



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Criminal Case 20 of 2003**

**PUBLIC.....PROSECUTOR**

**VERSUS**

**BENARD KARIUKI.....1<sup>ST</sup> ACCUSED**

**JAMES NGETHE KARIUKI.....2<sup>ND</sup> ACCUSED**

**PETER KINYANJUI MWAURA.....3<sup>RD</sup> ACCUSED**

**RULING**

The accused were charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that between the 16<sup>th</sup> and 17<sup>th</sup> June 2002 at Miti Tano area in Nyandarua District within Central Province, they jointly with others not before court murdered Joel Achochi Maturu.

The prosecution evidence was as follows:-

**PW1, Joseph Otara Maturu** testified that on 16<sup>th</sup> of June 2002 at about 9 a.m., he went to a quarry to cut stones. While he was there a tractor arrived and in it were the first accused, the driver and other people. The first accused carried in the tractor some ballast and asked PW1 to load building stones to a motor vehicle which he was going to send. The first accused sent the lorry and it carried some stones and PW1 and others boarded the lorry and as they were driving off, they met the tractor that had carried the ballast. The building materials were delivered by the tractor to the site of a person who was referred to as "**Baba Linus**" also known as Mr. Mathenge. The first accused gave PW1 Kshs.200/- to buy lunch for a group of people who were ferrying building materials to the construction site of "**Baba Linus**". After they took lunch, PW1 said that they found that the tractor had gone to work and they decided to go and wait for it at a place known as Rironi. It came back at about 7.30 p.m. and they boarded the same.

On the way, about five hundred metres from Rironi, the tractor was driven to a certain home where it was to stay overnight and PW1 and the other workers decided to walk home. As they proceeded, PW1 noticed that one of his brothers, Joel Achochi (the deceased), whom they had been working with, was missing. PW1 decided to go back to Rironi to look for him. He found him in a bar and was being beaten by the first accused and about ten other people. PW1 said that he asked the first accused why they were beating the deceased but he was not given any answer. PW1 held the deceased but the group turned to the witness and started beating him up. PW1 said that the deceased was being beaten by hands and bottles. Apart from the first accused, the witness did not identify the other people who were beating the deceased. PW1 and the deceased managed to escape and ran away. On reaching near the home of "**Baba Linus**",

PW1 said that they found the first accused standing on the road and he told them in Kikuyu language that they could not escape. He further testified that the first accused beat him with a piece of timber on the legs. The first accused screamed and said that PW1 and the deceased were thieves and suddenly other people came from their hiding grounds in nearby bushes and started beating PW1 and his brother. He further testified that they were taken to the gate of "**Baba Linus**" and their assailants pulled the deceased to the home compound of "**Baba Linus**". PW1 said that he screamed and PW2, Gideon Njoroge Ngige came out with a torch and ordered them to vacate the home compound. PW1 identified himself and he requested for a torch. It was about 9.30 p.m. and PW1 said that the deceased had sustained a severe head injury. The first accused and the other people he was with left shortly thereafter and PW2 escorted PW1 and the deceased for a few metres.

PW1 went on to say that as they were walking away, they found the first accused and his accomplices on the way and they started beating them again. PW1 said that he lost consciousness and he woke up at Olkalau Hospital the following day. PW1 said that as at the material date he had supplied to the first accused who was a foreman of "**Baba Linus**" building materials worth Kshs.5,200/- which had not been paid by the first accused. The witness said that the deceased had told him that he had gone to ask the first accused to pay him his wage for the loading work that he had done and the first accused refused to do so and he started beating him up. The deceased succumbed to death as a result of the beating that he got from the accused and his accomplices, PW1 stated.

In cross examination by Mr. Ndegwa for the first accused, PW1 said that he knew the first accused since the year 2000. He met the first accused again in the year 2002 when he was supplying him with building materials as a foreman of "**Baba Linus**". He said that the first accused was to get money from "**Baba Linus**" and pay him. He denied that he was drunk on the material night but admitted that the deceased was drunk. The witness further stated that apart from the first accused he did not identify the other people who assaulted the deceased. The witness further stated that on the material night he identified the first accused outside the house of "**Baba Linus**" by his voice. However, in his statement to the police, he did not state that the first accused was among the people who assaulted him and the deceased. The witness further stated that after his discharge from the hospital the money that was due to him was paid by "**Baba Linus**".

In cross examination by Miss Mathenge for the second and third accused, PW1 stated that the two accused were not among the people who assaulted him and the deceased. He had never even seen them.

