



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 22 of 2008

REPUBLIC.....PROSECUTOR

Versus

CEASAR WACHIRA WACHERA.....ACCUSED

RULING

Cesar Wachira Wachera, hereinafter referred to as “*the accused*” was on 9th April, 2008 arraigned before this court on an information charging him with Murder contrary to *Section 203* as read with *Section 204* of the Penal Code. The particulars of the information were that on the 11th March, 2008 at Ngomongo village in Kirinyaga District of Central Province, he murdered **Benson Wanjohi**. The accused pleaded not guilty to the charge and his trial ensued.

The prosecution called a total of seven witnesses. In a nutshell, the prosecution case was that on 11th March, 2008 at around 7.30 PM one, **Daniel Kamau** while proceeding to check on his charcoal that he was burning found the deceased nearby writhing in pain and bleeding profusely from the head. When he asked him what had happened to him, the deceased told him that he had been assaulted by one, **Cesar**. **Daniel Kamau** then rushed back home and told **Passy Njoki Ngirigacha** (PW1) of the encounter. **Passy Njoki** in the company of her workers, **Eliud Mwangi**, **Paul Mbogo** (PW3) and her daughter, **Mary Wanguru** (PW4) went back to the scene with the said **Daniel Kamau**. On their way however they met with police officers on patrol who asked them where they were going and they informed them about **Daniel Kamau’s** discovery. The police officers accompanied them to the scene. They found the deceased bleeding from the head and groaning in pain and could not speak. PW1 recognized the deceased as a person they worshipped with in the same church. The police could not offer any assistance then as they did not have a vehicle. PW1 then hired a motor vehicle and took the deceased to hospital. Enroute to the hospital they passed through Kutus police post, reported the incident and were given a note to take the deceased to Kerugoya District Hospital. At the hospital, PW1 telephoned the deceased’s uncle **John Gachoki Kathumbi** (PW3) who came. By the time he arrived, the deceased had already been admitted. The following day, the deceased passed on. According to PW1, PW2 and PW4, there was only one **Cesar** in the village. They passed that information to PW3 who in turn relayed the same to **CPL Pius Tana** (PW5). On 12th March, 2008 the relatives of the deceased informed PW5 that they had seen the accused in Kutus town. PW5 dispatched **PC Kamau** and **Noor** to Kutus town where the accused was pointed out to them and he was arrested. He was brought to the station, placed in custody and later charged with the offence after having been mentally evaluated by **Dr. Owino Ong’ang’a** (PW6). That is all the evidence that was tendered by the prosecution in support of the information.

At the close of the prosecution case, **Ms Mwai**, learned counsel for the accused submitted that no

prima facie case had been made out to warrant the accused being placed on his defence. The only evidence linking the accused to the crime was the alleged dying declaration made to PW1. The deceased claimed that he had been assaulted by **Cesar** and said no more. No further investigations were carried out to eliminate the possibility of the deceased having been assaulted by another person including other **Cesars**. On the basis of the aforesaid scanty prosecution evidence, counsel urged me to find that no prima facie case had been made out to warrant the accused being put on his defence and accordingly acquit him.

In response, **Mr. Makura** submitted that the prosecution had adduced sufficient evidence to establish a prima facie case to warrant the accused being placed on his defence. The prosecution had called 7 witnesses and relied on the dying declaration of the deceased. The deceased mentioned **Cesar** as the person who had assaulted him. He was not lying. The accused herein was the same **Cesar** that was referred to by the deceased.

It is trite law that for an accused person to be placed on his defence, the prosecution must at the close of its case establish a prima facie case against him. In the case of **Ramanlal Trambaklal Bhatt V R (1957) EA 332** the issue was stated as follows:-

“(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of the prosecution, the case is merely one ‘which on full consideration might possibly be thought sufficient to sustain a conviction.’

(ii) The question whether there is a case to answer cannot depend 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.’

In the circumstances of this case I am satisfied that what we have is a mere scintilla of evidence which is not enough to call upon the accused to defend himself. The only evidence purporting to link the accused to the offence is what the prosecution perceived to be a dying declaration which to my mind was not. The said purported dying declaration was not actually uttered to PW1 as incorrectly submitted by **Ms Mwai**, but to **Daniel Kamau**, a nephew of PW1. The deceased was alleged to have told the said **Daniel Kamau** that he had been injured by **Cesar**. Surprisingly, the said **Daniel Kamau** was never called as a witness. Accordingly any evidence relating to the alleged dying declaration is hearsay and inadmissible in court. If that evidence is rejected as it should then there is nothing left linking the accused to the offence.

Even if we were to accept that indeed there was a dying declaration, the same would not pass the threshold set in the case of **Choge V Republic (1985) KLR 1**. In that case the court of appeal held that:

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5. The general principal on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless

expectation of imminent death.

6. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

In the absence of the evidence of the person to whom the deceased conveyed the dying declaration, we are uncertain whether the same was indeed made and if so under what circumstances. It may well be that the said **Daniel Kamau** was the culprit perhaps having found the deceased messing up with his charcoal and decided to discipline him. How else can one explain the failure by the prosecution to call him as witness. No doubt he was a vital and crucial prosecution witness. Is it possible that his evidence may have been adverse to the prosecution. One is also left wondering the intense role played by PW1 in the whole episode. She went out of her way to hire a vehicle to ferry the deceased to hospital. Yet they had no special relationship. Before that she took the deceased to the police station. It is only after the deceased had been admitted in hospital that she contacted the deceased's uncle. It is also instructive that the deceased had been assaulted in a path in her farm. Is there a possibility that both PW1, PW2 and PW4 were hiding something? After all PW2 and PW4 were son and daughter respectively of PW1. It is for all the foregoing reasons that I am of the view that the alleged dying declaration was a figment of these three witnesses' imagination.

Further even if there was the dying declaration, the deceased merely mentioned one, **Cesar**. He said nothing more. No further investigations were carried out by the police with regard to who this **Cesar** really was. As occasionally stated in political rallies and or commercial adverts, the police never caused the real **Cesar** to stand up. There could have been several **Cesars** in the neighbourhood. On what basis then did PW1, PW2, PW4 settle on the accused as being the **Cesar** that the deceased allegedly referred to. Accordingly there is no evidence that the **Cesar** before court is the same **Cesar** mentioned by the deceased if at all.

The deceased was assaulted on a public path in the shamba of PW1. It is possible that he could have been assaulted by any other person(s) apart from the accused. That possibility was not at all eliminated by the police.

For all the foregoing reasons I am satisfied that no prima facie case has been made out to warrant the accused being put on his defence. Accordingly he is acquitted of the information pursuant to *Section 306 (1)* of the Criminal Procedure Code.

Dated and delivered at Nyeri this 30th day of November, 2009.

M.S.A. MAKHANDIA

JUDGE