



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Case 11 of 2005

REPUBLIC PROSECUTOR

VERSUS

GODFREY KABETU NYAMBURA

STEPHEN KARANI THUKIU ACCUSED

RULING

GODFREY KABETU NYAMBURA hereinafter referred to as the 1st accused and **STEPHEN KARANI THUKU** hereinafter referred to as the 2nd accused are charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the night of 21st and 22nd November 2004 at Ndimaini village in Nyeri District they jointly murdered Peter Mwangi Macharia (hereinafter referred to as the deceased). The prosecution has closed its case after calling a total of 13 witnesses.

The evidence touching on the 1st accused is that of Police Constable Paul Ndairu (PW 10), Police Constable Daniel Njuguna (PW 11), Inspector Jeremiah Ndubia (PW 12) and John Kimani Mungai (PW 2). PW 10 an officer attached to Ol Jororok Police Station testified that the 1st accused was booked at the police station on 6th February 2005. PW 10 took possession of one shoe of the 1st accused whilst the 1st accused remained with one shoe. On the 9th February 2005, 1st accused escaped from custody. On 10/2/2005, he was re-arrested and was handed over on 18th February 2005 to PW 11 who handed him over to Karatina Police Station. PW 11 later collected the 1st accused from Karatina Police Station and took him to Karatina District Hospital where blood samples were taken and PW 11 prepared an exhibit memo and forwarded the blood sample to the Government analyst.

PW 12 an Officer attached to Karatina police station was the investigation officer. He arrested the 2nd accused who upon interrogation

implicated the 1st accused. PW 12 went to look for 1st accused at his home. He did not find the 1st accused at home but conducted a search in his house and recovered a khaki trouser which had some blood stains. PW 12 also noticed footprints which were similar to the ones he had seen near the body of the deceased. The khaki trouser was later forwarded to the government analyst together with a blood sample from the body of the deceased.

PW 2 who is a government analyst employed by the government chemist examined the khaki pair of long trouser which belonged to the 1st accused and a blood sample of the 1st accused, together with the blood sample of the deceased. He formed the opinion that there were human blood stains on the trouser whose DNA profile matched that of the blood of the deceased.

The evidence implicating the 1st accused is therefore the khaki trouser alleged to have been recovered from his house which was said to be stained with human blood matching the DNA profile of the deceased. There are however two problems with this piece of evidence. First there is no evidence as to who took the blood sample from the 1st accused. PW 11 was unable to identify the person who removed the blood sample. According to the evidence of PW 11 the sample remained at Karatina District Hospital from 28th February 2005 to 2nd March 2005 but again PW 11 could not identify the person under whose care the blood sample remained. There is therefore no proof that any blood sample was taken from the 1st accused and if so whether it was the same blood sample forwarded to the Government analyst as that of the 1st accused.

Secondly the manner in which the khaki trouser was recovered also raised concern. It was alleged to have been recovered from the house of the 1st accused in the absence of the 1st accused. Neither the 1st accused's mother nor the brother who were said to have been present during the recovery were called to testify. There is therefore a doubt as to whether the pair of trouser was actually recovered from the house of the 1st accused.

Thirdly the evidence relating to the shoe said to have belonged to the 1st Accused whose footprints were said to be similar to the footprints found near the body of the deceased and also at the house of the 1st accused was also not very convincing given that there was no expert evidence regarding the prints. The allegation that the 2nd accused implicated the 1st accused cannot be acted upon without any corroborative evidence.

I find that the evidence adduced against the 1st accused was circumstantial evidence the inculpatory facts of which were not established. The evidence is therefore insufficient to establishing any case against the 1st accused.

As regards the 2nd accused the evidence implicating him was that of Alice Njeri Magundu (PW 5) and Francis Mwangi Kogi (PW 6) both of whom testified that the 2nd accused who is a first cousin to the deceased, was on the material night drinking with the deceased at Kihoto Bar and that the deceased, accused 2 and other patrons left the Bar when it closed and accused 2 remained outside the Bar talking to the deceased. John Warui Kieru. (PW 8) and Francis Kahiko Maina (PW 9) were in a motor vehicle on the same night coming from the Hospital where they had gone to take a sick child. They noticed two people walking near Ndimaini primary school one of whom tried to stop the vehicle. PW 8 recognised the deceased as one of the two people whilst PW 9 recognised the second man as the 2nd accused. PW 6 was later asleep at around 1.30a.m. when he was woken up by the barking of his dog. He then heard the voice of accused 2 talking to the dog. Accused 2 called out to PW 6 but PW 6 did not respond to him. When the deceased's body was discovered the next morning suspicion fell on accused 2 not only because he had been with the deceased the previous night but also because as per the evidence of the deceased's wife Rosemary Wakanyi Mwangi. (PW 7) and PW 6, the deceased and accused 2 had disagreed on several occasions over a tree which was on the boundary to their land (or family land).

Again the evidence adduced against the 2nd accused is purely circumstantial the alleged inculpatory facts being that the deceased was last seen alive whilst in the company of the 2nd accused, the night before the deceased's body was discovered, and that the relationship between 2nd accused and the deceased was not very good as the two who were first cousins had disagreed severally over a boundary dispute.

Even assuming that the above facts have been established they are not so compelling as to lead to the irresistible conclusion that the 2nd accused is the one who caused the death of the deceased. This is because the facts are not incapable of any other explanation, other than the guilt of the 2nd accused. The deceased could easily have parted company with the 2 accused before he met his unfortunate death. In the absence of any other evidence, the evidence tendered against the 2nd accused remains nothing more than mere suspicion. The evidence is not sufficient to establish any prima facie case against the 2nd

accused.

The upshot of the above is that I find no evidence that either the 1st accused or 2nd accused committed this offence. I find each accused not guilty and acquit each accused under section 306(1) of the Criminal Procedure Code.

Dated, signed and delivered this 22nd day of May 2006.

H.M. OKWENGU

JUDGE