



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Criminal Case 47 of 2008**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**JAMES NGANGA KAMAU ..... ACCUSED**

**JUDGMENT**

The accused person James Nganga Kamau was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge stated that on the 1<sup>st</sup> day of April, 2008 at Tee junction Trading Centre, Kiambogo in Naivasha District within Rift Valley Province he murdered Ibrahim Mwaura Kamau. The prosecution relied on the evidence of three (3) witnesses in their bid to prove the charge against the accused person.

Joseph Njuguna Waweru, PW1 testified that on 1<sup>st</sup> April, 2008 at about 9.00 p.m. he was called by some people who told him two brothers were fighting and one had sustained fatal injuries. He tried to alert the police but when he did not succeed, he went to sleep until the next morning. In the morning he went to the home to the deceased and found the body of the deceased lying outside the house. He recognised the deceased who was known by a nickname as Mutembesi. The body of the deceased had injuries on the hands and the head. He also recovered a stick. He went to the shopping and found the accused who had just been arrested by the members of the public and they wanted to lynch him. PW1 intervened and organized for the accused person to be locked at his home until the police arrived.

Charles Sirona Koigi PW2 is the Assistance Chief of Kiambogo Sub/Location. He received a call from PW1. He called the DO and OCS Elementaita and they all set for the Tee Centre. They found the body of the deceased lying outside the house. They recovered a stick from the scene which was the suspected murder weapon. They gathered that the deceased and the accused person were fighting over a debt of fifty (50) shillings after a drinking spree.

CPL Alex Ngewa PW3 investigated this matter. He received the report on the 2<sup>nd</sup> August, 2008. He saw the body of the deceased. He gathered that the deceased was staying with the accused person. The accused person had been arrested and escorted to the AP Camp. They re-arrested him. The body of the deceased was taken to the Provincial District hospital Nakuru. A post-mortem examination was carried out by Dr. Wainaina on the 9<sup>th</sup> April, 2008 in the presence of PW3.

The body of the deceased was identified by Simon Njoroge and Jane Kihara both of relatives of the deceased. PW3 also escorted the accused for mental examination, he produced the P3 form and the post-mortem reports since the doctor who carried out the post mortem and the examination on the accused

person's mental and physical status could not be called in without undue delay.

Put on his defence, the accused person denied having committed the offence. He gave a lengthy story of how he had gone to drink illicit brew at the centre with the deceased. After he finished his drink, he said that he went back home. He found another brother and prepared supper; they ate and slept until the next morning on 2<sup>nd</sup> April, 2008. While he was going to his shamba, he passed through the Tee Centre to buy cigarettes. He was approached by a village elder, who asked him whether he had seen the deceased. He confirmed he had seen the deceased except the previous evening.

That is when the village elder told him that his brother was found dead, the accused then enquired whether he could go and see the body of the deceased, the elder told him to wait until the police were called. The accused person was arrested and charged with the offence of murder. He denied that he had anything to do with the death of his brother. According to the accused person, the deceased used to live in a different place and it is not true that they were living together at the material time.

Counsel for the accused submitted that the prosecution failed to establish the charge against the accused person to the required standard. There was no direct evidence against the accused person. The evidence by the prosecution witnesses was mere hearsay. There were no witnesses to confirm that the accused fought with the deceased and he inflicted upon him the fatal injuries. None of the witnesses saw the accused person fighting with the deceased over the debt of 50/-.

I have carefully analysed the evidence by the prosecution witnesses. I have also taken into account the principles set out in the oft cited case of Bhatt –vs- Republic 1957 EA at Page 334 where the court of appeal explained what is a prima facie case as follows:

*“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggestion that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.*

*Nor can we agree that the question whether there is a case to answer depends only on whether there is ‘some evidence, irrespective of its credibility or weight, sufficient to put accused on his defence. A mere scintilla of evidence can never be enough: or can any amount of worthless discredited evidence. It is true, as Wilson J. Said that the court is not required at that stage to decide finally whether if believed it is weightily enough to prove the case conclusively: that that determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a ‘prima facie case’ but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”*

All the evidence that connected the accused person with the murder of the deceased was circumstantial, there was no direct evidence. In case of Kipkering Arap Koseki & Another –vs. - Republic 16 E.A.A.C.A. 135:

*“In order to justify, the inference of guilt, the exculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”*

The evidence on record can best be described as mere suspicion of the accused person. The police failed to carry out any investigation to support the allegation that the deceased met his death while fighting with the accused person over a debt of 50/-. There is no evidence to support the charge of murder against the accused person. The accused person is found not guilty and acquitted of the charge of murder.

Judgment read and signed this 25<sup>TH</sup> June, day of June, 2008

**M. KOOME**

**JUDGE**