



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 6 OF 2017

MARTIN MWANGI KIHURI.....ACCUSED

-VERSUS-

REPUBLIC.....PROSECUTION

RULING

The issue here is who killed James Mwangi Muthoni. Through an information dated 4th September 2017 the ODPP charged Martin Mwangi Kihuri with the offence of murder c/s 203 as read with 204 of the Penal Code.

They alleged that on 22nd August 2017 at Kiambogo village Endarasha location, Kieni West Sub County within Nyeri County he murdered James Mwangi Muthoni.

The prosecution called 7 witnesses.

According to **PW6 Euticus Wachira Ndegwa** on the night of 21st August 2017 and 22nd August 2017 he was working as boda boda rider in Endarasha when the deceased who was at “Club One” requested to be dropped home. He paid the fare of Kshs.100/- and was taken up to the footpath leading to his home about 100m away as it was not passable for the motorbike. He alighted and told PW6 he would walk the rest of the way home.

The following day PW6 was told by one Dan Wachira that the person he had dropped home had been killed. He wanted to go and see but was advised to instead go and record a statement with the police which he did.

PW1 Julius Kangethe Mwangi an uncle to the deceased was on 22nd August 2017 at home when he was told that his nephew had been killed on the road. He went there and confirmed about 50-100m from deceased’s home. He went and reported to the police, he found that a report had already been made. He noticed that deceased had a bell round his neck and had no other physical injuries- he learnt later that deceased had been strangled.

PW3 Joseph Kimani Ngando another uncle of the deceased was at his home when he also received a call about something that had happened at his home about 1 ½ from where he was. He left with his wife and they found a crowd near the homestead. He saw that it was his wife’s nephew and he had a rope round his neck – he saw that the body was about 30m from the road and 40m from his house on the footpath leading to his home.

PW5 No.234918 CI Eros Nyongesa was at the material time at Endarasha Police Post under Mweiga Police Station. On 22nd August 2017 about 11:18 am he received a report from Joseph Kimani and David Kamuthya both from Kiambogo village that they had found the body of Muthoni Mwangi along the footpath to his homestead. He proceeded to the scene and confirmed the report. He called scenes of crime personnel who came and took photos, then the body was removed to the mortuary at Nyeri PGH.

Later at about 1400hrs he received a call from one C.1 Mwakisha asking whether there was a murder incident in his locality. He confirmed. The C.I Mwakisha told him that there was a suspect who had surrendered himself by the name Martim Mwangi Kingori who was claiming that he had killed his cousin at Endarasha and dumped his body near his homestead. That the suspect had also surrendered a mobile phone make TKK Orange in colour which he claimed belonged to the person he had killed.

The suspect was collected from Nyeri Central police station and escorted to Mweiga together with the exhibit.

PW5 recorded statement from witnesses and had the postmortem conducted- **PW2 Joseph Karanja Mwangi** attended the postmortem on

28th August 2017. It was carried out by Dr. Peter Murimi at Mary Immaculate hospital on 28th August 2017. He found that the body had mild bruise on shoulder region, steno clavicular joints were dislocated, dislocation of the cervical spine, fracture of thyroid cartilage, collapsed lungs, dislocation of the spinal column between the 1st and 2nd cervical- cause of death was strangulation causing respiratory collapse and dislocation of the cervical spine. He filled a certificate of death. He produced the report as evidence.

According to the investigating officer armed with his postmortem report, and the suspect's confession, he charged him with the offence. He testified that he did not personally interrogate the suspect but he was interrogated by senior officers and he recorded a confession. The accused person was subjected to a mental examination.

PW7 Dr. Richu Mwenda testified that he examined the accused on 29th August 2017 and found that he was in low mood, had delusions and suicidal ideas, was not orientated in time and place, not fit to stand trial and required treatment in a maximum security hospital. He produced the report and the prosecution closed its case.

The issue for determination is whether the prosecution has established a prima facie case to warrant the accused being put on the defence.

Counsel for accused Mr. Kimunya submitted that on the totality of the evidences before me, the prosecution had failed to do so.

Mr. Magoma for the state submitted that the state was relying on the evidence on record, hence did not challenge the submissions.

I have considered that evidence and the submissions by the defence. The prosecution must establish the ingredients of the offence to such an extent that there is need for the accused person to respond.

It is in the case of **RAMANLAL TRAMBAKLAL BHATT -VS- REPUBLIC (1957) E.A. 332** that the court held as follows:-

"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.

