



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Case 23 of 2004

REPUBLIC.....PROSECUTOR

versus

TIMOTHY KAMETI NDIKU.....ACCUSED

RULING

Timothy Kameti Ndiku, the accused in this case is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 1/11/98 at Kalala village, Sengani sub-location, Tala location in Machakos district, Eastern province, jointly with others not before court, murdered Peter Maundu Kyengo. The accused denied the offence. The prosecution has so far called a total of eight witnesses. The question at this stage is whether the prosecution has made a prima facie case to warrant the accused being called upon to defend himself.

Isaac Mwanthi Mwau, (PW1), a neighbour of the deceased learnt of the deceased's death at about 8.00 am on 11/11/98. He had no idea who committed the murder but he started investigations and his key suspect was the Accused because of his having been mentioned in other incidents before.

PW1 used one Mbaluka Musyimi Ndendi (PW2) to trace Accused some time after the deceased had been buried. In company of PW2 and an Administration Police, officer they went to Accused's house where they found a blood stained jacket in Accused's box which they took possession of. They also found a knife (sword) which they carried away.

PW2 Mbaluka, who used to work as a matatu tout at Tala knew Accused person who also worked as a tout. He did not witness how the deceased met his death. He however noticed that Accused did not report to work as from 12/11/98 till 28/11/98 when he spotted and arrested Accused behind the shops at Tala. He was one of those who went with the Assistant Chief to accused's house which they searched and recovered a blood stained jacket which he identified in court (exhibit 2). He said they also recovered a knife at accused friend's home but they did not get the friend (exhibit No. 3). He left Accused with the Assistant Chief.

The Assistant Chief of Kyaume sub-location, Tala location, Peter Ngungu Kitaka, recalled that on 28/11/98 he was in his office when the wife of the deceased, Florence Nzisa reported to him that a suspect had been spotted at Tala Market and named the suspect as Kameti Ndiku, the Accused whom he knew. PW3 arrested Accused and took him to Administration Police's Camp at King'oti.

Philip Kavita Matute (PW4), did not witness the death save that he went to City Mortuary Nairobi, where

he identified the body of the deceased to the Doctor before postmortem was done.

Joseph Nzioki Kyengo (PW5), was the brother of the deceased. He received a report of his brother having been attacked and injured on 11/11/98 at about 6.30 am. He found his injured brother at Matungulu dispensary. He could not talk. He was transferred to Kenyatta National Hospital where he died. He also identified the deceased's body to the Doctor who performed the postmortem on 20/11/98.

Doctor Jane Wasike Simiyu (PW6), produced the postmortem report on behalf of Doctor Olumbe, who performed the postmortem. The Doctor had found that the cause of death was head injury due to a blunt object which caused fractures of the skull. PW7, P.C. Susan Njeri, escorted the deceased's relatives to the city mortuary to identify the deceased's body before postmortem. She knew nothing of accused's death.

Police Constable Jackson Njoroge (PW8), was posted to Kangundo police station in June 2003 and was handed over the police file, a sword, a shirt, jacket which he kept in exhibit store. They had Government analyst numbers. He produced the items as exhibits.

None of the above witnesses witnessed the deceased's murder nor do they have the slightest evidence as to what led to the deceased's death.

PWI who first suspected Accused as the culprit did not lay good basis for the suspicion. The only circumstantial evidence that may have connected accused with the offence is the recovery of a jacket which was allegedly blood stained from Accused's box. However, it has not been established whether the stains on the said jacket was blood or that the blood belonged to the deceased so that, that would place Accused at the scene of the murder or evidence of contact between Accused and deceased on the day of deceased's death. Circumstantial evidence should be such that it points at the guilt of accused and none else.

There was contradictory evidence as to where the sword was recovered. Whereas PW1 said it was found in accused's house, PW2 said they recovered it in accused's friend's house. In any case, even if it was taken to Government Chemist it has not been established if there was any blood found on it and whose blood it was.

So far there is no evidence connecting the accused with the offence whether direct or circumstantial. It is so unfortunate that a life was lost the police were so lax in their conduct of their case. On the other hand, the accused has been in remand for so long when there was no shred of evidence against him. This court therefore finds that the prosecution have not made a prima facie case against the Accused to warrant him to defend himself and he is hereby acquitted under Section 306 of the Criminal Procedure Code.

R.V. WENDOH

JUDGE

Read and delivered at Machakos this 26 day of October 2006 in presence of

R.V. WENDOH

JUDGE