



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 27/2011

REPUBLIC PROSECUTOR

VERSUS

JOSEPH RUNANA NDUNGU alias MURUKO..... ACCUSED

JUDGMENT

The accused herein **JOSEPH RUNANA NDUNGU alias MURUKO** was charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the offence were given as follows:

“On the 8th day of March 2011 at Ole Sankole trading centre in Narok North District within the Rift Valley Province, jointly with others not before court, murdered GIDEON WAMARIA NJENGA”

The accused entered a plea of ‘Not Guilty to the Charge’. This case unfortunately has been alive in the courts for an extended period of time. There are several factors which have contributed to this delay. Firstly the transfer of the first trial Judge **Hon Justice Willian Ouko**, (as he then was) and secondly the assignment of the succeeding Judge **Hon Justice Hellen Omondi** to hear election petitions in Bungoma. Hon Omondi was eventually transferred to the Bungoma High Court and thus I took over as the third Judge to handle this file. For the above reasons the case was heard in totality before Judges other than myself. **Hon Justice W. Ouko** heard the first five (5) prosecution witnesses. Thereafter Hon Justice Omondi heard all the evidence from the remaining five (5) prosecution witnesses and also heard the defence of the accused. My role therefore is to peruse the evidence on record and make a determination as to whether the charge of murder has been proved beyond a reasonable doubt.

The facts of the case remain somewhat sketchy as there was no eyewitness to the events of 8th March 2011 who testified in court. The only real witness **PW5 JAMES NDIRANGU**, **PW5** told the court that on 8/3/2011 himself the deceased ‘Ndungu’ (the accused) and one Maina were in Sankale at their place of work loading potatoes into bags. **PW5** states that he borrowed a knife from one Maina to carry out this work. At 9.00 pm they finished and each left to their respective homes. Later that night this Maina came and requested **PW5** to return the knife he had borrowed. **PW5** returned the knife and Maina left. The next day neither accused nor deceased reported for duty. On 10/3/2011 **PW5** was arrested by village elders on the allegation that the knife he had borrowed from accused was used to murder the deceased **PW3 PETER WAMARI MUNGA** a cousin to the deceased told the court that he had been informed that the accused, deceased, Maina and another man had fought. **PW3** began to search for the deceased.

On 9/3/2011 at about 10.00pm he found the accused at a place called Ngomali. On 10/3/2013 the body of the deceased was found at a pub called Kwa Anne. The body was taken to the mortuary where an autopsy was performed. Upon completion of police investigations the accused was charged.

On 12/6/2014 the accused was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied having fought and/or killed the deceased. This court is now required to determine whether the charge of murder has been proved to the standard required in law.

The offence of murder is defined by Section 203 of the Penal Code as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”

From this definition is derived the four (4) ingredients of the offence of murder all of which must be proved beyond reasonable doubt.

- i. The fact of the death of the deceased
- ii. The cause of said death
- iii. Proof of an unlawful act or omission on the part of the accused leading to the death of the deceased.
- iv. Proof that said unlawful act or omission was committed with malice aforethought.

Regarding the fact of the death of the deceased there can be no controversy. PW6 a brother to the deceased told the court that he was present when the body of the deceased bearing multiple stab wounds was found lying face upwards and with a knife and sheath next to the body. PW2 CORNELIUS KIMANI also a brother to the deceased told the court that he identified the body at the mortuary in Narok. Both witnesses who knew the deceased well as their brother identify the dead man as ‘Gideon Njenga’

Equally persuasive evidence on the cause of death was tendered by PW1 DR. TITUS NGULUNGU a consultant pathologist attached to Nakuru Provincial General Hospital. PW1 told the court that he conducted the autopsy on the body on 12/3/2011. The doctor confirmed that the body had stab and bruises. His medical opinion was that the cause of death was **“severe chest injuries with haemorrhage due to a single stab wound to the back of chest”**. The duly filled and signed post-mortem report was produced in court as an exhibit, P. Exhibit 1. This was expert medical evidence which was neither challenged nor controverted by the defence. I find that the deceased met his death as a result of having been stabbed in the back.

The real crucial question requiring an answer is whether the evidence on record proves that it was accused who so unlawfully stabbed and killed the deceased. As stated earlier there were no eyewitnesses to the events leading to the death of the deceased. All the court is told is that the accused deceased, PW5 and one Maina were working together packing potatoes into sacks on 8/3/2011. After work at 9.00 pm each went their own way. Nobody saw where the accused or deceased went. There is no evidence that the two left together. There is no evidence that at any point between 8/3/2011 up to 10/3/2011 when the body of the deceased was discovered the two were together.

There is an allegation made of a fight involving accused, deceased and two other men. Here again there exists no eyewitness evidence. PW6 a brother to the deceased told the court that on 10/3/2011 a new bride of the deceased told him that she had heard that the deceased had been stabbed during a fight with Maina. This lady (bride) was never called to testify to confirm what she had heard and from whom. The man ‘Maina’ who is alleged to have fought the deceased and who was mentioned by several other witnesses was not called to testify in this case. No reason is tendered for this omission.

From the evidence on record there are only two elements upon which the prosecution relied to link accused to the murder of the deceased. There are the knife found next to the body of the deceased and

blood-stains found on the accused's coat at the time of his arrest. The prosecution seeks to rely on this as circumstantial evidence to prove the guilt of the accused. In order for circumstantial evidence to suffice as proof of guilt it was held in the case of **REPUBLIC –VS- KIPKELION ARAP KOSKE [1949] GACA 135**

“the inculpatory facts must not only be incompatible with the innocence of the accused and be incapable of explanation upon any other reasonable hypothesis than that of his guilt, but also that the said facts must exclude co-existing circumstances as which may tend to weaken or destroy the inference of guilt”

With the above definition in mind I will proceed to analyze the circumstantial evidence relied upon by the prosecution.

It is alleged that the knife used to stab and kill the deceased belonged to the accused. I am at a loss as to where any connection between the knife produced in court and the accused arises.

PW5 told the court that he borrowed the knife from ‘Maina’ and **not** from the accused. **PW5** further states that the said ‘Maina’ later came to his house and took back his knife. At no time did **PW5** hand over any knife to accused. The knife in question clearly links this ‘Maina’ to the offence but not the accused. **PW5** goes on to state that he saw the knife he had borrowed from Maina placed next to the body of the deceased. But in the very next sentence **PW5** states

“The knife in court is not the one I saw and recognized was like a dagger and was in a sheath which was blue in colour”. (my emphasis)

Thus **PW5** clearly disowns the knife exhibited in court as he is categorical that it is **not** the same knife which he returned to Maina. Similarly **PW6** a brother to the deceased testified that a knife was found next to the body of the deceased. **PW6** like **PW5** disowns the knife produced in court when he states:-

“I would describe the knife on a heavy dagger with stripes on the handle. It is not this knife **MEI 1 which is before court. This is a kitchen knife”** (my emphasis)

If the knife produced in court was not the one found beside the body of the deceased, then what happened to that knife? Has there been manipulation of exhibits? Why did police bring to court a different knife than that which was recovered at the scene? In an attempt to explain this anomaly **PW8** the investigating officer states that he took the knife and other exhibits to the government chemist for analysis but that the knife “appears to have got lost there”. This laxity on the part of police does not help. If the knife got lost at the government chemist why did they not say so upfront instead of trying to substitute the genuine exhibit with a different knife?

In any event as I stated earlier there is no evidence to connect either the knife recovered at the scene or the knife produced in court to the accused.

The second element of circumstantial evidence relied upon by the prosecution to connect the accused to the murder of the deceased is the presence of blood stains on the coat which the accused was wearing at the time of his arrest. **PW8 PC NDAMBUKA** who arrested the accused told the court that at the time of arrest he noticed blood stains on the jacket of accused. The jacket was forwarded to the government chemist for analysis. **PW7 LAWRENCE KINYUA MUTHURI** was the government chemist. He told the court that he did examine and compare the blood stains on the accused's jacket and found that it corresponded with the DNA profile generated from a sample of the deceased's blood.

In other words the blood stains on the accused's jacket came from the deceased. This finding would

certainly raise a suspicion that the accused may have had a hand in the death of the deceased but it is not enough to prove the accused's involvement in the murder. It is trite law that suspicion alone is not sufficient grounds upon which to base a conviction. In his defence the accused gave a plausible explain

nation of how the deceased's blood came to be on his coat. The accused in his sworn defence stated that on the material date he was in a bar drinking with others.

A fight erupted between the deceased and one Mwaura. The deceased was stabbed and was bleeding. The accused and other patrons moved in and physically separated the two. In the process his coat got stained with the blood of the deceased. As I have stated earlier this explanation is in my view plausible.

It confirms the evidence of the prosecution witnesses that some fight and/or altercation occurred in a bar between the deceased and another. There is no evidence to controvert the accused's narration. His defence raises a doubt regarding the prosecution case. The benefit of that doubt must be accorded to the accused. All in all I find that the circumstantial evidence advanced by the prosecution does not meet the legal threshold. The prosecution case is based on rumours and immuendo. No tangible proof has been placed before the court. There is no evidence to prove beyond a reasonable doubt that it was accused who fatally stabbed the deceased. The *actus reus* for the offence of murder has not been proved. As such I enter a verdict of 'Not Guilty' and I hereby acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 17th day of July 2015.

M. A. ODERO

JUDGE

Mr. Kamau for Accused

Ms Ngovi for State

Order – Surety documents to be released to the depositor.

M. A. ODERO

JUDGE

17/7/2015