



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Case 135 of 2003

REPUBLIC PROSECUTOR

VERSUS

JOSEPH MBEU NGURE ACCUSED

RULING

Joseph Mbeu Ngure (hereinafter referred to as the Accused) has been arraigned before this court charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 2nd day of November 2003 at Kamuiru village in Kirinyaga District, He murdered Edwin Gioko Muriithi.

A total of 9 witnesses have testified on behalf of the prosecution. Briefly their evidence is as follows.

On the material day at about 6.45 p.m., the deceased and his brother Kenneth Ngure Muriithi (P.W.5) left their home in the company of one Mercy Njeri a girlfriend to P.w.5. They escorted Mercy Njeri to Kamuiru where they left her. P.W.5 and the deceased then went into Kamuiru Bar where they found the Accused. They were served by Jackson Maina Gachoki a Barman at the Bar.

The deceased and P.W.5 left the Bar at about 10.00 p.m. The Accused also left at about the same time. P.W.5 escorted the deceased past the shops at Kamuiru then went back to his girlfriend's house. At the time P.W.5 left the deceased Accused was just walking slightly ahead of the deceased. That was the last time the deceased was seen alive as the following morning the body of the deceased was found lying opposite the gate to the Accused's home.

Suspicion immediately fell on the Accused. The deceased's father Geoffrey Mureithi Ngare (P.W.2) identified the Accused to P.C. Dan Gathogo (P.W.7) and the Accused was arrested. P.W.7 noticed that Accused was wearing a 'T' shirt which had some blood stains. He took possession of the 'T' shirt.

On the 5th November 2003, Dr. Paul Mbalu a medical Doctor then attached to Kerugoya District Hospital performed a post mortem examination on the body of the deceased. He found that the body had bruises on the front neck and lacerations at the right side of the mouth and right leg. His face was swollen and blood was oozing from the right ear and mouth. Internally there was slight bleeding around the front neck muscle membranes surrounding the lungs as well as membranes surrounding the heart. Dr. Mbalu concluded that the cause of death was axphyxia due to strangulation. Dr. Mbalu took a blood sample of the deceased which he handed over to P.W.7. On the 7th November 2003 P.W.7 forwarded the T-shirt recovered from the Accused, blood sample specimens from the deceased and blood sample specimen from the Accused to the Government analyst for examination.

On the 12th November 2003 Dr. Abraham Gatangi examined the Accused and confirmed that he was

physically and mentally fit to stand trial. The specimens forwarded to the Government analyst were subsequently examined and analysed by Jeremiah Kavita Munguti (P.W.8) who found that the 'T' shirt was slightly stained with human blood of group 'B' which was the same group as that of the blood sample of the deceased, whilst the blood sample of the Accused was of group 'O'. He therefore formed the opinion that the bloodstains on the shirt could have come from the deceased after injury.

At the close of the evidence for the prosecution Mr. Gacheru who appeared for the Accused has submitted that the prosecution has failed to prove any malice aforethought on the part of the Accused. He also submitted that the prosecution had failed to prove that the fatal blow was inflicted by the Accused, or otherwise to connect the Accused with the offence. He dismissed the evidence that the Accused's 'T' Shirt was bloodstained contending that the deceased's father who was present during the arrest did not see the bloodstains. He therefore urged the court to find that no prima facie case had been established and acquit the accused.

Having considered the evidence, I find that there was no eye-witness to the murder of the deceased. The evidence against the Accused is therefore purely circumstantial. In such a situation the inculpatory facts put forward by the prosecution must be incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. (Republic v/s Kipkering arap Koske & Another (1949) 16 EACA 135).

In this case the inculpatory facts put forward by the prosecution were as follows:

- That the Accused was the last person to be seen with the deceased.
- That the lifeless body of the deceased was found near the gate to the Accused's home.
- That a 'T' Shirt which the Accused was wearing was found to be slightly stained with blood of the same group as that of the deceased.

It is clear from the evidence of P.W.5 that the Accused was the last person he saw with the deceased and that he next saw the lifeless body of his brother lying near the gate to the home of the Accused. These facts cannot however be said to be incapable of any explanation other than the guilt of the Accused as the possibility of the deceased having been attacked by someone else cannot be ruled out.

Perhaps the more incriminating set of facts is the evidence relating to the 'T' Shirt. In this regard however the prosecution evidence was wanting. First the fact that P.W.2 did not make any mention of the bloodstained 'T' Shirt in his statement to the police is a clear indication, that this is not something that he actually saw as he could not have missed such a critical detail in his statement. The evidence of P.W.7 was more positive on the presence of bloodstains on the 'T' Shirt recovered from the Accused. However it is not clear who took the blood sample of the Accused for comparison purposes and when such blood sample was taken. P.W.7 claimed that the blood sample of the Accused was brought to him by the O.C.S. There was however no evidence from the O.C.S. to confirm where he obtained the blood from.

Moreover the specimens were forwarded to the government analyst on 7th November 2003 but the Accused was examined by the Doctor several days later on the 12th November 2003.

I find that the prosecution have not established that the blood sample forwarded to the government analyst as that of the Accused was actually that of the Accused. In the circumstances the report of the government analyst cannot be relied upon as the possibility of the bloodstains on the 'T' Shirt being from the Accused has not been ruled out.

In the circumstances I find that the evidence adduced by the prosecution is not sufficient to establish a prima facie case against the Accused as no reasonable tribunal properly directing its mind to the law and the evidence can convict the Accused should he elect to offer no explanation in his defence. (Ramanlal Bhatt v/s Republic [1957] EA 332).

Accordingly I find the Accused not guilty and acquit him of the offence charged under section 306 (1) of the Criminal Procedure Code. The Accused shall be set free unless otherwise lawfully held.

Dated signed and delivered this 11th day of November 2005.

H. M. OKWENGU

JUDGE