



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
Criminal Case 31 of 2003 (1)

REPUBLIC PROSECUTOR

VERSUS

MATHEW MBALUTO NZIOKI ACCUSED

RULING

Mathew Mbaluto Nzioki, is charged with two charges of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 15/11/03 at Kalie village in Makueni district, jointly with others not before the court, murdered Stella Masila, and in the second count, he was charged with murdering Priscilla Wanza Masila.

He denied both charges. The prosecution has called a total of 8 witnesses.

On that fateful night of 15/11/03, PW1, Mwikali Masila, PW2, Jackline Mumo Masila, Gladys Ndunge Masila (PW3) were in their house at Kalie village with their mother, Priscilla Masila, and their elder sister Stella Masila and a brother called Mwongela. They retired to bed at 9.00 p.m. PW2, PW3 and the two deceased slept in their mother's bedroom while PW1 and the younger brother went to sleep in another room. They heard the door bang at about 11.00 p.m. The dog barked and stopped barking. People then started to hit the door to the house and entered. PW1 heard the people breaking in to their mother's bedroom. She hid under the bed. Nobody came to her room. She only heard her mother ask one Mbaluto, why he was killing her. She said it was a dark night. She did not see anybody. She went to her mother's room after the people left and found the mother, Stella, and Mumo, all injured. Once her mother mentioned Mbaluto, she knew who it was as he used to visit their home and lived in the neighbourhood. She was not aware of any grudge or dispute between the mother and Mbaluto, the accused.

PW2, Mumo, recalled that when the assailants entered the house, they started to cut the door as PW2, the mother and sister tried to push it from the inside. Their sister put on two hurricane lamps and placed one on a table near the door and another on the floor. PW2 was cut on both hands as she held on the door but the people broke it open and the door fell. When the assailants entered, they cut up the mother as they demanded money. PW2 said she was able to identify Mbaluto, the accused who wore a black jacket and a big hat. She said the deceased, Priscilla, hit accused with a piece of wood on the face. She also heard their mother ask Mbaluto why he was killing her. Before Mbaluto cut her, PW2 managed to cut him on the leg with a panga. As the assailants left, Stella then said she knew the assailant and Mbaluto came back and cut her. PW3 who was in the same room with PW2 reiterated that as the assailants were breaking the door, they held the door from inside. They first lit a torch, then two lamps. After the door gave way, the person who entered demanded for money and it is then their mother asked Mbaluto why he was killing her. PW2 knew who Mbaluto was as he used to visit them frequently. She was only able to see him when the mother mentioned the name 'Mbaluto'. Upon denying that she had no money, the person started to cut

the deceased up. Stella was attacked when she said she had known the attacker as Mbaluto and she was cut on the head and leg. By then, PW3 was hiding under a table and attacked from there. Stella died instantly but the mother died later when neighbours had come. She said accused wore a black big hat and jacket but the face was not covered.

PW4, a son to Priscilla Masila, learnt of the mother and sister's death through telephone on the same night. He went home next day and confirmed the death. On 21/11/03, he identified the bodies to the Doctor who performed the postmortem.

PW5, Simon Malika, and PW6 heard the screams from the complainants' home and went there only to find the assailants had escaped and Priscilla and Stella were dead whereas PW2 was injured. PW6 said that the daughters of Masila told him that Mbaluto committed these acts but he never told the police that information.

Doctor Onkware Richard (PW 7) produced the postmortem report on behalf of Doctor Ekwam who performed postmortem on the deceased persons but could not be traced within reasonable time and without unnecessary expense. PW7 produced the two reports in respect of Priscilla and Stella. In respect of Priscilla, Doctor Ekwam found the following injuries: deep cut on the head from face to occiput which involved skull bone; multiple cuts on the face; traumatic amputation of left hand; deep cut on left forearm, deep cut on left breast; fractured mandible; internally he found deep cut with linear skull fracture of the frontal bone, occipital bone, parietal bone. He opined that the cause of death was pulmonary arrest secondary to severe head injury and massive haemorrhage.

In respect of Stella, he found a deep cut on the left side of the head with obvious skull fracture and the brain was exposed; traumatic amputation of left hand and right limb; deep cut on left knee; multiple cuts on right forearm; fracture of distal muscles. He opined that the cause of death was cardio pulmonary arrest secondary to severe head injury.

PW8, Chief Inspector Peter Matu, received a report of the murders on 16/11/03 in the morning. They proceeded to Makindu Police Post where they found Corporal Mwanzia who accompanied PW8 and others to Makindu Hospital where PW2 and 3 were admitted. They proceeded to the homestead of the deceased where people were gathered. He found two bodies in the house, one in the sitting room and the other in the bedroom. He saw the outer door of the house smashed with a stone and the inner door too was shattered. He had photographs taken of the scene. He interviewed PW3, Gladys, and the brother Mwongela who mentioned the name of Mbaluto which name was mentioned by their mother as the person who was killing her. They described who Mbaluto was. PW8 had the dead bodies taken to the mortuary at Makindu. The officer in charge of Makindu Police Post knew who Mbaluto was and he was arrested on same day. PW2 did a search at Mbaluto's house where the clothes he allegedly wore the previous night were collected for investigations as to whether they had any blood stains. PW8 also received an axe left at the scene of the murder by the assailants. The rooms were heavily stained with blood and they collected samples of blood from the scene but they were misplaced on the way to the police station.

