



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 67 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

ZABLON OMBATI ONGERI.....ACCUSED

Criminal Law and Procedure - *insufficiency of evidence - duty of court to record finding of not guilty - S. 306*
(Criminal Procedure Code Cap. 75, Laws of Kenya)

RULING

The Accused Zablun Ombati Ongeri is charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code, (Cap 63, Laws of Kenya).

The particulars of the offence were that the Accused on the night of 5th - 6th July 2007 at Total Trading Centre in Molo District of the Rift Valley Province murdered Wambui Kuria. The Accused pleaded not guilty and the court entered a plea of not guilty, and the matter proceeded to full hearing. In the event the prosecution called seven (7) witnesses. At the conclusion of the prosecution's case, the Counsel for the Accused made submissions that there was insufficient evidence to put the Accused on his defence.

Firstly, Counsel submitted the pre-trial rights of the Accused guaranteed under Section 72(3)(b) of the Constitution were violated in that the Accused was detained for 24 days instead of the constitutionally prescribed period of 14 days before being brought before court. Mr. Maragia, learned Counsel for the Accused stated this issue was first raised on 14th February 2008 and that the court directed that the issue would be determined as a constitutional question. He urged the court to find that the Accused ought not to have been arraigned and relying on the decision of the court in Nakuru HC Criminal Appeal No. 28 & 29 of 2008 where the court referred to the famous case of Albanus Mutua Mwasya vs. Republic - that an Accused person whose right under Section 72(3) (b) of the Constitution have been violated ought not to be prosecuted.

I will respond to this question right away. The alleged violation of the pre-trial rights of the Accused, and torture

are proper grounds for a Petition under Section 84(2) of the Constitution. They are not grounds for either non-prosecution or acquittal of an accused, or the accused like in this matter.

Secondly, on issues of fact, there was no evidence of an eye witness who stated positively that he saw the Accused kill the deceased. The only evidence was that the Accused had differences with his wife, but the deceased was the mother-in-law. Similarly there was no evidence to support the allegation that the Accused had torched any houses and goods. There was no complaint or entry in any Occurrence Book (O.B.) of such an occurrence. There was no evidence of a charge of arson. Suspicion however strong cannot sustain a conviction.

Thirdly, there was the question of mob suspicion. PW2, stated that there was Okango and Otieno among the mob who were beating the Accused. They were however not called to testify despite PW2's assertion that they would do what the Accused had done, kill. Counsel submitted that what PW2 stated raised doubts as the Accused was arrested by the public at Molo Township - but the body of the deceased was found at Total Junction, a long distance away. There is no evidence connecting the Accused with the killing of the deceased at Total Junction. To connect the Accused with the killing the prosecution ought to have called the said Okango and Otieno.

Mr. Maragia also submitted that there was no circumstantial evidence. PW1 testified that there was no dispute between the Accused and the deceased. The disputes were between the Accused and his wife. She too was not called to testify.

With regard to the blood-stained clothes produced in court, there was no evidence from a Government Analyst connecting the blood stained clothes with the Accused. It is the wife of the Accused who identified the blood stained clothes as those of the Accused but she was not called in evidence to testify and identify the clothes.

Fourthly Counsel submitted the clothes were collected from a disused and abandoned house. The Accused was not a resident of that house. There was no evidence that the clothes belonged to the Accused.

Fifthly, the weapon of murder - a sharp object was not produced in court.

Counsel consequently concluded that in the absence of sufficient evidence it would not be in the interests of justice to put the Accused on his defence, as there is no prima facie case against the Accused, and urged the court to make a finding of no case against the Accused and acquit him.

In answer to the submissions by counsel for the Accused, Mr. Nyakundi learned State Counsel told the Court he relied on the evidence on record.

I have examined the evidence on record, and I am satisfied that this is a borderline case. None of the witnesses, PW1-4 gave any direct or circumstantial evidence connecting the Accused with the murder of the deceased. PW6-7 were formal witnesses. PW6, I.P. Peter Kathumi visited, and secured the scene where the deceased's body was found, drew a sketch plan of the area, and had the deceased's body taken to the Molo District Hospital Mortuary. The items of killing later found by PW5, were collected by his colleague I.P. Abdikadir and Wilfred Kirui, and were kept as exhibits at the

Molo Police Station.

PW7, was Dr. Everlene Agisa Kegode. She carried out the post-mortem, and described the injuries suffered by the deceased - cut wounds on the scalp, the whole of the trachea (*wind-pipe*) was cut (*slit*) and the blood vessels on the neck were also cut off completely, and so was the food pipe (*aesophagus*) and the cervical spine too - All these were severed, and put the cause of death as respiratory failure and shock due to loss of blood.

There is however circumstantial evidence from PW5, Julius Kioni Wambugu, a Carpenter and a village elder who knew the deceased - Jane Wambui a fellow villager at Total Village (*Mau Summit*). PW5 testified that he and the deceased Jane Wambui Kuria, went to the house of the deceased's daughter Jane Wambui, where he found the Accused whom he knew as "Mrefu" - to try and reconcile them. He failed as neither Jane Wamblui (*the original complainant to him*) nor the husband, the Accused was interested in reconciliation. He left them. Later, Jane Wambui went to him in the night and reported to him that the Accused had thrown out her things. That is the last time we heard of Jane Wambui - where did she go. What happened to her. What happened to Okongo and Otieno who effected a citizen's arrest of the Accused - why were their statements not taken, or if taken, why were they not called to testify? The only suspicion cast on the Accused, and suspicion however strong, is no ground or basis for a conviction, is the testimony of PW5 that the clothes found in a disused and abandoned house were those he saw the Accused wearing on the night of 5th July 2007 when he was called and tried to reconcile the accused and Jane Wambui - but failed to do so, and returned to his house.

The taking away of a human life, unless justified under the Constitution, is a heinous crime. It is the duty of the prosecution to prove their case beyond reasonable doubt, and not the accused person to explain himself in respect of the testimony that the blood stained clothes found hidden in a paper bag in a disused and abandoned house were his. For those reasons, I would give the accused the benefit of doubt, and I find the accused not guilty and acquit him under section 306(1) of the Criminal Procedure Code.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 14th day of May 2010

M. J. ANYARA EMUKULE

JUDGE