



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CRIMINAL CASE NO. 6 OF 2009

REPUBLIC.....PROSECUTOR

-VERSUS-

CLINTON INGAJI TARI.....ACCUSED

JUDGMENT

1. The accused, **Clinton Ingaji Tari**, is charged with murder, contrary to **Section 203** read with **Section 204** of the penal code, in that on the **12th January 2009**, at Ekerubo Village in Borabu District, murdered **Ronald Kirage Aenda**.

It was the case for the prosecution that the accused was at the material time an employee of **Paul Omwoyo Mokuu (pw1)**, and was working at Mokuu's farm at Borabu. The two had previously been neighbours at Eldoret before the employment of the accused as "shamba" boy by Mokuu.

2. At a later stage, the accused was sacked and replaced with the deceased, **Ronald Kirage** who reportedly went missing after a store in the farm was broken into. Mokuu (pw1), who was in Eldoret at the time received the necessary information and travelled to his farm in Borabu. He found that indeed his store had been broken into and his bags of maize and beans stolen from therein. He also found that the deceased had been killed. Later, he found the stolen items at the local police station.

3. **Junia Moraa Kirage (pw2)**, wife to the deceased, lived with the deceased at the home of Mokuu (pw1) where the deceased was employed alongside the accused who was employed as a herdsman. She indicated that the accused misappropriated his employer's money and was sacked. She took supper with the deceased and their two children at about 7.00p.m. on the **11th January 2009**. She normally stayed at the home of Mokuu's brother and after supper on that material night she accompanied the deceased to the place where he normally slept. On the following morning, she was called by one Tom and told to go to Mokuu's home. She went there and found the houses locked. She saw the deceased and thereafter went to prepare food at a kitchen which was 200 metres away.

4. Tom used to work at the home of Mokuu. He was at a place called Manga, four (4) kilometers away, when he again called the wife of the deceased (pw2). He told her that he had met the accused with some maize and that he (accused) was blood stained. She started to scream and attracted villagers to the scene. A search for the deceased began even as it was noticed that a glass window to his room was cracked. A peep through the window revealed a black polythene paper spread on the bed and when it was lifted up by a stick pushed through the window, the body of the deceased was discovered.

5. The police arrived at the scene after being notified. They broke the room and removed the body which had blood on the forehead.

The said Tom, met **Atira Mokuu (pw3)**, brother to Paul (pw4), and told him that he had seen the accused weighing maize at Morara's shop within Manga Makutano's shopping centre. He (Tom) suspected that the accused had stolen the maize because he ran away on seeing him (Tom).

Atira and Tom proceeded to Mokuu's home and were among the people who saw the body of the deceased covered with a plastic sheet. It was Tom who lifted the sheet using a stick. Atira (pw3) passed the necessary information to the area assistant chief.

6. **Sgt. Derrick Atemi (pw4)**, was on duty at Manga police station on **12th January 2009**, at 10.00a.m. and when he received a report that the accused had been apprehended by members of the public for stealing maize and beans and killing the deceased. He (pw4) re-arrested the accused. He later visited the scene of the offence and found the dead body of the deceased lying under a bed. It had a bleeding wound on the forehead.

7. **Richard Morara Ochiri (pw5)**, operated a shop at Manga. It was where the accused went and attempted to sell maize, beans and sorghum at a very low price which raised suspicion in the mind of Richard (pw5). It was also where the person Tom had found the accused. Richard enquired from Tom as to whether the cereals belonged to the accused. He (pw5) had previously seen the two together. Tom indicated that he would confirm on much as visiting the home of the accused's employer.

8. Richard (pw5), later received a call from Atira (pw3) who informed him that the accused had been implicated in stealing and killing a person. He (pw3) instructed him (pw5) to get hold of the accused and tie him up. He did so with the help of others and then called the area District Officer.

9. The accused was eventually charged in court with the present offence which he denied. His defence was that he was a doughnuts vendor and did not know the deceased. He was in church on the **11th January 2009**, and thereafter went to fetch firewood. He then went to his home at Nyamira and on the following day proceeded to a shop to buy cooking oil and while there a group of people confronted him and demanded to know his tribe. These people conversed in the Kisii language which he did not understand as he was a Luhya. They alleged that he had come to Kisii from Western province to kill people.

10. He was branded a murderer amid his protest that he lived in Eldoret. He was attacked and assaulted by the group of people who were about to lynch him but for the appearance of a good Samaritan and the police who rescued him. The police demanded to see the murdered person. They went with him to a place where a dead body was found. They took the dead body to the mortuary while he was left behind at the police station where he was seriously beaten and forced to admit the alleged offence. He indicated that he was in Nyamira courtesy of his employer (pw1) who took him away from Eldoret where he hailed.

11. From all the foregoing evidence, the basic issue arising for determination is whether the deceased was murdered and if so, whether the accused was identified as the person responsible.

The defence raised by the accused was a vehement denial of responsibility for the offence and an indication that he was incriminated simply for being a person from a different community or tribe. Nonetheless, he was not under any obligation to prove his innocence [see, ***Chemagong vs Republic (1984) KLR 611***].

The burden of proving his guilt beyond reasonable doubt lay with the prosecution.

12. Under **Section 203** of the penal code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

This provision presupposes that a person has died and that his death has been caused by a criminal act or omission of another.

The particulars of the charge indicate that one **Ronald Kirage Aenda** (herein, deceased) was murdered

on 12th January 2009.

13. The evidence by most of the prosecution witness indicated that the body of the deceased was found in circumstances which strongly suggested that he was assaulted and killed by an individual who was suspected to be the accused. However, there was no evidence establishing the actual cause of the death of the deceased even though his body was found with an injury on the forehead.

The cause of death is a vital ingredient of the offence of murder as it attaches criminal responsibility on a suspect.

14. The failure to establish the cause of death would invariably mean that a suspect cannot be held responsible for a death whose cause is unknown. And, if the cause of death is unknown can it really be said that an offence of murder has been committed? The answer would be in the negative.

Clearly, in its attempt to establish the offence, the prosecution omitted to avail the most important evidence to establish the cause of death i.e. the post mortem report by a medical officer.

The omission was very fatal to the prosecution case against the accused as there was no evidence to show that the deceased was actually murdered.

15. For all the foregoing reasons, it is difficult to sustain the charge against anybody let alone the accused.

However, if the charge was duly established, the evidence tending to implicate the accused was essentially circumstantial but of the weakest kind since there was no evidence of identification of the maize and beans allegedly stolen from a store at the home of Mokuia (pw1) as belonging to him or the deceased.

16. It was clearly evident that the accused was arrested and charged on the basis of the suspicion that because he was found with maize and beans suspected to have been stolen from where he previously worked but was sacked and replaced by the deceased then he was the person who “murdered” the deceased.

The suspicion was initially raised by the person called Tom yet he was not availed as a witness. He was a person of interest in the whole affair. The manner in which he kept calling the wife of deceased (pw2) and even revisited the brother of the employer of the deceased (pw3) placed him in the position of a prime-suspect.

17. Be that as it may, suspicion no matter how strong cannot be used as evidence in a criminal case especially of a capital nature [see, *Faith Lucas .vs. Rep Criminal Appeal No. 274 of 2006 at Msa (C/A).*]

Therefore, if there was murder in this case, then there is no proof that the accused was responsible. In sum, the prosecution has failed to discharge its burden of proof such that it cannot herein be said that there was murder and that the accused was the person responsible.

Consequently, the accused is found not guilty as charged and is acquitted accordingly.

J.R. KARANJA

JUDGE

[Delivered and signed this 3rd day of March 2016].