



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 168 of 2003

JOSPHAT MURURU M'MATHIU ACCUSED

V E R S U S

REPUBLIC PROSECUTOR

JUDGMENT

The accused, Josphat Mururu M'Mathiu, is charged under sections 203 and 204 of the Penal Code with the murder of his father M'Mathiu Mucheke on 3rd September 2003 at Inoro Village. The prosecution case rested on the following facts.

On the fateful day PW4, Catherine Kaburi (Catherine), the daughter in-law to the deceased and a sister in-law to the accused, served the duo with porridge at the grazing area. According to her, earlier on before this time, the two had been involved in an argument regarding the deceased person's miraa. It was the evidence of Catherine that the deceased had alleged that the accused had plucked his miraa without his permission. That the deceased threatened to administer an oath to the accused.

She confirmed, however, that by the time she served them porridge the quarrel had subsided. Catherine returned to her house to feed her baby and start cooking. When she returned to the grazing area where she had left the accused and the deceased, she found the deceased dead and the accused gone. She screamed and neighbours responded. Among those who responded were PW1, Samuel Mbaabu (Mbaabu) and PW2, Elias Mutuma (Mutuma). According to Mutuma he went to the scene and confirmed the death of the deceased. Catherine explained to him that the deceased had been killed by the accused person. Mutuma further testified that he saw the accused person standing at a kiosk armed with a long knife. It was Mbaabu's evidence that on arrival at the scene where the body of the deceased was lying, Catherine told him that he (the deceased) had been killed by the accused. Mbaabu saw the accused at a kiosk some 100m from the scene. That the accused was armed with two swords (long and short) and a rungu. He was chased but the crowd was unable to apprehend him.

PW5, P.C. Josephat Yegon proceeded to the scene in the company of his OCS where they found the body of the deceased. It had a cut wound on the throat. The post-mortem was conducted by PW3, Dr. Celestus Muriungi (the doctor). He noted that the body had a deep cut wound on the neck severing major blood vessels. In his opinion the cause of death was cardiac arrest due to massive bleeding as a result of the cut wound on the throat. In his defence the accused confirmed that he returned home from a trip, was served porridge and thereafter went to the market.

While on his way returning home he received information that the deceased had been killed. He got home and assisted in taking the deceased to the hospital. He traveled again to Giutine to inform his

mother and siblings about the incident. He spent the night at Giutine. He was later that day arrested on allegation that he had killed the deceased and charged with murder.

On my part I have duly considered the evidence adduced by both sides. There is no doubt whatsoever, from the medical evidence, that the deceased died following severe cut wound on his neck. The only broad question that falls to be determined by this court is whether the fatal cut was inflicted by the accused and whether the accused, if he is found to have inflicted it, had malice aforethought. The trial was conducted with the aid of two assessors, the third assessor having been discharged. The two assessors were unanimous in their opinion that the case against the accused has proved beyond any reasonable doubt.

I find as a fact that on the fateful day the accused and the deceased were together. They took porridge together. Shortly after Catherine found the deceased dead and the accused missing. There was, therefore, no eye witness. The prosecution case consequently rests on circumstantial evidence. The law is settled on the authorities of Kipkering Arap Koske & Another v. R. (1949) EACA 135 and Simoni Musoke V. R (1959) EA 715, among a long line of other authorities that a court can only base a conviction on circumstantial evidence if it finds that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused person's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

The prosecution is relying on the evidence that the accused was the last person who was seen with the deceased. That shortly after the deceased was found murdered he (accused) was sighted some 100m from the scene armed. That they had a quarrel before the incident.

Learned counsel for the State submitted that section 111 of the Evidence Act came into play. The two assessors similarly found that the accused having been the only person who was last seen with the deceased must have been the one who caused his death.

Counsel for the state cited the case of Samuel Ndungu Kamau & Another V. R. (unreported) in which it was held that section 111 of the Evidence Act places the burden on the accused in certain situations to explain the circumstances leading to the deceased person's death or at least how they parted company. The case also held that where the suspect fails to offer an explanation then by dint of section 119 of the Evidence Act, a presumption is raised that either the suspect alone or in concert with others caused the death of the deceased. It is the duty of the suspect to offer an explanation on a balance of probability which would discharge the above presumption. I will return to this point shortly.

Turning to the circumstantial evidence in this trial, it is a fact that Catherine did not witness the attack on the deceased. After serving the two with porridge she went into her house to feed her baby and prepare a meal. She estimates that she took ten (10) minutes. However, given the chores she was engaged in, namely to feed the baby and start preparing a meal, it is unlikely that she took ten (10) minutes.

She was not interrupted in her chores by any commotion or alarm. She certainly must have taken longer than ten (10) minutes in the house. Her evidence does not, in my considered view, point irresistibly to the guilt of the accused.

Indeed the time she was away was long enough for any other person to execute the murder of the deceased. Although the accused and the deceased had had a quarrel, the two appeared to have settled their differences and had porridge together. The evidence of the accused being seen some 100m from the scene armed cannot be credible as there was no agreement by the witness as to what he was armed with.

While Mbaabu said in his evidence that he saw the accused armed with two swords and a rungu, his statement read to him in court is to the effect that he saw the accused with a panga. Mutuma on his part claimed that he saw the accused with a log knife and a rungu. The fact that the accused was armed was not recorded in the witness' statement. Yet, Catherine was categorical that when she left the accused and the deceased the former was not armed with any weapon of any kind.

Regarding the application of sections 111 and 119 of the Evidence Act, while it is correct to say that the accused was the last person to be seen with the deceased, the accused has offered a plausible explanation which was not challenged, that he left the deceased to go to the market.

Bearing in mind that Catherine took longer than 10 minutes, this explanation effectively discharges the burden placed on the accused by section 111 of the Evidence Act.

I find that the circumstantial evidence does not point irresistibly to the guilt of the accused. The two assessors based their opinion on the fact that the accused was the last person with the deceased and was therefore the likely culprit. Agreed, there is a strong suspicion based on this fact. But in law suspicion alone, no matter how strong cannot be a basis for a conviction. I have explained above that the accused gave an acceptable explanation to the effect that the deceased met his death when he had walked to the market.

I find the accused not guilty of murder and acquit him. He shall be set at liberty forthwith unless he is held for any other lawful reason.

Dated and delivered at Meru this 16th day of ...May..... 2008.

W. OUKO

JUDGE