



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 27 of 2004

REPUBLICPROSECUTOR

VERSUS

PETER MBURU MUTHONI.....ACCUSED

JUDGMENT

The accused was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence state that on the 27th October 2001 at Jomo Kenyatta Academy in Thika District within Central Province he murdered **LILIAN AWUOR OBOYA**.

The prosecution case is that on the 27th October 2001 the deceased was found at Jomo Kenyatta Academy having been stabbed and was bleeding from the stomach. A report was made to the police who came and removed the deceased and rushed her to Kenyatta National Hospital for treatment but she died while undergoing treatment.

In order to prove its case the prosecution called 5 witnesses. PW1 SGT. SOI and PW4 PC MUNYAO are police officers who visited the scene after a report was made to the police at Juja Police Station.

The evidence of PW2, PW3 and PW5 is formal. PW2 DR. PAUL MAUNDU is the doctor who performed the post mortem on the body of the deceased and formed opinion that the cause of death was due to a stab wound. PW 3 DR. NGANGA examined the accused in respect of his age and mental status. He assessed the age of the accused to be 16 years and of sound mind. PW 5 is the police officer who escorted the relatives of the deceased to the City Mortuary to identify the body of the deceased to the doctor who performed the post mortem. The only material evidence is that of PW1 and PW4 the police officers who visited the scene and removed the deceased and rushed her to Kenyatta National Hospital for treatment where she died while undergoing treatment.

According to the evidence of PW1 Sgt. Soi when they visited the scene the deceased though bleeding profusely, she was able to talk and she told them that she had been stabbed by Mburu. But according to the evidence of PW4 P.C. Munyao when they reached the scene the deceased was not talking and she never mentioned to them who had stabbed her. If the deceased indeed told the two officers that she had been stabbed by Mburu, this could amount to a dying declaration.

The general rule on which a dying declaration is admitted in evidence is that it is a declaration made

in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person. See **CHOGE VS. R [1985] KLR I**

In the present case the two police officers who visited the scene give different versions. PW1 says the deceased had mentioned the name of the person who had stabbed her while PW4 says the deceased did not talk. It is difficult for the court to choose which witness to believe and for that reason this piece of the evidence does not assist the prosecution case.

Since there was no eye witness, the only other evidence that might assist the prosecution case is circumstantial evidence. Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the facts at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but to one proposed to be proved in this case that it was Peter Mburu Muthoni who murdered LILIAN AWUOR. In other words there should be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused person and it must be such as to show that within human probability the act must have been done by the accused.

The circumstantial evidence does not irresistibly point at the accused as the murderer of the deceased.

It is the duty of the prosecution to prove its case against the accused beyond any reasonable doubt which it has failed to do.

The evidence against the accused is far below what is required to warrant a conviction in a criminal case. The two assessors returned a unanimous verdict of not guilty. I concur with them.

Accordingly I make a finding of not guilty and acquit the accused.

Dated and delivered at Nairobi this 9th day of March 2005.

J.L.A. OSIEMO

JUDGE