*(ii) The question whether there is a case to answer cannot depend only on whether there is 'some' evidence irrespective of its credibility or weight sufficient to put the accused on his defence. **A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.** (emphasis added).*

The fact of death has been established but is there any connection between the death of deceased and the accused person?

The only connection brought by the prosecution was

1. An alleged surrender to Nyeri Central police station by the accused person.

Neither Chief Inspector Mwakisha nor anyone from Nyeri Central police station testified that accused person had surrendered to the police at any one time in the manner described by the investigating officer. No evidence of any OB entry by the police at Nyeri Central Police station of such an event was produced.

2. An alleged confession.

PW5 the Investigating officer alleged that accused had made a confession of having killed his cousin at Endarasha and dumped his body near his home. No such confession was produced in court. None of the witnesses –PW1, PW2 and PW3 testified that the accused person was related to them.

Even PW6, the boda boda rider who knew the deceased told the court that he did not know the accused person. If this one piece of allegation was true, then PW1, PW3 and PW3 would surely have identified the accused as their nephew as well. It is evident from the evidence on record that there was nothing to support the alleged confession or to connect the accused's alleged confession to the deceased. The Investigating officer was at pains to explain where the alleged confession was and whether the said C.I Mwakisha had recorded a statement. There was nothing and he conceded it was all hearsay.

3. Alleged surrender of deceased's phone by the accused

An exhibit of a phone was produced alleged to be that of the deceased. This was a useless piece of evidence. No one bothered to verify the same, whether it contained any evidence that connected it to the deceased so that the police could actually take it and lay it before the court as evidence to connect the accused with the murder. I have no idea whether it was a mobile phone or a toy. No one checked whether it was working, or had a line, and any data in it that could connect it to the deceased – nothing at all.

The accused person's mental state: The prosecution's laxity.

The psychiatrist produced in court the report that indicated that the accused was not fit to stand trial- yet there was a report supplied to court on 8th March 2018 dated 5th January 2018 which showed that following the recommendations made on 29th August 2017, the accused had been subjected to treatment and was now fit to stand trial. Why this report was not produced is not clear. However, it is clear that the state realized after calling all those witnesses they had nothing against the accused person.

Conclusion

While it is a fact that deceased died, and the cause of death was established the foregoing evidence shows that there was no evidence as to whether it was at the act or omission of the accused person with malice aforethought.

It is glaringly evident that this is one of those cases that should never have come for trial as there was nothing to connect the accused person with the murder.

The Investigating Officer conducted no investigations – none at all. Recording statements of the relatives of the deceased who arrived after the fact and who had no idea who could have done this is only part of investigations, so is the calling the scenes of crime personnel to take photos of the scene and visiting the scene and drawing a sketch plan.

Black's law dictionary 10th edition 953 defines to **investigate**: - Inquire into a matter systematically, to make a suspect the subject of a criminal inquiry.

The Investigation officer went through the motion of carrying out an investigation but did not demonstrate the outcome of the **Investigation**: - *The activity of trying to find out the truth about something, such as a crime, accident, or historical issue; esp., either an authoritative inquiry into certain facts, as by a legislative committee, or a systematic examination of some intellectual problem or empirical question, as by mathematical treatment or use of the scientific method.*

There was no activity to find the truth about the allegations made about the accused person. Just a collection of things, ideas e.t.c without any analysis making this is one of those cases I have come to know in my career as a judicial officer, as time wasters, fillers where the investigating and prosecuting authority for reasons best known to them which do not have anything to do with the interests of justice shrug their shoulder and say “wacha itupwe na koti.” It is an abuse of the rights of the accused person and the Criminal Justice System to prefer charges against a person when you have not conducted any investigations and when you have nothing to even establish the bare minimal, ‘bare necessities’ of the charges. Prosecuting counsel must of necessity interact with the evidence gathered by the investigators, before approving charges against a suspect. It is not just about prosecuting the person, but the lived reality of the accused, his family and the family of the victim going through a hopeless trial. That Constitutional mandate to prosecute given under Article 157 must of necessity be exercised within the values and principles of our Constitution as set out at Article 10 viz:

10. National values and principles of governance

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

In the end I am bound by the provisions of section 306 (1) of the Criminal Procedure Code:

*When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, **record a finding of not guilty.***

I find neither a scintilla nor an iota of evidence to connect the accused with the offence herein. I enter a finding of not guilty and direct that he be released forthwith from prison custody unless otherwise legally held.

Dated, delivered and signed this 17th May 2019 at Nyeri.

Mumbua T Matheka

Judge

In the presence of:-

Court Assistant: Jerusha

Magoma for state

Mr Warutere holding brief for Muchiri wa Gathoni

Judge