



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Case 32 of 2003

REPUBLIC.....PLAINTIFF

VERSUS

MULATYA KILONZO.....RESPONDENT

JUDGEMENT

1. The accused person herein, Mulatya Kilonzo, is charged with the offence of murder. The particulars are that on the night of 5th and 6th January 2003 at Masilya Village, Ngwani, sub-location, Kyatune Location in Kitui District of the Eastern Province, jointly with others not before court, he murdered Kithome Ngele.
2. He denied the charge and when his trial commenced, the evidence tendered by the Republic was that a number of people including the accused person, were drinking traditional liquor at the home of PW2, Koki Muvita. Among them was the deceased who arrived before the accused person. According to Koki, the deceased had a panga which he gave her on arrival and which he took when he left. That he left after giving Kshs. 1,000/= for his drinks worth Kshs. 80/= and receiving change of Kshs. 920/= .That after he left, one Kilunda and the accused also left. Later she heard that the deceased had died. On the same night PW1, Peter Kivisu was one of those at PW1's house and he recalled that after taking and paying for his drinks, the deceased walked towards certain shops where he was employed as a night watchman and thereafter Kilunda and the accused also left the drinking den.
3. PW3, Maleve Lazaro discovered the deceased's body in his shamba on the morning of 6.10.2003. He noted that it was of a person he knew and was present when the police collected it at 2pm. He was also the one who reported the incident to PW6, Stephen Mutie and PW4, Joshua Masya, Assistant Chief who made the report to the Police.
4. PW5, Dr. Leonard Oduor Okoko produced the post-mortem report prepared by one Dr. Kaisha. It was his evidence that the deceased had deep cuts on the neck, and scalp and obvious compound fractures of the left foot above the ankle joint. That the cause of death was trauma as a result of those injuries.
5. PW7, PC Maurice Mulwa was one of the officers who visited the scene, collected the body and later attended the conduct of the post-mortem on 15.1.2003.
6. PW9, Bernard Kilunda was the one referred to by other witnesses above and in his evidence, he stated that the deceased was his uncle and that he was present at the home of PW2 until 8pm when he left and the next day he was informed by his mother that the deceased had died.
7. PW10, PC Justus Kasimu stated that he, like PW7, visited the scene, investigated the matter and decided to charge the accused person with the offence of murder. His reason of doing so, he said, was because "***he was the last person to be seen with the deceased.***"
8. When the accused was put on his defence, he stated that he was indeed at the home of PW2 on the material night but he left at 9.30 p.m without incident. The next day he was told that the deceased, whom he had indeed seen the previous evening, had been killed. He later attended his funeral and was surprised when he was arrested on 21.1.2003 and charged with the offence of murder. He maintained that he had nothing to do with that offence.
9. I have taken into account the submissions by Mr. Konya, learned counsel for the accused and I have perused the following decisions;
 - i. Andrew Obonyo & others vs R [1962] E.A. 540

where it was held that circumstantial evidence can be used to convict if all other possibilities can reasonably be

excluded.

ii. Kiarie vs Republic [1984] KLR 739 where it was held that the demeanour of a witness is important in determining his credibility.

10. It is clear to me that the evidence against the accused person is not direct and is drawn from the circumstances surrounding the death. In all the evidence before me however, the only link between the accused and the death of the deceased was that they were drinking alcohol at the home of PW2 on the material night and when the deceased left, the accused and one Kilunda also left and the next day the deceased was found dead. That therefore the accused had something to do with the death. Are those circumstances sufficient to convict? I think not.

11. In Kariuki Karanja vs R [1986] KLR 190 at 193 it was stated as follows with regard to circumstantial evidence;

“...circumstantial evidence, to sustain a conviction must point irresistibly to the accused. In order to justify, on circumstantial evidence, the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts: Rex v Kipkering Arap Koske, 16 EACA 135. An aggregation of separate facts are inconclusive because they are as consistent with innocence as with guilt and is not good enough evidence.”

12. The above exposition of the law if applied to the present circumstances would show that the evidence against the accused is very weak. He was not the only person who was drinking liquor with the deceased. He was not the only person who left the drinking den after the deceased did. What then connects him to the death? Nothing, because all other evidence in the case was irrelevant as far as his own conduct was concerned.

13. The charge of murder is a serious one and attracts a serious sentence, the evidence must be fool-proof and in this case it is clear that a conviction cannot be sustained.

14. I find the accused person not guilty and I will order him to be acquitted and to be released unless he is otherwise lawfully held.

15. Orders accordingly.

Dated and delivered at Machakos this 27th day of **November 2008**.

Isaac Lenaola

Judge

In the presence of: Mr. Konya for accused

Mr. Wangondu for Republic

Isaac Lenaola

Judge