



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.109 OF 2001**

**KENNETH NDUNGU MUIGAI ..... ACCUSED**

**VERSUS**

**REPUBLIC ..... PROSECUTOR**

**RULING**

The accused person in this case is charged with murder contrary to section 203 as read with S.204 of the Penal Code. The particulars of the charge are that on the 8th day of June 1998 at Kamangu Trading Centre Karai Location in Kiambu District within Central Province murdered Samwel Kagiri Wanjiku. The accused denied the charge. Mr. Mbugua appeared from her while Mr. Karuri appeared for the state.

P.W.1 who received the deceased person after he was arrested by the accused person noticed that he had swollen leg and swollen face. The accused's explanation is that those injuries were sustained from a fall and not from his beating of the deceased person. P.W.2 saw similar injuries during his examination of the same deceased person. He admits that such injuries could have been sustained from a fall or a blow. It was also admitted that such injuries could have been sustained from a fall if the boy had a history of epileptic fits.

Evidence to the effect that the deceased used to suffer from epileptic fits was adduced by several witnesses in this case and is on record. No eye witness gave evidence to the effect that he or she saw the accused person inflicting some blows to the deceased at the time of arrest. P.W.3 who witnessed the arrest of the deceased did not give such evidence. P.W.4 and P.W.5 who claims to have seen the accused person beating the deceased with fists and kicks at the time of arrest are not credible witnesses. P.W.4 admitted under cross-examination that for instance he did not like the accused a lot because the accused had got him arrested by the police as a habitual thief in the area whereas P.W.4 claimed that the deceased received physical injuries after the accused assaulted him on 8th June 1998, P.W.5 who witnessed the same incident did not note any such injuries on his own brother. P.W.5 admitted in cross-examination that he did not see the accused beating the deceased P.W.4 and P.W.5 are unreliable eye witnesses.

Their credibility is also wanting because both denied that the deceased was epileptic yet the bulk of evidence in this case shows that the deceased was epileptic. P.W.6 testified to the effect that the boy used to be epileptic. He had seen him falling down from an epileptic fit one day prior to his death on 19th June 1998 at the trading center when the boy fell down as he was watching a football match. P.W.6 noticed that he was injured on the back and on the head. P.W.6's evidence is that P.W.5 the deceased's brother saw the deceased suffer the epileptic fit on the 19th June 1998 because the deceased remained unconscious for over 1 ½ hours. It is important to note the cause of death of deceased as diagnosed by Dr. Maundu who did the post mortem on the body of the deceased.

The boy had a bruise on the forehead which was fresh. The doctor did not note the age of the injury and

the possibility that the same was sustained on the evening of 19th June 1998 when the boy had an epileptic fit cannot be over ruled. There were two immediate causes of death which the doctor observed, namely brain hemorrhage and pneumonia. It is note worthy to note that P.W.11 did not notice any injuries on the deceased person on the 12th day of June 1998 when the boy reported that he was assaulted by the accused person. This would mean that whatever injuries P.W.1 saw on the deceased at the time the accused brought him had healed within the three days that the deceased had remained in the custody of his mother seeking treatment.

The fresh injury noted by the doctor as he performed the post mortem must therefore be the one which P.W.6 saw him sustain on the evening of 19/6/1998 when the deceased fell from an epileptic fit. This is definitely not the same injury that the accused might have caused to the deceased going by the evidence of P.W.1 and P.W.2. According to P.W.13 the accused in a statement under inquiry denied having caused the death of the deceased. He claimed that the deceased had a long history of epilepsy which could have caused whatever injuries he had. The evidence of the accused was corroborated by two other independent witnesses whom the investigating officer interviewed.

I have noted the submissions of the accused counsel at the close of defence case carefully. From the bulk of evidence adduced by the prosecution witnesses there is no evidence which proves that the beating which the accused gave the deceased if any on the 8th of June 1999 led to the deceased death. The injury which P.W.1 and P.W.2 noted on the deceased on the 8th and on the 9th June 1998 were not the same injuries which P.W.10 noted when he did post mortem on the deceased.

According to P.W.6 who struck me as a truthful witness the deceased had healed and was even watching football on 19th June 1998 before he fell down and was injured on the head. The injury which P.W.10 noted was on the head and was fresh. This must be the same injury which P.W.6 saw the deceased sustaining on the date he fell from an epileptic fit. Eye witness who claim that the deceased was assaulted by the accused person were not credible witnesses. All of them denied that the deceased was epileptic a matter which the investigating officer confirmed from the independent witnesses besides P.W.6.

From the evidence adduced by the prosecution witnesses the deceased is likely to have died from Brain Hemorrhage. Such bleeding may have resulted from a fall or a from blow. The evidence available shows that the deceased could have been received such a blow from the accused person or from a fall attributed to epilepsy. If such an inquiry came from an epileptic fit then it would be unfair to blame the accused person with having caused fatal blow that killed the deceased. The deceased could also have sustained his death from a pneumonia attack because the doctor opinion that such an attack could have led to fatal results. Once again it is unfair to attribute the death of the deceased to the accused when he could have died from pneumonia.

Given the doubt created in the prosecution's case as to the cause of the deceased's death as well as from the discrepancy as to whether the deceased died from injuries sustained by him from the beatings of the 8th June 1998 or from the injuries sustained by him from the epileptic fall of the 19th June 1998 I find that it would be unfair to call upon the accused person to explain these discrepancies. The accused is entitled to the benefit of doubt which is quite apparent in the prosecution's case as at the close of the prosecution's case.

I find that the prosecution has not established a prima facie case against the accused person as charged. I therefore find that the said person has no case to answer. I therefore acquit the accused person of the charge under S.306 (1) of the Criminal Procedure Code. The accused is set at liberty unless otherwise lawfully held.

**R.M. MUTITU**

**JUDGE**

**31/7/2002**

Delivered in open court in the presence of Mr. Mbugua for accused, Mr. Karuri for state and the accused person Mr. Moses Mwangi, George Mwangi and Grace Mugambi appeared as assessors.

**R.M. MUTITU**

**JUDGE**

**31/7/2002**

Order:

Assessors be paid today.

**R.M. MUTITU**

**JUDGE**