

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
Criminal Case 56 of 2003

REPUBLIC.....PROSECUTOR

VS

MOSES BARASA NABUTALA.....ACCUSED

RULING

The accused herein, Moses Barasa Nabutala, is before this court on the information of the Attorney General duly facing a charge of murder contrary to section 203 as read with section 204 of the Penal code. It is alleged that on the 26th day of June 2003, at Chepkui Village, Chepkui Sub-location, Lwandanyi Location in Bungoma District within Western Province, murdered Yohana Barasa.

A total of eight (8) witnesses testified in support of the prosecution's case before the Learned Principal State Counsel closed the prosecution's case. Both Mrs Chungge, the learned defence counsel and Mr. Onderi, the Principal State Counsel, were invited to make submissions under section 306 of the Criminal Procedure Code.

I have considered the evidence of the eight prosecution's witnesses. I have also taken into account the able submissions made by both learned counsels. In my mind, the main witnesses in this case were Rasto Nabutala (P.W.3), Sarah Mutua (P.W.4), Wycliffe Mugenya (P.W.6), Joseph Kibor (P.W.7) and Dr. John Ouma Juma (P.W.8).

According to P.W6, the deceased visited his home on 24.6.2003 at about 7.30 p.m upon which he told him that he was assaulted by his father (accused). P.W.6 told this court that he observed the deceased and noticed visible injuries at the head, back and buttocks. He said he saw blood oozing from the deceased's head. He said he took the deceased to Lwakhakha Police Post and then to Lwakhakha Nursing Home where the deceased was stitched. P.W. 6 said he took him back to Lwakhakha Police Post where he recorded his statement. Joseph Kibor (P.W7) confirmed that P.W6 booked a report of assault at Lwakhakha Police Post on 24.6.2003. P.W.7 recorded a statement from the deceased on 25.6.2003 which was admitted in evidence as the deceased's dying declaration. In that statement the deceased claimed that the accused assaulted him on 23.6.2003 using a panga and an iron bar. He also claimed that the accused burnt his legs upon which he ran to P.W.6's house to seek refuge. The dying declaration is recorded in English though P.W.7 claimed the deceased spoke to him in Kiswahili.

Dr. John Ouma Juma (P.W.8) produced a post mortem report on behalf of Dr. Wanjala who prepared the same. According to the postmortem report, the deceased died as a result of severe malnutrition, moderate severe anaemia and soft tissue injuries. The deceased was assessed to be aged 4 years. Doctor John Ouma Juma (P.W8) was of the opinion that the main cause of death was severe malnutrition which condition made the liver enlarged.

It is the submission of Mrs Chungge, advocate for the accused that the prosecution had not established a prima facie case to warrant the accused being placed on his defence. She urged this court not to place much weight on the evidence of a dying declaration because the deceased's original statement made in Kiswahili was not produced in evidence. The learned defence counsel was also of the view that there was no conclusive cause of death.

On his part, Mr. Onderi the learned Principal State Counsel was of the view that the dying declaration was corroborated by the evidence of P.W3 and P.W6.

Let me begin by considering the issue touching on the evidence of a dying declaration. Section 33 (a)

of the Evidence Act gives the circumstances which a dying declaration can be accepted in evidence. The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. The evidential value of a dying declaration is lessened by the fact that the deceased's expectations of death was not severely imminent at the time it was being made. In this case, the statement was made by a boy aged between 4 and 7 years. It is necessary for such evidence to be corroborated under section 124 of the Evidence Act. There is of course the evidence of the post mortem report which tends to corroborate the evidence of the dying declaration. The view I take is that the evidence contained in the post mortem is not conclusive. It is said that the main cause of death is severe malnutrition. It is noted that other causes are moderate anaemia and soft tissue injuries. The kind of injuries noted in the deceased body appear to be soft tissue injuries. I agree with the submissions of Mrs change that the dying declaration should not be heavily relied upon because the statement in the deceased's language was not produced. In fact the English Version recorded by P.W7 was produced. P.W7 told this court that the deceased spoke to him in Kiswahili Language. It was incumbent upon the prosecution to produce the Kiswahili version of the statement with the English Translation.

Even if the dying declaration was found to be credible, there is some allegation that the deceased was of an unstable mind. The allegation is contained in the evidence of Rasto Nabutala (P.W3) and Wycliffe Mugenya (P.W6). This makes the dying declaration evidence to be unsafe and unreliable to sustain a conviction.

In the end, I find that the evidence tendered by the prosecution does not establish that the accused committed the offence he is charged with, meaning the prosecution has failed to establish a prima facie case against the accused.

The end result is that, the accused is acquitted of the offence of murder. He is hereby set free forthwith unless lawfully held.

Dated and delivered this 11th day of September 2006.

J. K. SERGON

JUDGE

In open court in the presence of Mrs Mumalasi holding brief for Mrs Change for the accused. In the presence of Mr Onderi for the state.

COURT: Assessors are hereby discharged but should be paid for today.

J. K. SERGON

JUDGE