

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APP 147 OF 2000

KASEE KITEMA ::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT

Coram: J. W. Mwera J.

Appellant not present

Orinda State Counsel for Respondent

C.C. Muli

J U D G E M E N T

The appellant was charged with manslaughter C/s. 202 and S.205 Penal Code in that on 12.10.96 at Yimiwa village, Ngwate Kitui he unlawfully killed Paul Maluku Ngelu.

The evidence of seven 7 prosecution as well at the defence which the Learned Trial Magistrate appreciated, was to a great degree circumstantial. The appellant was represented by Mr. Maweu. At the end of the day he was convicted and given 4 years imprisonment.

The appeal petition was all the basis that the appellant was not identified as the killer of the late Ngelu and that the evidence adduced did not connect him with the offence so as to warrant the conviction. The Learned State Counsel though supported the conviction and sentence after going over the lower court record and noting some slips.

The evidence of the prosecution was that on the evening of 17.10.96 when Ngelu was killed he rode along Ikutha Kanziku Road and that the appellant followed him also on a bicycle. That was the last the deceased was seen alone because on the following morning his bicycle was found near his blood-drenched clothed body by the roadside. (see Benjamin Munguti P.W.2).

The deceased's son Maiwo Matuku (P.W.1) was informed of his father's death and he visited the scene. He held a strong suspicion that the appellant unlawfully caused the death of the deceased because two families had a long running land dispute in which the deceased had caused the appellant's father Kitema Syindu (P.W.6) to be arrested for disobeying a court injunction.

IP Evans Monda (P.W.3) who investigated the incident recovered blood stained brown shirt and a grey long trousers from the house of the appellant, apparently in absence of the appellant (see Matuku P.W.1) whom it was said filed on seeing police approaching his home (see Stephen Vata P.W.5). The stained clothes which the deceased wore and those that were collected from the appellant's house were taken to the government chemist for analysis.

The government analyst found that the deceased's clothes were stained with human blood of group A-B-O. This was an inclusive classification and the government chemist said so in his report (C.1). He found that the appellants blood group was O and the blood clothes recovered from his house were stained with group O blood. So from this the appellant's blood group is that that stained the clothes taken from his house – not that of the deceased Mutuku.

In such circumstances it was in error for the Learned Trial Magistrate to hold that all leads posited to the appellant. Given his family and that of the deceased had a bitter land dispute and on the evening the same route that the deceased had gone on a bicycle. And true, the following day the deceased was found murdered by the way side. But from this kind of evidence it cannot be said that it was watertight and it posited to nothing else but the guilt of the appellant. He did not dispute in cross examining Stephen Vata (P.W.5) or in the defence that he ran away when he saw the police coming to his home. But still the circumstantial evidence here was too weak to base a conviction on. There was a strong suspicion yes but that cannot be a basis to convict in a criminal prosecution.

Accordingly the conviction is quashed and the sentence set aside. The appellant may be set at liberty forthwith unless otherwise lawfully held. It is noted that the appellant did not attend the hearing of the appeal at his expense. Judgement accordingly.

Delivered on 5th June 2001.

J. W. MWERA

JUDGE