



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL CASE 30 OF 2000

REPUBLICPROSECUTOR

VERSUS

JOHN MUTHOKA SURIACCUSED

R U L I N G

(Under the Provisions of Section 306 Criminal Procedure Code Cap 75)

John Muthoka Suri the Accused herein was charged with the offence of murder contrary to Section 203 read with Section 204 of the Penal Code in that on 29/8/1999 at Kisemeni "B" Village Kasigau Location in Taita Taveta District of the Coast Province murdered ALICE MBIKI MUTHEMBWA "the deceased".

Accused was arrested on 30/8/1999. He has been in custody since then. The accused was brought to this court on 17/10/2000. He first pleaded to the charge on 14.11.2000.

The assessors were duly selected on 13/12/2000 when the Trial was fixed for 15/2/2001.

However for various reasons the trial did not commence until 6th February the year 2002 before Hon. Justice Ouna when two witnesses were taken.

Trial continued on 7/2/02 when 6 other witnesses were called. In all 12 witnesses were called by prosecution.

On 8/3/04 the matter was in court. By that date Hon. Justice Ouna had left the Judiciary so the Trial was ordered to start de novo. Assessors serving were discharged. Fresh plea was taken after a fresh information was filed. Fresh assessors were selected. This second time trial commenced and PW 1 testified that he was residing in Mombasa doing business but his family was residing at home in Taita. Sometime there was a dispute with his neighbour, the accused about the neighbours cattle which were cut. The dispute was resolved by elders and the PW 1 had to pay Shs.4,810/- to the accused which he paid. There was another dispute when the accused alleged that his child was killed by the family. In August 1999 this witness the PW 1 received information from home that his wife had been killed. He traveled to Voi Mortuary and saw the body.. On 3/9/99 post mortem was done on the body by Doctor who found that the body been shot on the left shoulder. He did not see the accused shoot the deceased but on cross-examination he confirmed that his child saw the accused kill his wife (deceased). PW 2 also testified she was a farmer residing in Kasigau. She knew deceased who was running a shop in the neighbourhood.

On 29/8/99 at about 7.00 p.m. she was in her house with her husband and family. She did not see the

arrow but she heard a voice say she was shot in the body with an arrow which had poison. She saw the deceased in her compound. She held the deceased and gave her water to drink. Police were called and by the time they came they found her dead in the house of this witness.

This witness did not visit the scene. She testified that the shamba of accused was nearer her hoe but between her house and that of deceased. She (deceased) also said John Suri had shot her.

PW 3 was the husband of PW 2. He is a Pastor of Church in Kisemeni village. He is a neighbour of accused and the deceased. He knew them.

On 29/8/1999 he was in his house at about 7.10 p.m. with PW 2. They heard the voice of deceased say. I have been injured by an arrow. PW 2 got out and PW 3 followed. The deceased was walking towards the witness' home. The deceased said she was shot with an arrow. PW 3 went to nearest Chief and reported. Accompanied by officers they returned to his house. Earlier deceased said she was shot with an arrow by John Muthoka Suri (accused).

When PW 3 returned back the deceased had already died. Cosmas gave information as to the scene of crime. He saw a mask - a small cloth won around the head. He saw Mshale (arrow without a head), he saw a bicycle. He saw a lessa (piece of cloth). There was a green branch by the roadside. He testified that he did not know the owner of these items. I did not see the head of arrow (Mshale). PW 4 also testified he was also a neighbour. He also knows accused as a neighbour. He got information the deceased was assaulted and that PW 4 should travel to Pastor Musyoki (PW 3). He went and found deceased already dead. He traveled to the scene where he found one arrow, one bicycle and 2 pieces of cloth. Some items were taken but others were left there. He knew the accused who was a neighbour. This witness had received information of 2 earlier disputes between the family of deceased and accused but that disputes had been resolved. Further evidence was produced by PW 5 an assistant Chief of Kasigau. He knew deceased and the accused, they were residents of the same area. He received report that a lady had been shot with an arrow. He got a vehicle. He went to the scene but on arrival found deceased already dead. He went to the scene.

There was a log across the road blocking the road. He arrested the accused from his house and took him to Chief's camp where he left accused guarded by APs Chief Guards. After these witnesses on 25/6/05 the state applied for adjournment to bring to court further evidence. There was objection to the application of adjournment by defence Counsel for accused. However, on consideration the court granted adjournment for hearing on 20/6/05. Further evidence was offered by Cosmas Mulwa who testified that on 29/8/1999 he was carrying his mother home on the back of the bicycle. On the road there were some branches on the road which were blocking the road. He asked his mother/deceased to alight and remove the branches. As she was removing the sticks she said she had been shot. The witness left the bicycle and started looking around for the enemy. It was about 7 p.m. He met a man who was struggling with him. He overcame the witness. Witness could not see his attacker's face. He had a red mask. In the course of struggle the mask fell down. The struggle ended and the witness was released. The witness identified the mask in court. He testified that his mother was shot with an arrow but he did not see the arrow. He is the one who reported the attack to Pastor Musyoki. He found his mother dead in the house of Pastor. He took the people and witnesses to the scene of crime. He identified items in court. He confirmed accused is his neighbour.

Further evidence was offered by PC Remy Mwaseri who received report that a woman was shot. The witness went to house of accused and arrested him. On 20/6/05 further evidence was offered. The State Counsel then said no other witnesses were in court. He was granted adjournment to 5/9/05. on which date he said witnesses were not available and that he needed an adjournment. The application was opposed by defence. However, since the court could hear the suit on following date namely 6/9/05 the trial was adjourned to that date to enable the state to call witnesses. Come 6/9/05 at 9.00 a.m. the State Counsel sends word that he would be available at 2.30 p.m. Order made accordingly. When called to bring forward other evidence the State Counsel addressed the court and hands in a Notice of Nolle Prosequi and asks the court to terminate the proceedings.

The episode ends in a Ruling rejecting the Notice of Nolle Prosequi. The state Counsel fails to produce any further evidence and thereafter the provisions of Sec. 306 CPC come into play. I have considered the evidence offered by prosecution this time. I find no direct evidence that the accused shot the arrow which is said to have killed the deceased. On the same issue of circumstantial evidence, I find no evidence pointing at the accused as the only person who could have been in a position to commit offence. The incident happened at night. He was not arrested at the scene but in his house the following day. I find the evidence not sufficient to sustain a conviction and it is not just to continue denying accused his liberty for now about 7 years and perhaps more in custody. I make a finding that the accused is not guilty. I acquit him and order that he be set at liberty forthwith.

Delivered and dated at Mombasa this 7th day of September 2005.

J. KHAMINWA

J U D G E

7/9/05

Khaminwa, J

Jason – Clerk

Mr. Chizipha for Defence

Mr. Ademba for State

Accused present

3 Assessors present

Ruling read in their presence.

KHAMINWA, J

Mr. Ademba

I apply for certified copies of proceedings and ruling.

KHAMINWA. J

Court:

L et the state counsel be supplied with proceedings and ruling.

KHAMINWA, J