

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Case 26 of 2006

REPUBLIC :::::::::::::::::::: PROSECUTION

VERSUS

KAINGU KOMBE KAZUNGU :::::::::::::::::::: ACCUSED

R U L I N G

KAINGU KOMBE KAZUNGU, the Accused in this case is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged in the information that on the 5th day of December 2002 at Mwembe Legesa in Bamburi Location within Mombasa District of Coast Province the Accused murdered STEPHEN KOMBE (the deceased). He pleaded not guilty.

After calling six witnesses and closing its case I agree with counsel for the Accused's submission that the prosecution has not made out a prima facie case to warrant calling the Accused to defend himself.

None of the six prosecution witnesses saw the Accused kill the deceased. All we have is that the Accused was guarding PW4's premises at Mwembe Legeza from which a trail of blood led to where the deceased's body was found a few metres away. Besides the fact that the trail of blood leading from the premises the Accused was guarding has not been shown to be that of the deceased, there is no evidence that the deceased was at the material time or any other time seen in that premises or that the deceased was last seen with the Accused. Infact there is no evidence that he was even seen with the deceased.

Even if I was to accept that the blood stains found on the walls of the premises and the trail to where the deceased's body was found was indeed that of the deceased that would not prove that it is the Accused who killed him. PW1 and PW4 said that one would gain access into that premises through an opening at its centre. PW1 who had the duplicate key to the building had also access into it. The circumstantial evidence in this case does not therefore point to the Accused and to the exclusion of everybody else as the murderer of the deceased. It falls far short of the kind of circumstantial evidence required to found a conviction.

It would appear that the prosecution had intended to rely on a cautionary statement allegedly made by the Accused which they could not produce in light of the provisions of the Evidence Act.

In the circumstances I find that the prosecution has not made out a prima facie case to require the Accused to be put on his defence. I accordingly acquit him and order that he be set free forthwith unless otherwise lawfully held.

DATED and delivered this 17th day of December 2007.

D.K. MARAGA

JUDGE

