



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Criminal Case 8 of 2006

REPUBLIC APPELLANT

VERSUS

PRISCILLA KANARIO1ST RESPONDENT

PETER KARUKU MATE2ND RESPONDENT

SAMUEL KITHURE NDEGWA3RD RESPONDENT

HENRY MATUBI MWORIA alias MWANAUME.....4TH RESPONDENT

JACKSON KAILIKIA5TH RESPONDENT

JUDGMENT

The four accused persons together with the 3rd accused person, who was acquitted under Section 306(1) of the Criminal procedure Code are jointly charged with murder contrary to section 203 as read with section 204 as read with section 204 of the Penal Code. The particulars of the offence as laid by the information are that the accused persons murdered Zakayo Michubu Kaumbuthu alias Sedi, (the deceased) on 11th February 2006 at Kangeta Location in Meru North District.

According to the evidence adduced by eight prosecution witnesses, the deceased was seen being carried by the accused persons on the material day at about 7.00am.

PW2, Julius Bario (Julius) was on his way to Kangeta market on the material day at 7am when he met 3 people, two of whom were carrying a person lying on a sack. He was able to identify the 2nd accused person. He did not indicate whether the person who was being carried was the deceased. He, however, noted that the three appeared drunk and dismissed him when he sought to know what was the matter with the person they were carrying. At more or less the same time, PW3, David N'Toithia Mworerea (David) was on his way to the shamba when he saw a group of about five (5) people, one lady and four men carrying a person he shortly learnt was the deceased. He identified 1st, 2nd and 3rd accused persons. After the five abandoned the body, David approached it and confirmed that it was the deceased and he was dead.

Julius Mwito, PW4 (Mwito) was at a kiosk buying sugar and milk at 7am on the day in question. He saw five people carrying another person. According to him they were 1st, 2nd, 4th and 5th accused persons. He saw them place the body on the ground, cover it with a jacket and walk away. He identified the body as

that of the deceased.

The 4th accused person reported to the deceased person's mother, PW5, Sabina Kabuko (Sabina) that the deceased was sick. They both went to the scene where they confirmed that he was dead. Members of the family and the police were notified of the deceased person's death. PW1, P.C. Ben Wafula led police officers to the scene and later moved the body to the mortuary for preservation and post mortem. Dr. Mutha Titus Kiriinya (the doctor) who performed the post mortem observed that the body had frictional burns on the right forearm, fracture of the 2nd left rib, scalp haematoma, muscle haematoma on the left side of the head and a fracture of the base of the skull. He also noted blood in the chest cavity and some oozing from the nose and ears. In his opinion, hemorrhagic shock due to head injuries was the cause of the deceased person's death. Upon being called to make their defence, all the accused persons elected to remain silent and called no witness.

Learned counsel representing them submitted that the prosecution has failed to prove the case against the accused persons beyond any reasonable doubt. He argued that the mere fact that the accused persons were seen carrying the deceased is not sufficient proof that they caused his death. That the prosecution failed to prove malice aforethought. Finally, he submitted that suspicion alone is not sufficient to base a conviction on. In support of these submissions counsel relied on three authorities.

On his part, counsel for the state maintained that there was evidence to convict the accused persons. He referred the court to section 111 of the Evidence Act and argued that the burden was upon the accused persons to explain how the deceased met his death. Having failed to discharge that burden, counsel urged the court to conclude that the accused persons were the murderers.

I have considered the entire evidence adduced by the prosecution which was not challenged either in cross-examination or by way of defence by the accused persons. From that evidence I am convinced that people who knew the accused persons very well saw them carrying the body of the deceased. They abandoned it under a tree and walked away.

I am further persuaded that the deceased was already dead when the first eye witnesses saw him after being abandoned. There is further uncontroverted evidence that that very morning the 4th accused person went and reported to the mother of the deceased, PW5, Sabina Kabuko, that the deceased was sick. Of course on reaching where the deceased person's body was she (Sabina) confirmed that the deceased was already dead.

However, according to the doctor (who conducted post mortem examination), the deceased had frictional burns, fractures of the ribs, scalp haematoma, fractures on the skull and accumulation of blood in the chest cavity. He attributed the deceased person's death to hemorrhagic shock due to head injuries.

