



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 19 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

SILAS BUNDI KABIRO.....ACCUSED

RULING

Silas Bundi Kabiro hereinafter referred to as the Accused was arraigned before this court charged with the murder of Timothy Waweru Warui on the night of 18th and 19th September 2005 at Gichonjo village in Kirinyaga District.

The prosecution has closed its case after calling a total of 8 witnesses. The evidence adduced by the prosecution is in a nutshell that the Accused and the deceased were good friends and were at the material time working together.

On the 18th September 2005 they spent the day procuring paw-paws for one Elijah Ngugi from various farms. Sometime after 4.00 p.m. the deceased's brother Edward Mureithi Warui (P.W.1) saw the Accused and the deceased in the vehicle of Elijah Ngugi at Mururi Trading Centre. P.W.1 joined them and they went into a Hotel and ate. Thereafter the deceased, Accused and P.W.1 walked back home. When they reached the gate P.W.1 went into the home whilst the Accused asked the deceased to accompany him so that they could go and pay one of their suppliers.

At about 9.00 p.m. Elias Njeru Nyamu (P.W.4) was on duty at Thayo Bar in Mbiriri when the Accused and the deceased entered the Bar. They ordered for drinks and after being served joined two other customers who were in the Bar. These were Josia Mutero and Muchiri. Later the whole group of 4 got up to leave.

When they reached the door, the deceased came back into the Bar and the others walked out. A couple of minutes later the Accused came back into the Bar got hold of the deceased's hand and told him that they should go and they walked out.

Sometime around 11.00 p.m. Millicent Wanja Mureithi (P.W.5) wife to Josia Mureithi Mutero was woken up by her husband. She noticed that her husband was in the company of the Accused and the deceased. Accused bought cigarettes which was given to him through P.W.5's husband. The Accused and the deceased then left. The deceased did not however go back to his home that night.

By the next day, his mother Rose Muthoni Warui being concerned started looking for the deceased. She went to inquire from the Accused who claimed they had parted at 9.00 p.m. The Accused produced a jacket belonging to the deceased.

On 20th September 2005, the matter was reported at Gachoge Police Station and the Accused was arrested. A search party was put together and the body of the deceased was recovered from a Dam within Mbiri area. A shoe said to belong to the Accused was recovered near the Dam. On 27th September 2005, Dr. Paul Mbalu performed a post mortem examination on the body of the deceased. He found that the cause of death was head injuries and injuries to the abdominal organs.

From the above it is evident that there is no direct evidence which has been adduced to show how the deceased suffered the injuries that led to his death. The case against the Accused person is purely circumstantial based on his association with the deceased on the fateful day. To prove a *prima facie* case against the Accused it was necessary that all the incriminating facts which are established be consistent only with the guilt of the Accused. However the fact that the Accused was seen drinking with the deceased on the fateful day and the fact that they left together is not sufficient to establish that the Accused is the one who attacked and injured the deceased. There was absolutely no evidence of any malice aforethought. To the contrary the Accused and deceased are said to have been very good friends.

The only other piece of evidence which could have provided some incriminating evidence is the recovery of the clothing of the deceased and the shoe said to belong to the Accused. It was necessary for the prosecution to establish that the clothing not only belong to the deceased but were the same clothing deceased was wearing at the time of his disappearance. It was also necessary for the prosecution to establish that the clothing were recovered from the Accused. As regards the shoe, it was necessary to prove that the shoe belonged to Accused and that He was wearing it on the fateful day. However the evidence regarding the recovery of the clothing was inconsistent. According to P.W.2 it is the Accused person who produced the jacket and gave it to P.W.3. Neither P.W.2 nor P.W.3 said anything about the shirt and yet according to P.W.1, P.W.2 had both the jacket and the shirt. Indeed both were produced in evidence, yet the question remains as to where the shirt came from. There was no clear evidence as to whether the deceased was wearing these clothing on the material day.

As regards the shoe it was alleged that the same belonged to Accused however no evidence was made to connect the same with the Accused nor was any attempt made to recover the other missing shoe. There is in fact even no evidence to show whether the shoe is the same size as that for the Accused's feet.

The sum total of the prosecution evidence is that it is nothing more than sheer suspicion. This is the same suspicion that led to the arrest of Josia Mureithi Muteru and Muchiri who were later released by the police. I find that the evidence which has been adduced falls far short of proving any case against the Accused. It is not surprising that the police took almost one year to charge the Accused person after his arrest. This is a clear indication that even the police were not confident that they had any case against the Accused person. To put the Accused person on his defence on the basis of the evidence which has been adduced would be to place a burden on the Accused person to prove his innocence. The burden however remains on the prosecution to prove its case.

The upshot of the above is that I find that no *prima facie* case has been established against the Accused person and accordingly I find him not guilty of the charge and acquit him under **Section 306** of the Criminal Procedure Code.

The Accused person shall be set free unless otherwise lawfully held.

Dated, signed and delivered this 8th day of February 2007.

H. M. OKWENGU

JUDGE