



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Case 20 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

JAMES KATETI NGURUNA.....ACCUSED

RULING

The accused, James Kateti Nguruna was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 11th February 2006 at Topoti location in Narok District, the accused murdered Joseph Mureithi (*hereinafter referred to as the deceased*). When the accused was arraigned before this court, he pleaded not guilty to the charge. The trial commenced on the 27th September 2006. On that day, two witnesses were heard i.e. PW1 Serah Wanjiku and PW2 Monicah Nduta. The hearing was adjourned to the 16th October 2006. On that day, the prosecution sought an adjournment on the grounds that its witnesses were not before court. The application for adjournment was granted.

The hearing was adjourned to the 16th January 2007. On that day, PW3 Joseph Mureithi Thuo gave his testimony in chief. Hearing was adjourned to the following day, i.e.the 17th January 2007 when PW3 continued giving his testimony in chief. When it reached the time for Mr.Gekonga, learned counsel for the accused to cross-examine PW3, he requested for the cross examination to be reserved for another date because the prosecution had not availed to him the original statement that PW3 had recorded with the police. The application to reserve cross examination was allowed. This court however proceeded to hear the evidence of PW4 Antony Maina Ndungu and PW5 Joshua Mureithi Gichimu.

The hearing was adjourned to the 31st January 2007 when PW3 was to be cross examined by the defence counsel. He was cross examined on that day. Upon conclusion of this cross examination, hearing was adjourned to the 15th February 2007. On that day, the prosecution did not avail any witnesses before court. They sought an adjournment which was granted. Hearing was deferred to the 28th February 2007. On that day, PW6 Dr. Paul Gachunga testified. The prosecution again applied for an adjournment. This court reluctantly granted the prosecution the adjournment sought but marked the said adjournment as the last adjournment on the part of the prosecution. The court listed further hearing of the case for the 22nd May 2007. On that day, the prosecution again failed to avail its witnesses. They again sought to be granted an adjournment. This court rejected the application for adjournment and ordered the prosecution to proceed with the case. The prosecution was in the circumstances constrained to close its case.

This ruling therefore is in regard to whether the evidence adduced by the prosecution is sufficient to

enable this court put the accused to his defence. As stated earlier in this ruling, the prosecution called six witnesses who testified before this court in support of the charge. The facts of the case as were narrated by the said prosecution witnesses are as follows; the deceased was at the material time aged 18 years. He was the son of PW2 Monicah Nduta. PW2 is the sister to PW1 Serah Wanjiku and the brother to PW3 Joseph Mureithi Thuo. PW1, PW2 and PW3 together with the deceased are residents of Mau Narok in Nakuru District.

PW1, PW2 and PW3 had leased land at a place called Topoti in Narok District. From their evidence, it was clear that Topoti is some distance from Mau Narok. According to the said witnesses, on the 11th February 2006, they left their homes at Mau Narok and went to Topoti where they had planted subsistence crops which included potatoes. They were accompanied by the deceased. PW1 was with two of her children called Mary Watere and Margaret Wambui. They worked on their separate leased farms until about 3.00 p.m. PW2 recalled that they were weeding the crops. At about 3.00 p.m., she instructed her son, the deceased to go ahead of them and take some potatoes to their home at Mau Narok. According to PW3, the deceased went to the plot where he had constructed a temporary structure, and borrowed his bicycle. He gave his bicycle to the deceased. The deceased loaded two tins of potatoes on the bicycle. He also loaded a bag of charcoal.

PW3 recalled that the roads heading to the farms that they had leased at Topoti was rough. It was not possible for one to ride a bicycle on the said road. He recalled that they started walking towards Topoti Trading Centre. They assisted each other to push the bicycle. They were accompanied by PW1 and her two daughters. They walked uneventfully until they reached Topoti Trading Centre. The road from Topoti Trading centre to Mau Narok is good. The deceased told PW1 and PW3 that he would ride the bicycle ahead of them. The deceased left PW1 and PW3 walking towards the direction of Mau Narok. PW1 testified that the deceased rode off on the bicycle and took a turn on the road.

On his part, PW3 testified that he saw the deceased ride the bicycle about 50 metres ahead of them when he was stopped by a man and a woman. PW1 on her part, testified that the deceased had ridden the bicycle about 200 metres ahead of them. PW3 testified that it appeared as if an argument ensued between the deceased and the man. PW3 testified that he saw the man hit the deceased on the head once with a rungu. The deceased fell to the ground. The man again hit him on the head while he was on the ground. He hit him on his hand. PW3 rushed to the scene. He recalled that when he reached the scene, and when the man saw him, he entered a nearby bush and emerged some distance on the road towards the direction of Topoti.

PW3 recalled that he immediately sought to assist the deceased who was lying on the ground. At that time the deceased was conscious. He asked the deceased why the man had assaulted him. The deceased answered that the man had assaulted him for no apparent reason. The deceased was bleeding profusely from an injury on his head.

PW3 attempted to staunch the flow of blood by applying pressure using a piece of cloth on the head injury. He recalled that his attempt to stop the blood flow was unsuccessful. At that time, he realised that the deceased had become unconscious. He rushed to the houses within the neighbourhood and borrowed salt which he said he required to control the bleeding. It is at that time that PW1 arrived at the scene. She found the deceased unconscious. They fashioned a stretcher out of the sack which the deceased had used to carry the charcoal. They sought help from a police lorry which was passing by. The deceased was taken to Mau Narok health centre. PW3 was advised to take the deceased to the Nakuru Provincial General hospital because the injuries sustained by the deceased were serious. PW3 decided to look for a motor vehicle to take the deceased to Nakuru. It was while they were preparing to put the deceased on the vehicle that the medical officer who was attending to the deceased told them that the deceased had succumbed to his injuries and died.

