

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Criminal Case 21 of 2006

STATE.....PROSECUTOR

VERSUS

GODFREY MASIKA JUMA.....ACCUSED

RULING

The accused herein is charged with 2 counts of murder contrary to section 203 as read with section 204 of Penal Code. The particulars are as in the charge sheet. He denied both counts. The deceased in court 1 one Felistas Namulanda was the accused 's mother. At the close of the prosecution case, a total of 8 witnesses testified for the prosecution. Both counsel made submissions at the close of the case with counsel for the accused urging the court to acquit his client at this stage under section 306 (1) of the Criminal Procedure Code. The State Counsel on the other hand maintained that they have established sufficient evidence to convict the accused person if he were to offer no defence if called upon to do so. In other words his contention is that they have established a prima facie case against the accused person and he should therefore be placed on to his defence to defend himself.

Basically, the prosecution case is that on 26.4.2006, the accused person, then aged about 17 years old went to buy some 'busaa' (a traditional liquor) for his mother. By sheer coincidence, he landed into the house of PW7 – one Adlelaide Nafuna. I say "coincidence" because according to PW7 that was the very first day for her to prepare busaa. She also said that she was not preparing it for sale but for some 4 women including PW2 who were starting a "Merry Go Round" group. That notwithstanding, she sold the busaa to the accused person. She says she asked him to taste a little before he left to confirm if it was ok. Both PW1 and PW7 said that he took a little busaa and then left. Later the same evening, accused's mother was to be taken ill. She started to diarrhoea and vomiting. She was rushed to hospital but she passed on. Another woman called Grace who had shared the busaa with her also died on her way to hospital. The matter was reported to the police station and the accused person was arrested. PW7 who was the source of the busaa was also arrested but was released later on after recording a statement under inquiry. Post mortems on the 2 bodies were carried out later. The 2 post mortem forms were produced as exhibit by PW6 – Dr. Habel Aluanga. He carried out the post mortem on the body of Grace Nanjala while the other post mortem was conducted by a different doctor. In Doctor Aluanga's opinion, the late Grace died of cardio-respiratory arrest as a result of alcohol poisoning. He told the court that he suspected that the alcohol Grace had taken had been poisoned. He needed confirmation of this and so he took some specimens from her body and sent them to the Government analyst for analysis and toxicology. The results were never returned to him. Dr. Waringo who conducted the other post mortem found the cause of death to be "cardiopulmonary arrest secondary to query alcoholic poisoning" - meaning that he only suspected alcoholic poisoning but needed to confirm the findings after the specimens were analysed by the Government analyst. He never received the report back and so he did not confirm the cause of death. These 2 reports were to be the final proof of the "cause of death" in respect of both deceased. These reports were produced in court under section 77 of the Evidence Act by the state counsel through the investigating officer one IP Francis Gituma. The defence counsel objected to their production on the basis that the witness "is not capable of giving the meaning of the report to this court." I could see the danger in allowing this witness to produce the reports given the nature and importance of the evidence they contained. I therefore suggested to the state counsel that it would be proper if the maker of the documents or a person with expertise in that area came to produce them as exhibits. For reasons I could not comprehend, he insisted that it was his right to produce the documents under section 77 of the Evidence Act as the law allowed him to do so. I accordingly allowed him to produce the said reports. The law is nonetheless clear on this issue. Section 77 of the Evidence Act is

only an enabling section which authorizes the reception of evidence of the reports of the Government analyst, ballistics expert's report etc and dispensing with the formal proof of the signature on such a report. It does not however preclude the prosecution or the defence from proving the nature of the evidence such a document entails. That is why in my considered view the prosecution has to be very careful and cautious when invoking that provision. A document with evidence of a technical or specialist nature should not be produced by a person who lacks knowledge of the issues contained in such a report. A police officer who cannot understand or who is not trained in medical matters and cannot therefore answer any questions on the substantive matters raised in a report should never be called to produce such a document. A police officer should not therefore be called to produce a medical report, post mortem report, Government analyst's report etc unless there is no objection to such a production by the defence. Where the defence clearly indicate that they would like to cross-examine or have some issues clarified in the report, then if the maker of the document cannot be found, then an expert in that field should be called to testify on the report. Then and only then, would such a report have any evidential value.

The 2 reports produced by PW8 were not explained or contents explained to this court. For purposes of this case, they remain mere chits of papers signed by the Government analyst. They did not add any value whatsoever to the prosecution's case. Where then does that leave us? This means that the suspicions by both Doctors that the deceaseds' deaths were as a result of alcohol poisoning were never confirmed. The "query" as put in one of the post mortem forms was never answered or resolved. In my considered view therefore, the cause of death was not established.

This is a very fatal flaw that renders the prosecution case inevitably susceptible to collapse.

Secondly, for the sake of argument, even assuming that the 2 deceased persons died from poisoned busaa, there is no evidence on record to show that the busaa the accused is said to have purchased from PW7 – which according to PW2 and PW7 – was not poisoned is the same busaa which the 2 deceased women drunk and which resulted into their death. The container in which the said busaa was in, was not recovered and taken for analysis to confirm if it had the poison. Even the so called circumstantial evidence in this matter is very disjointed and not cogent enough to imply or infer guilt on the accused person. There was room for other intervening factors in between. Taking all these factors into account, my finding is that the prosecution has dismally failed to connect the offences in question to the accused person. The evidence on record so far in my considered view does not suffice to warrant him being placed onto his defence. Accordingly, I make a finding of "not guilty" in his favour and acquit him under section 306(1) of the Criminal Procedure Code. He will be set to liberty unless he is otherwise lawfully held.

W. KARANJA

JUDGE

Delivered, Signed and Dated at Bungoma this 23rd day of October, 2007. In the presence of Mr. Onyando for accused and Mr. Ndege for the state.