



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE 31 OF 2003

REPUBLIC ::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

MUTUA KAUMBUTHU ::::::::::::::::::::::: ACCUSED

R U L I N G

Mutua Kaumbuthu is charged with the offence of Murder contrary to section 203 and 204 of the Penal Code. The particulars of the offence are that on 21.10.2002 at Twimiwa sub Location, Mivukoni Location in Mwingi District, murdered one Musyoka Muisyo. He denied the offence and the case proceeded for hearing.

The prosecution called a total of 15 witnesses.

P.W.4 Mary Muende Musyoka the wife of the deceased recalled her husband and the accused had a land dispute and they were supposed to attend a mention on 22.10.2002 so that the dispute could be referred to elders. On 18.10.2002 when in her garden the accused passed by, asked for the deceased and left a message that by 22.10.2002 either the accused or deceased would be dead. On 21.10.2002 the deceased left for the garden at 8.00 p.m. and did not return. P.W.4 left her home at 2.00 p.m. to go for a women's group. She returned at 7.00 p.m. only to learn that the husband had been killed. She was led where the body was, about 200 metres from her home but in their land. She claimed that the panga she saw the accused with on 18.10.2002 is the one produced in court as exhibit No. 3.

The body of the deceased was discovered in the bushes by P.W.1 Kalu Mwendwa and P.W.2 Mutua Mutuku on 21.10.2002. They are young boys who were looking after donkeys. They alerted other members of public who then went to the scene and found that it was the deceased Musyoka Muisyo.

P.W.5 Mutemu Manzi a nephew to the deceased recalled that on 21.10.2002 as he returned home from checking on his beehives, he met the sons of the accused who told him that they had finished what they used to boast over in their home. P.W.5 did not understand what Manzi Mutua and Munywoki Mutua meant. On reaching home, on the same night he learnt of his uncle, the deceased's death and went to the scene with police. He was aware of the land dispute between the accused and the deceased. P.W.6 David Nzuki a neighbour of both the accused and the deceased recalled having been invited by their area sub chief to take part in a land dispute between the accused and the deceased. He learnt of the deceased's death on 21.10.2002 at 9.00 p.m. and went to the scene the next day at 6.00 a.m. He described his observations at the scene. He said that when police arrived, they asked for a possible suspect and people named the accused as a possible suspect and people went in search of accused. P.W.7 Joseph Mutuku was informed of the deceased's body having been found at about 1.00 p.m. on 21.10.2002 and he went to the scene.

P.W.8 Job Mutisya was the first to be informed by P.W.1 and 2 that they had seen a dead man's body. He went to the scene, saw the body and informed other villagers. P.W.9 Samson Kilonzo a neighbour of both accused and deceased learnt of the death on 22.10.2002. He went to the scene and after police arrived, they decided to go and look for accused. He was in the group that went to look for accused and found him in his garden. Accused was in possession of a panga. They ordered him to raise his hands, threw the panga down and he complied. P.W.9 took possession of the panga which he said had some blood stains. He arrested accused and handed the panga to the Assistant Chief. He identified the panga produced as Exhibit No. 3 as the one he recovered from the accused person.

P.W.10 Sammy Musya is the Assistant Chief of Twimiwa Sub Location where both accused and the deceased resided. He recalled having been woken up on the night of 21.10.2002 and informed of the murder of the deceased. He went to the scene at 8.00 a.m. After confirming the death he called Kyuso Police Station and reported the murder.

P.W.2 Police Constable Nicodemus Muindi accompanied the Officer in charge Station to the scene of the murder on 22.10.2002. When at the scene the Assistant Chief was asked to search for the suspect and he was taken to police station in possession of a blood stained panga Exhibit No.3. P.W.3 is the one who took possession of the panga. He said that on 31.10.2002, accused's 2 sons were also arrested and taken to police station. They must have been released later as they were never charged. P.W.11 Police constable Charles Ambuga said he re-arrested the accused from Assistant Chief of Twimiwa on 22.10.2002 while at Kyuso Police Station.

