

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Case 35 Of 2004

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN W. MUHIUHIA.....ACCUSED

JUDGMENT

The Accused is charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 27th day of May 2004 at Majengo area in Mombasa District within Coast Province, jointly with others not before court he murdered Hussein Maarufu and Fauzia Husson.

The prosecution called nine witnesses and closed its case. Mr. Asige who teamed up with Mr. Alando in defending the Accused has submitted that the prosecution has not made out a prima facie case against the Accused to require him to be called upon to defend himself.

Of the nine prosecution witnesses who testified only PW1 and PW2 were at the scene at the time of murder. PW1 said that she went to the deceased's shop on 27th May 2004 at about 6.30 .m. to buy kerosene. She found the deceased Maarufu with his workers behind the counter. As she was being served a man training a gun at her ordered her to go behind the counter where Maarufu and his workers were. As he was herding them into a dark store in the shop Maarufu's wife and child shouted "waizi" "waizi". The man then shot Maarufu and his wife Fauzia. The witness was so scared that she did not look at the face of that man. She therefore did not identify him.

PW2 who is a neighbour of the deceased went to his shop on hearing gunshots. He saw three people enter a car and drive away. He was also too scared to look at them properly. With the other neighbours they rushed Maarufu to hospital leaving the wife behind. They did not know that she had also been shot. She was soon also taken to hospital but both were pronounced dead on arrival.

Apart from PW5 who identified the bodies of the deceased and PW6 who performed the post mortem examination the other witnesses were police officers who got involved in the case after the murder. Inspector Phyllis Kanina PW9 conducted an identification parade where the Accused was allegedly identified as one of the people who murdered the deceased. The witnesses who allegedly identified the Accused were, however, not called. The police were apparently unable to secure their attendance as they had relocated to Saudi Arabia. In the circumstances I agree with Mr. Asige that the identification forms produced by PW9 are not of any assistance in identifying the Accused as the murderer of the deceased.

The Accused was arrested on the 15th June 2004, about 20 days after the murder, at Mvita grounds in what the police called suspicious circumstances. He was found in possession of a gun. When examined by a ballistic expert it was found not to be the one which fired the bullets the cartridges of which had been found at the scene of murder.

That is basically all the evidence adduced in this case against the Accused. When examined as a whole I agree with Mr. Asige that it has not established a prima facie case against the Accused to require him to be put on his defence. Mr. Monda, the learned state counsel must have realized that and I suppose that is why he saw no need of making any submissions in the matter. Unable to secure the attendance of the identifying witnesses there is not much he could do in the matter.

In the circumstances I find that no prima facie case has been made out against the Accused to warrant his being put on his defence. I accordingly acquit him and order that he shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this 21st day of March 2006.

D. K. MARAGA

JUDGE