



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CRIMINAL CASE 131 OF 2003**

**REPUBLIC..... APPLICANT**

**VERSUS**

**SALOME MUTHONI MUTHEGU..... ACCUSED**

**RULING**

(UNDER SECTION 306 OF CRIMINAL PROCEDURE CODE)

The Accused Salome Muthoni Muthegu before the Court is facing a charge of offence of murder contrary to Section 203 as read with Section 204 of The Penal Code (Cap 63 Laws of Kenya).

It is alleged against her that on 8th February, 2003 at Gathage Village in Thika District she jointly with others not before the Court murdered Samson Muthee Macharia (referred to as 'the deceased' hereinafter).

The Prosecution case was closed after 12 witnesses testified. The Learned Defence Counsel Mr. Mutua thereupon submitted that the prosecution has failed to lead any evidence to connect the Accused with the offence and thus she should be acquitted at this stage as provided under Section 306(1) of Criminal Procedure Code (Cap. 75 Laws of Kenya).

At the outset I must note that even though the Accused is alleged to have committed this offence 'with others not before the Court' the prosecution totally failed to prove or even to hint at those possible others who could be with her. In my humble view, that is a serious shortcoming in the case of the prosecution.

At the outset I shall find that the prosecution has proved as per required standard the death of the deceased. His body was found in the bushes of Waithaga farm in Gathage Village naked minus his head and both arms. The father of the deceased Francis Macharia (PW1) and John Ndungu (PW9) identified the said body from his toe which had a gap inside. The chain which was worn by the deceased was also found near the scene. PW.10 Ms Jane Wasike performed autopsy on the body which was identified by the said two witnesses. CPL Francis Kyalo (PW.12) was also present at City Mortuary when post mortem was performed.

It is also incontrovertible that the prosecution case rests on circumstantial evidence as no eye witness to this heinous crime is before the Court.

The Accused before the Court is said to be the current girl friend of the deceased. What I am perturbed to note is that despite the fact that PW.1 Francis Macharia father of the deceased has testified that as per

deceased's friend one Joseph Maina who informed him that the deceased was with him and others upto 9.00 p.m. on 8th February 2003, the prosecution has, without any explanation, neither called the said Joseph Maina as a witness nor any other friend who were with them at that night. It is also on record through evidence of PW.1 that he knew the Accused before the deceased started his relation with her and also that their relation was friendly. Furthermore, he also mentioned that the deceased was separated from his wife called Wahu.

PW.2 Francis Mwaria Kimani testified that he saw the Accused with her child and one Otieno having meal at his hotel at 8.30 p.m. on 8th February 2003. The deceased was also there and was alone. The Deceased left his hotel before the Accused.

Apart from that, I also note that from this evidence, it is clear that the Accused was not the last one with the Deceased. Again this witness contradicts the evidence of PW.1 who stated that the Deceased was with his friends upto 9.00 p.m.

PW.3 Stanley Ndungu stumbled into the dead body on 10th February 2003 around 1.00 p.m. He also saw blood few meters away from the body. He also saw police removing a chain from the dead body, (P. Ex 3).

PW.4 Esther Wanjiku Kamau testified that the Accused came to her on 10th February, 2003 saying that she was scared as she had heard that someone was found on the other side and next day the Accused informed her at 7.30 p.m. that the body found was of her friend. Then she was arrested from her house around 11.00 p.m. PW.5 is Bernard Otieno who stated that after playing pool he went to the hotel owned by PW.2 and stated that the Accused happened to be sitting next to him. He also saw the deceased (whom he knew as his customer) seated at the opposite table. He categorically stated that the Accused was alone on her table unlike what PW.2 had stated. PW.6 is Veronica Wahu who was one of the team members who were searching for deceased's head and arms. They did not find anything in the bushes. But then she went to a place where houses were rented and in a thicket saw a sack. The police opened the sack and a green pullover (PEX.1) and a shirt with a hood was found. I shall pause here and have to note that the said shirt is not before the Court, and PW.11 P.C. Edwin Mwai categorically stated that he was given only a sweater found by this witness. I also note that PW11 testified that this witness told him that she had seen the Deceased wearing that sweater on 8th February 2003, but she herself has not testified to that effect. She only confirmed that the sweater was found in a sack with a shirt.

PW.8 Joseph Maina a brother to the Deceased testified that a pullover and a rag, red and black in colour, was found in a sack.

PW.7 the mother to the Deceased had stated that an orange and red cap, brownish shirt plus green pullover were found in the sack.

Coming back to evidence of PW.6, she stated that the place where the sack was found was at a distance of 60-65 feet from the rental houses! She knew the Accused and identified her in the Court, but did not state that the Accused was staying in one of those rental houses, while PW.11 stated that the sack containing sweater (Ex1) was found at a distance of about 10 meters from the Accused's house. PW.8 as well stated that the sack was found in a thicket near Accused's house. He saw the Deceased wearing that sweater on 25th January 2003.

PW.11 P.C. Mwea and PW.12 Cpl. Francis Kyalo are police officers who received the report of dead body and visited the scene. PW.11 stated that as blood was found on the foot path and the body was found in bushes, according to him the deceased was killed on the road and dropped in the bushes. PW.12 was of the opposite view. Due to proximity of blood and body he opined that the deceased was killed in the bushes. In any event there is no further evidence that soil with blood was collected from the scene. PW.11 also confirmed, which is very relevant and thus I quote:

"We arrested the Accused as father and many others said that they were living together"

As I have stated apart from the fact that the Accused and the deceased were intimate friends, there is no other evidence to connect the Accused with this offence. On the contrary there is evidence to the effect that they had friendly relation. I do not have any evidence to show that the relation became sour which could motivate the Accused to commit the Act.

This case is a classic example of the defective investigation by the investigating side of Police Force.

Without any further investigation, the Accused was arrested by them since February 2003 simply because she happened to be a girl friend of the deceased. I can, in the premises, unhesitantly find, which I positively do, that the prosecution has failed to lead any evidence as per law to connect the Accused with the offence of murder of the deceased and I do enter finding of not guilty in her favour. As a result of such finding I acquit her of the charge of offence of murder as leveled against her in information dated 20th August, 2003.

I further direct that she be released forthwith unless held otherwise as per law.

**Dated and signed at Nairobi this 15th day of December, 2005.**

**K.H. RAWAL**

**JUDGE**

**15.12.2005**