The main question is how the deceased sustained these fatal injuries. From the evidence, there was no eye witness to the assault or attack resulting in the injuries. Without eye witnesses the case must be decided on circumstantial evidence. It is now settled law that a conviction can only be based on circumstantial evidence if the evidence points irresistably to the accused person's guilt and further, if there are no co-existing factors or circumstances which may weaken or destroy the inference of that guilt. See **R. V. Kipkering arap Koske & Another** (1949) 16 EACA 135 and **Simon Musoke V. R** (1958) EA 715. The circumstantial evidence presented in this trial is the fact that the deceased had multiple severe injuries. He was seen being carried by the accused persons who left him under a tree after covering him with a jacket. The 4th accused then reported to the deceased person's mother that he (the deceased) was sick. It is a cardinal rule of criminal law that the burden of proving the guilt of a suspect is throughout on the prosecution. The standard of that proof is beyond any reasonable doubt and the suspect bears no burden of establishing his own innocent. However, I wish to make reference to section 111 of the Evidence Act, which has been the subject of long line of cases. Those cases include **R. V. Nkendeswwo (2202)** I KLR 461, **R. V. Kimeu**, (2002) I KLR 756 and the most recent Court of Appeal decision in **Luciana Juma Farjala V. R.** Criminal Appeal No. 111 of 2004.

Section III and these authorities place a rebuttable burden on the suspect to offer a reasonable explanation

as to the circumstances leading to the deceased losing his life, where that fact is peculiarly within his (the suspect's) knowledge. The burden on the suspect is discharged if the court is satisfied, from the prosecution evidence, cross-examination or otherwise that the circumstances or facts exist. Under the proviso to that section the suspect is also entitled to be acquitted if the court is satisfied that the evidence presented by either the prosecution or the defence creates a reasonable doubt as to the guilt of the suspect.

In this trial, a total of eight (8) witnesses were called by the prosecution. Three of these witnesses gave evidence which directly touched on the accused persons, yet no questions were put to them in cross-examination. When called upon to make their defence all the accused persons elected to remain silent.

It is clear from what I have stated regarding the burden created by section 111 of the Evidence Act that there must be some form of response or rebuttal by the suspect regarding the charges laid against him. In this trial the accused persons denied themselves an opportunity to rebut a very light burden. The deceased, from the medical evidence adduced, did not die from natural causes. The fractures on the head and ribs were caused by exertion of external pressure or force. The accused persons having been seen with the deceased with such serious injuries were expected to explain how such injuries were sustained or even how they came by the deceased and whether he already had the injuries.

Both section 77(7) of the Constitution and Section 306(3) of the Criminal Procedure Code envisages that the accused may elect not to give evidence in defence. It was, therefore within their right to remain silent. But having elected not to say anything or to cross-examine prosecution witnesses, the court must invoke section 119 of the Evidence Act and draw a conclusion that the accused persons knew how the deceased died. That is the conclusion I come to.

Regarding malice aforethought, it is only one witness, Julius who alluded to the fact that the three persons he saw carrying the deceased appeared drunk. In this regard, it has recently been held in the **Luciana Juma** case (supra) that the defence of drunkenness is only available where it is demonstrated that:-

“... the person charged, by reason of intoxication at the time of committing the act or making the omission complained of, did not know that such act or omission was wrong or that he did not know what he was doing (see section 12(2) of the Penal Code). There are, however, pre-conditions. Firstly, that the state of intoxication must be shown, either to have been caused by the malicious or negligent act of another person without his consent, or secondly, that by reason of such intoxication he became insane, temporarily or otherwise, at the time of the act or omission complained of.”

The accused persons have not brought themselves within the foregoing requirements. They were aware of what they were engaged in. They asked Julius to mind his own business. They covered the deceased with a jacket and one of them, the 4th accused person went to the deceased person's mother and made a false report that the deceased was sick. They knew the deceased person's home, yet they abandoned him on the way. From the multiple serious injuries particularly the fracture on the skull I find, and the assessors agree, that the accused persons intended to cause grievous harm or even death to the deceased.

I find all the accused persons guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. They are accordingly convicted.

Dated and delivered at Meru this 8th day of February 2008.

W. OUKO

JUDGE