



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Case 31 of 2000

REPUBLICPROSECUTOR

VERSUS

KYUSYA KIVWIAACCUSED

RULING

Kyusya Kivwia is charged with two offences of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on 12.6.1999 at Ngiluni village, Kathungu sub location, Ikanga Location in Kitui District, murdered Ndinda Mwanja and her son Kivwia. Mwanja.

The accused is the brother to Ndinda Mwanja the deceased. As at the time of her death the deceased was living at her parents' home.

P.W.1, Mwanja Muthoka was the father in law of Ndinda Mwanja whereas Kivwia Mwanja was his grandson. The deceased was married to his son but deceased had disagreed with the son and gone back to her parents. On 12.6.1999 he was at his home when he received information that the two were murdered. He identified the two bodies to the pathologist who performed the Post Mortem before he took the bodies for burial. He said that he had known the accused person for a long time and he seemed to have a mental illness. He had seen him break his bicycle and many other things.

Makuthu Ndambuki (P.W.2) said that the accused is an uncle to him. He knew Ndinda to be a sister of the accused. When coming from the shamba on 12.6.1999, he heard screams and asked his neighbour Kitema to go and help in case a person was in distress. They went to the home of Kivwia where screams emanated from. They found the bodies of Ndinda and the child lying outside, dead. He noticed a cut wound on the left side of Ndinda's head which was bleeding. The deceased child too had a deep cut on the head. P.W.2 never found anybody in that home except the deceased. P.W.2 left Kitema to watch over the bodies as he reported to the chief and police. On his return he found people had arrested accused and tied him up. P.W.2 knew accused as a wood carver and denied knowing of any abnormal behaviour in accused.

Kitema Muthengi Mutua (P.W.3) recalled that on 12.6.1999 at about 4.00 p.m. he was at his home when he heard Makutha a neighbour calling him. He asked P.W.3 to accompany him to where screams were emanating from. They went to Kivwia's home and found the two dead bodies. He noted injuries on the heads of the deceased. Later the youth brought accused to the home. P.W.3 knew accused as a wood

carver. Accused's mother arrived in the home after accused's arrest.

P.W.4 Joseph Mutinda Kivwia also a brother to accused Ndunda arrived home at about 4.00 p.m. on 12.6.1999 when he learnt of the death of his sister. Later accused was brought back home and it was alleged he killed the deceased. He said that accused had not disagreed with the deceased but that in 1992 accused had had a mental problem.

Dr. Wazome P.W.5, a psychiatrist, examined the accused as to his mental capacity. He examined accused in November 1999. He examined him again in 2001. At the first examination he found that accused did not suffer from any mental illness. The Doctor interviewed accused's relatives and found accused to have had episodes of violence and abnormal behaviour. He had been violent to his wife. In 1999 he started walking with weapons and threatened to kill people. He formed the opinion that accused suffered from paranoid schizophrenia and was insane at the time of commission of the offence. The doctor produced his report as exhibit No.1.

After closing their case, the Learned State Counsel Mr. Omirera urged that the court should proceed under 166 Criminal Procedure Code and find that the accused committed the offence but was insane and therefore commit him to jail at the pleasure of the President.

I have considered the evidence adduced by the prosecution and I find that there is no shred of evidence linking accused with the offence. Nobody witnessed the murder and there is not even circumstantial evidence pointing at accused. Those people who first came to the scene P.W.2 and 3 did so and only found the 2 dead bodies in the compound.

Though the State Counsel urged the court to proceed under S. 166 Criminal Procedure Code, the court can only proceed under that section if it is established that accused actually killed his sister and child. In the absence of any such evidence the actus reus is not proved and the court has no option but acquit accused of the charge at this stage under Section 306 of Criminal Procedure Code.

Dated, read and delivered at Machakos this 19th day of June 2006.

R. V. WENDOH

JUDGE

Read and delivered in the presence of

Mr O'Mirera – State Counsel

Mr Mutinda for accused

Mutinda – court clerk

R. V. WENDOH

JUDGE