



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO.8 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

ELIJAH KIBE NTHIGA.....ACCUSED

JUDGEMENT

Background

Elijah Kibe Nthiga, hereinafter “the accused”, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of this offence are that on the 11th day of January 2010 at Sunton Area of Kasarani District within Nairobi Province jointly with others not before the court he murdered Nicholas Mutembei Thurania.

This is one of the old cases that still remain unresolved. It has passed through the hands of several judges and several defence counsels. The plea was taken on 23rd February 2010 and now five years after the case had not been concluded. The reasons for this delay are recorded in the court file. I took over the proceedings in this case in February 2015. I noted that four prosecution witnesses had testified before Honorable Mr. Justice Nicholas Ombija. The defence applied to start the case *de novo* but this was opposed by the prosecution. Counsels on opposing sides made brief submissions before me and I made a ruling in favour of starting the case *de novo* for the interest of justice given the number of defence counsels who had handled the matter.

The offence of murder is committed when any person who of malice aforethought causes death of another person by an unlawful act or omission. In **Abdi Kinyua Ngeera v. Republic [2014] eKLR (Criminal Appeal No. 312 of 2012)** the court stated the following in respect to the ingredients of murder that must be proved beyond reasonable doubt:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.”

Prosecution case

Nicholas Mutembei Thurania, hereinafter “the deceased” went missing on 11th January 2010. His phone was switched off and he was not reachable after he left home on that day at 9.00am. Efforts by his family to trace him at Sunton and Mwiki Police Stations were unsuccessful. His decomposing remains were found buried in a shallow grave at a place known as *Kiwanja* in Kasarani Sports Complex on 2nd

February 2010. The body had been cut into two and buried in two gunny bags in a grave measuring 4 feet by 4 feet.

According to the police the accused in company of others chased the deceased, caught up with him and put him in Motor Vehicle No. KBJ 248L Toyota NZE as deceased's friends, Patrick Thuo and Samuel Kamande, escaped. He was not seen alive again.

The vehicle in question was being used by Joseph Kilonzo (PW1). Kilonzo told the court that the vehicle belonged to one Mary Kuria. He said he let out the vehicle to one Peter Maina on 11th January 2010 after taking his particulars and copies of his driving license and identity card. Kilonzo said Peter Maina was alone at the time. He said the vehicle was returned to him on the same day at 10.40pm. He was later arrested in connection with this offence but later released.

Police said the accused was identified to them by Patrick Thuo and after arresting him he led them to *Kiwanja* in Kasarani Sports Complex to a shallow grave where upon opening it they found the remains of the deceased.

Defence case

The accused was the sole witness for the defence. He denied committing this offence. He denied having been in Motor Vehicle No. KBJ 248L; he denied that he knows Kilonzo or Peter Maina who was said to have hired that vehicle from Kilonzo. He told the court that he was arrested by the police and taken to Kasarani Police Station where he was placed in cells. He said he did not leave the cells until the time he was being taken to court to answer these charges. He termed it as a lie to state that he led police to recover the body of the deceased. He denied being a member of *Mungiki* (an outlawed ragtag group) and said he knew nothing about the fight between members of *Mungiki* and youth at Mwiki.

Determination

That Nicholas Mutembei Thurania died is not in issue. The remains found in a shallow grave at *Kiwanja* Kasarani were identified by his mother Elizabeth and his uncle Edward Stephen Mwitii (PW3). The defence did not raise any issue with the identity of the remains found in that shallow grave. This court therefore has no reason to doubt that those remains were those of the deceased. Dr. Joel Mungai (PW5) performed the post mortem on the remains. He told the court that the clothes had stuck to the body and had become firm like a hide. The doctor said the body was poorly preserved and had been deliberately cut into two and placed in two sacks (gunny bags). In one sack was the legs and lower abdomen and in the other sack was the upper body. The doctor found no fractures on the body but he found it difficult to determine if the body had lacerations due to the state it was in. He found blood in the left chest. He said it was difficult to determine the cause of death but strangulation was likely to have occurred. The prosecution did not lead evidence nor did the defence cross examine as to whether the deliberate cutting into two of the body was done while the deceased was alive or after he had died.

My finding on this issue, after analyzing available evidence, is that the death of the deceased and the cause of that death have been proved beyond reasonable doubt. The manner in which the body of the deceased was cut into two parts and the fact that there was a rope round his neck is indicative that the deceased met an unlawful death. The police theorized that the reason for cutting the body into two was because the grave was small and could not fit the body in its normal state. This could be true or not true. The doctor told the court that the body was of an African male of good nutritional status and it was the body of a tall and large person.

The issue of death having been settled, the next question is who killed the deceased and did he/she have malice aforethought? The investigators left out very crucial witnesses. Elizabeth testified that one Thuo (Patrick Thuo) and one Kamande (Samuel Kamande) informed her that they had been with the deceased when he was kidnapped by the accused and placed in motor vehicle KBJ 248L and that Thuo saw the accused hitting the deceased. CPL Ben Amboka (PW4) told the court in regard to 2nd February 2010 as follows:

“I was briefed and I proceeded to Mwiki and met one Patrick Thuo one of the witnesses. I interrogated him and he told me that he was with the deceased person when they were confronted by a group of men and the accused being one of them. Patrick managed to escape but the deceased was kidnapped by the accused and others and bundled into a motor vehicle KBJ 248L Toyota Corolla white. With the support of Thuo we managed to trace the accused in this case along a road in Mwiki. I arrested the accused. I was with three others PC Ndonye, PC Kurgat and PC Mutunga. I proceeded to Kasarani Police Station while interrogating the accused. The accused is Elijah Kibe. He is the accused in the dock. While at Kasarani before alighting the accused opened up and told me what happened. He led us to Kasarani Sports Complex in the open field at a place called *Kiwanja*. All the four of us were present. He pinpointed a shallow grave where the deceased had been buried. On scooping the soil we found 2 sacks containing body parts. We called our senior officers and our scenes of crime who continued to remove the whole body parts as photographs were taken” (sic).

