



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO.40 OF 2012

REPUBLICPROSECUTOR

VERSUS

BILLY WAWERU NJOGUACCUSED

RULING

The accused **BILLY WAWERU NJOGU** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

“On the 30th day of May 2012 at Mwariki Estate in Nakuru District within Nakuru County murdered VICTOR NJOGU THIONGO”.

The accused entered a plea of ‘**Not Guilty**’ to the charge. The trial commenced on 9/5/2013 before **Hon Justice Anyara Emukule** (retired) who heard the first four witnesses. Following his transfer to Mombasa High Court, I took over the case and heard the final witness. A total of five (5) witnesses testified in this case.

The accused was the father to the deceased **PW1 JOTHAN ARINGAI KUNYORE** told the court that the accused and deceased were his neighbours in Mwariki Estate in Nakuru. On the night of 30/3/2012 at about 8.50pm **PW1** was inside his house when he heard a commotion from the neighbour’s house. **PW1** did not bother to go out to check because as he told the court it was usual for the deceased to fight when they were drunk.

The following day at 10.00am **PW1** passed by the deceased house and noted that the door was not properly closed. He alerted **PW2 STEPHEN MUCHAI KIMANI** who was the caretaker. Together they went to the house and upon entering found the body of the deceased lying under the bed. The matter was reported to police who came and took away the body. The accused was even fully arrested and charged with this offence.

At the close of the prosecution case the court must determine whether the prosecution have established a *prima facie* case to warrant placing the accused onto his defence.

In this case the cause of the deceased death is not in any doubt. **PW1** and **PW2** both neighbours told the court that they saw the body of the deceased lying dead under the bed inside the house. The two witnesses who know the deceased well identified him as ‘**Victor Njogu**’.

In order to prove a charge of murder the prosecution must adduce evidence to show that the deceased died

due to a homicidal act. It is essential therefore that the cause of the deceased be proved beyond reasonable doubt. This is ordinarily by way of the evidence of the doctor/pathologist who conducted the autopsy on the body and production of a post-mortem report. In this case no such evidence was called.

As stated earlier the trial commenced on May of 2013. From that time to March 2017 when the prosecution closed its case (a period of four 4 years) no doctor was bonded to come to court and testify. This was despite **PW5 SERGENT CHARLES KAVINGA** the arresting officer confirming to the court that an autopsy was conducted on the body of the deceased. What is the effect of the failure to record evidence regarding the cause of death?

In **CHENGO KALAMA Vs REPUBLIC (2013)eKLR**. The Court of Appeal sitting in Malindi held as follows.

“The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause therefore 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. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt”.

Failure to adduce medical evidence to prove the cause of death is fatal to the prosecution case.

All **PW1** told the court was that he heard a commotion in the house of his neighbours. He had no idea who was fighting who. No witness saw accused assault the deceased. In any event the mere fact that the accused was involved in a fight is not proof that this assault led to the deceased death. There are several situations where a person involved in a fight but walks away unharmed or unscratched or with minor injuries. It cannot be assumed that the deceased died as a result of such fight.

Therefore notwithstanding the weight of other available evidence, I find that in failing to prove the cause of death, no *prima facie* case has been established. I therefore enter a verdict of **‘Not Guilty’** and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Nakuru this 7th day of April 2017.

Mr. Mbeche holding brief for Mr. Bichanga

Mr Chigit for defendant

Maureen A. Odera

Judge