P.W.12 Dr. G. Nderitu performed post mortem on the body of the deceased on 31.10.2002. He found the body to have no blood (rigamortis) with a deep cut on anterior part of the neck (front) which had cut major blood vessels, trachea and cause of death was opined to be excessive loss of blood because of severance of blood vessels. He produced the post mortem report as Exhibit No.1. He took a blood sample to be taken for further analysis. P.W.13 Jeremiah Munguti a Government Chemist on 8.11.2002, received blood sample of the deceased labelled Musyoka Muisyo, rusty panga, which he was asked to examine and group the blood on the panga and that of the deceased. He found deceased's blood group to be A and the panga was slightly stained with blood group A. He produced his report as prosecution Exhibit No.2. P.W.14 was Inspector Johana Ekidor, who took over the Police Station Kyuso on 5.2.2003 when the investigations in this case had commenced and also took over the file. He found the panga had been forwarded to Government analyst. P.W.15 Inspector Francis Ngugi Officer in charge Kyuso Police station. He received the panga from Government Chemist which he produced as Exhibit No.3.

At this juncture the court has to decide whether or not the prosecution has made out a prima facie case against accused person so that if accused is put on his defence and he opts to be quiet, the court can still go ahead and convict on the evidence on record.

None of the witnesses and indeed nobody has come up claiming to have witnessed the murder of the deceased.

What is before court is circumstantial evidence.

P.W.4, 5, 6, 7, 8, 9 10, were all aware that there was a land dispute between the deceased and the accused. The dispute had been deliberated upon by the Assistant Chief and according to P.W.4 the parties were supposed to go back for the case on 22.10.2004. The issue of land dispute is not in doubt.

P.W.4 said that the accused came by her home looking for the deceased and threatened that either accused or deceased would be dead by 22.10.2002 when the case was due. We only have the word of P.W.4. Nobody else seems to have witnessed or heard these threats by accused.

Besides P.W.4 claims to have identified the panga, Exhibit 3 as what accused had on 18.10.2002 before the death. She never told the court that she examined it closely or touched it on 18.10.2002. She did not even say there was any mark on the panga nor was the court told how far she was to be able to see and identify the panga several days later. It is unlikely that she did identify the panga as what accused had on

18.10.2002.

The panga produced in court as exhibit No.3 was found with accused. There is ample evidence to that effect. According to P.W.9 who actually retrieved the panga from the accused, he said there were blood stains on the panga. P.W.10 corroborated P.W.9's evidence that there was some blood stains on the panga. Indeed P.W.17 the Government Analyst found some slight stains on the panga that he was able to analyse. He found the blood stain to belong to blood group A and so was the deceased blood. However the accused's blood sample was never taken nor was the blood group ascertained. The question is whether the blood stains found on the panga can be said to belong to the deceased and nobody else. The answer is in the negative. Even accused who had the panga could be blood group A. The prosecution had left the court to guess. If I were to put the accused on his defence and he alleged that the panga had cut him and that was his blood what would the court do? The court would have to acquit him. Also, if he were put on his defence and he kept quiet there would still be a gap in the prosecution evidence as to whether the blood on the panga belonged to none else than the deceased. Whereas the accused is indeed a prime suspect considering the simmering land dispute between the accused and deceased and the alleged threats made to P.W.4 yet the circumstantial evidence before court does not irresistably point at accused as the murderer and no other. There is a possibility of another having done it.

Accused remains a mere suspect. The prosecution evidence should be such that it leaves no doubt in my mind as to accused's guilt. Since there is still a doubt save for strong suspicion that court has no option but acquit accused of the charge of Murder under Section 306 (1) of Criminal Procedure Code.

Dated at Machakos this 30th day of November 2004.

Read and delivered in the presence of

R. V. WENDOH

JUDGE