



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Case 28 of 2003

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS KIPROTICH TANUI.....1ST ACCUSED

JOSEPH KIPKETER TOWETT.....2ND ACCUSED

MARY ROBI MINGANYI.....3RD ACCUSED

JUDGMENT

The accused persons were charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on the 5th day of July 2002 at Mulot Trading Centre in Narok District of the Rift Valley Province, jointly with others not before court, murdered Paul Kiplangat Tanui, hereinafter referred to as “*the deceased*”. It is unfortunate that the third accused fell sick while she was in custody and succumbed to the sickness.

The deceased was a teacher at M S School and according to the testimony of **PW5, Benard Kipkemoi Cheptiony**, the Headmaster of the said school, the deceased left the school on 5th July, 2002 shortly before lunch hour, having been granted leave of absence for one week. PW5 was informed of the demise of the deceased on 6th July 2002. It was not in doubt that the deceased used to take local alcoholic brews known as “*chang’aa*” and “*busaa*”.

On 6th July, 2002, the deceased’s body was found lying near Mulot Market. It had injuries on the face and the eyes. **PW1, Mohamed A. Ali**, the area District Officer was the one who notified the police about it and they removed the body after carrying out some investigations.

PW2, Vyulex Chepkemoi told the court that on 5th July, 2002 at about 6 p.m. she had seen the deceased arguing with one Dixon Mwanthi alias “*Boxer*” and both of them were drunk. They were arguing over a money related issue but he did not know how the argument ended up.

PW3, Edwin Kipkoech Tuimising told the court that on 6th July, 2002, he was told by the children of “*Boxer*” that “*Boxer*,” the first and the second accused had chased the deceased and beaten him but none of those children was ever called to testify and PW3 had no personal knowledge of the alleged incident.

According to **PW8, Police Constable William Kariuki**, the deceased had been murdered in a different place from where his body was found because at the scene, there was no sign of struggle neither was there any blood. The deceased’s clothes also had no blood stains. The witness and other police officers

collected the body of the deceased and took it to Narok District mortuary for post mortem. On 19th July 2002 the police were tipped by an informer that the first accused was hiding in a house some three kilometres from Mulet police station. He knew that the second and the third accused had been arrested as suspects. The police then proceeded to arrest the first accused. The witness further testified that the three accused as well as other suspects who had been arrested and released had all been arrested because they had been drinking “*chang’aa*” with the deceased shortly before he was murdered.

The evidence of **PW10, Kiprotich Koech** indicated that the first and the second accused and “**Boxer**” were the last people who were with the deceased shortly before he met his death. He testified that on 5th July 2002 at about 7.30 p.m. he went to the third accused’s house and found the first and the second accused, “**Boxer**”, the third accused and a lady known as Rose taking “*chang’aa*”. The witness heard “**Boxer**” asking the deceased to pay him Kshs 300/= for some alcohol which he had sold to the deceased. The third accused was also demanding Kshs 200/= from the deceased for some alcohol allegedly sold to him. PW10 further testified that the third accused removed from the deceased’s pockets a note of Kshs 1,000/=. After a short while, the deceased left in the company of the first and second accused and “**Boxer**” but the two accused and “**Boxer**” returned to the third accused’s house after about 30 minutes and continued to take “*chang’aa*”. The witness did not enquire from them where the deceased had gone. PW10 left the “*chang’aa*” den at about 8.30 p.m. On the following day, at about 7.00 a.m., the first and the second accused went to the house of PW10 and told him that the deceased had been murdered the previous night and advised the witness to hide his “*Busaa*”, just as they had done with theirs because they expected the police to conduct a search in the area.

As per the evidence of **PW12, J C**, aged 13 years at the time she testified, “**Boxer**” and her mother, R, were staying in a house next to that of the third accused. On 5th July 2002 at about 5.00 p.m., PW12 saw the first accused, the second accused, “**Boxer**” and the deceased taking “*chang’aa*” as they sat outside the house of the third accused. In the morning of the following day, as PW12 was going to draw water from a river, she saw the body of the deceased lying near the river. Thereafter, the police arrested her mother and the third accused but her mother was later released. The witness said that “**Boxer**” disappeared after the death of the deceased. PW12 said she did not see the first accused outside the house of the third accused.

