

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL 173 OF 2002

REPUBLIC PROSECUTOR

VERSUS

MOSES MAINA MUGWERU ACCUSED

RULING

Under Section 306 of C.P.C The Prosecution closed its case after seven witnesses gave their evidence. After the close it was submitted that from the evidence led the prosecution has failed to address any evidence against the Accused to link him with the offence.

PW.1 came to the scene after he was informed that the deceased was killed and saw him stabbed thrice in the chest and two stab wounds on his head. He was dead and found that the members of public had already arrested the Accused whom he knew. He talked about a dispute between the two the previous year when the deceased had fought with the Accused and had broken his tooth. He specifically stated that the Accused's clothes did not have any blood thereon.

He talked about a clean knife on the scene which was a kitchen knife. Despite this and other witnesses having talked on the recovery of a knife on the scene, the knife has neither been shown for identification to any of the witnesses nor has been produced. PW.2 Inspector William Kanyi talked about the knife near a drain which was a bit far from the body of the deceased. He also talked about blood stained clothes of the Accused which was sent along with the knife to Government chemist. Blood sample of the deceased was also sent. However, no report from Government Analyst is before the court.

From the evidence of PW.3 P.C. Julius Marete, it is shown that Post mortem on the body was performed after proper identification of the body by relatives. In my view evidence of PW.4 Charles Makara Njoroge is somehow relevant to the Prosecution case. He was with the deceased and the Accused at a funeral ceremony who were seated next to each other. He knew both of them for about three years. He was dancing with a girl. Due to a small disagreement of lighting a cigarette (he did not know who had the cigarette and who refused to light it) between the two, the deceased removed a note of KShs.10 and asked the music to stop and left the place. The witness went to go for a natural call and went to a small lane between the houses at a distance of about 30 to 40 feet from that place.

There he saw under moonlight both Accused and Deceased holding each other. Although he could see them, he could not hear their conversation. He only described Accused wearing a red scarf and then he went back. He did not discuss this event with anyone and saw the Accused return to the funeral place looking a bit worried and then went out hurriedly. I must note that as per this witness he watched the Accused and the deceased earlier and then the accused returning while he was dancing with a girl. He further added that someone with long hair arrived at the scene and told them that he had seen the deceased lying down with a stab wound. They all went there. The person who informed them was coming from a nearby bar. According to witness the Accused had a stab wound on the chest and nail marks on his mouth, as if someone wanted to stop him from shouting. He also denied that he saw the Accused with a knife.

These injuries described by him vary with those described by PW.1. He agreed that people at the funeral were buying alcohol from a nearby bar but refused that he drank any. He also denied having seen any knife at the scene. At his disclosure of the earlier event the Accused was arrested by members of public.

He also denied having seen any blood on the Accused's clothes. PW.5 Raphael Irungu was one of the persons who visited the scene after the news were received. He only saw a stab wound on the body. He said it was dark at the scene. He described Accused's clothes as wet and stated that he did not wear scarf. He also did not talk of a knife on the scene.

PW.6 Veronica Njeri is sister to the deceased who was at the funeral but the deceased escorted her home at one point and locked the house from outside. She was woken up at 1 a.m. with the news that the deceased was stabbed. According to her people went to the Accused's home after being informed of him having been seen but was not at home. However, the Accused did come back to the scene where he was held by them.

She also talked about previous dispute between the two. She however did not mention any disagreement between the two at the funeral. She described the injuries on the body as stab wounds on his chest, and denied that there were any scratch marks on his face. She further stated that the knife was under his body. She did not name PW.4 but described him as a young man and did not state that she had seen him at the funeral. It is on record that there were about 10 people at the funeral and she did not place him there.

Similarly, PW.7 Joseph Mwangi Njuguna, who stated that he was at his sister's funeral, did not place PW.4 at the funeral. He testified that at about 1 a.m. a young boy who told him that he had seen the Accused running who had a fight with the deceased. He only stated that he saw the Accused at the funeral. He went to the scene and found the stab wounds on the chest of the body. When he went back to the funeral he saw the accused asking people around and held him. He saw a knife when body was lifted and gave the same to the police. He testified that there was no fight at the funeral.

This is the Evidence of PW.4 who has tried to connect the Accused with this offence and which has been at variance in many aspects with those of other witnesses as specified hereinbefore. However, I stress that no other witnesses seem to know PW.4 and has even stated that he was at the funeral. Furthermore, PW.7 denied specifically that there was any disagreement of any kind at the funeral which happened to be the funeral of his sister. No one has mentioned apart from PW.4 that the Accused and the deceased were drunk. PW.4 is the sole witness who claims to have seen both the

Accused and the deceased at a place when he was relieving himself and could not hear what they were talking. The circumstances of identification herein are not conducive to the safe identification. The different versions of the injuries received by the deceased have not been set at rest by post mortem report. The story of mysterious knife also does not help the prosecution case. I would not expect any miracle of any change in the aforesaid evidence if I ask the Accused to give his defence. In the premises, I agree with the Learned Defence Counsel that the prosecution has not led any evidence to connect the Accused with this offence. I therefore enter a finding of not guilty under section 306(1) of C.P.C. and direct that the Accused be set at liberty unless held otherwise as per law.

Dated and signed at Nairobi this 20th day of June, 2005.

K.H. RAWAL

JUDGE

20.6.2005