



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Case 27 of 2003

REPUBLIC PROSECUTOR

VERSUS

SAMMY MUTUKU MUTHOKA ACCUSED

RULING

Sammy Mutuku Muthoka, 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 16/6/01, at Kivani village, Ngungi sub-location, in Machakos District, murdered Josephat Muli Muia.

Accused denied the offence and the prosecution has called a total of 10 witnesses to prove the charge. After the close of the prosecution case, the question for this court to consider is whether the prosecution has made a prima facie case against the accused person to warrant him to defend himself. This being a criminal charge the burden is always on the prosecution to prove its case beyond any doubt.

The key witness in this case is PW1, Catherine Mbatha Muli, the wife of the deceased. She recalled that on the evening of 16/6/01, she was in the kitchen working. She was with her children born 1988, 1991 and 1996. Her husband called her to the bedroom which was in the next house to talk about what she had gone to do at the market during the day. As they talked, she heard somebody talking to the children. The door was suddenly pushed open and the person entered. The person addressed her husband that he would know that he was a man on that day. Her husband pushed the person outside, the person then produced a powerful torch and shone it at the deceased's face. They started a struggle after the intruder hit the deceased with a stick on the chest. She tried to separate them but failed and it is then she sent her children to call her mother-in-law. She then heard her husband say in Kikamba "Sammy you have killed me." She knew the name Sammy because he was a neighbour. Sammy then ran off. PW1 said that there was no form of lighting in the house or outside. She did not recognize the voice of the person who talked to her children. She also said she recognized accused when he came into their house. She screamed after the husband fell down and people came. Later she noted the deceased was stabbed on the left side of the ribs. PW1 denied knowing why Sammy and deceased fought as they used to relate well and she also related well with Sammy as he is her relative as their fathers are related.

Mwongeli Muia (PW2), the deceased's mother heard screams from her son's home at about 8.00 p.m on 16/4/01. She ran there and on the way there, she met Sammy who told her to go and tell her son that he is a fool. She said it was dark but she recognized Sammy's voice. She went and found her son lying in a pool of blood, dead. She said that accused and deceased related well and stayed together as young

children but she did not know how they related as grown ups. She said her son and the wife lived peacefully.

PW3, John Kinyae Mumo, heard screams from the deceased's home at about 8.00 p.m and ran there and found the deceased lying in a pool of blood dead. PW1 informed him that Sammy had come, stabbed the deceased and ran off. Later after several months, PW3 arrested accused in his home and handed him over to police.

PW4 Kavithi Mbithi, only learnt of Muli's death and visited the home on 17/6/01 and found the deceased's body still at the home.

PW 5 Edward Nzomo Mbiu, was woken up at about 10.00 p.m on 16/6/01 and was told about the deceased's death. Next day he reported to Wamunyu police station. He received information that the accused caused the death and he never saw accused again till he was arrested in Nairobi.

PW6 Mark Mwaniki Mue, is a brother to the deceased. On 27/6/01, he identified the deceased's body to the Doctor who performed postmortem.

PW7, John Wambua Mung'athi, arrived home from Nairobi at about 7.30 p.m. on 16/6/01. He heard screams from the deceased's home and ran there. He met PW1 screaming and she informed him that Sammy had stabbed the deceased. He went where the deceased lay, flashed a torch on him, saw he was bleeding from the left side of the chest and died as he watched. He reported to Administration Police on 23/12/01 he spotted Sammy Muthoka, in Nairobi in a salon; he informed police who arrested the Accused.

PW8, Thomas Mutinda Musina, also heard screams at about 8.00 p.m. on 16.6.01. He ran to the scene, found PW1 and PW2 screaming and they informed him hat Sammy, accused had stabbed Muli and he had died. He went with others to report at chief's office.

PW9 Police Constable Andrew Ireri, received a report that a person required for murder had been spotted in Embakasi area. He arrested the Accused at Mukuru Quarry after he was identified to him.

Doctor Kaburu (PW 10), produced the postmortem report on behalf of Doctor Mwangi, whom he had worked with and knew his signature and writing. Doctor Mwangi, could not be available to testify without undue delay and costs in this case. PW 10 said that the Doctor found a stab wound on the left side of the upper stomach, intestines were dismembered, perforation of the lungs and there was blood in the chest cavity. The heart was also pierced. The Doctor formed the opinion that the cause of death was bleeding in the chest.

There is no doubt that the deceased sustained a serious stab wound that resulted in instant death. Apart from PW1 all other witnesses came to the scene after the incident. The offence was committed at night. PW1 and PW2 both testify that there was no form of lighting at the scene. Although PW1 said the assailant took out a torch at one time, he flashed it at deceased only. PW1 did not see the assailant's face at any time. The only evidence led by the prosecution that links the Accused with the offence is that of voice identification by PW1 and PW2. According to PW1, Accused said to deceased "today you will know that I am a man." There were no other words uttered by the assailant even though deceased talked thereafter.

PW 2 on the other hand said she met Accused as he ran away from deceased's home. She too was running. She said that Accused told her to go and tell her son the deceased, that he was a fool. PW2 knew the Accused from his childhood as she said she saw the Accused and deceased grow up as friends.

In the case of **CHOGE versus REPUBLIC (1985) KLR I** the court held as follows regarding voice identification;

"Evidence of voice identification is receivable and admissible in evidence and it can, depending

on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the Accused person's voice that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it."

The prosecution are entitled to rely on voice identification as if it was visual identification but this court has to take care that there is no possibility of mistake. The court should ensure the witness was familiar with the voice recognized it and conditions were such that the witness could not make a mistake.

Taking evidence of PW2 first, it was not stated how far the assailant was from PW2 when he uttered the words. Besides, both were running. The person PW2 first spoke to and who replied that her son was a fool must have been panting and considering what had just happened it must have been a voice that was anxious and afraid and may not sound its natural self. I would not find it safe to rely on PW2's evidence considering the circumstances under which the words were uttered.

On the other hand, PW1 had known accused since 1995 when she got married to the deceased. She knew him as a neighbour and relative. Though she recalled the words uttered by the assailant, that the deceased would know that he was a man, she denied recognizing the Accused's voice. She however said she actually recognized Accused despite the darkness. The court cannot therefore rely on voice identification by PW1. Though PW1 came into close proximity with the assailant, it was a dark night and the circumstances were not favourable for positive identification of the assailant by PW1. I find that there is real possibility of mistake or error in identification by PW1. It would mean relying on evidence of PW2 on recognition of the assailant's voice but I have above found the circumstances not to have been conducive to voice recognition. Under the circumstances, this court will have no option but find that there is not sufficient evidence adduced by prosecution to call upon the accused to defend himself. He may be a prime suspect but that is not sufficient to call upon accused to defend himself. It is not for accused to prove his innocence and for these reasons accused is hereby acquitted under Section 306 of the Criminal Procedure Code.

R.V. WENDOH

JUDGE

Read and delivered at Machakos this 25th day of October, 2006

In presence of

R.V. WENDOH

JUDGE