PW13, Dr Edward Wafula who performed the post mortem on the body of the deceased on 12th July, 2002 told the court that the deceased’s body had bruises around the waist, a stab wound on the forehead and signs of bleeding under the skin around the neck. The Adam’s apple had collapsed and there was obstruction of the trachea. The Doctor concluded that the cause of death was strangulation using physical force.

The investigation officer, **Police Constable Josephat Murage (PW14)** told the court that the second and the third accused were arrested shortly after discovery of the deceased’s body whereas the first accused was arrested after about ten days but Dixon Mwanthi alias “**Boxer**” had alleged gone into hiding at Matuu. According to his evidence, the accused and “**Boxer**” were the last people to be seen with the deceased before his demise. As per his investigations, “**Boxer**” differed with the deceased because of the deceased’s refusal to pay some money which he owed “**Boxer**”. The witness further stated that according to his investigations, the deceased was killed in the house of the third accused and thereafter his body was dumped at the place where it was found. However, there was no evidence to that effect. That was also contrary to the evidence of PW10 who was with the accused and the deceased in the house of the third accused and who saw the deceased, the first two accused and “**Boxer**” leaving the third accused’s house.

Both accused persons gave sworn testimonies in their defence. The first one said that on 5th July 2002 he never went to the house of the third accused. He further denied having met the deceased on the said date. He denied any knowledge of PW10 and added that he had been arrested for the offence of selling “*chang’aa*” but not for the offence that he was now facing.

The second accused admitted that he was taking “*chang’aa*” in the house of the third accused on 5th July 2002 but said that the first accused was not there. He said that he did not know whether the deceased was

among the people who were at the house of the third accused and further denied having seen PW10 on the material day.

It is not in dispute that there is no direct evidence to connect either of the accused persons with the death of the deceased. The prosecution urged the court to find that there was sufficient circumstantial evidence upon which the accused persons could be convicted for murder. It was the prosecution's case that the accused and "**Boxer**" were the last people to be seen with the deceased before he met his death and further more, "**Boxer**" and the third accused were each demanding some money from the deceased. According to PW10, the first and the second accused and "**Boxer**" walked out of the third accused's house together with the deceased on 5th July 2002 at about 7.30 p.m. and after about thirty minutes all the above except the deceased returned to the third accused's house and continued to take the illicit brew. There was some dispute as to whether the first accused was in the third accused's house or not. The following day, the body of the deceased was discovered lying about 100 metres from the house of the third accused.

The question is, does the circumstantial evidence adduced by the prosecution against the accused point to the accused as the only ones who must have killed the deceased and no one else?

In **R vs KIPKERING ARAP KOSKE [1949] EACA 135** it was held as follows:-

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt".

Applying the above holding to the present case, the circumstantial evidence that was adduced by the prosecution is not strong enough to sustain a conviction against any of the accused persons. The evidence of PW10 who was taking "**chang'aa**" together with the accused and the deceased on 5th July, 2002 was that when the first and the second accused, "**Boxer**" and the deceased walked out of the third accused's house, there was no disagreement between them and neither did he see any of them carrying any weapon. It was not clear where they were going. Could it be that the deceased was attacked and robbed by some people other than the accused on his way home or could it be that the first two accused and "**Boxer**" assaulted and robbed the deceased then returned to the house of the third accused and continued to take "**chang'aa**"? Either of the above is possible.

I would say that the prosecution did not advance anything more than mere suspicion as against the accused and suspicion, however strong it may be, cannot in law be the basis of convicting an accused person, and more on a capital charge which would otherwise result in a death sentence being meted out.

I agree with the verdict that was returned by the assessors and hold that there is no sufficient evidence to warrant the conviction of the accused. I acquit them of the charge of murder and order that they be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED at Nakuru this 8th day of May, 2006.

D. MUSINGA

JUDGE

8/5/2006

Judgment delivered in open court in the presence of Mr. Gumo for the state, accused present, Mr. Nyamwange holding brief for Mr. Mongeri for the accused.

D. MUSINGA

JUDGE

8/5/2006