

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Case 24 of 2001

REPUBLIC.....PROSECUTOR

VERSUS

MUSYOKA MUNYAO.....ACCUSED

RULING

The Accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the night of 11th August 2000 behind two Fishes Hotel along Diani Beach, in Kwale District of Coast Province he murdered Fatuma Karisa.

At the close of the prosecution case after calling six witnesses Mr. Mulongo for the Accused submitted that the prosecution has not made out a prima facie case to require the Accused to be put on his defence. He submitted that the prosecution having failed to call the doctor who performed the post mortem on the body of the deceased the case against the Accused has not been proved as required by law as the cause of death is indeterminate. He further submitted that the prosecution bases its case on circumstantial evidence which is far short of meeting the required test to found a conviction.

On his part Mr. Monda, learned state counsel, while concurring with Mr. Mulongo that the prosecution case is based on circumstantial evidence, submitted that the case against the Accused has been proved as required by law. He said that there is on record evidence of domestic violence. On the night before the deceased's body was found in a thicket near the Accused's house Accused was heard assaulting the deceased and the logical conclusion from that is that he is the one who killed her.

Whereas I agree with Mr. Monda that there is on record evidence that prior to the night of alleged murder the Accused assaulted the deceased twice I am afraid there is no evidence that he assaulted her on the material date thus causing her death. PW 2 and PW 3 testified that on the night of the alleged murder they heard a woman screaming from the direction of the Accused's home. They however did not go out to confirm that it was indeed the deceased who was being assaulted by the Accused. As there were other homes in between the Accused's and where the two witnesses were living it cannot be ruled out that the screaming was from any of those other homes.

Besides there being no evidence of the Accused assaulting the deceased on the night of 11th August 2000 the prosecution has not established the cause of the deceased's death. The doctor who performed the post mortem examination on her body is said to have left Government service and his whereabouts is not known. The prosecution was therefore unable to call him and that being the case the cause of death remains indeterminate. I agree with Mr. Mulongo that where the cause of death is indeterminate the charge of murder is not proved. Before an accused person can be convicted of murder it must be proved that it is his act which caused the death of the deceased. That has not been shown in this case.

When at the close of the prosecution case there is no evidence which can found the conviction of the Accused a prima facie case is not made out to require the Accused to enter his defence and the Accused should be acquitted. In this case I find that no prima facie case has been made out to require Accused to enter his defence and I accordingly acquit him under section 306 (1) of the Criminal Procedure for lack of evidence.

I order that he be set free forthwith unless otherwise lawfully held.

DATED and delivered this 4th July 2006.

D. K. MARAGA

JUDGE