



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 59 of 2008

REPUBLIC..... PROSECUTOR

VERSUS

PAUL KIMANI WACHIRA..... ACCUSED

R U L I N G

The accused, PAUL KIMANI WACHIRA, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

It is the prosecution's case that on 15th March 2008, at Dandora Estate, Phase 2, the accused murdered the deceased, JAMES GITAU.

By the close of the prosecution case, the state had called seven (7) witnesses.

PW 1, JACKSON KINYANJUI NJENGA, was the father to the deceased. In his testimony, he said that the deceased told him that it was the accused who had assaulted him.

PW 2, JOEL NJUGUNA KINYANJUI, was a brother to the deceased. He said that when he visited the deceased at Kenyatta National Hospital, where the deceased had been admitted to, following an assault, the deceased identified his attacker as the accused.

PW 3, PC FRED NYANGURU, was the police officer who arrested the accused. He was led to the bar where the accused was drinking; the person who led him there was a brother of the deceased.

According to PW 2, it is he who led the police to the bar where they arrested the accused.

PW 4, DR. ZEPHANIA KAMAU, was a medical doctor, who is employed in the police force, as the Police Surgeon.

When he carried out the age assessment of the accused, he formed the opinion that the accused was 31 years of age.

Dr. Kamau also carried out the assessment of the mental status of the accused, and found him to be of sound mind.

During the assessment of the accused, PW 4 did not observe any injuries on the accused.

It was also the evidence of PW 4 that the accused did not complain of any injuries having been inflicted on him.

PW 5, DR. MINDA OKEMWA, was a medical doctor. It is he who carried out the post mortem examination on the body of the deceased.

From the history on the deceased, PW 5 noted that he was assaulted on 15th March 2008, by a person who was known to him.

Following the said assault, the deceased was admitted to the Kenyatta National Hospital, but he passed away on 1st May 2008.

When PW 5 examined the body of the deceased, he formed the considered opinion that the cause of death was the cervical spine injury with paraplegia, due to blunt trauma to the spine. By way of an explanation, the doctor said that the deceased was injured by a blunt object which was applied with force, causing the victim to suffer a fracture of the neck. He further explained that the force which caused the fracture was exerted by someone other than the deceased.

PW 6, PC KYALO KILULU, was the police officer who escorted the body of the deceased from the hospital to the mortuary, where post mortem was done by PW 5. The police officer also witnessed the post mortem examination.

PW 7, CONSTABLE EUNICE KIPCHUMBA, carried out investigations into the assault on the deceased. Initially, she had the accused charged with the offence of causing grievous harm to the deceased. At that time, the deceased was still undergoing treatment in hospital.

However, when the victim of the assault succumbed to his injuries, PW 7 withdrew the original charge, which was before the Magistrate's Court, Makadara, and thereafter charged the accused with the offence of murder.

Having analysed the evidence on record, I have no doubt that the deceased died due to injuries which he suffered when he was assaulted. However, it is equally true that none of the seven prosecution witnesses, saw the accused assaulting the deceased.

The only two persons who are alleged to have witnessed the assault were the wife to the accused and a waiter who

used to work in a pub that was then operated by the accused's wife. Those two persons did not testify.

Therefore, the prosecution appears to be relying on the dying declaration made by the deceased.

The accused is of the view that the evidence on record is insufficient to warrant his being put to his defence.

He relied on the decision of Okwengu J. in REPUBLIC Vs. FRANCIS GATONYE RICHU, (NYERI) HCCRC NO. 22 of 2005 for the proposition that where the evidence adduced by the prosecution was insufficient, the accused ought not to be put on his defence.

In that case, the learned Judge expressed herself thus;

“The evidence that has been adduced by the prosecution raises suspicions against the subject. The dying declaration points an accusing finger at the subject. It is not however sufficient to prove the case should he elect to keep quiet at this stage. Given the evidence available, putting the subject to his defence would be to call upon him to explain the gaps in the prosecution case, which is not his responsibility, as the burden of proof lies entirely on the prosecution”

In arriving at that conclusion, the trial court took into account the following findings;

“It is evident that the deceased did not receive proper medical examination following the assault.”

The deceased had failed to reveal to her mother that she had been sexually assaulted. And the court also formed the considered view that the investigations were poorly conducted, as nothing was done to determine the presence of seminal fluid in the deceased's vaginal area or cervix, or the presence of any infection which could then have been connected to the accused.

Bearing in mind the evidence on record herein, I find that there was absolutely nothing to suggest that there was any intervening factor between the time of assault, and the time of death. There has been no suggestion that the medical treatment accorded to the deceased was wanting.

In the event, I find and hold that the prosecution has proved a prima facie case against the accused, to warrant his being put on his defence. In effect, the accused has a case to answer. He will therefore be, and is now put to his defence.

Dated, Signed and Delivered at Nairobi, this 28th Day of January 2010.

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FRED A. OCHIENG
JUDGE