PW3 testified that he was able to identify the man who assaulted the deceased. He testified that the man was a Maasai by tribe. He however contradicted himself when he first said that he had not seen the man before and then changed his story and said that he had seen the man once before at Topoti. He told the court that he had once seen the man a year before in 2005 at a place called Kirangi when he had sought to

lease a parcel of land from him. The crucial aspect of his testimony was however when he claimed that during the assault of the deceased, there were herds boys who witnessed it. PW3 told the court that when the deceased was injured, one of the Maasai herds boys of between seven and eight years identified the man who assaulted the deceased by his name. The herd's boy told PW1 and PW3 that the man was called James Kateti Nguruna. PW3 recalled that after the incident, when the police lorry arrived at the scene, they travelled back to Topoti to see if they could trace the man. They were however unsuccessful in their attempt. Both PW1 and PW3 testified that they could not be able to identify the woman who was with the man.

It is on the basis of the name that PW1 and PW3 were allegedly given by the herd's boy that a report was made to the police at Mau Narok. PW1 and PW3 told the police that they could identify the assailant if they saw him. It is however apparent that neither PW1 nor PW3 gave the description of the assailant to the police when they made the first report to the police. They did not describe the clothes that the assailant wore at the time neither did they describe the physical and facial features of the assailant. Although PW3 claimed that he was standing about 5 metres when he saw the man assault the deceased, it is highly improbable that he could have witnessed the man assault the deceased and not make any effort to intervene. After all, the deceased was his nephew.

It is therefore evident that when the report was made to the police, the police proceeded with their investigations on the basis of the name that was allegedly given to PW1 and PW3 by the herd's boy. Another disturbing aspect of this case is the manner in which PW3 actively participated in the search and the eventual arrest of the accused. He told the court that the police told him that if he ever saw the man going by the name James Kateti Nguruna, he should inform them so that they could arrest him. PW3 testified that he lured the accused to Mau Narok on the 13th March 2006 on the pretext that he desired to lease land from him. It is when the accused came to Mau Narok that he was asked to identify himself and upon stating that his name was James Kateti Nguruna, he was arrested and taken to Mau Narok Police Station.

PW1 and PW2 testified that after the accused had been arrested, they went to Mau Narok Police Station where the police showed them the accused person to confirm if he was the one whom they had seen on the day that the deceased was assaulted. They testified that when they saw the accused, they recalled that it was the accused who had assaulted the deceased. It is the view of this court that the police ought to have mounted an identification parade to confirm the initial identification, if any, made by PW1 and PW2. PW1 testified that she had not seen the accused before the day the deceased was assaulted. She did not give the description of the person whom she met with after the deceased was assaulted. She only stated that she would be able to identify the person if she saw him. A month later, after the accused had been arrested, PW1 could still not give a description of the assailant. She only stated that it was the accused who assaulted the deceased after she was shown the accused at the Mau Narok police station cells.

As regard the evidence of identification by PW3, the same was fraught with inconsistencies and contradictions. He at one time stated that he had not seen the person who assaulted the deceased before the said assault incident. In the statement that he recorded with the police, he stated that he could not recognise the person who had assaulted the deceased. During his testimony before court, this court noted that it was apparent that PW3 had discussed with PW1 and PW2 the nature of their testimony that they had adduced before court before he presented himself to the police to record a statement. PW1 and PW2 testified before this court on the 27th September 2006. PW3 recorded the statement at Mau Narok Police Station on the 16th October 2006. It is therefore clear that the evidence of PW3 was an afterthought. PW3 did not record a statement with the police until after PW1 and PW2 had testified. It was clear that the testimony of PW3 was meant to fill up the obvious gaps that were evident in the testimonies of PW1 and PW2 as regard their evidence of identification.

It is evident that the basis upon which the accused was arrested was his alleged identification by a young Maasai herd's boy. PW1, PW2 and PW3 conceded that they did not know the young boy and neither could they identify him. The police did not record the statement of the herd's boy. The evidence of PW1, PW2 and PW3 as regard hearing the herd's boy mention the name of the accused is therefore hearsay

evidence which in the circumstances of this case is inadmissible evidence. Further, upon analysis of the said evidence it is inconceivable that an eight year old boy could know the three names of the accused namely James Kateti Nguruna.

It is therefore clear from the foregoing that this court was not persuaded at all by the evidence of identification that was put forward by the three prosecution witnesses. PW4 Antony Maina Ndungu and PW5 Joseph Mureithi Gichimu identified the body of the deceased before post-mortem was performed. PW6 Dr. Paul Gachunga performed the post-mortem on the body of the deceased and reached a determination that the deceased died due to head injury that was caused by a blunt object. The testimonies of PW4, PW5 and PW6 do not therefore aid the prosecution's case as regard the identity of the killer of the deceased.

The prosecution has not therefore adduced sufficient evidence which would enable this court put the accused to his defence. The witnesses who allegedly identified the accused as the person who assaulted the deceased offered unsatisfactory evidence of identification. The police did not conduct an identification parade to confirm the identification of the assailant by PW1 and PW2. They failed to call the herd's boy who allegedly identified the accused by name. The only fact the prosecution managed to establish is that the deceased met his death through a violent act. The prosecution did not establish to the required standard of proof beyond reasonable doubt the identity of the assailant of the deceased. The charge was not therefore proved. The accused is acquitted on the charge of murder. He is ordered set at liberty and released from prison unless otherwise lawfully held.

DATED at NAKURU this 30th day of May, 2007.

L. KIMARU

JUDGE