

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Appeal 13 of 2001

REPUBLIC.....PROSECUTOR

VS

DISMAS NAKITARE MUSIONDO.....ACCUSED

RULING

Dismas Nakitare Musiondo is before this court facing a charge of murder contrary to section 203 as read together with section 204 of the Penal code. The particulars of the offence are that on the 26th day of February, 2001 at Musembe village, Kamukuywa Location in Bungoma district within western Province murdered Nakitare Musiondo Nafua.

Six witnesses testified before the prosecution closed its case. The learned counsels on both the defence and the prosecution gave oral submissions under section 306 of the Criminal Procedure Code. The star witnesses in this case are the deceased's daughters namely Mary Nerima (P.W4) and Phanice Nakitare (P.W5). According to the duo, they woke up early at about 6.00 am on the 26th day of February 2001 to Nakarila Primary School. They said that while on their way to school they met the accused who is their step-brother who stopped and told them that he had killed the deceased. They said the accused was riding on a bicycle which had a jembe-axe which was blood stained. The duo said they went ahead and within a short distance, they found the body of the deceased lying dead next to his bicycle. It is said that the deceased had rushed to the nearby shops to buy biro pens for P.W4 and P.W5. The duo went to tell their mother, Nakitare Musiondo (P.W2) about what they heard and saw. On the basis of the statements of P.W4 and P.W5, the accused was arrested.

It is the submission of Mr. Kituyi advocate for the accused that a prima facie case has not been made out to enable this court place the accused on his defence because there was no credible evidence proving that the accused committed the offence of murder. It is the opinion of Mr. Onderi the learned Principal State counsel that the evidence of P.W.4 and P.W5 is sufficient to sustain a conviction hence the accused should be place on his defence. The learned Principal State counsel is of the view that the accused's conduct of fleeing the scene is consistent with that of a person who is guilty.

I have considered the evidence tendered. I have also taken into account the submissions made by the learned counsels on both sides. The only evidence which connect the accused with the deceased's death is that of P.W4 and P.W5. they alleged that the accused confessed to them that he had killed the deceased. They also said that they saw the accused carrying a jembe-cum-axe which had blood stains. It is obvious that the law cannot permit such confessions to be admitted in evidence. Section of the Evidence Act clearly spells out what confession can be relied in evidence. In this case the police should have carried out further investigations to unravel the truth in this case. Investigations were carried out in the most casual manner. The evidence of P.W4 and P.W5 were taken as the gospel truth. There was no explanation as to why the murder weapon was not produced in evidence. There was no evidence also as how the accused was arrested. The evidence of the investigating officer was very crucial in this case to show this court how the accused was linked to this offence. It is not denied that the prosecution's case having relied on circumstantial evidence. In such a case the inference of the accused's guilt should only

be drawn where the facts said to incriminate the accused are incapable of any other explanation rational explanation except the guilt of the accused and are wholly inconsistent with his innocence. To be fair I am of the view that the evidence tendered by the prosecution cannot sustain a conviction hence there is no need to call upon the accused to offer an explanation. It has been argued by the learned Principal State Counsel that the accused fled his homestead after the incident hence his conduct is consistent with that of a person who is guilty. I have perused the entire evidence and I am unable to trace the evidence of any witness who claimed the accused had fled the scene save for the evidence of P.W1. according to Joseph Wanjala Nakitare (P.W1) he received a report that the accused fled the scene after committing the offence. He did not mention who told him the story hence his evidence remained as hearsay. It would appear the learned state counsel relied on the evidence recorded in the police station. The unsworn statement cannot be treated as equivalent to sworn testimony.

The end result is that I find that there is no cogent showing a prima facie case that the accused committed the offence. The accused is consequently acquitted of the offence of murder. He is hereby set free forthwith unless lawfully held in custody.

Dated and delivered this 14th day of September 2006.

J. K. SERGON

JUDGE

In open court court in the presence of Mr. Onderi for the state and in the presence of Mr. Kituyi for the accused.

COURT: The assessors are hereby discharged but may be summoned to serve in other cases. They should be paid for today.

J. K. SERGON

JUDGE