



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Criminal Case 15 of 2002

REPUBLIC:.....COMPLAINANT

VERSUS

PETER AGONGA:.....ACCUSED

JUDGEMENT

Peter Agong'a Kiroboto the accused herein was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 20th day of September 2001 at 9.00p.m at Kamukunji estate in Uasin Gishu District of the Rift Valley Province jointly with another not before court murdered Salina Aura Night.

The Prosecution called four (4) witnesses. Prosecution witness number one was Martha Wandia. Her evidence was that on the material night she, Elizabeth Okutoyi Akinyi and the deceased had supper together in the house where the witness lived with Elizabeth. Akinyi and the deceased left to go and sleep at the deceased's house. Akinyi presently came back to the house where the foursome had had supper and told the witness and Elizabeth that the deceased was being killed. The trio took to their heels and about 100 meters away they found the deceased lying on the ground. They found three men at the scene who upon seeing them ran away. The witness did not know the three men at the scene by names but she knew them by appearance. One of the three men was a handcart (mkokoteni) pusher based at a place called west. She had known this one since the year 2000, she identified him as the accused in the dock. Her further evidence was that the deceased was bleeding. The witness and Elizabeth went to inform the deceased's brother Cheku who accompanied by his other brother Isaac went to where the deceased was lying on the ground. The two brothers then went to Eldoret Police Station to report the matter. On cross examination the witness said that she knew the accused by the name Kiroboto. She added that when they found the deceased the latter could not talk. She said that the accused was one of the three men whom the witness and others found where the deceased was lying on the ground. She did not witness the incident but suspected that the three men were responsible for the death of Salina Aura Night. The witness said that she did not know who killed the deceased.

Prosecution witness number two was Isaac Ngachee Okutoyi. He was the brother of the deceased and Elizabeth. He was informed of the death of his sister Aura by PW1 and Elizabeth. When he went to the scene the deceased was dead. There was blood at the scene. He then went to Eldoret Police Station and reported the matter and was accompanied to the scene by police officers. The police officers arrested a man at the scene called Njoroge who said that he knew the people who had committed the offence. On cross examination he said that he was not present when the deceased was killed. He said that he had known the accused for between three to four years prior to the incident as both operated at the same work area. He added that someone called Willy was at the scene when the witness went back there with police officers but the said Willy disappeared.

Prosecution witness number three was the assistant chief of Kamukunji in Eldoret. His name is David Kiprotich Simatei. He had been such assistant chief for some ten years at the time. His evidence was that on the twenty first day of September 2001 he received a report from milk vendors of a murder in Kamukunji. He proceeded to the scene and found that the police had taken the body away. At about 2:00pm that day he saw a group of people coming from the direction of Kidiwa in the company of a man who they claimed was responsible for the death of the deceased. The man was handed over to him to take him to the police station. That man was the accused. The assistant chief said that he had seen the man on many occasions as he worked at the market at Eldoret west. He did not know the man's name. The man gave his name as Peter Agong'a. He is the accused. The accused told the witness that he had been with Bongoman who worked at the bus stage. The witness proceeded to the bus stage and arrested the said Bongoman and took the two

to the Eldoret Police Station and handed them over to the police. Bongoman was not in court and the witness did not know where he was. On cross examination he said that he did not witness the incident.

The final witness was Doctor Joseph Embenzi from Moi Teaching and Referral hospital. He stated that he had worked for six years at the said hospital with Professor Kosolova who had left the country for her home country after the expiry of her contract. Professor Kosolova had prepared the post mortem report and the witness was familiar with her handwriting and signature. He read and produced the post mortem report on the deceased which was done on 27th September 2001. The report gave the cause of death as a stab penetrating wound on the chest which penetrated the heart. That was the close of the prosecution case.

In his defence the accused gave an unsworn statement. He stated that he used to live in Kamukunji estate, Eldoret. He left his house at about 6:00am on the 20th day of September 2001 and went to work at a hotel in Eldoret town. He said that he heard people saying that someone had died. He did not know who had died. He said that he worked the whole day and went to his house in the evening. That people came to his house and asked him to go and assist them with some information but he said that he did not know what they were talking about. That is all he said in his defence. He did not call any witness.

I have carefully considered the testimonies of the prosecution witnesses and that of the accused person. I find as a fact that not a single witness actually saw the accused person stab the deceased. None of the prosecution witnesses witnessed the incident. Martha Wandia's evidence (PW1) that the accused was one of the three men who ran away from the scene of the crime when the witness and one Elizabeth and Akinyi approached the scene was not corroborated by either the said Elizabeth or Akinyi both of whom were not called as witnesses. And even if PW1's evidence that the accused was at the scene is true, and nothing is given to show that it was otherwise, that alone does not show that the accused committed the offence as alleged. No evidence was adduced to show intention/motive on the part of the accused to murder the deceased. No evidence was called to establish how the deceased met her death. That her death was a result of a stab wound cannot be questioned in light of the post mortem report. However, who stabbed her and with what weapon did not come out of the adduced evidence. A Njoroge who PW2 said was found by the police at the scene and who is alleged to have said that he knew the people who killed the deceased was not called as a witness. His evidence would have been invaluable. PW3 said that the accused said he was with one Bongoman. It did not come out in evidence where it was they, accused and Bongoman were together and what that had to do with the death of the deceased. The said Bongoman who PW3 said he arrested and took to the police was not called as a witness. Nothing was said about him further. The failure by the prosecution to call the investigating officer dealt a fatal blow to the prosecution case. That officer may have filled the gaping holes left by the evidence as presently adduced. His evidence would have explained the basis upon which the accused was charged with murder. The evidence that the accused was one of the persons found at the scene of the murder is circumstantial evidence. That was not corroborated at all. The killer weapon was not produced. I find that no evidence was adduced to connect the accused to the murder committed. It is a pity that a life was brutally lost and poor investigations, if any were done, have led to the culprit going unpunished. I find that the prosecution have totally failed to establish a case against the accused beyond any reasonable doubt. Accordingly I acquit the accused of the charge of murder and order that he be released from custody forthwith unless he be otherwise lawfully held.

DATED AT ELDORET THIS 27TH DAY OF MAY 2009

P.M.MWILU

JUDGE

DELIVERED AT ELDORET THIS 28TH DAY OF MAY, 2009

M.K.IBRAHIM

JUDGE

IN THE PRESENCE OF:-

.....Accused

.....Court clerk

.....Counsel for the state

.....Counsel for the Accused