

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Case 54 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

L K MRESPONDENT

RULING

L K M is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are that on the 8.12.2003 at Kikoko Location, Kalongo Sub-location [particulars withheld] Village of Makueni District, he murdered one Joseph Ndeti Kioi.

The offender is a minor. The Doctors report indicated that he is under 18 years.

J M M was on his way to Kitungulu Market at about 7.00p.m. when he found a crowd of people and a person who had been pushed down a cliff. He jumped down the cliff to where the person lay. He found the victim was his neighbour who told him that one K had pushed him down the cliff when he refused to give K some milk. The person who had been pushed down the cliff complained of weakness in the legs and PW1 helped carry him up. PW1 was aware of one K in their area and knew K to be the accused. The deceased never gave him the other names of the person who pushed him. PW1 sent for deceased's relatives and people came from the deceased's employers home and they took him to hospital at Kikoko. He was treated and referred to Machakos Hospital. In cross examination, PW1 went further to state that the deceased said that K who pushed him down the cliff was brown in complexion.

C Mukeku, (PW2) was on his way from Kikoko market at about 7.30p.m. when he was informed that his uncle's employee had been pushed down a cliff. He went to the scene and found the deceased who talked with difficulty and deceased informed him that he knew the boy who pushed him physically but not by name and described him as brown in complexion and short in stature and that the boy had pushed him because he wanted deceased to give him milk but deceased said the milk was all sold out. PW2 said that the deceased was injured on the back and spinal code. He escorted him to hospital in Machakos where deceased was admitted. He reported at Police Station and named Kingatya as a suspect. He was also told by people that were present when the incident occurred that Kingatya pushed deceased.

PW3 CPL Thomas Odenyo who received a report of the deceased's death on 10.12.03 visited the scene and found that the deceased had actually fallen from the road to a man-made lower bench because the area is hilly and steep. PW3 arrested the accused person from his home.

Doctor Katangi Kyuvi, a medical doctor based at Machakos General Hospital received a request that he carries out post mortem on one Joseph Ndeti which he did on 27.12.03. Upon external examination, the body was intact and on dissection all systems were normal except for a bruise on the forehead, a broken neck bone on the spinal column which was displaced, Spinal Code was injured and ligaments were torn. He formed the opinion that the cause of death was spinal injuries that resulted in trauma. Fracture led to the injury of the spinal column. The injury could have been caused by a blunt object even a fall which would depend on the height.

The Doctor filled and signed the post mortem report which he produced as exhibit. PW5 PC Outa Tom visited the scene of the fall with PW3 after the deceased passed away. He was shown the scene to

have been a fall from a higher level to a bench 2 metres below. He arrested accused. Later on 28.12.03 he accompanied the deceased's relatives to Machakos General Hospital where post mortem was conducted.

I have considered the evidence adduced by the prosecution and submissions by both counsel for the offender and the state counsel on whether the offender has a case to answer to warrant him being put on his defence.

So far no eye witness testified. PW1 found when the deceased had already fallen down the cliff or bench as described by the different witnesses. PW1 arrived at the scene after 7.00p.m. It was dark. PW1 was not able to name any of those who witnessed the incident nor were any called if at all they did witness.

PW1 told the court that the deceased was able to talk and he did mention the name of Kingatya as the person who pushed him. Deceased did not give the full names of the culprit. However PW2 who came to the scene after the deceased had been brought up from the bench denied that the deceased mentioned any names. He said that the deceased who talked with difficulty only said that the person who pushed him was short and brown and he only knew him physically. Pw1 and 2 later escorted the deceased to hospital. I believe that what the deceased told PW2 was in the presence of PW1 who had arrived earlier. It is a wonder as to why the contradiction in the evidence of the two on the identity of the assailant. Either the deceased knew the person who pushed him or did not . PW2 did admit that he never gave any name to the police because the deceased did not name anybody. Pw2 said he suspected the accused because of the description given by the deceased and what he was told by those present at the scene and who are not witnesses in this court. The question is whether PW1 was actually told who the culprits was. What PW1 told court is supposed to be a dying declaration but it is clouded in doubt in light of Pw2's testimony. There is no independent evidence corroborating the dying declaration. Identity of the person who pushed the deceased is in doubt. This court therefore holds that the evidence on record is not sufficient to warrant the offender being called upon to defend himself. He is therefore acquitted of the charge of murder and he is set at liberty forthwith unless otherwise lawfully held.

Delivered at Machakos this 13th day of December, 2005

R. P. WENDO

JUDGE