



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 63 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

RICKSON IMBWAGA MABIA.....ACCUSED

RULING

1. **Rickson Imbaga Mabia** the accused stands charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on 5th day of June 2013 at Nyamakima area along cross road in Nairobi county murdered **Joseph Nginga Kanguru**.

2. He pleaded not guilty to the charge and the matter proceeded to full hearing. At the close of the prosecution case six (6) witnesses had testified.

3. **PW6 Dr. Peter N. Ndegwa** produced the post mortem report on behalf of Dr Johnson Oduol who was not readily available for a long time. He stated that the body of the deceased was identified to Dr Oduol by **John K. Nginga** (PW2) and **Rosemary Muthoni** (PW1) with **P.C William Cheruiyot** (PW5) in attendance.

4. The body had the following injuries:

- Head crashed
- Multiple wounds on the head and chest
- Multiple rib fractures on both sides
- Crashed head and brain lacerations

The doctor found the cause of death to be multiple injuries due to blunt force trauma. The post mortem report was produced as **EXB3**.

5. **PW4 69585 PC Vincent K. Lagat** was the initial investigating officer in this matter. He said he was on 5th June 2013 instructed by Chief Inspector Isaac Kiama of Kamukunji Police station to investigate a case of robbery with violence. The report had been made by Caroline Irungu an Mpesa attendant.

6. Upon investigation he found that the deceased had visited his sister PW1(**Rosemary Muthoni**) in Githurai- Nairobi. He went to Nyamakima to buy for his father PW2 (**John Kanguru Nginga**) a motorbike handbrake. PW 2 sent him money via Mpesa for the said item. The deceased went into an Mpesa shop to transact and while being served a gang of robbers entered the said shop and pushed him inside.

7. The gang robbed Carolynne the Mpesa attendant of Kshs 86,000/- and 3 mobile phones (Samsung Galaxy, Nokia c2-01 and Nokia 2800) all valued at Kshs 104,500/-. As the robbers left Carolynne raised an alarm and the deceased was mistaken to be one of the robbers. A mob descended on him and at one point the accused lifted a metal shoeshine stool and hit the deceased on the head. The deceased's body was moved to the city mortuary and a postmortem conducted.

8. He said he charged the accused because he is the one who was identified while the others were not. A Mr. Harrison who had identified the accused to PW4 died before testifying. The metallic stool was produced as EXB2, having been recovered on 7/5/13 under the guidance of Harrison the deceased.

9. PW1 (**Rosemary Muthoni**) and PW2 (**John Kanguru Nginga**) are a sister and father to the deceased. The deceased had left PW1's house

that morning for Nyamakima while PW2 was away in Nyahururu. None of them witnessed the incident.

10. PW3 No 47483 (**Stanley Mwenda**) was attached to Kamukunji Police Station. He testified that on 6/6/2013 around 9.00 hrs he was on patrol with P.C Mwema. He was instructed by the OCS Chief Inspector Mureithi to proceed to Nyamakima Nuclear stage where a man had been arrested by a mob which was about to lynch him. They went and confirmed the report. On inquiry they were told the man had killed someone the previous day. They arrested the person who is the accused and took him to the police station.

11. Mr. Okeyo for the State submitted that the death of the deceased had been proved. That the evidence placed the accused at the scene and he was arrested and handed over to the police.

12. Mr Abenga and M/s Gathu appeared for the accused person. They highlighted on written submissions filed by the firm of E. Begi Nyachicho advocates. Mr Abenga submitted that the prosecution had not established a prima facie case against the accused. The said PW3 and PW5 were not at the scene and the accused was arrested a day after the event when he was about to be lynched by a mob.

13. He added that the murder weapon was recovered two days after the event at Nyamakima area. M/s Gathu submitted that several doubts had been created i.e whether the accused was at the scene; whether he participated in the mob injustice and whether his participation (if any) caused the deceased's death. She further submitted that the *mens rea* and *actus reus* were both missing.

14. The fact of death is not in dispute as testified to by PW1, PW2, PW4 and PW6. PW6 (**Dr Peter N. Ndegwa**) produced the post mortem report (EXB3) which gave the cause of death as multiple injuries due to blunt force trauma. A mental assessment report in respect to the accused (EXB1) confirmed he was fit to stand trial.

15. The issue for determination before this court is whether the prosecution has established a prima facie case against the accused person to warrant his being placed on his defence. What is a prima facie case? The court in the case of **R.T. Bhatt v R [1957] E.A 332** stated thus:

“Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is 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”. This is perilously near suggesting that the Court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the Prosecution case. We cannot agree that the question whether there is a case to answer depends 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.”

16. Section 107(1) of the Evidence Act provides:

1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Section 109 of the same Act states:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

17. In criminal cases the burden to prove a case lies solely on the prosecution and the prosecution alone. The burden never shifts. The Court of Appeal in the **R.T. Bhatt case** (supra) 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.”

18. In the present case none of the witnesses was at the scene during the occurrence of this incident. Even the Mpesa attendant called Carolyne never testified before this court to place the accused at the scene.

19. **PW3 Stanley Mwenda** and another called PC Mwenda are the ones who rescued the accused from a mob that was baying for his blood. None of those who were baying for his blood testified before this court to state why they wanted to lynch him. PW4 who investigated this case was unable to produce any witness who identified the accused as one of the people who beat up the deceased. In fact when asked why the accused was arrested PW 4 said:

“the accused was arrested because a mob wanted to lynch him.”

20. The alleged murder weapon (EXB2) was recovered on 7th May 2013. It is not even clear how the investigating officer (PW4) came to possess the said metallic stool (EXB2).

21. Placing an accused person on his/her defence simply means that there is sufficient evidence to convict unless rebutted by the defence. In this case would this court convict the accused if he elected to remain silent which is his right? My answer is a very big **NO**. There is nothing that was produced before this court that even remotely points out to the accused as the person who committed this offence. For my part I find the prosecution case not proved, the accused not guilty, dismiss the charge and proceed to acquit him under section 306(1) Criminal Procedure code.

Orders accordingly.

Delivered, signed and dated this 11th day of October 2018 in open court at Nairobi

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HEDWIG I. ONG'UDI

JUDGE