



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Case 71 of 2004

REPUBLIC
PROSECUTOR

VERSUS

1. JOHN WAINAINA KANYAGU

2. LILLIAN MWIHAKI MUGAMBI ACCUSED

JUDGMENT

The two Accused persons before the court are jointly charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 10th April, 2004 at Illasit Loitokitok in Kajiado District, they jointly murdered Musau Kamanda.

It does not come out from the evidence that the death of the aforesaid deceased is disputed. PW.6 Dr. David Kabure who performed autopsy on the body of the deceased specifically stated, and which is not disputed, that he did so in the presence of police officers and relatives of the deceased. He found clotted blood on nostril, right ear and mouth and huge haematoma on right temporal region of the body. On internal examination he found a crack fracture at temporal area subdural haematoma with compression of right cerebral hemisphere. He found internal injury on his right kidney. After this examination he formed an opinion that cause of death was head injury. Although he did not mention probable cause of head injury he was questioned at length on the probability of the cause of death. He opined that only slapping cannot cause such head injury but a force due to blunt object could cause such injury. He also agreed to suggestion that falling from height could also cause such injuries. I have detailed above the injuries and probable cause of such injuries as evidence to that effect has been led by the prosecution and queried by the Defence.

I shall now go to evidence of Peter Kasaini (PW.1), Charles Mwolile (PW.2) and A.P Corporal Henry Bosire (PW.3) as regards the evidence on injury and death.

PW.1 was at Illasit Shopping Centre at about 4.00 p.m. on the material date to get his money from a hotel where he worked. While he was inside the hotel, he heard commotion. He came out and found large crowd consisting of about 100 or more people gathered. He checked and found 1st Accused, whom he knew as a cycle repairer beating and kicking the deceased who was his neighbour. He also saw the 1st Accused forcing the deceased to swallow a note of Shs.500/- by pushing it in his mouth. He did not question anyone the reason for the incident.

Later when he was going back home, he found the deceased sitting along the road. The deceased also joined him and they started walking home together. The deceased was not talking much as he was in pain

but he only told him that he was feeling pain due to beating and that his neck hurt. He went home and on 16th April, 2004 he was informed that the deceased died.

PW.2 is uncle to the deceased and the deceased was staying with him and family on the material time. On the material day, the deceased was sent to buy house hold groceries at Illasit Shopping Centre. It is on record that it was a Monday and thus was a market day. The deceased came back with change of Shs.81 and a note of Shs.500/-. As his wife wanted cooking oil he sent him back to the Shopping Centre, by giving Shs.500/- which he had brought back. He also confirmed that the deceased did not tell him from which shop he got that note. 2nd Accused in her testimony has confirmed that the deceased came to her to buy cooking oil and came with Shs.500/- note.

While he was waiting for the deceased to return, PW.1 came first to him and informed that the deceased was beaten at the Shopping Centre and that the deceased was following he did not mention by whom though. It may be noted that PW.1 did not mention that he passed by the deceased's home. The deceased came after PW.1 had gone and just went to sleep. It was clarified in cross-examination that the deceased complained of headache and stomach pain. He also confirmed that the 2nd Accused (lady in the shop), on seeing the note asked 1st Accused (the person repairing cycle and referred to this witness as Wameri) to take the deceased to the Chief. But the 1st Accused beat him up and forced him to swallow the note which was alleged to be a fake one. He denied suggestions from the Defence that the deceased fell at home on 8th April, 2004 and that he was suffering from epilepsy. However none of the Accused persons has indicated anything pertaining to those questions as if they were posed for blind shots. This witness also confirmed that the 2nd Accused had beaten the deceased.

The next day i.e. on 8th April, 2004 they went to the Chief to report the incident. The two Accused persons were summoned. The chief asked him to get P3 form for the deceased. Anyway he looked for some money to take the deceased to a hospital but before he was successful, the deceased died on 10th April, 2004.

PW.3 also confirmed the facts of report and eventual death of the deceased. According to him the deceased was pushed and fell down and then the 1st Accused beat and killed him. He confirmed the deceased was complaining of headache and stomach pain and looked as if he was beaten.

Both the Accused persons gave sworn testimony. 1st Accused simply stated that while he was at his place of work the 2nd Accused called him and requested him to take a Youngman held by her to the Chief. She (2nd Accused) said that he had a fake note which was held by the deceased in his hand while he was talking to the deceased on the corridor of the shops, the deceased swallowed the note. He slapped him and informed the 1st Accused about what happened and went back to his work.

2nd Accused also testified similarly and reiterated that she had almost eight customers (which the 1st Accused stated as six). The deceased came with the fake note of Shs.500/- to buy cooking oil. She found the same as fake and called the 1st Accused to take him to the Chief. After they left her shop she did not know what happened. I shall find it difficult to accept her testimony that she did not know that the deceased was beaten even after the 1st Accused himself said that crowd of about 100 people gathered as the deceased was screaming when he held him.

The evidence as a whole in my view, would point out the offence of manslaughter and not the murder.

However, can I even convict the two Accused persons when there is a stark discrepancy in the particulars of the information filed against them? Can I also notice that or rely on that discrepancy, in absence of either of the parties bringing the same to my notice?

The discrepancy is the date of the commission of the offence, which in my view is very material and this court cannot overlook the same despite its attention was not drawn by either the Prosecution or the Defence. This court has to dispense justice as per law and that dispensation cannot be dependent on efficiency or otherwise of the counsel.

These two Accused persons are charged that they committed the offence on hand on 10th April, 2004 while the evidence on record shows that the incident occurred on 7th April, 2004 and the deceased died on 10th April, 2004 as a result of the crime committed on 7th April, 2004.

As the record shows, the Accused persons were arrested on 10th April, 2004. It is the prosecution who has sole responsibility to prove the charge as particularized. I do lament that due to negligence on the part of the Prosecution it has failed to do so.

The Assessors have opined that both Accused persons are guilty of manslaughter. But for reasons as been particularized by me I do not agree with them. I really regret to enter the finding of not guilty against both the Accused persons, under these circumstances.

With heavy heart I also direct that they be released forthwith unless held otherwise as per law.

Dated and signed at Nairobi this 10th day of November, 2005.

K.H. RAWAL

JUDGE

10.11.2005