



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 59 OF 2011

REPUBLICSTATE

VERSUS

DAVID NJOGU NDUNGU.....1ST ACCUSED

SAMSON KAMAU KARANU.....2ND ACCUSED

RULING

The two accused persons namely **DAVID NJOGU NDUNGU** (hereinafter referred to as the 1st accused) and **SAMSON KAMAU KARANU** (hereinafter referred to as he 2nd accused) were jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

“On the 14th day of August, 2011 at Rironi IDP Camp of Rironi Village in Kipipiri District, Nyandarua County, jointly with others not before court murdered JOE GIKA NJENGA”

Both accuseds pleaded ‘**Not Guilty**’ to the charge and their trial commenced on 26/5/2014 before **Hon. Justice Anyara Emukule** (retired). The prosecution called a total of five (5) witnesses in support of their case.

The facts of this case revolve around an incident which occurred on the night of 4/8/2011 at Rironi IDP Camp. **PW1 BEATRICE MWIHAKI GIKA** told the court that she was a resident of the IDP Camp. On 4/8/2011 she and her children and the deceased **JOE GIKA NJENGA** who was her husband took their super together. At about 10.00pm the family retired to sleep.

PW1 said she heard a loud bang of a stone hitting their door. A crowd of fellow IDP’s forced their way into the house and began to attack her husband with clubs and pangas alleging that he had defiled and impregnated his daughter. **PW1** took her children and ran out of the house into the nearby bushes.

PW2 VERONICA WAIRIMU GIKA was a daughter to **PW1** and the deceased. She told the court that she was aware of the allegations that her father had defiled and impregnated her. **PW2** denies the truth of those allegations.

PW2 told the court that on the night in question she was at home in the IDP Camp with both her parents

and her siblings. After supper the family retired to sleep. **PW2** said she heard the sound of soil being thrown at their house. The door was forced open and a mob came in. The witness says she saw one **'Baba Wangui'** cut her father and that she saw the 2 accuseds among the mob armed with metal bars.

PW3 KEVIN NJENGA was the 13 year old son of **PW1** and the deceased. He testified that on the night of 4/8/2011 at about 11.00pm he was asleep in the family home. He heard a band and a mob broke into their house. His father (deceased) screamed as he was pulled out by the mob who set upon him with sticks and stones. The mob later burnt the deceased with kerosene. **PW3** told the court that he saw the two accused's among the mob who attacked and killed his father.

The incident was reported to the police **PW5 CORPORAL JOHN RONO** was the officer who went to the scene. He found the body of the deceased lying about 200m from the house with cuts and burns all over. He removed the body and took it to the mortuary. Upon conclusions of police investigations the two accuseds were arrested and charged with this offence of murder.

During the course of the hearing specifically on 4/9/2015 the 1st accused **'David Njogu Ndungu'** who was out on bond absconded from this court. A warrant of arrest was issued against him but he was never apprehended. Thus in this ruling I will only consider the evidence as it relates to the 2nd accused person namely **Samson Kamau Karanu**.

The prosecution having closed its case on 9/11/2016 this court must now analyse the evidence and determine whether a prima facie case has been established to warrant calling upon the 2nd accused to defend himself. The Court of Appeal in the case of **RAMANLAL BHATT Vs REPUBLIC [1957] E.A 332** pondered over the question of what constitutes a **'prima facie'** case. In that case the court held

"It may not be easy to define what is meant by a 'prima facie case' but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence"

The 2nd accused herein faces a charge of murder. The prosecution is under a duty to avail sufficient evidence to prove the crucial ingredients of this charge beyond reasonable doubt.

Firstly the fact as well as the cause of death of the deceased must be proved. The fact of the death of the deceased was readily proved. **PW1**, **PW2** and **PW3** all of who were present during the incident told the court that the deceased was pulled out of his house by a mob, attacked with crude weapons and later set alight. All the three witnesses who knew the deceased very well identify him as **'Joe Gika Njenga'**.

Having proved the fact of death the prosecution is also under an obligation to prove the cause of death of the deceased beyond reasonable doubt. It must be shown that the deceased met his death due to an act of culpable homicide and not due to other factors e.g illness or natural causes. The cause of death is most commonly established or proved by the evidence of a doctor/pathologist who conducted the autopsy on the body as well as through the production of a post mortem report.

In the case of **NDUNGU Vs REPUBLIC [1985]eKLR** the court held that

"Where a body is available and the body has been examined, a post mortem [report] must be produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the medical officer who performs the post-mortem examination is cross-examined"

In this case no medical officer was called to the stand to testify and no post-mortem report was produced.

