



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 58 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MUTAI KIBET.....ACCUSED

JUDGMENT

The accused **DAVID MUTAI KIBET** has been charged with the offence of **murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that:-

“On the 28th day of July 2011 at Kipturgut Trading Centre Mulot in Narok District within Laikipia Narok County murdered PETER MARITIM TUEI.

The accused who was represented by Mr. Mongeri Advocate entered a pleas of ‘**Not Guilty**’ to the charge. The prosecution led by the learned state counsel called a total of five (5) witnesses in support of their case.

PW1, Gilbert Kiplagat Maritim, a brother to the deceased told the court that on 28/7/2011 he accompanied the deceased who was taking the accused ‘**David Mutai**’ to his home on his (the deceased) boda boda bicycle. The two left Kaprototuo riding upon the deceased’s motor bike. Upon arrival at Kipturgut the accused alighted. The deceased asked the accused to pay the Kshs.50/- fare. The accused declined to pay. Instead he caught hold of the accused and began to beat him. One **Reuben Signai** found the accused beating the deceased. Members of the public intervened and separated them. The deceased and **PW1** then rode away.

Before reaching the hospital the deceased spotted a man wearing his hat. The deceased stopped and asked the man **Kenneth Chemist, PW3** to return the hat to him. **PW5** obliged and returned the hat to the deceased. Just then **Reuben Sigilai** and the accused emerged. **Reuben** caught hold of the deceased’s hands whilst the accused stabbed the deceased with a knife on the thigh just below the buttock. The deceased fell down bleeding profusely. Others present at the scene including **PW2, Peter Kibenei** and **PW5, Kenneth Cheluget** helped carry the deceased to a nearby vehicle. Accused was rushed to the hospital at Longisa but unfortunately died on the way there. The matter was reported to the police who conducted investigations. The accused was arrested and charged with the present case.

At the close of the prosecution case the accused was ruled by **Hon. Lady Justice H. Omondi**, to have a case to answer following the transfer of the trial judge to Bungoma Law Courts. I took over the case and heard the accused’s defence. The accused gave an unsworn defence in which he denied any and all involvement in the murder of the deceased. This court now has the duty of examining the evidence adduced by the prosecution witnesses in order to determine whether the charge of murder has been proved beyond reasonable doubt. The offence of murder is defined in 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.”

This definition therefore establishes four (4) critical ingredients of the offence of murder all of which must be proved beyond reasonable doubt in order to prove the charge.

1. **Proof of the fact of death of the deceased;**
2. **Proof of the cause of that death;**
3. **Proof that an unlawful act or omission on the part of the accused led to the death of the deceased;**
4. **Proof that the said unlawful act or omission was committed with malice aforethought.**

On the question of the fact of death there can be no controversy. **PW1** the brother to the deceased, as well as **PW2** and **PW5** all state that they saw the deceased bleeding profusely from a wound below his buttock. All these witnesses testify that the deceased died whilst being rushed to hospital. They all knew the deceased very well and identify him as **“Peter Maritim Tuei”**. In addition there is testimony from **PW4, Towet Johnstone**, who told the court that he identified the body of the deceased who was his nephew and was well known to him to the doctor at Longisa Mortuary. There can therefore be no doubt that one **“Peter Maritim Tuei”** is in fact deceased.

Having established the fact of death the prosecution is required to go further and tender evidence to prove the cause of death. Evidence must be led to show that the deceased met his death due to a homicidal act. Obviously where a person dies of illness or old age a charge of murder could not stand. In this case it was alleged that the deceased met his untimely end as the result of a stab wound to his thigh. However proof that the deceased was stabbed is not conclusive proof of the cause of death. There are several cases where a person is stabbed but does not necessarily die. Evidence must be adduced to show the effect of the stab wound and in what manner such injury contributed to the death of the deceased. The most conclusive proof of cause of death would be evidence of an autopsy conducted by a qualified doctor/pathologist. In this case although **PW4** confirmed that an autopsy was conducted on the body of the deceased no doctor was called to testify and no post mortem report was produced as an exhibit. The prosecution have therefore failed to discharge their burden of proving the **cause of death** of the deceased. In the case of **Ndungu vs Republic (1985)KLR 487** the Court of Appeal in upholding the view that medical evidence is essential to prove the cause of death stated that:-

“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence supporting the cause of death alleged by the prosecution.”

In this case the cause of death is alleged to have been the stab wound inflicted upon the deceased. However, no medical expert opinion evidence was called as proof that this was so and to describe the effect of such injury upon the deceased's life. The court is being invited to speculate on this issue. No convincing and/or valid reason was given for the failure to call such expert evidence. The doctor was in my view a crucial witness whose evidence was omitted. The true position is that failure to call the doctor was a result of laxity/carelessness by the prosecution. The result is that one crucial ingredient of the offence of murder being the cause of death remains unproven. For this reason alone the charge fails. The prosecution have failed to discharge their burden of proof. As such I do 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 in Nakuru this 11th day of November 2015.

MAUREEN A. ODERO

JUDGE

PRESENT:

Accused in person

Ms Ngovo for DPP