



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 2 OF 2013

REPUBLIC.....PROSECUTION

VERSUS

JOSPHAT NJIRU NJOKA.....ACCUSED

R U L I N G

A. Introduction

1. The accused person faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 23rd December 2012, at Kathitu village, Riandu Location within Mbeere North District of Embu County jointly with others not before court murdered SAMUEL MURIMI. He pleaded not-guilty to the charge.
2. The prosecution called eleven (11) witnesses in support of their case which is summarised herein.

B. Prosecution Case

3. It was PW1's testimony that on the material day he met the accused carrying a jerrican with some liquid in it. PW2, the Chief of Riandu Location testified that on the material day he was called by one Wanyaga who informed him that they had arrested the deceased for stealing money. He further testified that at around 4.00pm he was called by the wife of the accused one Igoki who informed him that she had received a report that the deceased had been killed by a mob. PW2 said that he later went to the crime scene where he found the body of the deceased's burnt down. He further testified that members of the public informed him that the accused was involved in the deceased's death.
4. PW3 testified that he met the accused in a bar in Siakago on the material day who informed him he was going to meet a thief who had stolen his money. PW3 further testified that the accused later told him he had met the deceased who had agreed to show him where the Kshs. 90,000/= was. PW3 said he saw the accused leave the bar with five (5) people. He further testified that he was informed by PW2 that the accused had killed the deceased.
5. It was the evidence of PW4 and PW5 that they did not witness the death of the deceased but learnt that the accused had killed the deceased. PW6, Dr. Joseph Thuo testified that he examined the accused and found him fit to stand trial.
6. PW7 testified that on the material day at around 1.00pm while at Siakago town he noticed a crowd that had surrounded a young man who was alleged to have stolen cash Kshs. 97,000 from the accused.
7. PW10 testified that on the material date, he was instructed to go to the crime scene in the company of two other officers. Led by PW2, the officers went to a stream where the deceased's badly burnt body lay. It was his testimony that he did not recover any evidence from the crime scene and later handed over the case to the CID to carry out investigations.
8. PW11, Dr. Phyllis Muhonya produced the report of Dr. Thuita and testified that the deceased died from severe burns and a head injury.

C. The Defence

9. In his unworn testimony the accused testified that on the material day some people in the company of a C.I.D officer brought the deceased to his bar at around 11.00 am. The accused said he confronted the deceased on whether he had his money to which the deceased replied that he was remaining with only cash Kshs. 70,000/= that he had kept in the bush.
10. The accused testified that he sent his manager with the crowd to go pick the money and bring it to him but was to later learnt that the deceased was killed by the mob. The accused then escaped to his sister's place in Nyeri as he feared for his life.

11. He denied that he was seen carrying paraffin in a container as alleged by PW1 but said that he was carrying water for his workers.
12. The counsel on record for the accused submitted that he was not responsible for the death of the deceased. He argued that there was evidence that the deceased was killed by a mob and further that the accused was not present at the time the mob lynched the deceased.
13. The accused submitted that nothing in the case pointed towards the accused as a perpetrator of the murder and thus the prosecution had fatally failed to prove their case beyond reasonable doubt.
14. The accused relied on the case of **Republic v Philip Mwangi Chege [2006] eKLR** in which the court found that though the accused therein was present at the crime scene, he did not attack the deceased and who was attacked by a crowd and members of a vigilante group who had responded to an alarm raised by one of the prosecution witnesses.

D. Analysis of the Law

15. It is trite law that the burden of proof in this case lies on the prosecution to prove beyond any reasonable doubt that the accused murdered the deceased.
16. The prosecution bears the duty of proving that the death of the deceased occurred; that the death was unlawfully caused by the accused and that such death was caused with malice aforethought.
17. **Section 206 of the Penal Code** provides that malice aforethought may be proved by establishing any of the following circumstances: -

“(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

18. The death of the deceased was proved by the prosecution through the testimony of PW11 the doctor who produced the post-mortem report of Dr. Thuita confirmed that the cause of death was severe burns and head injury.
19. The critical issue is whether the accused was positively identified as the person who participated in the assault and lynching of the deceased and whether the evidence taken as a whole is sufficient to lead to a conviction for the offence of murder.
20. None of the prosecution witnesses was present during the death of the deceased. Although PW1 testified that the accused was carrying a jerry can with some liquid, the content was not established. While PW7 may have witnessed a crowd gathering around the deceased, he did not stay at the scene to witness what happened. Pw7 did not identify the accused as being part of the crowd that killed the deceased.
21. In my view, the testimony is not sufficient to positively identify the persons who attacked the deceased. All he said was that the deceased was confronted by a crowd over allegations of theft. The investigations officer in this case was not called to explain why he charged the accused with the offence herein.
22. I reach a conclusion that without proper identification of the accused and the part he played in the lynching by the crowd, it is not safe for this court to come to a conclusion that the accused person was present at the scene and actually participated in acts which led to the demise of the deceased.
23. I find that the prosecution have failed to prove the offence of murder against the accused person. He is hereby found not guilty and is acquitted accordingly.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF JUNE, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Njeru for accused

Accused present in person