I have carefully considered all the evidence adduced by the prosecution regarding this most unfortunate and brutal murder of the two deceased persons. The offence occurred in the middle of the night, at about 11.00 p.m. and the question of identification is at the very core of this case. The ultimate question to be asked and answered is whether the accused, Mbaluto, was one of the people who viciously attacked the deceased and murdered them in cold blood.

The only witnesses to the incident are PW2 and 3. They were in the same room as the deceased when attacked. Both of them claim that lanterns were lit when they were attacked. Going by their evidence, there was light in the bedroom where they slept by the time the assailants managed to bring down the door. PW2, Mumo, explained that they tried to fight off the attackers which is evidenced by the injuries suffered on her hands by PW2 and even the deceased persons had several injuries on their hands.

In the evidence of PW1, PW2 and PW3, they all say that it is their mother who first mentioned the name

of Mbaluto and asked him why he was killing her. PW2 admitted that before that she had not noticed that he was the one. This is after the door had been broken and the assailant had entered the bedroom. PW2 described the said Mbaluto as having worn a big black hat and a black jacket but that the face was uncovered. Pressed in cross examination, PW2 admitted that she told police in her statement that she was not able to recognize any of the assailants because it was dark. She also admitted that she was not able to recognize Mbaluto because only his eyes were uncovered. I believe and find that what PW2 admitted to have told police who recorded her statement soon after the incident when it was still fresh in her mind must have been what happened and what she saw as opposed to what she told the court in her testimony later.

PW3 also admitted that until the mother called the name of Mbaluto, she had not recognized him. One would wonder why these witnesses had not identified Mbaluto and yet it was a person they knew so well and who visited their home frequently. It leaves questions in ones mind as to whether there was light in the bed room as alleged or not. PW3 was never injured. She hid under a table in the same room and it was not clear at what time she went under the table. Might it be the reason she could not have seen the assailants well?

The witnesses were under attack, it was at night. They must have been terrified by what the attackers were doing to them and I do believe the circumstances were not conducive to proper identification. In the case of *KIARIE versus REPUBLIC 1984 KLR 739*, cited by counsel; *MOHAMMED MAFHABI AND OTHERS versus REPUBLIC Criminal Appeal 15/1983 and REPUBLIC versus ERIA SEBWATO 1960 E.A 174*, it was held that if a case wholly or substantially depends on evidence of identification, that evidence must be watertight. In *REPUBLIC versus ERIA SEBWATO EA 174*, the court had this to say:

“When the evidence alleged to implicate an accused is entirely on identification, that evidence must be absolutely watertight to justify the conviction.”

Though we had two eye witnesses in this case, it seems one saw more than the other and even though PW2 who seems to have seen more contradicted herself in her evidence and it may not be safe to rely on her evidence.

As earlier pointed out, it seems PW2 and PW3 only agreed when their mother said that Mbaluto was the person killing her. The court cannot tell how the deceased knew the accused to be her assailant especially considering what PW2 admitted to that she told police that it was dark and she was not able to identify the assailant or that the assailants had concealed their faces. As submitted by Mr Kakonzi, for the accused, this may be a case of mistaken identity. In the case of *REPUBLIC versus TURNBULL (1976) 3 ALL ER 549*, Lord Widgery said:

“Recognition may be more reliable than identification of the stranger, but even when the witness is purporting to recognize someone whom he knows; the jury should be reminded that mistakes in recognition of close relatives, and friends are sometimes made.”

Under the prevailing circumstances, it is possible that the deceased honestly mistook and called another by name of Mbaluto, the accused. In any event, PW2 and PW3 just assumed the Mbaluto referred to by their mother is the one they knew. It cannot be ruled out that the deceased may have known Mbaluto. PW2 also testified that she cut Mbaluto on the leg. Accused was arrested the day after the attack. There is no evidence that he was found to have suffered any cut or injury on the leg which was inflicted by PW2. There should have been a fresh wound on the accused. PW2 also said that Priscilla, the deceased, hit Mbaluto on the face with a piece of wood. There is no evidence that Mbaluto was found with any injury on the face. That goes to raise more doubt as to whether the accused was at the scene.

PW8 took possession of the accused’s clothes that the allegedly wore the night before, that is, night of 15/11/03. They were produced in evidence as exhibits. They were taken to Government analyst for investigations to find out the presence of any blood stains. The report of Government analyst was never produced in evidence. There was evidence from PW8 that the rooms where the murder were committed were splattered with blood and if the clothes produced were indeed what the accused wore, then there

would be obvious presence of blood stains. Failure to produce the Government analyst report is deemed to be adverse to the prosecution case.

The postmortem reports were produced by Doctor Onkware on behalf of Doctor Ekwam who performed the postmortems but could not be traced without unreasonable delay or expense. Section 77 of Evidence Act as amended does make provision for production of documents by another other than the maker if the maker cannot be traced without unreasonable delay or expense. Whether Doctor Ekwam produced the postmortem report or doctor Onkware, the findings are an opinion and they are not binding on the court but the court has to consider the Doctor's opinion in conjunction with the rest of the evidence on record. The findings in the postmortem report were consistent with the narration of PW2 and PW3 on how injuries were inflicted on the deceased persons.

From the foregoing, I do find that there are serious doubts raised in the prosecution case as to the identity of accused, whether accused was one of the assailants and the court finds no reason why he should be placed on his defence to fill in the gaps for the prosecution case. If he kept quiet in his defence, the court would still be forced to acquit him. Though this is a sad and unfortunate case, yet the court has to acquit the accused for lack of adequate evidence. Accused is hereby acquitted of the two counts of Murder.

R.V. WENDOH

JUDGE

Dated at Machakos this 17th day of August 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE