



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA

HCCR NO. 36 OF 2015

(FORMERLY MERU HCCR NO. 73 OF 2014)

REPUBLIC.....PROSECUTOR

- VERSUS -

KELVIN MUTWIRI MURUNGI.....ACCUSED

RULING

1. On 22nd September, 2014, at about 11.00 a.m. the body of the late David Kimathi Wachira (*"the deceased"*) was found at the dumping site at Kathungu the area Chuka with stab wounds. On 7th October, 2014, the state lodged information in the High Court charging Kelvin Mutwiri Murungi (*"accused"*) with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. It was alleged that on the 22nd September, 2014 at Kangondu Location, within Tharaka Nithi County, the accused murdered the deceased. The state lined up seven (7) witnesses to prove the information.

2. Catherine Kawira Mutegi (PW₁) recalled that on the material day, she and her four (4) other colleagues working at the Tharaka Nithi County cleansing department had gone to the dumping site at Kathungu the area to empty the tractor when they stumbled on a dead body of the deceased. She informed her immediate supervisor Janet Wanja (PW₂) who came immediately to the scene. PW₂ informed the County Administrator Mr. Chabari PW₃ who came with police officers. When the police came, PW₁ saw the accused sleeping in a banana plantation next to the dumping site. She told the court in cross-examination that it was usual to find street children sleeping around the dumping site all the time. To her, the accused looked like a street child. She did not see the accused with any weapon. Janet Wanja Julius (PW₂) recalled being contacted by PW₁ when the latter found a body at the dump site in the morning of 22nd September 2014. She informed her superior (PW₃) who came with police officers to the scene. She saw someone sleeping at a nearby banana plantation. That person was lying down with a knife.

3. On his part, the Town Administrator of Chogoria, Frankline Justus Bundi Chabari (PW₃) recalled that on the material day at about 11.00 am, PW₂ informed him on phone that they had found a body lying at the dump site. PW₃ then accompanied the Police from Chuka Police station to the scene where he saw a body with an injury on the neck. When the police were loading the body to the vehicle, he saw someone lying down about 5 metres from where the body was. The police recovered a knife from that person whom PW₃ identified as the accused. He confirmed that he did not see the knife well, although he remembered the same was of a wooden handle. The accused did not have any blood stains.

4. Dr. Justus Kitili (PW₄) conducted a post mortem on the body of the deceased on 30th September, 2014. The body had a deep cut wound at the back of the neck and another wound on the sculp measuring 8 cm long. He formed the opinion that the cause of death was cardiopulmonary arrest due to severe

hemorrhage. Athania Simon Kiiru (PW5) and Wilfred Kinyua Nkanya (PW6) an uncle and father of the deceased, respectively, identified the body for post mortem and later collected the same for burial. Inspector Sheela Kwatukha (PW7) investigated the case. She recalled how PW3 made a report at Chuka Police Station on the material day at about 12.00 noon. She went to the scene and found the body with neck injuries. Five metres away was a banana plantation where the accused was lying. That on interrogating the accused, he gave her a knife and told her that he had killed the deceased with it and had cleaned it in a nearby river. She arrested him and recovered the subject knife and took the body to Chuka Hospital Mortuary. She requested Superintendent Kariuki who recorded a confession from the accused. PW7 stated that "MF1 2" the knife that was present in court was not the one she recovered from the accused. In cross-examination, she stated that in normal circumstances, a killer will run away from the scene of crime. That was the prosecution case.

5. At the close of the prosecution case, the court is enjoined to rule whether or not a prima facie case has been established against the accused for him to be called upon to offer his defence. Ms Kaaria submitted that no prima facie case had been established. That the murder weapon was never produced and that there is no direct link between the murder and the accused. Counsel cited the cases of Abanga alias Onyango .v. Republic Cr. Appeal No. 10 of 1997 (UR) Sawe .v. Republic [2003] KLR 364 and Dias Singh .v. Republic Cr. Appeal No. 10 of 1997 (UR) in support of her submissions that for circumstantial evidence to be relied on, there should be no other co-existence circumstances. That the only evidence adduced was the accused's presence at the scene at the time the body was discovered. On her part, Ms Njagi the learned prosecutor submitted that the presence of the accused at the scene incriminated him. That the accused had confessed to PW7 to have committed the offence. That notwithstanding the failure to produce the murder weapon, the prosecution evidence was sufficient to put the accused on his defence.

