



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL CASE NO. 95 OF 2017

FORMERLY HCCRC 17 OF 2016

REPUBLIC.....PROSECUTION

-VERSUS-

RAPHAEL MUTHOKA MAINDO.....ACCUSED

RULING

1. **Raphael Muthoka Maindo** the accused stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on the 27th day of March, 2016 at Maangani village of Kitaingo location in Mukaa sub-county within Makueni county murdered **PMM**.
2. He denied the charge and the matter proceeded to full hearing with the prosecution calling nine (9) witnesses. The deceased's body was found on a footpath with injuries on 27th March 2016 at around 7:00 pm. There is no one who witnessed the killing.
3. The accused was suspected because he had been heard to say he would kill the deceased. Secondly that a blood stained panga was recovered from the accused's home. Further that the blood on the panga (EXB1) was found to match the deceased's DNA profile.
4. **Pw1 Kamula Kimuyu** was a village elder. He received a call from the assistant chief on the material day at 9:30 pm. He was asked to go Muindu wa Thome near the accused's father. When he went he found many people and on the road he found the deceased's body which had injuries. It was speculated that the accused was the suspect.
5. In cross examination he said the accused was arrested while asleep in his house. From the scene to accused's place is 200 meters, while from the deceased's home it is $\frac{3}{4}$ kilometers. He saw the panga recovered from the accused's place but he could not describe it.
6. **Pw2 Sarah Wambua** is the assistant chief Kiungwani sub-location. She received a call from Bedetta on 27th March 2016 in respect to the dead body at the scene. She rushed there and confirmed the report. The body had a deep cut on the neck and it was near the Catholic Church. She informed the OCS Salama police station. The accused was arrested as a suspect.
7. **Pw3 SN** is the deceased's grandmother. She claimed to have been told twice by the accused that she (witness) would pick a dead body. She never reported the matter but she told his son. It is the OCS who told them the accused was the killer.
8. **Pw4 AW** who is the deceased's mother was in her house cooking on 27th March 2016 7:30 pm when she heard Kioko on phone saying somebody had been cut. He asked his son M aged 16 years to call his uncle M, and the deceased. None picked the call, and she left for the scene with Mulwa. They found the deceased's body which had a cut on the neck side of the head and face. The deceased was her son. There was no one at the scene and they decided to call Pw2.
9. She said she had heard noise from the accused's home which was $\frac{3}{4}$ kilometers away from her home. It was her evidence that the accused and deceased were together on the date of incident. She met them at the home of Mumbua who is the accused's sister. The two had no issues, she said.
10. **Pw5 BM** is the deceased's father. He received a report of the death. He also attended the postmortem and identified the body. The deceased had injuries on the neck, shoulder, face and mouth.
11. **Pw6 John Maundu Wathome** is the accused's father. He said he was asleep when he was called by his grandchildren as the accused was being arrested by police officers. He also saw the deceased's body. He knew of no problem between the accused and deceased.

12. **Pw7 Stephen Nzomo Nzuvi** is a cousin of the accused, and he works as a watchman at Kiungwani girls. He was among those who went to accused's home. He was present when the items panga (EXB1) wooden rod (EXB2) and stone (EXB3) were recovered.

13. **Pw8 Ruth Wangari Kahu** is a government analyst. She produced a report on behalf of a colleague after the defence counsel consented to the production. She confirmed that (EXB1-3) had been received at the government chemist on 13th April 2016 from I.P John Makumi of Salama police station. They also received blood samples of the deceased and the accused plus the deceased's fingernails. They were to examine and determine the presence and origin of blood stains in the said items.

14. She confirmed that EXB1 and 3 were lightly and moderately stained with human blood. After doing the DNA profiles they found the DNA of the blood stains to match the deceased's DNA profile. She produced the exhibit memo and analyst's report as EXB4a and b respectively.

15. **Pw9 No. 237056 I.P Regina M.I.P John Mbaluka** took over this matter from C.I Abdi (*retired OCS Salama*) and I. P Makumi who is on interdiction. She gave a summary of what she had read from the witness statements.

16. She stated that the accused had been arrested from his house where he had been found sleeping. Those who arrested him also found a blood stained stone (EXB3) and blood stained piece of wood (EXB2) which they took as exhibits. Later on 30th March 2016 a blood stained panga (EXB1) was recovered.

17. In cross examination she said there were no details given as to where the panga was recovered from. Accused was also not taken to the recovery site.

18. The postmortem report was produced by consent under section 77 of the Evidence Act. It shows the cause of death as severe hemorrhage secondary to multiple deep cuts.

19. Mr. Muthama for the defence filed written submissions. He submits that the prosecution has not established a prima facie case against the accused person. He relied on the cases of **Republic –vs- Martin Oluoch Okwako & 2 Others (2015) eKLR, Republic –vs- Morris Karani Alando (2012) eKLR; Bhatt –vs- Republic (1957) E.A 332.**

20. The duty to prove a criminal case is always on the prosecution. This duty has never shifted. Besides what Pw9 said she read from witness statements she did not carry out any investigations. She stated that from the statements a blood stained piece of wood (EXB2) and blood stained stone (EXB3) were recovered from accused's home/house.

21. None of the people who participated in the alleged recovery testified before this court. Even the recovery of the panga (EXB1) falls in the same category. The person or persons who recovered the panga did not also testify. The alleged recovery was also not done in the presence of the accused person.

22. The evidence on these recoveries was extremely crucial evidence as it's the one that seemed to connect the accused with this offence. The blood found on the panga (EXB1) and the stone (EXB3) matched that of the deceased. That link between the accused and the recovery of these items is missing, which is very unfortunate.

23. Pw3 had said that she suspected the accused to be the killer because he had told her she would receive a dead body. The witnesses kept saying the accused was suspected even by those who referred the police to him. It was however never stated why he was suspected. Pw3 did not report to the police or any authority what the accused allegedly told her.

24. In the case of **Sawe –vs- Republic (2003) KLR 364** the Court of appeal said:

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

25. Without evidence on how EXB1 – 3 were recovered and how they were connected to the accused all that evidence remains mere suspicion. In this case if the accused was placed on his defence, and he elected to remain silent as is his right, I find no evidence here that would lead to a conviction.

26. In the end, I find that the prosecution has failed to establish a prima facie case against the accused. For my part I find the accused not guilty and I acquit him under section 306(1) of the Criminal Procedure Code.

27. He shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 10th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge