



KTL.NO.150/2017

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 6 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

WOLI ABDULLAHI BARE ALIAS WILLI.....ACCUSED

R U L I N G

1. **Woli Abdullahi Bare alias Willi** is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence are that on the night of **26th and 27th day of May, 2015** at **Ithamba Nzau Village, Mutha Location in Mutomo Sub-district** within **Kitui County**, jointly with others not before court, murdered **Maluki Kilungya** (Deceased).

2. Facts of the case are that the Deceased was a Pastoralist. On the **26th May, 2015** the Deceased left his home with his wife PW1, **Ndinda Maluki**. They went to graze animals in the thicket. They put up a temporary polythene structure that they used for dwelling purposes. On the night of the **27th May, 2016** at about midnight while asleep they were attacked by people who killed the Deceased. The matter was reported to the police who investigated the case and charged the Accused.

3. To establish the case the Prosecution called ten (10) witnesses. PW1 saw two (2) people. One of them ordered the Deceased to wake up as he raised up a stick and hit him. The Deceased pushed her outside. She ran to the shelter of one **Kimwele Kinyale**. She called out for assistance. People scampered into different directions. She returned to the shelter the following morning to find the Deceased having passed on.

4. PW2 **Joshua Ntaliki Mwele** stated that on the material night while some **100 meters** away he heard the Deceased calling out saying that he had been attacked by **Somali** individual whose animals had grazed on his farm. He said it was **Willy and Abdi**. He encountered PW1 who advised him to flee. They hid until the following morning.

5. PW3 **Simon Muli** a brother of the Deceased identified his body to the Doctor who performed the postmortem. On cross examination he stated when he learnt of the brother's death he wondered whether it was as a result of a land issue or if it was as a result of **Mukite Musembi's** allegation that the Deceased had killed his child through witchcraft. In his statement to the police he expressly stated the allegation.

6. PW4 **No. 64515 Corporal Benedict Kiptoo** was at the **Mutha Police Station** when the Deceased made a report of illegal grazing by camels owned by the Accused on his farm. The Deceased was supposed to identify the suspect on the **27th May, 2015** to the police. He visited the scene of murder only to find it was the Deceased. Persons who murdered him were unknown. On cross examination he stated that the Accused was suspected because of the illegal grazing.

7. PW5 **Patrick Munyao**, the **Ward Agricultural Extension Officer, Mutha** was instructed by the Officer Commanding the Police Station to assess a crop damage on the farm of **Kilungya** (the Deceased). He assessed the damage at **Kshs. 14,100/=**. Visible evidence included camel footprints, camel dung, damaged crops, namely greengrammes, peas, millet and a destroyed fence.

8. PW6 **Dr. Cosmas Muthama Mutisya** conducted a postmortem on the body of the Deceased and made a report thereof.

9. PW7 **No. 217756 CI Jones Sandoka** investigated the case and handed over the case following his transfer prior to the arrest of the Accused.

10. PW8 **No. 64510** processed the films and prepared them for photographic prints pursuant to the report and exposed film that they received from **Corporal Benedict Kiptoo** of **Mutha Police Station**.

11. PW9 No. 60468 Corporal John Thuthia took over investigations from PW4, arrested the Accused and caused him to be arraigned before court.

12. PW10 Daniel Malii Mauyo heard screams in the material night and hid in the bushes until morning.

13. Issues to be determined are whether:

- Death occurred.
- It was caused by the Accused.
- It was an unlawful act or omission.
- He acted with malice aforethought.

14. When the Deceased was attacked he was with PW1 one of his wives. She identified his body the following day. PW3 his brother identified the body to PW6 the Doctor who conducted the postmortem. Per the findings, externally, the body had lacerations on the left parietal region. The anterior chest had scratches while the right breast region was bruised. The head had a fracture of the skull and subdural haematoma. He formed the opinion that the cause of death was severe head injury caused by both sharp and blunt objects. The fact of death was therefore established.

15. The evidence against the Accused as to whether or not he caused the death of the Deceased is of visual identification. In the case of **Cleophas Otieno Wamunga vs. Republic 1989 KLR 424**, the Court of Appeal stated thus:

“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was sufficiently stated by Lord Widgery CJ, in the well known case of Republic vs. Turnbull (1976) 3 ALL ER 549 at Page 552 where he said “Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone who knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

16. The only eye witness in this matter was PW1. The incident occurred at night. It was dark. However, she stated that the two (2) persons that she saw had torches. They flashed torches onto the yellow cellophane paper that had been used to construct their temporary shelter. She saw the person who hit the Deceased ordering him to wake up but she did not recognize him. She was pushed out by the Deceased and she fled. She ran to his grandfather **Mwangangi's** home. She allegedly encountered a lad whose name she could not remember whom she requested to go and rescue the Deceased. She later heard the Deceased stating that he was being murdered by **Willi**. On cross examination she stated that by the time she encountered her grandfather **Mwangangi** she was aware of who had attacked them but she did not tell him that indeed they had been attacked by **Willi**.

