



REPUBLIC.....PROSECUTOR

~VRS~

PETER BARASA MAFUTAACCUSED

JUDGMENT

The accused person Peter Barasa Mafuta is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 8th day of June, 2006, at N Village, N Location, Bungoma District jointly with others not before the court, he murdered MN. He pleaded not guilty to the charge.

This case was taken over by myself under section 200 of the Criminal Procedure Code from my senior brother Justice Msagha Mbogholi on 29th July, 2009. Justice Mbogholi had taken over the case from Justice Wanjiru Karanja who had heard the first three (3) witnesses. After Justice Mbogholi heard two more witnesses, he put the accused on his defence. I heard the accused in his sworn statement of defence and took the submissions of the defence and the state.

The prosecution called five (5) witnesses. Precisely, the evidence was that on 8th June, 2006 at around 7.00 a.m. PW2 the husband of the deceased left his wife at home and went to work. He was a primary school teacher. At around 10.00 a.m, someone telephoned him and asked him to return home. On return, he found a crowd of people in his maize plantation. The chief of the area, administration police officers and regular police were at the scene. The body of his wife lay on the ground half naked and with severe injuries. The accused person, his father Jacob Mafuta and brother who are neighbours of PW2 were also at the scene. The three of them were arrested as suspects. Two weeks later, the father and brother of the accused were released and the accused was arraigned in court on 26th June, 2009.

PW1 testified that, he was in his house on the material day in the morning hours. He went to throw rubbish outside his house and saw the accused person about 400 metres away bending over a pool of water as if he was bathing. PW1, returned to his house. After a short while, PW1 heard screams from outside which he at first ignored. When they escalated, he went out and met some people coming towards his homestead. The person informed him that their mother had been killed in the maize plantation. PW1 went to the scene and found the body of deceased half naked with her skirt lifted upwards. She had injuries on her body and was bleeding profusely. The accused's brother and father came to the scene. The accused came two hours later to the scene.

PW2, the husband of the deceased was called from his place of work and found a crowd at the scene of murder. He found the police and the area chief there. Later he identified the body of the deceased to the doctor who performed the postmortem. Before the incident he said the accused had been harassing him for he was not happy with him for having bought land from accused's father. On two occasions, he had been threatened by the accused and his wife had been attacked earlier by an unidentified person in the house who attempted to rape and strangle her.

PW3, the Village Elder testified that he had received a report from PW2 that, he had been

threatened on two occasions at night but had not identified who the persons was. PW3 also went to the scene that fateful morning and witnessed the arrest of the accused, his father and brother.

PW4, Dr. Nancy Kegonde produced the postmortem report of the deceased. The cause of death was said to be due to massive injuries on the head and hemorrhage and fracture of cervical spine. The physical injuries included deep cuts on the forehead, stab wounds on the left eye, fracture of left eye, fracture of left ear bone, fracture of entire maxilla nasal bridge, fracture of the mandible, joint deep cuts on both cheeks, burns on both arms and abdomen and fracture of the cervical spine. The P.3 form showing that the accused was an adult and of sound mental and physical status was also produced in evidence. The post mortem form confirms that a vaginal swab of the deceased was taken for DNA test.

PW5, IP Richard Omayo visited the scene before the body was removed. He arrested the accused and two other suspects at the scene. He found out in the course of his investigations that the family of deceased and that of the accused had a land dispute involving sale of land to PW2 which the accused did not approve. At the time he testified, he was still awaiting DNA tests of accused's blood and a vaginal swab from the deceased. The prosecution closed the case without producing the DNA test which the defence said they were in a possession of a copy.

The accused gave a sworn statement of defence and denied murdering the deceased. He denied having gone to the water well where PW1 said he saw him. It was his testimony that he was in his house milking his cows in the early morning hours of the material day. At 9.00 a.m, the accused went to the home of a bereaved neighbour to mourn with them. At around 10.00 a.m, he was helping to erect a tent when a son of a neighbour called Paul informed him and others that someone had been killed in the maize plantation. He went there with other people and found that it was the deceased. He admits that his father sold the land to PW2 but denies opposing the sale or threatening and harassing PW2 with an intention of driving him and his family out of the land.

It was submitted by Mrs Mumalasi for the defence that there is no evidence to convict the accused person in the absence of any eye witness and failure to produce results of DNA test. The defence argued that prosecution have not proved *mens area* on part of the accused. Mr. Onderi for the state responded that the case is grounded on very sound circumstantial evidence and that *mens rea* is evident in the severity of injuries inflicted on the deceased leaving no doubt that the assailant intended to kill her.

The accused was arrested at the scene by PW5 who also became the investigating officer. This was after PW2 the deceased's husband shouted that the family of Jacob Mafuta (father of accused) was out to finish PW2's family. PW5 admitted in cross-examination that there was no tangible evidence against the accused and that he was awaiting the DNA test results which could have supported the prosecution's case.

The said DNA test results were not produced in evidence by the prosecution. The defence said they had a copy of it in court and were ready to hand over the copy to the prosecution to tender in evidence. This offer was declined by the state counsel and the case was closed after adjournment to obtain the original was refused by the court.

It was only PW1 who said he saw the accused that morning at the water well bending like he was bathing. The well was said to be about 400 metres from the scene. Nobody saw the accused at the scene that morning or saw him coming from that direction. PW1 said that when he saw the accused, he was not holding any weapon. No exhibits were recovered from the accused or from his house to connect him with the killing of deceased. PW3 told the court that when PW2 reported to him that he had been threatened or harassed on two occasions at night, PW2 said he was not able to identify the persons or person involved. PW2 in his testimony said that at one time when he was coming from some church gathering, he saw a person holding a panga and a torch and he recognized him as accused. Had he recognized the person as he alleged, PW2 would have given the name to the village elder as he reported the matter. PW3 confirmed that the family of accused and

that of deceased had a land dispute which had not been resolved. However, the existence of a dispute must be followed by evidence like threats to harm or to kill or any other act so as to show that there was intention to cause harm or kill the person on the receiving end.

On cross-examination, PW1 who said he had seen accused said accused wore a brown shirt while in his statement to the police he stated that it was a white shirt.

It is my finding that the circumstantial evidence on record does not point guilt on the part of the accused. It would therefore serve no useful purpose to deal with the subject of *mens rea* since the *actus rea* has not been proved.

When this trial began, the law on requirement of assessors had not been amended. It was still a legal requirement that all murder trials be conducted with the assistance of assessors. PW1, PW2 and PW3 were heard in the presence of assessors. When PW4 and PW5 were heard, there were no assessors. Although law had by then been amended to exclude assessors, any trial which began with assessors should be concluded with them as has been held by the Court of Appeal. This was a flaw in the trial of this case which may render the proceedings a nullity.

That notwithstanding, it is my finding that the prosecution have failed to prove the offence of murder against the accused person. I find him not guilty and acquit him accordingly.

F. N. MUCHEMI

JUDGE

Dated, Delivered and Signed at Bungoma this 23rd day of September, 2009 in the presence of the accused and the state counsel and Mrs Mumalasi, the defence counsel on the 23rd day of September, 2009.

F. N. MUCHEMI

JUDGE