



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO. 40 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

ALEX MUNGAI KAMANDE.....ACCUSED

RULING

1. The accused **ALEX MUNGAI KAMANDE** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on the night of 5th and 6th June, 2012 at Mwioko Estate in Githurai within Nairobi County jointly with others not before the court murdered **GEORGE NJOROGE GITAU**.

2. He pleaded not guilty to the charges and to prove its case against him the prosecution called a total of nine (9) witnesses and at the close of the prosecution case it was submitted by Mrs. Kinyori on behalf of the accused that the prosecution had failed to prove a *prima facie* case against the accused to enable the court place him on his defence.

3. It was submitted that the case against the accused was based on an alleged identification by **PW1** under conditions where identification was difficult. No witness was called by the prosecution to corroborate his evidence. It was further submitted that there were material contradictions on the evidence of the prosecution witnesses in particular as regards the weapon used on the deceased and whether the same was naked or not at the time when his body was found. It was submitted that the only thing that linked the accused with the murder was an allegation that he was found wearing the deceased shoes but the ownership thereof was not established. It was further submitted that there was contradiction on the nature of weapon used as per the prosecution witness and how the accused was arrested.

4. In support of the submission the case of **REPUBLIC v BENARD OBUNGA OBUNGA [2015] eKLR** that the defence cannot be expected to fill in the gaps for the prosecution was submitted. The court was therefore urged to acquit the accused because putting him on his defence would be like telling him to fill or explain what the prosecution had failed to do.

5. On behalf of the prosecution it was submitted that the accused was positively identified assaulting the deceased and the death of the deceased occurred soon thereafter. It was submitted that failure to call the owner of the gate where the deceased was found did not weaken the prosecution case.

6. The issue for determination is whether the prosecution had established a *prima facie* case within the definition of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332** to enable the court place the accused on his defence or if not established to acquit the accused. The guiding principle in this undertaking is whether based on the evidence on record, should the accused opt to exercise his constitutional right to remain silent the court can convict him.

7. The prosecution case against the accused was as follows:-

PW1 RICHARD KING'ANG'I was at funeral gathering at 10.00 p.m. on the material day when he heard a loud noise from outside the house and when he got to the scene he found eight (8) boys beating the deceased on an allegation that he had stolen a mobile phone. He stated that he knew all the eight (8) boys and that he suggested that they take the deceased to the police station and that he saw the accused beat the deceased using a club and a whip. He left the deceased being taken to the police station only to hear that he had died the next morning from one **JOSEPH** who sent him a text. He stated that when he went to the scene he found the deceased dressed in clothes which were not his. He stated further that the accused was arrested by some youth who brought him to the scene together with the clothes of the deceased which were allegedly found in his house. This witness was stood over and at the close of the prosecution was not recalled to be cross examined.

8. PW2 CHARITY WATETU GITAU the mother of the deceased confirmed that on the material night the deceased did not sleep at home only to be called and informed of his death the following morning. At the scene she was told that there had been a fight at the funeral vigil on allegation that the deceased had stolen somebody's mobile phone. She confirmed that the sandals the accused was accused was alleged to had been wearing were common.

9. PW3 ISAAC NYORO NJOROGI only identified the body for the purpose of postmortem examination while **PW4 JOHN NDUMIA KARAU** went to the scene where the body of the deceased was and saw a sisal rope which made him think that the deceased had been strangled. It was his evidence that the accused whom he did not know was arrested at the scene wearing red slippers which were alleged to be the deceased's. In cross-examination he stated that there was no special feature on the same sandals to confirm that they belong to the deceased.

10. PW5 PC MOSES WAMBUA stated that he investigated the matter and that the deceased was found at the scene naked. It was his evidence that the accused was brought to the scene wearing clothes – a jacket, short trouser, T-shirt and one pair of open shoes which had been worn by the deceased. He stated that he did not interview those who had brought the accused to the scene. **PW6 CI SAMUEL OTONGO** the then OCS at the area stated that he went to the scene where the body of the deceased was lying down with blood oozing from his mouth. While at the scene about eight (8) young men came with the accused on an allegation that he was among those who had killed the deceased. He re-arrested the accused and recovered exhibits from the young men. It was his evidence that the accused was not wearing the clothes produced as exhibits.

