



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NUMBER 59 OF 2015

REPUBLIC.....ODPP

VERSUS

JAPHETH IRUNGU MATHENGE.....ACCUSED

RULING

1. The accused person Japheth Irungu Mathenge was charged with the offence of **Murder Contrary to Section 203 as read with Section 204 of the Penal Code.**

2. The two (2) provisions provide;

“S. 203. Murder

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

204. Punishment of murder

Any person convicted of murder shall be sentenced to death.”

3. It is alleged that on 23rd August 2015 at 2145 hours at Mutaro Village, Samburu Central Sub County within Samburu County he murdered Hussein Mohammed Hassan.

4. The case for the prosecution was that the deceased, and the accused person fought over PW1 one Janet Joash, on the fateful night, and that the accused struck the deceased with a piece of timber and ran away, leaving the deceased at the scene where his body was found together with a blood stained piece of wood, and a blood stained jacket, which items the investigating officer conceded to not have subjected to any forensic examination.

5. The prosecution on 24th February 2020 led the evidence of PW1 Janet Joash who in 2015, was fourteen (14) years and in class six (6). She told the court that in April 2015, she asked the mother to allow her to go and assist Maina Hussein, the mother to the deceased. She indeed went there, stayed with her until schools re-opened and she went back to school. However, while she was at Mama Hussein's, a sister to Hussein, one Asha, came and told her, PW1 that she wanted her to have a relationship with her brother. When she told her mother about this, her mother removed her from Hussein family's home.

6. PW1 testified that on 6th July 2015, Hussein went to disturb at her home, demanding to marry her. He was told to never return to that home as he had formed a habit of going there while drunk and making those demands, and her parents would chase him away. He stopped going to her home. When he died on 25th August 2015, his sister Asha and her brother Hassan went to her (PW1's home) and took her to Maralal Police Station, accusing her of knowing how Hussein had died.

7. PW1 denied knowing the accused beyond seeing him in the neighbourhood. When cross examined by the defence counsel Mr. Murunga, the PW1 told the court that she knew the deceased to be so notorious he would beat his mother, and even stole her chickens. She described him as a mchokozi who had many enemies. She confirmed that in 2015, she was fourteen (14) years old.

8. **PW2 Peter Miano Kagwima** testified that both the accused and the deceased were among his employees, and that both took alcohol. That on the material night about 7.00 p.m. he learnt from two (2) of his employees that there was a person lying on the ground near his workshop and there was a crowd. The people were saying that the person lying down had been hit by one of the persons who worked in his workshop.

9. He went to the scene and saw the person lying there was Hussein. His mother was there, and she was saying that PW2's "short" employee is the one who had killed her son. The police came and they went to his workshop where he paraded his employees. Two of them, the accused and another by name Kevin were not present.

10. He rang one Sammy and the accused responded. He told the court he told them to come to the workshop. He came thirty (30) minutes, drunk. He said that the accused told him he had fought with Hussein over a girl, and that the accused had hit Hussein. He called the police who came and collected him. He then went to accused's room where he found a girl he had seen twice, and ordered her to leave. On cross examination he said he rang Sammy around 8.00 to 8.30 p.m. and when accused responded he told him to come to the workshop. He did so in the company of another drunk person unknown to PW1. He said the accused was arrested around 9.00 p.m. He testified that the deceased was a jailbird. He said the accused was not a violent person, but a person who liked his alcohol, a drunk.

11. **PW3 Dr. John Karima Kuria**, a Senior Medical Officer holder of MBChd from the University of Nairobi conducted the post mortem. The deceased had a cut wound on the left side of the head about 2 x 8 cm, cut wound on right eye brow about 2 x 4 cm. Obvious deformity of the left side of the head, evidence of a depressed fracture of the left part of the head, shattered pieces of skull bone, with massive hematoma. Cause of death: Cardio pulmonary arrest secondary to severe head injury caused by blunt force.

12. **PW4 Margaret Areng** a niece to Hussein's mother, a cousin to Hussein testified how on 23rd August 2015 she was in the homestead of Mama Hussein, she told the court that about 4.00 p.m. the accused person came and found Mama Hussein and told her to tell Hussein not to pass on the road near where the accused had his business because he would kill him. He said that and he left. About 6.00 p.m. she left Mama Hussein's homestead. About 8.00 p.m. she was told that Hussein had been killed. In cross examination she said that when Mathenge (accused) went to the shop he found Maina Hussein, not her, but she saw him. She said she also saw the piece of timber and blue jacket at the scene but did not examine the same.

13. PW5 Number 85902 was Cpl Charles Omae the investigating officer. His testimony was that on 23rd August 2015, the mother to the deceased made a report at 2.00 p.m. at Maralal Central Police Station, that her son, had gone to enjoy himself with his friends within Maralal Town, and had taken beer. About 2145 hours while going back home he encountered the accused, a fight ensued, and he was hit with a piece of wood on the head. That the accused ran away after that.

14. That police went to the scene and found Hussein lying unconscious. He was taken to Maralal Hospital but died upon arrival. Police recovered the jacket, said to be that of the deceased, and the piece of timber, both of which the witness produced as evidence.

15. He testified that at the scene he conducted some interrogations. He even recorded statements, conducted investigations and charged the accused. On cross examination he confirmed that the report was made at 8.00 p.m. on 23rd August 2015, and he went to the scene at 2145 hours. He confirmed that he did not have the blood stained jacket subjected to forensic examination, and assumed that, it belonged to the deceased, and the blood on it belonged to the deceased. He also confirmed that the piece of timber which was said to be blood stained was not subjected to forensic examination and he assumed that the stains he saw on it were blood belonging to the deceased.

16. He also confirmed that none of the witnesses whose statement he recorded said that he/she was an eye witness. He said that even though there was a fight between the accused and the deceased the accused did not have any injuries when he was arrested.

17. The prosecution closed its case.

18. The issue for determination is whether the prosecution has established a prima facie case to warrant the accused to be put on his defence, as provided for by **Section 306 of the Criminal Procedure Code** which provides for what should happen at the close of the case for the prosecution.

“ s. 306. Close of case for prosecution

(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.

19. The defence filed Submissions to the effect that the prosecution had failed to establish a prima facie case and urged the court to make a finding of not guilty and to acquit the accused accordingly.

20. The meaning of a prima facie case is set out in **Bhatt vs Republic [1957] EA 332 – 335**

"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not 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.

(ii) The question whether there is a case to answer cannot depend 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."

21. The prosecution has established that Hussein died. They have also established that he did not die of natural causes, but that he was hit with a piece of timber.

22. Have they established that the accused person was in away way connected with the death of the deceased"

23. The first theory is that the deceased wanted to marry the fourteen (14) year old PW1. It is the prosecution's contention that PW1 had a relationship with the accused, and that the two (2) fought over her. There are problems with this theory. PW2 told the court that on the material night there was girl in the house of the accused. It was alleged the fight was over this girl. PW1 denied any relationship with either the deceased or the accused. There is no connection established between the girl who was allegedly found in the house of the accused, and PW1 or the deceased. That by itself brings down the theory that the accused was rivals with the deceased over PW1.

24. I find it unfortunate that the police would receive a report of alleged relationship between a minor and two (2) adult men and fail to investigate the same, that the prosecution received the file, and found it ok to simply avail the PW1 as a witness without directing the police to investigate the alleged relationships between the accused, the deceased and the child. The child reported in her statement that certain adults wanted her to abandon school and have a relationship with the deceased, that part of her complaint was not even looked into but when deceased died, they were very quick to arrest her, take her to the police station, accusing her of knowing what had caused his death. This girl was fourteen (14) years then. The investigating officer said absolutely nothing about that, and it was left to lie so. Evidently the police had a suspect in the fourteen (14) year old.

25. The second thing is that the deceased riled the parents of PW1 the wrong way. There is no evidence that they were interrogated. The prosecution also presented sworn evidence that deceased was a person to create enemies.

26. The third thing is that the accused and the deceased fought about 7.00 p.m. on the material date not far from the PW2's place of work. There was no eye witness. No one saw the accused and the deceased together on the material night, not one person said they had been seen drinking together, or talking to each other, or even quarreling over the alleged girl that day or any other day before that.

27. PW4's testimony is that the accused uttered certain words to the mother to deceased, but she also said that when the accused did so, she was not there, she only saw him.

28. The police who investigated the case had another opportunity to place the accused at the scene, but they blew it. The exhibits recovered there were never examined for any DNA, no samples were taken from the accused, the deceased or the scene. The last theory is that the accused told his employer that he fought with deceased. He hit him. That he admitted fighting with the deceased. The witness who testified to this did not say when the fight took place or where it took place, and this piece of evidence was not interrogated by the investigating officer.

29. In any event the same employer told the court that the accused came to the workshop drunk, that accused was a drunk, and that he was accompanied by another drunk person.

30. Hence, from the foregoing analysis it is clear to me that accused was a suspect for various reasons, but suspicion alone, is not enough.

31. The prosecution had the duty to place the accused at the scene, and to place the piece of wood in his hands, but having no eye witness the circumstantial evidence has not placed the accused at the scene to warrant his being put on the defence.

32. I proceed under **Section 306 (1) of the Criminal Procedure Code** to dismiss the charge and acquit the accused person accordingly.

33. He is to be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY 31ST DAY OF JANUARY, 2022.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant: Edna

For state: Ms. Murunga

Mr. Murunga for Accused N/A

Accused present: I will proceed without counsel



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