



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL CASE 32 OF 2002

REPUBLICPROSECUTOR

VERSUS

MATHIAS MWAKUGHU MWALASHA.....DEFENDANT

RULING

Mathias Mwakughu Mwalasha is charged with the offence of murder contrary to section 203 read with section 204 of the Penal Code that on the 6th day of June 2002 at about 9.00 p.m. at Musengoni village Kimorigho within Taita/Taveta District murdered Moses Mwalasha.

The trial commenced on 4/3/04.

The Prosecution's evidence shows that the accused was the son of deceased and was residing with his wife with him in his house in a family compound where another son David Mwalasha had his house a pace away from deceased house. On that 6th day of June 2002, David (PW 1) and his brother Mathias accused, decided to visit another village known as Eldoro not far away. There they met another brother Martin who was selling liquor. David was interested with liquor but accused was on business of collecting some debt. This family were farmers. Accused was entrusted with the management of farm produce and there were differences from time to time on money between the deceased and Mathias (the accused).

Upon reaching the village Eldoro the brothers met their other brother Martin. Then they returned to the father's compound that night. David went to sleep but at about midnight he woke up. He was drunk. He saw someone with a panga and torch. He decided to hide. The person was asking for a jembe (hoe). In cross-examination he said it was Mathias the one who knocked at that hour. David was frightened he ran to Eldoro (not far away) to talk to his other brothers. He slept there. In the morning he talked to Martin and Juma. The brothers suggested they go back to their father's house and check on him. It was now 7th June 2002 in the morning. On the way they met Mathias (Accused) who asked David "Where did you sleep?" "where are you going?" When the 3 brothers said they were going to their father's house, he said "Why are you going there and our father has gone to Mombasa?"

All the brothers walked on and reached home. Martin spotted some blood stains by the Mango plant outside. Accused told them that he had killed a cat. Then Martin entered the father's house gaining entrance through a window, and found no net or mattress. Father was not there. The brothers decided to go to bus stop and police station to check on the whereabouts of their father. The matter was later reported to Taveta Police station. The police came to the house. The wife of accused took the officers to where the body was buried in the family shamba. At this time accused was not present.

He ran away.

Note: The woman who led the officers to the grave was not called as a witness.

More evidence shows that David (PW 1) and Juma went to a house of PW 2 in Eldoro and said Mathias had been quarrelling with their father at night. They decided to visit the house of the deceased. They were joined by Mathias who was following them from behind. A woman wife of Mathias led the police to where the deceased was buried. The body was exhumed and 2 days after the incident the Accused was arrested. David was also arrested and kept in custody for 2 weeks. It is PW 1 David who reported that the deceased was missing.

The body was exhumed on 7/6/02 at 2 p.m. and the post mortem was done on 12/6/02 at 2.30 p.m. Report Exhibit 2.

There were severe injuries reported and the cause of death was recorded as due to severe haemorrhage and brain damage. The mental status of the accused was performed by a mental health assistant but it has not been suggested that the accused was mentally sick at any time.

A sketch of the scene was drawn by PW 11. PW 1 returned home with police. The wife of accused took the police to where the body was buried in the family shamba. The deceased had 4 sons and he was residing in his compound with David PW 1 and his children in a separate house, accused and his wife. The other brothers were residing elsewhere.

The police arranged to obtain a court order to exhume the body which was done on the same day. The body was transferred to Mortuary and post mortem was done by Medical Doctor.

His report is exhibited as exhibit 2. The post mortem report and the photographs of the body taken, Exhibit 4 show the very serious injuries suffered by the deceased on his body. The opinion of that Doctor was that death was due to severe haemorrhage and brain damage. There is no reason to doubt the doctor's opinion. Any medical doctor can tell when a person is dead. The main evidence is that of PW 1 the son David. David was awake at about midnight that night. The other person he says was the accused, his brother. His evidence is contradictory. In his first statement to the police when the matter was fresh in his mind he omitted to state matters that he was asserting in his evidence in court. He did not know what went on in his father's house which was only a pace away from his house where he was sleeping. In his evidence in Chief he said he never saw the person who knocked at his door at that hour but upon Cross-examination he named Mathias accused as the person who approached him with a panga and torch asking for a jembe. Although he said he was drunk at the time he ran away to Eldoro to his brothers' house Juma. Then it was in the morning that he talked to his brothers about the matter. It is also clear that he was arrested as a suspect together with the wife of accused. The wife of the accused who was said to have pointed out the grave was not called to give evidence. There is in fact no eye witnesses to testify positively that the act was committed by the accused.

There is evidence that the other 3 brothers suspected the accused because when he met them he told them that their father had gone to Mombasa and when at the house some blood was seen outside. He explained that he had killed a cat. Thereafter he was not seen in the area and was later arrested 2 days after the incident.

All this conduct led the witnesses to suspect that the accused had committed the crime.

Notice that evidence of suspicion is not sufficient to find a conviction of murder.

However, apart from the allegation that accused was residing in the house with deceased and that there may have been a quarrel which evidence was not followed seriously by prosecution, no other circumstantial evidence is available to lead to the accused as the doer of the heinous act.

There is the issue of the evidence on the mental status of the accused. It has not been suggested that his mental status was disturbed at any time. But the defence contended that the witness called to give evidence as to accused's mental status was not qualified.

We have in this case a situation where the intention to kill is not proved and the act also that the accused did cause the death is also not proved.

The standard of proof in Criminal case is of high standard beyond reasonable doubt. If there is any

doubt as to whether the accused did what he is charged with, the accused must benefit from such doubt. It is my considered view that the evidence of the prosecution offered in this trial is not up to standard required. Under section 306 Criminal Procedure Code. I enter a find of Not Guilty. I acquit the accused and order that he be set at liberty forthwith.

Delivered and dated at Mombasa this 13th day of September 2005.

J. KHAMINWA

J U D G E

I thank the Assessors for being with the court all time. The Assessors are discharged from performing assessor's duty for the next 12 months from today. For today they should be paid for attending court.

KHAMINWA, J