can connect the accused with the deceased's death.

The evidence before court, especially from PW1 is clear that the probable eye witness of the incident was one Joanina Kabura. She gave a report of the incident to PW1. She made no statement with the police. A warrant of arrest issued by the court on the prosecution's request, in order to have Joanina brought to court, was never executed. The prosecution had five weeks to execute the warrant. At the end of the five weeks no explanations were offered of efforts made, if at all, to apprehend Joanina Kabura.

PW2's evidence was that after arresting the accused, the accused led him to a place where a knife stained with blood was recovered. That knife was handed over to PW1.

PW1 informed the court that he had the knife, together with blood sample taken from the body of the deceased, sent to the Government Analyst for analysis. The results of the analysis are in the Government Analyst's Report P.Exh4. The results were that the blood stains on the knife matches in group with the blood sample taken from the deceased.

First of all the Analyst's Report was not conclusive as it did not bring a DNA result. The DNA result could have indicated with certainty whether the blood stains on the knife came from the deceased.

Secondly the evidence that the accused led PW2 to where the knife was recovered is not sufficient evidence against the accused that he was the one who used it. The fact accused knew where the knife was is capable of an innocent explanation, for instance that accused saw who threw the knife where he led PW2 to recover it. That evidence of the knife in its totality is worthless.

From the evidence of PW 2, one taxi man by name Kobia Kithela was involved in taking the deceased to hospital. This man was not called as a witness, and no explanations were given or efforts made to secure him as a witness in this case.

The general rule where the prosecution fails to avail witnesses was set out in the case of **BUKENYA & OTHERS**, [1972] E A, where LUTTA Ag. VICE PRESIDENT held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

I find the principle in that case applicable to this case. The prosecution failed to avail important witnesses. The court is justified to make an adverse inference that if those witnesses were called, their testimony could have been adverse to the prosecution case.

The Prosecution needed to establish a prima facie case against the accused in order for the court to place the accused on his defence.

Having considered the evidence adduced in this case, I find that the prosecution has failed to establish a prima facie case against the accused person to warrant the court place him on his defence. In the circumstances I find that the accused has no case to answer and I acquit him of murder as charged under section 306 of the Criminal Procedure Code.

Dated, signed and delivered this 22nd day of September 2011

J. LESIIT

JUDG