REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 64 of 2004

REPUBLIC ……. PROSECUTOR

VERSUS

EDWIN GITONGA NKOROI ……..……. ACCUSED

RULING

I took over this matter from Lenaola J on 16th September 2008 pursuant to the provisions of section 201(2) of the Criminal Procedure Code following his Lordship's transfer from this court. I recorded evidence of two prosecution witnesses out of eight.

The accused person is charged with murder contrary to section 203 as read with section 204 of the Penal Code. According to the information laid before the court by the Attorney General it is alleged that on 23rd July 2004 at Kibirichia Location, Kimbo sub-location in Meru Central District, the accused murdered the deceased Daniel Nkorori, his father.

At the close of the prosecution case eight witnesses had been called. It was the evidence of PW1, Nteere M'Rintari (M'Rintari) a neighbour to the deceased that on the 23rd July 2004 at about 8.30pm the accused went to his home and reported that he had found the home of the deceased in unusual state with stuff loaded on the Land Rover while others were strewn all over the compound.

The witness in the company of the accused and two other young men visited the home of the deceased and confirmed the state of affairs as reported. On the Land Rover were a sewing machine, mattresses and clothes. They were not able to trace the deceased immediately. M'Rintari left the accused and one young man to guard the home as he made a report to the chief. The chief came and they broke the main door to the house.

In the house they noticed clothes were strewn all over the floor and the doors to the other rooms locked. The chief arranged for the home to be guarded overnight as he went to make a report to the police.

PW3, John Mwenda Muhindi, the chief, reported the matter to the police. The police went to the scene with the chief and again they searched for the deceased. They broke the door leading to the kitchen and in the adjoining room they found the body of the deceased lying on the back, lifeless with a cut in the throat.

PW7 Gitobu Daniel Nkori, another son of the deceased was called and informed. PW8 P.C. Mugambi

Francis commenced investigations after moving the body to the mortuary. In the process of investigations PW2, John Mwenda Muhindi (Muhindi) was arrested so was PW6, Dennis Munene Nkanata (Nkanata). It was the evidence of PW4, Ayub Mwenda (Ayub) that on 23rd July 2007 (I suppose 2004) at about 5-6 pm while going to Kibirichia Market with his brother, Christopher Mbaabu the accused approached them and gave Christopher Mbaabu a paper bag containing five pairs of slippers. He asked Mbaabu to deliver them to their neighbour called Stephen. Mbaabu took the items to Stephen who refused to take delivery.

That was basically the prosecution evidence against the accused. The court at this stage is only concerned with the question as to whether or not a *prima facie* case has been established against the accused to warrant the court to call upon him to make his defence. While it is a cardinal principle of criminal law that the onus of proving the charge against a suspect is on the prosecution and the standard proof is beyond any reasonable doubt, the standard required at the stage of case/no case to answer under section 306(1) of the Criminal Procedure Code is different.

That standard was set as early as in 1957 in Ramanlal Trambaklal Bhatt V. R. (1957) EA 332 at P. 334 – 335 where the term *prima facie* case in a criminal trial was defined in the following words:-

"*Remembering that the legal burden is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that prima facie case is made out of it, at the close of the prosecution, the case is merely are:-*

"*Which on full consideration might possibly be thought sufficient to sustain a conviction."*

This is perilously rear suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is:-

"*Some evidence, irrespective of its credibility or weight sufficient to put the accused on his defence."*

A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true, as Wilson J, said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case" but atleast it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

The question is whether the evidence so far adduced is sufficient to find a conviction if the accused person elected not to adduce evidence in rebuttal?

First it will be noted that the prosecution has had time from 5th February 2007 when the hearing commenced to call all its witnesses. Several adjournments were granted. Specifically with regarding to calling the doctor the first application for adjournment was made on 12th June 2008. Two further adjournments were granted yet the prosecution was unable to procure the attendance of the doctor who conducted the post mortem examination on the body of the deceased. Consequently, the prosecution case was closed without the doctor's evidence on the cause of death.

Although there was evidence that the deceased had a cut on the throat, that cut has not been linked directly to his death. That can only be done through medical evidence.

I am alive to the fact that medical evidence *per se* is merely an opinion evidence which must be considered and tested against other evidence. Since the decision in the case of Ndungu V. R. (1985) KLR 487 it is now trite that the cause of death must be proved by medical evidence.

In that case the court stated the law as follows:-

"*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."*

See also Joel Mutisya Mwanza V. R Criminal Appeal No. 230 of 2005.

The other aspect of this trial is that there was no eye witness to the murder of the deceased. His body was found in a room adjacent to the kitchen. The doors were all locked and they had to be broken. There is evidence that the accused did not live with his father, the deceased; that he lived at Kibirichia market in a house rented from Muhindi.

The prosecution evidence is based purely on circumstantial evidence. It follows that it must be shown that the evidence points irresistibly to the guilt of the accused and further that there are no co-existing circumstances which may destroy or weaken the inference of his guilt. See Kipkering arap Koske & Another V. R. 16 EACA 135 (1958) EA 715. See also Musoke V. R..

The accused went to the deceased home where he found things in disarray. He went to the immediate neighbour and reported. He was involved in the recovery of the body and keeping guard throughout. Is that the behaviour of a person who has committed a crime? I do not think so.

The only evidence that the prosecution is relying came from PW4, Ayub and PW8 PC Mugambi. Ayub testified that the accused gave his brother Christopher Mbaabu some five pairs of slippers to take to Stephen. Mbaabu and Stephen were not called to throw light on these slippers.

Secondly, although the deceased had a "Bata" shop, there was no evidence linking the slippers to the deceased. The other evidence was adduced by P.C. Mugambi to the effect that when the police were about to break the room where the deceased person's body was found the accused attempted to run away. That evidence is curious, bearing in mind that the accused had participated in the search for the deceased from the previous night to the day it was retrieved from a room. Secondly, apart from PC Mugambi no other witness who was present noticed this fact. There are also co-existing circumstances which weaken the inference of the guilt of the accused. For instance there was evidence that the deceased had two workers in his home. They were not there when the deceased was found murdered and today they are still at large.

Secondly, the police appeared to be in arresting spree. Apart from the accused, PW6 Dennis Munene Nkanata and Muhindi were also arrested in connection with the murder of the deceased.

Finally, it was submitted that the constitutional rights of the accused person under section 72(3) of the Constitution were violated. The accused was arrested on 24th July 2004 but was not brought to court until 28th October 2004, some two months later instead of the fourteen days allowed under the Constitution. The explanation offered by P.C. Mugambi is that he spent this time recording statements from witnesses and also because he was still looking for the other suspects who are still at large.

That cannot constitute a reasonable explanation or justification for detaining the accused beyond the permitted fourteen (14) days' period. I come to the conclusion that no useful purpose will be served by requiring the accused to make his defence.

He is therefore acquitted and it is ordered that he shall be set at liberty forthwith unless he is held for any lawful cause.

Dated and delivered at Meru this 9th day of February 2009.

W. OUKO

JUDGE