



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 135 of 2003

WILLIAM NJENGA NJOGA ACCUSED

VERSUS

REPUBLIC RESPONDENT

RULING

The accused, William Njenga Njoga (herein-after referred to as the accused) is charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code.

The particulars are that on the 6th day of February, 2003 along Dume Road, Lavingtone within Nairobi Province murdered Henry Njuki Njoka (hereinafter referred to as the deceased)

P.W.1, Francis Ndungu Gichero, was at all material times an employee of Lee Njiru, the Press Secretary of President Daniel Arap Moi. On 6th January, 2003 at about 4.00 p.m. he was enjoying Muratina at a pub in Kawangware market. He was joined by one Henry Njoki Njai the Administration policeman in-charge of Lee Njiru home security. Both of them were resident at Lee Njiru Nairobi residence. They left the pub at about 9.00 p.m. They boarded a Nissan matatu registration No. KAG 411G. a quarrel ensued over the fare between the matatu taut on one hand and P.W.1 (Francis Ndungu Gichiro) and the deceased on the other hand. When the matatu reached Marange it stopped and the tout opened the door. P.W.1 (Francis Ndungu Gichiro) paid shs 20/= for both of them but the tout demanded an additional shs 20/= . A fight erupted. The matatu that hit the deceased who fell on the pavement. The deceased straggled to his feet as the matatu speed away. They both went home when they reached their residence at about 9.45 p.m. the security team examined the injury to the deceased and were of the opinion that it was a minor injury. They decided that they would take the deceased to the hospital the following day.

In the morning of 7th January, 2003 P.W.1 (Francis Ndungu Gichioi) went to the house of the deceased. He knocked but there was no response. Eventually he gained entrance and found the deceased unconscious. He called for an ambulance who took the deceased to Forces Memorial Hospital where he was admitted. On 15th February, 2004, Njage passed on. On 24th February P.W.1 (Francis Ndungu Gichoi) identified the accused at Muthangari police station. He knew the accused before this incident.

P.W.2, No. 793846 P.C. Gerald Kimoti, attached to Kilimani Police station arrested the accused on 24th February, 2003 at Kenaru Bus Stage and took him to Kilimani Police station from where he was

transferred to Pangani police station and later charged with the offence of murder.

After P.W.2,(P.C. Gerald Kimoti) the state failed to avail further witnesses though given the opportunity. Finally on 23rd November, 2005, the prosecution closed its case.

At the close of the prosecution case neither Mrs Ogoma, for the state, nor Mr. Kinaru for the accused made submissions. I reserved my ruling which I now give.

Wilson J, in **REPUBLIC –V- EJIVAN M. PATEL & OTHERS (1) T.L. R (R) 85** with reference to Section 205 of the Criminal Procedure Code Tanzania which is in pari material with Section 211 of the Criminal Procedure Code (In trials before the subordinate court) and Section 306(1) (in trials before the High Court) had these to say:-

“.....all that a Court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to matter his defence. It may be a strong case or it may be a weak case. The Court is not required at this stage to apply its mind in dealing finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond measurable doubt. A ruling that there is a case to answer would be justified, in my opinion, in border in the case where the Court, though not satisfied as to the conclusiveness of the prosecutions evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

I am alive to the law that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, I cannot agree that a *prima facie* case is made out it, at the close of the prosecution, the case is merely one

“which on full consideration might possibly be thought sufficient to sustain a conviction.”

These is probably near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Applying those principles to the case before me, it is clear to me that there was a fight between the accused and the deceased on the basis of the evidence of P.W.1 (Francis Ndungu Gichiro) which culminated into an injury and eventual hospitalization of the deceased. *But that is all.* There is no evidence that the deceased died of the said injury. There is no medical evidence as to the cause of death. It is quite possible that death was caused by intervening circumstances unconnected with injury which has not been excluded. It has not been proved that death was caused by the act of the accused. See **GICHUNGE –V- REPUBLIC [1972] E.A. 546.**

Accordingly I am inclined to record a finding of *NOT GUILTY* in terms of the provisions of Section 306 (1) of the Criminal Procedure Code. The accused is set free unless lawfully held for some other lawful reason.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF AUGUST, 2006.

N.R. O. OMBIJA

JUGE

Mrs Ogoma for the Republic

Mr. Kihara for the Accused