**PW2, Gideon Njoroge Ngige** was a Farm Manager employed by Isaac Mathenge alias "**Baba Linus**". He testified that on 16<sup>th</sup> June 2002 at about 11 p.m. he heard dogs barking and some people making noise. He then heard somebody screaming saying that his brother had been killed. PW2 said that he heard a voice of a person which he identified as that of the first accused. The voice stated in Kikuyu language the following words; "**Get out of here, what did you come to do here?**". PW2 said that he went out of the house and asked the first accused what was going on and the first accused answered him that there were thugs who were hiding there. PW2 flushed his torch and he identified the first accused and other people including one person who was lying down. The witness further testified that the first accused beat up one of the people whom he was referring to as a thug. The person who was being beaten said that he was not a thug and that he knew "**Baba Linus**". PW2 said that he realised that he had seen one of those people who was being assaulted and he said that he was PW1 who had earlier during the day delivered building stones to the construction site of "**Baba Linus**". PW2 said that he also recognized the second accused. He had known him for sometime and he had also seen him during the day as he had been given some work by the first accused. PW2 further stated that between 11.30 p.m. and midnight, the deceased and his brother, PW1 left together and he did not accompany them. On the following day the first accused went to the home of "**Baba Linus**" and PW2 asked the first accused why he had gone to the home of "**Baba Linus**" with people who were drunk on the previous night and the first accused told PW2 not to discuss the issue any further as one of the people who was at the scene was in a bad condition and had been admitted to a hospital. Shortly thereafter the first accused left and said that he was going to the police station to make a certain report. PW2 saw the first accused that evening at about 7.30 p.m. accompanied by some police officers. PW2 said that the second accused was not involved in the fight between the first accused and the deceased and was outside the compound of "**Baba Linus**".

In cross examination by Mr. Ndegwa, PW2 said that on the material night he recognized the first accused as well as the second accused. He denied that he implicated the first accused to cover up an alleged intimate relationship between him and the wife of "**Baba Linus**". Upon further cross examination by Miss Mathenge for the second and third accused, PW2 said that on the material night he did not see the third accused.

**PW3, Julius Mbau Waichungo** testified that on 16<sup>th</sup> June 2000 at about 1 a.m. he heard somebody calling him while he was asleep. He realised that it was Mwaura, a son of the first accused. He said that his father had been beaten by thugs. PW3 went to the home of the first accused and found a person lying outside the house as the first accused sat next to him with a lamp. The first accused's wife was also there. The person who was lying down was muddy all over and was bleeding from the nose and mouth and was not talking. When PW3 asked the first accused what had happened to that man, the first accused explained that he had given some work to the man and other people and they thought that the first accused had money and they waylaid him. The first accused said that he was with the second and third accused. PW3 and the first accused put the injured man in the kitchen of the first accused and in the morning the man had not made any recovery and they decided to go and report the matter to administration police line. Later the first accused got a vehicle to take the injured man to a hospital but he succumbed to the severe injuries that he had sustained. In cross examination, the witness said that the first accused was on the material night drunk and his clothes were very muddy but the second accused was not drunk.

**PW4, Ayub Njoroge Mutura** testified that on 16<sup>th</sup> June 2002, the first accused engaged a group of about fifteen men to offload stones from a lorry and a tractor. When they reached a place known as Rironi, some of the men were so drunk that the driver of the tractor refused to continue with the journey and they started demanding for their money from the first accused. The first accused said that he would only pay them on the following day. PW4 further testified that the first accused went to one of the bars and bought for him a soda and while they were there, PW1 and the deceased arrived and started demanding payment from the first accused. The first accused was very drunk at the time. An argument started between the deceased and the customers who were in the bar. The deceased poured beer on some of the customers and a scuffle arose. The deceased then ran away but PW1 was left in the bar. The second accused was in the bar and the first accused had bought him some beer.

The witness said that he left and went home and on the following day he heard that the deceased had died. He did not know how he met his death. The witness was supposed to be cross examined on 15<sup>th</sup> December 2004 but on that date he was not availed and neither was he called on the subsequent hearing dates. No reason was given for that.

The prosecution called **Dr. Moses Ngugi, PW5**, who produced P3 examination forms in respect of the accused persons. All the accused were found to be of sound mind. PW5 said that the post mortem on the body of the deceased was conducted by one Dr. Muia. PW5 said that according to the post mortem report the cause of the deceased's death was consistent with head injury due to trauma but he did not produce the post mortem report. The same was marked for identification to be produced by the said Dr. Muia but the prosecution closed its case before the said doctor was called. The prosecution did not indicate why it failed to call the said Doctor, the Investigating Officer and other material witnesses who had recorded their statements and which statements had been supplied to the defence counsel.