Neither Patrick Thuo nor Samuel Kamande testified. Their evidence is crucial to prosecution case in respect to the identity of the people who chased and caught up with the deceased and forced him into the vehicle. The evidence of Patrick Thuo is crucial in respect to the pointing out the accused person to the police officers before he was arrested. The officers who accompanied CPL Amboka to arrest the accused, PC Ndonye, PC Kurgat and PC Mutunga also did not testify.

When the scenes of crime officer, CIP Lacton Bengi (PW6), arrived at the scene (grave) at 5.00pm on 2nd February 2010 CPL Amboka led him to the grave where he found the top soil of the grave had been removed. This witness was not cross examined as to whether he saw the accused at the scene.

Although CPL Lucy Mutisya (PW8) testified to the same events as CPL Amboka she told the court that Thuo and Kamande told them that they had been with the deceased when a vehicle whose registration number CPL Lucy could not remember stopped near where they were and Peter Maina and Elija Kibe (accused) came out and chased them and that they managed to catch the deceased and push him in the vehicle while Thuo and Kamande escaped. CPL Lucy said when they arrived at the scene at *Kiwanja* they found officers from the Flying Squad and the accused person. CPL Lucy told the court that they were informed that the accused had pointed out the grave to the Flying Squad Officers. Lucy later contradicted herself when she told the court during cross examination that:

“I witnessed accused pointing out the grave.”

CPL Lucy was cross examined about her statement which does not contain evidence that the witness found the deceased at the scene or she witnessed the accused pointing out the grave to the police.

Mwiti on his part told the court that he could not remember whether he saw the accused at the scene. Mwiti had been called by Elizabeth his sister to accompany her to *Kiwanja* where the body of the deceased was found.

Given the contradiction in the evidence of CPL Lucy I am doubtful that she witnessed the accused pointing out the grave to the police. I take the view that she was shown the grave by CPL Amboka. The evidence of CPL Amboka in my view requires corroboration. The reason for this is that this court declined to admit the statement of the accused as part of the prosecution evidence because of failure to follow the laid down procedure in recording that statement. The statement in my view was given under the same conditions under which the accused found himself in. As testified by CPL Amboka he intensely interrogated the accused before he pointed out the grave to the police. His colleagues who are said to have been present when interrogation was conducted and during the pointing out of the grave to the police did not testify. The law frowns upon any incriminating statements made by a suspect unless the same is taken in strict adherent to the law and such statements are not admissible in court as against the accused.

Is the evidence of Patrick Thuo and Samuel Kamande admissible? That Patrick Thuo and Samuel Kamande were with the deceased on 11th January 2010 and witnessed him being assaulted by the accused and being bundled into motor vehicle KBJ 249L cannot be ascertained. This statement, if it were true,

would have been very crucial to the prosecution case. Its truth however cannot be verified without having the two witnesses testify. In the form it is in, it is hearsay evidence which is inadmissible in a trial. As stated in numerous local and international authorities including the case of **Subramaniam v Public Prosecutor (1956) WLR 965**:

“A statement made by a person not called as a witness which is offered in evidence to prove the truth of the fact contained in the statement is hearsay and it is not admissible. If however the statement is offered in evidence, not to prove the truth of the facts contained in the statement but only to prove that the statement was in fact made it is not hearsay and it is admissible”.

I also find the evidence that Patrick Thuo pointed out the accused to CPL Amboka and his colleagues who then arrested him not useful to support prosecution case. Having discredited the evidence on the identification of the grave by the accused and having disallowed his statement to the police as well as the failure to call Patrick Thuo and Samuel Kamande as witnesses, I find that it is not safe to rely on this evidence.

The case for the prosecution in my view is based on shaky evidence in respect of the identification of the accused leading to his arrest, the manner in which he was arrested and his alleged identification of the grave where the remains of the deceased were found.

In my conclusion of this matter, it is my finding, after taking into account all the evidence surrounding the circumstances of this case that the prosecution has failed to prove beyond reasonable doubt that the accused committed this offence. Although I find that the unlawful death of the deceased has been proved beyond reasonable doubt, it is my considered view that the other elements of the crime of murder have not been proved to this standard. The benefit created by this doubt must be applied in favour of the accused person. As a consequence therefore, I find the accused, Elijah Kibe Nthinga, not guilty of the murder of Nicholas Mutembei Thurania. I hereby enter acquittal against him and order that he shall be set at liberty immediately unless for any other lawful reason he is held in custody. Orders shall issue accordingly.

Dated, signed and delivered this 12th day of May 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Esther Macharia, prosecution counsel

Mr. S. Wamwayi, defence counsel

Mr. Elijah Kibe Nthinga, the accused

Mr. Daniel Ngumbi, court clerk