



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINLA CASE 24 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

BUNGE LELEMOSI.....ACCUSED

RULING

The accused, Bunge Lelemusi is charged with the murder of his step brother, Lmelingaas Lelemusi, (the deceased) on 17th January, 2009 at Naimaralal. It was the prosecution case that on the fateful day, the deceased, the accused and their brother, **P.W.3, Stephen Lemutita (Stephen)** had gone to graze their animals away from home. The later, Stephen returned home in the evening at about 8p.m., leaving the deceased and the accused in the grazing area for the night. The next day one Lekemadene brought the new that the deceased had been murdered.

All the witnesses who went to the scene where the body was, except **P.W.2 Lelemusi Swaki (Swaki)**, did not find the body. It is only Swaki who stated that he saw the body of the deceased lying on the ground. According to him, he noted an injury on the head and blood was oozing from the nose and mouth. It was Swaki's evidence that he was in the company of Lukosum when he went to the bush where the body was. They left the body at the scene.

Swaki and the rest of the relatives returned to the scene three days later and found only a skull. However, according to the area chief, **P.W.4, Henry Lesile Leshronai (the chief)** and **P.W.5, P.C. Bernard Waswa**, the skull was recovered three months later, in March, 2009. The same was submitted to Dr. Misoi who advised in the post mortem report that the skull required further forensic examination. That was not done with the result that two major facts have not been established, namely that the skull was indeed that of the deceased and secondly the cause of death.

The third matter is that there is nothing to link the accused with the disappearance of the deceased. I say disappearance because I find Swaki's testimony incredible. In the company of Lukosum, he went to the scene, found the deceased dead, with a head injury and blood oozing from the nose and mouth, which suggest the injuries were fresh, yet they left his body in the bush. All the witnesses who went to the scene

confirmed that it is a dense bush inhabited by wild animals. If indeed and personally I doubt this, Swaki and Lukosum went to the wilderness where they found their cousin dead and they had the human (or is it the animal) heart to leave his body there for three days (and according to other witnesses three months), then that was not only irresponsible but also incredible.

It is equally incredible that all the people who went to the scene the next only saw blood on the soil and not the body. Yet Swaki saw the injured body. His companion, Lukosum was not called as a witness to confirm the fact that they indeed saw the body of the deceased. Similarly, the first person to report the death of the deceased, one Lekemadene was not called. But more fundamentally, it has not been proved that the deceased actually died in the absence of conclusive proof that he indeed died and that the accused caused his death.

Proof of the cause of death in a murder trial is paramount as was stated in the case of **Ndungu Vs. Republic** 1985) KLR, 487 where the Court of Appeal said:

“Of course there are cases, for example, where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the cause of the death in the circumstances relied on by the prosecution.”
(Emphasis supplied)

With the kind of evidence presented in support of the charges against the accused person, it would be futile to require him to make his defence. Indeed that would amount to asking him to fill in the gaps in the prosecution case.

For these reasons, I find that no *prima facie* case has been established. The accused is acquitted under **section 306** of the **Criminal Procedure Code**. He shall be set at liberty forthwith unless held for any other lawful cause.

Dated, Delivered and signed at Nakuru this 20th day of December, 2010.

W. OUKO

JUDGE