

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Criminal Case 58 of 2005

REPUBLIC..... PROSECUTOR

VS

ZABLON MAYENDE.....1ST ACCUSED

JOHNSTONE WANYAMA(dead).....2ND ACCUSED

RULING

Zablon Mayende hereinafter referred to as the accused person is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on 24.10.2005 at Nzoia – Dorof Village, Mwikhupo Sub-location, East Bukusu Location in Bungoma District within Western Province jointly murdered Francis Mayende. He denied the charge. The matter proceeded to hearing with the help of 3 assessors. At the close of the prosecution case, 6 witnesses testified. Counsel for the accused person through Mr. Mukisu who was holding his brief said he had no submission to make but would await the ruling of the court. The state counsel made a submission and urged the court to place the accused person onto his defence saying the state had established a prima facie case against him.

I wish to state here that a counsel for an accused person whether appearing on a pauper brief or being instructed by the accused person must apply himself fully in his role as a defence counsel and do all that is necessary to effectively represent his client. I say this because I was very disappointed by Mr. Otara's attitude in this matter. He knew the nature of the evidence before the court and yet he declined to make any submission leaving it to the court to make its ruling. This is a clear indication that he did not care whether the accused was acquitted at this stage or if he was further remanded in custody to await the defence hearing which may not be necessary at all.

Having said that, I now come to the substance of the case before me. The evidence so far adduced is to the effect that PW2 Patrick Nyongesa, PW3 Dickson Sifuna and the deceased and the accused person herein were all drinking chang'aa in the house of one Johnstone Wanyama on the date in question. PW2 & PW3 both appear to have left the deceased in that house as they went to their homes. The deceased appears to have left later. There was no evidence however as to how he left Johnstone's house and with whom. It had rained and the ground was muddy and wet. The deceased never got home and his mud-covered body was found lying somewhere along the road the following morning. PW1 – Silvester Wanyonyi – the village elder was alerted. He went to the scene where the body was. He saw the body and then went to the Chief's Office where he reported the matter. PW1 and PW5 both relatives of the deceased are the ones who identified the body for post mortem purposes. PW6 was the doctor who produced the post mortem form. He told the court that the deceased had a dislocation on the cervicle bone at the level of C2 Vertebra. The cause of death was found to be "*cardiopulmonary arrest secondary to spinal code injury due to dislocation at Atlanto Axial Joint, due to blunt neck injury.*"

That briefly is the summary of the evidence on record. I have considered the same along with the short submission by the state counsel. As he rightly submitted, the fact and cause of death is not disputed. The

only point in issue here is whether it was the accused person who was responsible for that death. According to the state counsel, they are relying on what he called overwhelming circumstantial evidence. He submitted that the accused person had been seen leaving together with the deceased.

With profound respect for the state counsel, I do not know where he got that bit of evidence from. From the evidence of PW2 and PW3, they both left the deceased drinking with the other persons who the prosecution did not bring to court to testify. Neither PW1 nor PW3 said they saw the deceased leave the house and in whose company. What we have on record is only the evidence to the effect that the deceased was drinking alcohol in one Johnstone's house and that he was found dead on the road the following morning. Nobody saw him being killed and nobody saw the accused person anywhere near that scene. Does this amount to circumstantial evidence? In my considered view it does not. This evidence cannot pass the test of circumstantial evidence which would be sufficient to convict an accused person. As set out in the well celebrated case of R. -VS- KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135 for circumstantial evidence to be relied upon to support a conviction, there must be inculpatory facts which must be incompatible with the innocence of the accused person and not capable of explanation on any other hypothesis than that of the accused's guilt. In this case, there is not even one fact that exists that can lead to an inference however remote that the accused person was involved in the killing of the deceased.

There is even no basis for suspicion that the accused person could have killed the deceased. The only fact that has been proved here is that the deceased died. The circumstances under which he died and who could have killed him remain a mystery. No evidence was adduced to show how and why the accused person herein was arrested and charged with this offence. This in my view is a matter where a public inquest should have been conducted first to establish the circumstances surrounding the death of the deceased.

As the case stands now, there is not even an iota of evidence against the accused person to warrant me to place him onto his defence. Accordingly, I record a plea of '*not guilty*' in his favour and acquit him under section 306 (1) of the Criminal Procedure Code and order that he be set at liberty forthwith unless he is otherwise lawfully held.

W. KARANJA

JUDGE

DELIVERED, Signed and dated at Bungoma this 26th day of June, 2007 in the presence of Mr.Otara for the accused and Mr. Ndege for State.