



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

CRIMINAL CASE NO. 41 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

JORAM WAFULA LUTOMIA.....1ST ACCUSED

LOTUMIA SAMUEL MULUPI.....2ND ACCUSED

RULING

1. The accused are charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on 20th July 2010 at Chekalini village in Lugari District within Western Province, the accused murdered Boniface Khaimba. The accused pleaded not guilty.

2. The prosecution called eight witnesses. Seven of the witnesses were heard by my predecessors. On 7th July 2014, and after compliance with section 200 of the Criminal Procedure Code, I heard the last witness. PW1, Daniel Ngole Musyoki, testified that on 20th July 2010, at about 6.00 in the morning, he left Chekalini on his way to Kipkaren. He was on a motorbike. At about 9.00 a.m. he disembarked at a junction known as *Bishop Njenga*. PW2, the motorbike rider, confirmed dropping off PW1 at the junction.

3. PW1 then started walking towards the shopping centre. As he passed a mud house, he heard some noises and decided to investigate. He peeped through some gap in the door and saw three persons. He testified that one was the deceased; the other two were the accused. He knew the deceased but did not know the accused persons. The deceased was being held on the neck by the two accused. He testified that the accused were demanding Kshs 1,500 from the deceased. Someone then emerged from the back of the house wielding a *panga*. PW1 fled from the scene.

4. PW1 later heard on *Mulembe* radio of the death of the deceased. He contacted PW5, a cousin of the deceased. PW1 told PW5 that he witnessed the attack on the deceased. PW1 went to Lumakanda Police Station six days later and recorded a statement. He wrote three other statements between that day and 6th April 2011. He attended two identification parades conducted by PW7 on 16th April 2011 where he picked out the accused persons.

5. On 20th July 2010, PW3 was running an errand to the house of the deceased. She found the deceased dead at the verandah. She sought help from Mary Barasa. They called the village elder and the police. The police took away the body. PW4 and PW5 were cousins to the deceased. They heard of the death at about

10.30 am on the material day. PW5 identified the body for purposes of a postmortem examination conducted by PW6, Dr. Alex Munyendo. The examination was done on 21st July 2010. The opinion of the pathologist was that the deceased died from a spinal shock caused by torn vertebral ligaments at the neck through a twisting force. The last witness PW8, police constable Edward Rotich, said he took over the investigations from his colleague, Kelly Mwenwa, now deceased. He recorded some of the witness statements. He recommended that a formal inquest be held.

6. From that evidence, it is clear that the charges were founded on the evidence of a single identifying witness, PW1. In Kiarie v Republic [1984] KLR 739, the Court of Appeal had this to say-

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”

7. There is a plethora of decisions on the subject. See for example Joseph Ngumbao Nzaro v. Republic [1991] 2 KAR 212, Richard Gathecha Kinyuru & another v Republic Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR. In Obwana & Others v Uganda [2009] 2 EA 333, the Court of Appeal of Uganda stated as follows at page 337;

“It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. The rationale for this is that a witness may be honest and prepared to tell the truth, but he might as well be mistaken. This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence”

8. In Maitanyi -v- Republic [1986] KLR 198 at 201, the Court of Appeal delivered itself as follows-

“It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the “greatest care” the evidence of a single witness?”

9. When I juxtapose those authorities against the evidence, I find further as follows. PW1 did not know the accused persons before the incident. It was in the morning. The attack took place inside a mud house. The witness was attracted by the noises emanating from the house and decided to investigate. He peeped through some gap in the door and saw three persons. One was the deceased who was being held on the neck by two persons. There was no clear evidence on the size of the gap or the lighting inside the house.

10. PW1 never gave any description of the accused persons to the police in any of the four statements he made. The identification parades were conducted about *ten* months after the incident. The statements by PW1 were contradictory. He admitted making the statements dated 1st August 2010, 2nd December 2010 and 6th April 2011 but denied making the statement dated 1st October 2010.

11. Although the witness identified the accused on the dock, it was *worthless* in view of the circumstances of identification. In Ajode -v- Republic [2004] 2 KLR 81, the Court had a very dim view of dock identifications-

“It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade (see case of Gabriel Kamau Njoroge v Republic [1982 – 88] 1 KAR 1134).”

12. From the cross-examination of PW1, the inconsistencies in his statements to the police, the length of time between the first statement on 1st August 2010 and the last one on 16th April 2011, I am afraid he did not come across as a reliable witness. PW7, the investigating officer was not confident about the charges. He had proposed that a formal inquest be held. There is an illuminating passage in Ndungu Kimanyi v Republic [1979] KLR 282-

“We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

13. In the totality of the evidence in this case, there is serious doubt about the identification of the accused persons and the veracity of the evidence of PW1. I would then not say that the elements of a charge of murder have been laid, or at any rate that the accused persons unlawfully killed the deceased with malice aforethought.

14. Granted those circumstances, I am unable to say that a *prima facie* case has been established. The law on that subject was well settled in Bhatt v Republic [1957] E.A. 332 at 334-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one

“which on full consideration might possibly be thought sufficient to sustain a conviction.”

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is

“some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as WILSON, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case,” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

15. On the totality of the evidence, and from my analysis of the legal authorities, I am not persuaded that the State has established a *prima facie* case against the accused sufficient to place them on their defence. Accordingly, under the provisions of section 306 (1) of the Criminal Procedure Code, I enter a finding of *not guilty*. The accused persons are hereby acquitted.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 16th day of September 2014.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

The accused persons.

Mr. Okara holding brief for Mr. Marube for the accused.

Mr. J. W. Mulati for the State.

Mr. Kemboi, Court clerk.