Mr. Ndegwa for the first accused urged the court to find that the prosecution had not established a prima facie case as against his client as to require him to be placed on his defence. He wondered why the prosecution had not called several key witnesses including the Investigating Officer, Dr. Muia who would have produced the post mortem report, "**Baba Linus**" and many others whose statements had been recorded. He urged the court to find that the reason why those material witnesses were not called was that their evidence would have been prejudicial to the prosecution case. He cited the Court of Appeal decision in **JOSEPH PEITUNI LOSUR VS REPUBLIC Criminal Appeal No. 168 of 2001** at Nakuru (unreported) where the court referred to an earlier decision in **BUKENYA VS UGANDA [1973] EA 579**. In the latter case, it was held that where the prosecution fails to call a material witness and no explanation is offered for such failure the court would be entitled to draw the inference that had such witness been called his evidence would have been adverse to them.

Mr. Ndegwa further submitted that failure to call Dr. Muia or to produce the post mortem report was a fatal omission on the part of the prosecution as the cause of the deceased's death had not been established. Counsel cited the Court of Appeal decision in NDUNGU VS REPUBLIC [1985] KLR 487. In that case it was held that although there were cases in which death could be established without medical evidence relating to its cause like where there were obvious and grave injuries, it was still important to avail to the court sufficient medical evidence to show the effect of such injuries. He further pointed out that there were material contradictions in the evidence that was adduced by the prosecution witnesses and in particular PW1 and PW4. Mr. Ndegwa further submitted that PW2 did not report to the police that one of the people whom he saw on the material night assaulting the deceased was the first accused.

Miss Mathenge for the second and third accused submitted that the prosecution had also failed to prove a prima facie case as against her clients. The evidence of PW1, PW2, PW3 and PW4 did not show that the second accused had inflicted any injuries on the deceased at all. The second accused was a co-worker with the deceased and it was not shown that there was any common intention between him and the attackers of the deceased, counsel submitted. She further submitted that the third accused had not been mentioned adversely by any of the witnesses. Counsel also supported the submissions by Mr. Ndegwa to the effect that important prosecution witnesses were not called and no reason was given for that failure. Mr. Koech, State Counsel, submitted that the prosecution had made up a case against each of the accused and urged the court to place them on their defence. He sought to rely on the evidence of PW1 who was said to have been an eye witness when the deceased was allegedly assaulted by the first accused and others who were not identified. He further pointed out that the deceased was found at the first accused's home shortly before he died. Mr. Koech further told the court that the explanation given to PW3 by the first accused that he had been waylaid by thugs was not true. He said that it was not important to call "**Baba Linus**" as a witness because he was not there at the time of the attack. He added that there was evidence that the deceased and others were pestering the first accused to pay them their money. He further submitted that the injuries that caused the death of the deceased were inflicted by the first and the second accused. Mr. Koech conceded that there was no evidence against the third accused but urged the court to find that there was sufficient evidence as against the first and the second accused.

Having carefully considered the prosecution evidence, it is clear that the second and the third accused were not implicated in the death of the deceased. Although PW2 said that he saw the second accused on the material night when the first accused and others were assaulting the deceased, he added that the second accused was outside the compound of "**Baba Linus**" and he did not see him assaulting the deceased. PW1 said that he had never seen the second and the third accused. These two accused persons were never adversely mentioned by any prosecution witness. In RAMANLAL TRAMPAKLAL BHATT VS REPUBLIC [1957] EA 332, in considering what prima facie case meant, the court stated as follows:-

*"It may not be easy to define what is meant by a 'prima facie case', but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence."*

Applying the above principle I find that the prosecution has failed to establish a prima facie case as against the second and third accused persons. I hereby acquit them under Section 210 of the Criminal Procedure Code. On the other hand I find that the prosecution has established a prima facie case as against the first accused and is hereby put on his defence.

DATED, SIGNED and DELIVERED at Nakuru this 4<sup>th</sup> day of August, 2006.

**D. MUSINGA**

JUDGE

Ruling delivered in open court in the presence Mr. Mulindi holding brief for Mr. Ndegwa for the first accused and Miss Mathenge for the second and third accused. Mr. Gumo, Assistant Deputy Public Prosecutor.

**D. MUSINGA**

JUDGE