



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 56 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

SIMON GICHUHI NGUNJU.....ACCUSED

JUDGMENT

SIMON GICHUHI NGUNJU, the accused, 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 7th April 2004 at Kiluli Village in Narok District of Rift Valley Province he murdered Babilon Shoru Ole Kinyaka (the deceased).

The hearing of the accused's case commenced before the Hon. Justice Musinga who took the evidence of four prosecution witnesses and upon his transfer I took over the case. After granting the prosecution several adjournments they were unable to avail the remaining witnesses and were forced to close their case.

None of the witnesses who testified saw the accused kill the deceased. PW1 and PW2 said they went to the scene upon hearing screams. PW1 said he heard the deceased cry that he was being killed but he did not say who was killing him. When he ran to where the deceased was he found him lying down with an injury on the head and the accused standing beside him. The accused immediately held and they started fighting with him but the accused freed himself and ran away.

PW2 said he found PW1 holding the deceased and the accused standing several metres away. The deceased died as he was being rushed to hospital. Thereafter the matter was reported to the area chief who arrested the accused and called the police who went there and rearrested the accused and took the body to the mortuary.

That is all the evidence that was adduced against the accused. Having reviewed this evidence I find that the accused had no case to answer. PW1 is a brother of the accused and the deceased. In his evidence he denied knowing the accused at all. That leaves a lot of question marks in my head as to why he could lie on such an issue.

Be that as it may, there is no evidence to show the cause of death. Section 203 of the Penal Code defines murder in the following terms:-

“Any person who of malice aforethought causes the death of another person by any unlawful act or omission is guilty of murder.”

From this definition, it is clear that there are three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought. See *Nyambura & Others Vs Republic* [2001] KLR 355.

As was stated by the Court of Appeal in the case of *Ndungu Vs Republic* [1985] KLR 487, except where the deceased is for instance stabbed through the heart or where the head is crushed, medical evidence is always required to prove the cause of death. In the absence of that evidence neither the offence of murder nor manslaughter can be sustained – *Omar Rajab & Another Vs Republic* Criminal Appeal No. 236 of 2006 (CA at Nakuru).

In this case besides there being no direct evidence linking the accused to the death of the deceased, there is no medical evidence to establish the cause of the deceased’s death. The charge of murder against the accused cannot therefore hold. Consequently I find that the accused has no case to answer and I accordingly acquit him under Section 306 of the Criminal Procedure Code. The accused shall be set free forthwith unless otherwise lawfully held.

DATED and delivered at Nakuru this 3rd day of December, 2009.

D. K. MARAGA

JUDGE.