17. PW2 on the other hand said he heard his grandfather, the Deceased, calling out saying that he had been attacked by the **Somali** individual who had illegally grazed animals on his crop and he mentioned **Willi** and **Abdi**. When he encountered his grandmother PW1 she advised him to flee.

18. Whether or not PW1 met PW2 on the material night is a matter that cannot be clarified because PW1 was not able to remember the person she allegedly met on the material night if at all she did.

19. PW7, the initial Investigating Officer visited the scene in the morning. He met witnesses amongst them PW1, PW2 and PW3 the brother of the Deceased. PW3 even after interacting with PW1 and PW2 and upto the point of recording his statement he believed that the Deceased could have been murdered by either the Accused because he had a land dispute with him following illegal grazing on his crop or one **Mukiti Musembi** who accused the Deceased of having bewitched his child who subsequently died. On examination he stated thus:

“But, it was said Willi was the suspect because he had threatened him.”

20. The Accused was a person well known to the Investigating Officer **Chief Inspector Sandoka**. He was part of the committee that used to resolve disputes between pastoralists and agricultural farmers within the area. Therefore he was a person who could easily be arrested. However, he was not arrested at the outset and no reason was given why action was not taken against him. The Investigation Officer stated that PW1 told him that she identified one **Woli** but she did not give him the description of the person.

21. If she did and the Accused was their neighbour nothing would have been easier than expressly stating that they were attacked by their neighbour **Woli**.

22. The Accused was subsequently arrested by PW9 some two (2) months later. After he had been given instructions to continue with investigations in the matter, the Accused and one **Mohamed** went to the police station to make a report of a camel that had been killed by a **Kamba** individual, one **Daniel Mawingi**. The Officer Commanding the Police Station (PW7) instructed PW9 to place them in custody and interrogate them in respect of the murder case. He called PW1 who identified the Accused and he was arraigned before court on the **21st July, 2015**.

23. In the case of **Kiarie vs. Republic (1984) KLR 739 at Page 744** the Court of Appeal stated that:

“Where the evidence relied upon to implicate the accused person is entirely of identification, that evidence should be watertight to justify a conviction.”

24. The events as they unfolded suggest that the police did not actually know who had been identified as the person who caused the death of the Deceased. The evidence that was collected by the police was not watertight that is why PW7 despite knowing the Accused very well did not arrest him. The report he went to make at the police station with **Mohamed** was not considered at all.

25. Therefore by charging the Accused the police simply acted on suspicion. The suspicion arose from the fact that the Deceased was aggrieved by the Accused’s animals act of damaging his crop. An Agricultural Extension Officer assessed the damage caused by animals at **Kshs. 14,100/=**. According to PW9, the Accused admitted responsibility and agreed to compensate the Deceased. But before the Deceased was compensated some other people of **Somali** origin went to graze some **20 camels** on the land claiming a right over the same land.

26. In the case of **Joan Chebichii Sawe vs. Republic Criminal Appeal No. 2 of 2002** the Court of Appeal stated:

“Suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiko Gichiva vs. Republic Criminal Appeal No. 17 of 1998 (Unreported) “Suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

27. Looking at evidence adduced, circumstances that existed on the fateful night could not have favoured correct identification. It was dark, the lights emanating from torches held by the attackers having not been directed to the attackers it is unlikely that they could have aided the witness to see them. When PW1 encountered the person she alleged to have met, she did not know the attackers. Even after the police commenced investigations they did not have cogent evidence that would make them arrest the Accused. Basing a conviction on evidence collected would be improper.

28. It is apparent that the Accused was arraigned before court following suspicion as a result of the crop damage that is not sufficient evidence.

29. To put the Accused on his defence a *prima facie* case must be established against him. Such a case was stated in the case of **Ramanlal Trambklal Bhatt (1957)** as:

“..... a prima facie 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. The question whether there is ‘some’ evidence irrespective of its credibility or weight sufficient to put the accused on the defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.”

The evidence adduced by the Prosecution has been discredited such that if the Accused is put on his defence and he opts to remain silent then the Court would not even convict on it.

30. In the result, I find the Prosecution having failed to adduce sufficient evidence that would require the Accused to be put on his defence. He is acquitted under **Section 306(1)** of the **Criminal Procedure Code**.

31. It is so ordered.

Dated, Signed and Delivered at Kitui this 12th day of January, 2017.

L. N. MUTENDE

JUDGE