In this case the body of the deceased was recovered by police and taken to the mortuary, I have no doubt that an autopsy was conducted on that body before it was released to the family for burial. Why then was

this evidence not adduced in court?

The court is therefore left in the dark regarding what directly led to the death of the deceased. The prosecution is inviting this court to conclude that the deceased must have died due to the assault and burning of his person. However the court cannot make any such presumption in law. It is a cardinal principle in law that the burden lies upon the prosecutor to prove each and every ingredient of the offence beyond reasonable doubt. Without proof of the exact cause of death this court is left to wonder whether it was the assault or the burning or both which directly led to the death of the deceased. The court cannot render a decision on the basis of guess work or assumptions.

In the case of **CHENGO KALAMA Vs REPUBLIC 2015 eKLR** the Court of Appeal held as follows:

“..... save in very exceptional circumstances..... it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular a post mortem examination report of the deceased”

The failure of the prosecution in this case to call as a witness the doctor who performed the autopsy on the body of the deceased or to avail the post mortem report as an exhibit, means that a critical ingredient of the charge of murder being the cause of death remains unproven. In the circumstances no prima facie case can be said to have been established.

Even if the cause of death had been proved as required in law, the evidence on record would still fall short. **PW1** the wife of the deceased admitted that she was not able to identify any of the people who attacked her husband. More specifically **PW1** states

“I did not see any of the accused”

And under cross-examination **PW1** says

“I do not know the 2nd accused”

PW2 the deceased’s daughter in her evidence claims to have seen ‘**Kamau**’ carrying a metal bar on the night in question. However under cross-examination **PW2** clarifies that the Kamau she was referring to is not the 2nd accused. She states

“..... there is one man I saw, Baba Wangui – he is the one who had a panga and he is the one who threw us out. It is only Baba Wangui that I saw. He is known as Kamau. He is not among the accused.....” (my emphasis)

Thus **PW2** also does not identify the 2nd accused as one of the suspects.

PW3 the deceased’s son states that

“I was able clearly to see David and Kamau. David is brown. Kamau is dark skinned. They burned my father with kerosene. I saw with my own eyes.....”

PW3 never at any time identified the 2nd accused in the dock as the Kamau he was referring to. The court takes judicial notice of the fact that ‘**Kamau**’ is a very common name among the Kikuyu community. I have no doubt that there were several Kamau’s in that IDP Camp. **PW2** had already referred to another Kamau who was also known as ‘**Baba Wangui**’. It is not clear which ‘**Kamau**’ **PW3** was referring to.

Aside from that **PW3** admitted under cross – examination he recorded two statements with the police. The boy stated that the police rejected his first statement on the grounds that it was ‘**unsatisfactory**’ and he was made to record a second statement. What was unsatisfactory about this first statement? When shown a statement in court **PW2** denied it was his and denied having signed it. The witness is a 13 year

old child who attends school. He was in a position to sign his own statement. I find that the evidence of **PW2** remains unclear and lacks cogency.

The incident occurred at 10.00pm undoubtedly it was dark. How were the witnesses able to see and identify anyone amongst a mob who broke down their door. **PW3** says that there was light from a bulb in the house. **PW4 ANTHONY NGANGA KIMANI** the chairman of the IDP Camp explained that there was no electricity in the camp. The residents often rigged a bulb to batteries to create lighting. He stated that this type of bulb gives out '**very faint light**'. I do not think such light would have been sufficient for a clear and positive identification.

Finally both **PW2** and **PW3** made mention of a '**Baba Wangui**' as one of the main perpetrators. This Baba Wangui was identified by **PW4** the camp chairman as **Wilson Kamau Maina** who was the camp's secretary. He was not arrested in connection with this incident neither was he called as a witness. It is clear that efforts were being made to shield this person. This was probably because he was a benefactor to the family of the deceased and oversaw the sponsorship for schooling for **PW3**.

PW5 the investigating officer claimed that his efforts to arrest this Kamau bore no fruits. I do not believe that **PW5** was being entirely truthful. This man was the camp secretary. He could not have vanished into thin air. He continued taking **PW3** to and from school. I suspect that the '**Kamau**' was easily traceable but **PW5** simply did not wish to arrest him. The 2nd accused was charged as a scapegoat in the matter.

On the whole I find that the evidence on record falls woefully short of establishing a prima facie case. I enter a verdict of '**Not Guilty**' and I acquit the 2nd accused of this charge of murder. The 2nd accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Warrant of arrest to remain in force for the 1st accused.

Dated and Delivered in Nakuru this 17th day of February, 2017

Mr. Waiganjo for accused 2.

Maureen A. Odero

Judge