11. PW7 PC JAPHETH MUGAMBI a scene of crime officer documented the scene and took photographs but lost the printer. **PW8 DR. PETER NDEGWA** conducted post-mortem examination on the body which had bruise mark on lateral neck, face, multiple tramline abrasions on the chest wall, brain contusion among others and as a result of the examination formed an opinion that the cause of death was manual strangulation and head injuries due to blunt face trauma. **PW9 PC JOHN KIRING** stated that he had made effort to trace other witnesses to no avail and produced the mental assessment report confirming that the accused was fit to stand trial.

12. The prosecution was required to prove all the elements of the offence of murder that is to say:-

- (a) The fact and the cause of death of the deceased.*
- (b) That the said death was caused by unlawful act of omission or commission on the part of the accused.*
- (c) That it was caused with malice aforethought.*

13. The fact and the cause of death of the deceased is not disputed. What is in dispute is whether the said death was caused by unlawful act on the part of the accused person. From the evidence tendered, there is no direct material witness produced by the prosecution save for **PW1** whose evidence was not tested by way of cross-examination as the prosecution failed to avail him for cross-examination. As submitted by Mrs. Kinyori for the defence, his evidence was that the deceased was beaten by eight (8) youths all whom he knew by name but none of them was arrested and charged. It is also of interest that **PW7** the first police officer at the scene stated that the accused was brought to the scene by a group of once again eight (8) persons none of whom was called as witness so as to link the accused to the offence.

14. The only item linking the accused to the offence charged is that he was found wearing sandals which were alleged to had belonged to the deceased but once again there is contradiction as regards the identity of the sandals which was alleged belonged to the deceased, whether they were brown in colour as per **PW2** and **PW6**, red as per **PW3** and black as per **PW2**. It must be borne in mind that as per the evidence of **PW4** and **PW2** those types of sandals were very common and there was no special feature to identify them as belonging to the deceased exclusively. There was further no evidence tendered on how the clothes produced as exhibits allegedly belonged to the deceased were recovered as no inventory thereon was produced neither were the witnesses who recovered this called to testify.

15. The law is very clear that where a case as in this one solely depends on circumstantial evidence then as per the case of **SAWE v REPUBLIC [2003] KLR 302** the following must be satisfied:-

- (a) In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.*
- (b) There must be no other co-existing circumstances weakening the chain of circumstances relied on.*
- (c) The burden of proving facts to justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused.*
- (d) The evidence must irresistibly point to the accused to the exclusion of all others.*
- (e) Suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.*

16. At the end of the prosecution case there still exists the following doubts in the mind of the court the benefit of which ought to be given to the accused without asking him to fill the said gap in the prosecution case:-

- (a) How was the accused identified by PW1 and was the conditions prevailing ideal for identification?*
- (b) Did the deceased die as a result of the alleged beatings witnessed by PW1 whose evidence is very weak having not been tested*

by way of cross-examination?

(c) Was the death caused by the accused to the exclusion of anybody else there being evidence that the deceased was assaulted by a mob and no common intention has been proved by the prosecution?

(d) How was the accused arrested?

17. With these doubts in mind and whereas it is sad that the deceased lost his life, I have come to the conclusion that the evidence tendered so far by the prosecution against the accused is very weak and does not meet the standard set for *prima facie* case as the court will be placed in between the rock and the hard place should the accused opt to exercise his Constitutional right under **Article 50** of the **Constitution** to remain silent. It therefore follows that the prosecution has failed to establish *prima facie* case and the only available remedy under **Section 306 (1)** of the **Criminal Prosecution Code** is to acquit the accused which I hereby do. The accused shall be set free forthwith unless otherwise lawful held and it is so ordered.

18. The prosecution has a right of appeal.

DATED, SIGNED and DELIVERED at Nairobi this 2nd day of May, 2018

.....

J. WAKIAGA

JUDGE

In the presence of:-

Miss Wegulu for the State

Mr. Opolo for Kinyori for the Accused

Accused present

Court Assistant - Paul