6. Has the prosecution established a prima facie case? The onus is always upon the prosecution to prove its case beyond any reasonable doubt and a prima facie case is said to be established where a reasonable tribunal, properly directing its mind to the law and the evidence would convict if no explanation is offered by the Defence (see Ramulal T. Bhatt .v. Republic [1957] EA 332)

7. The first issue is the testimony of PW7 that the accused made a confession that he murdered the deceased. PW7 told the court that when the accused made the said confession, she handed him over to a Superintendent Kariuki who took the confession. Section 25 A (1) of the Evidence Act, Cap 80 Laws of Kenya provides:

"25 A. (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of police, and a third party of the person's choice."

8. Pursuant to section 25A (2), the Evidence (Out of Court Confessions) Rules, 2009 were enacted. Under Rule 13 thereof, it is the officer recording the confession who is the proper person to attend and prove to the court beyond reasonable doubt that the rules were complied with when the confession was being made. In the instance case, the alleged confession was neither produced nor did the alleged Superintendent Kariuki appear to testify on the alleged confession. The mere statement by the investigations officer that the accused admitted murdering the deceased, in my view, is not sufficient. This court therefore finds that there was no evidence of any confession on the part of the accused. A confession must be proved beyond reasonable doubt that it has been made and in accordance with the law. This is lacking in this case.

9. The prosecution evidence was to the effect that on 22nd September, 2014 when PW1 in the company of others went to empty the tractor of gabbage at the Chuka dump site at Kathunguci, they stamped upon the body of the deceased. Upon the police being called to the scene, the accused was discovered sleeping in a banana plantation about five (5) metres away from the body. A knife was recovered a short distance from where the accused was sleeping. The accused was therefore suspected to have been the one responsible for the murder of the deceased. No one saw the accused murder the deceased. The

prosecution therefore only relied on circumstantial evidence. The prosecution was perfectly entitled to rely on such evidence.

10. In the case of **Erick Odhiambo .v. Republic [2015] eKLR** the Court of Appeal held:-

"It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this court stated in MUSILI TULO .V. REPUBLIC (supra):

"Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics."

11. However, for circumstantial evidence to form a basis for conviction, it must point to the guilt of the accused and not otherwise. The Court of Appeal in the case of **Abanga Alias Onyango .v. Republic Cr. A No. 32 of 1990 (UR)** held:-

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which the inference of guilt is sought to be drawn, must be cogently firmly established (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

In this regard, if there be other co-existing circumstances which would weaken the inference of guilt, the case cannot be said to have been proved beyond reasonable doubt. (see **Parvin Singh Dhalay .v. Republic [1997] eKLR**.)

12. In the present case, PW5 the uncle of the deceased told the court that the deceased lived in the streets of Chuka. PW1 told the court that it was normal for the street children to be found sleeping on the dumpsite. That the accused looked like a normal street boy. That many a times when PW1 and her colleagues go to empty gabbage at the dumpsite, they find many people there. PW4 the Medical Officer who conducted the postmortem could not tell the time of death. The accused was only found sleeping in a bananas plantation near the body. Is this evidence compelling enough to call upon the accused to give his defence? If the accused kept quiet, can this evidence be sufficient to convict him?

13. From the prosecution evidence, there was nothing wrong for the accused as a street boy to be found sleeping near the dump site. PW1 and PW2 stated that it was not normal for a person who have killed someone to wait and be found sleeping at the scene. Indeed PW1, PW2 and PW3 did not see the accused until after the police came and were in the process of removing the body from the scene that is when they discovered the accused sleeping in the banana plantation. There was no suggestion that he was hiding thereat. Further, the alleged murder weapon, which curiously the prosecution failed to produce or give an explanation for its non-production, was not found in the possession of the accused. The same was lying some distance from where he was sleeping. In this court's view, there was an opportunity for the offence to have been committed by someone else other than the accused.

14. The evidence adduced does not unerringly point towards the guilt of the accused but to his innocence. The accused was subjected to two (2) mental examinations to ascertain his mental health. First before he was charged and then immediately before the trial commenced. In both occasions, the results were that he was not mentally challenged. The question is whether someone in his right senses can kill and be expected to linger around or sleep near the body of the victim as in this case. That conduct cannot be consistent with that of a person guilty of an offence. In this regard, this court does not find it necessary to call upon the accused to explain why he was found sleeping at a banana plantation near where the body of the deceased was recovered.

15. Accordingly, I find that the prosecution has failed to establish a prima facie case. I hereby dismiss the case, find the accused not guilty under section 306 of the Criminal Procedure Code and acquit him of the offence of murder.

DATED and delivered at Chuka this 3rd November, 2016.

A.MABEYA

JUDGE

Ruling read and delivered in open court in presence of all the parties.

A.MABEYA

JUDGE

3/11/2016