



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

H.C. CRIMINAL CASE NO. 174 OF 2003

REPUBLIC PROSECUTOR

V E R S U S

JACOB MBURU NJOGU ACCUSED

J U D G M E N T

The Accused Jacob Mburu Njogu is charged that on 7th February, 2003 at Mugumoini Farm in Kakuzi Division, Thika District he murdered Zachary Kimotho Nduati.

The Prosecution case solely rests on the evidence of one infant Bernard Mbugua (P.W.1). He was six years of age when the incident happened.

Thus I shall carefully deal with his evidence. He struck me as an intelligent young boy and was giving his evidence with ease. He started his evidence by stating and I quote:-

“I know I am in court because my mother told me we are here for a case involving a per son who killed Kimotho.”

He testified that he recalls 7th February 2003. On that day at about 6.00 p.m. he went to buy flour at a shop of (P.W.7) and saw the deceased with a stranger. On the other hand his mother Monicah Wairimu (P.W.2) deponed that the Accused was known to her and his son.

Going back to his testimony he stated that he started going back after he bought the flour. He was with those two persons who branched after some time but joined his way once again and he saw ‘the other person hitti ng him with a club’ and was telling the deceased “you better think properly”.

Later on he stated that the other person was using a knife a foot long and hit him on head.

According to him the deceased was drunk but not the other person. He added that he could see them as there was still day light. There is evidence on record that it was threatening to rain. He (P.W.1) went home running and informed the mother what had happened. But there was no reaction from her and after she cooked they ate and slept.

Next day while going to school he saw the deceased lying with a stab wound and asking for water. He once again ran off to his mother (P.W.2) and told her what he saw. This time P.W.2 responded by saying that she had known about it. He attended an identification Parade and identified the accused and added the police were happy when he (P.W.1) identified the Accused. However he also stated during crossexamination that before the identification parade the Police officer told him and I quote:-

“The Police told me that the person would be in parade and look for him amongst them and find him.” He described dressing of the Accused by stating that the Accused was wearing a T-shirt written ‘50 years’ thereon, a hat and trousers.

As the above testimony is from an infant of very tender age I shall have to consider it carefully before relying thereon and to find some corroboration from the other witnesses.

The evidence of his mother (P.W.2) states that P.W.1 came back at about 6.30 p.m. and did not tell her anything after coming from the shopping centre, but he told her what happened in the morning. I do note that it completely contradicts the testimony of P.W.1. She also said, as earlier pointed out by me, that P.W.1 knew both the deceased and the Accused which is not what P.W.1 told the court. I also note that she did not go to the police but police came to her and then she informed what happened. At this juncture I shall also note what she said in her evidence as to what she was told by P.W.1. According to her testimony, P.W.1 told her and I quote:-

“On the way, Jacob snatched knife from Kimotho and started hitting his head,” she then asked P.W.1 whether he was stabbed by a knife and he responded which I shall quote:- “he said he was not but he was hit by a knife on his head and he was told to go as he was the only child around and was about to rain.”

This is the end of evidence of mother and child. Now I shall deal with the evidence of P.W.7 Patrick Kung’u Kamau. He is also a person who last saw the deceased alive in company of the Accused. He stated the Accused came to his shop around 6.45 p.m. and was later joined by the deceased at about 7 p.m. I observe at this juncture that according to P.W.2, P.W.1 returned home at about 6.30 p.m. after buying flour. P.W.7 continued his testimony by saying that they both drank alcohol which was ordered by the Accused. He heard the Accused asking the deceased “whether he had collected anything from the place of work” and deceased responded in negative. I note this piece of evidence only because the Prosecution tried to infer from the above words that the Accused owed some money from the deceased and his failure to get the same was the cause of or motive behind the death. I must reject that assumption being far fetched and obviously without any basis. I am also fortified in the above observation by P.W.7 testifying that he had never seen the Accused and deceased quarrel and he had seen them together as friends.

P.W.7 also mentioned the presence of P.W.1 at his shop when both Accused and deceased were drinking at his shop. He also stated that three of them left the shop together as he recalled the deceased telling P.W.1 why he had come so late alone. He described the dressing of the Accused by stating he wore T-shirt with writings ‘New York’ in front. He had a Jacket on top and a round hat. He saw deceased requesting the Accused to carry his green bag which the Accused did. This bag was not produced before the court.

I shall then consider the testimony of Dr. Jane Wasike (P.W.10). She observed a penetrating neck injury due to a sharp object during post mortem on the body of the deceased. I shall here recall the evidence of P.W.1 and P.W.2 which stated that the Accused hit the deceased on head.

There is contradictory evidence on the presence of blood stained clothes found at the scene from P.W.8 and P.W.11 as against P.W.6 (father of the deceased) who said he carried deceased clothes home which did not have blood stains. In any event those clothes which were said to have been carried by Police Officer (P.W.11) are not produced before the court. I state this because there is evidence from the owner of the knife (P.W.3) who stated that he had made the knife (Ex.1) which was stolen from him. He later saw P.W.4 with it and allowed him to keep the same because he (P.W.4) was his friend. He did not report, or complain of its theft. He also stated that the knife had a handle like an umbrella.

P.W.4 said he had cut some pineapples which were not from his farm and then sold two pineapples to the Accused and also loaned the knife to him to cut the same.

With these facts, I am not and should not be satisfied that the prosecution has proved the charge of murder against the Accused person. The evidence of P.W.1 is not corroborated in material aspects by any

of the Prosecution witnesses.

Even if I take his evidence at the face value he had said that he saw the Accused hitting the deceased on head. It was about 6.30 p.m. according to him and her mother who in any event stated that P.W.1 categorically denied having seen the Accused stabbing the deceased. The knife in question is proved to be owned by P.W.3 whose testimony along with that of P.W.4 and P.W.9 does not seem creditworthy to me.

According to the Accused person, he left the deceased at a place which was at a distance of about 200 meters in the direction of his house.

I have the evidence of the father of the deceased (P.W.6) who carried the clothes of the deceased at home. But I also have evidence of P.W.8 and P.W.11 which stated that Police carried the clothes full of blood lying at the scene. Where are these clothes? They could have given a clearer picture of the incident. The Prosecution has not brought those clothes which could have been important to its case and thus I am entitled to make adverse presumption which I do and its benefit has to go to the Accused person.

Furthermore I also note the evidence of Dr. Wasike (P.W.10) which stated that the death could be almost instantaneous. P.W.1 had seen the Accused hitting the deceased between 6.30 p.m. 6.30 p.m. to 7.00 p.m. But all the witnesses who gathered around the scene told that the deceased was alive and was asking for water. He was also taken to hospital for treatment from the scene.

With all these yawning gaps in the Prosecution case, I am not satisfied that I can justifiably infer anything against the Accused person and have to give benefit of those lacuna in case to the Accused person.

I concur with the opinion of the Assessors and acquit the Accused person from the charge of offence of murder as levelled against him.

I further direct that the Accused person be released forthwith unless otherwise held as per law.

Right of Appeal within 14 days.

Dated and delivered at Nairobi this 1st day of July, 2004.

K.H. RAWAL

JUDGE.