REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL CASE 14 OF 2001

REPUBLIC :: PROSECUTOR.

VERSUS

DOUGLAS WAFULA WEPHUKHULU

FRED WANAMI WANYONYI

PHILIPH KIPSEREM ARAP KOECH

TOM KARAKACHA NYABARO ::::::::::::::::::::::: ACCUSED.

DISMAS NYONGESA NAMUNGU

CLEOPHAS WAFULA LUKHALE

STEPHEN WAFULA LUKHALE

R U L I N G.

All 6 accused persons are charged with murder under section 203 as read to section 204 of the penal code. Particulars are that on 10/9/00 at Muungano Farm in Trans Nzoia District within the Rift Valley province, jointly murdered Luka Muliko. Their case proceeded for hearing before justice (Rtd) Omondi Tunya. He took the evidence of 6 prosecution witnesses. He retired and the matter had to start denovo before me on 2/6/2004. At the close of the prosecution case, a total of 14 witnesses testified. Counsels for the accused persons made submissions urging the court to acquit their clients under section 306 of the C.P.C.

Mr. Mutuku for the state however insisted that the evidence on record is sufficient to warrant the accused persons to be placed onto their defence. He therefore asked the court to place them onto their defence under section 306 (2) of the CPC. The evidence adduced by these witnesses is quite voluminous. It is nonetheless agreed by both the prosecution and the defence that it is only the evidence of PW2 MARGARET MULIKA, which has any relevance as far as the identification of some of the suspects is concerned.

It is not disputed that the robbery was committed against the deceased on the right in question it is not denied either that the accused persons herein were all arrested following information given to the area chief by one of the suspects – FRED WANAMI WANYONYI. He was initially A.2 in this matter. He is

said to have escaped from court under mysterious circumstances which are yet to be unravelled. Other than AI, 2 & 3 who were mentioned by PW2, none of the other accused persons were placed at the scene of the robbery by the prosecution witnesses. Accused No. 6 Stephen Wafula is said to have visited the deceased's homestead earlier that day. He had talked with the deceased and the 2 parted peacefully.

None of the witnesses saw him at the scene as at the time the robbery was committed. There is therefore no evidence whatsoever to show that he went back to the deceased's home and further that he was involved in the said robbery. He may like the others have been mentioned by the accused person who absconded. The court will note at this stage that even the state counsel appears to have conceded that there was no evidence against accused 4 – accused 6. That is why his submissions only revolved around Accused No. 1,2 & 3.

The position in law is that since the person who mentioned accused 4, 5 and 6 was not called to testify, whatever information or evidence he may have had against these witnesses did and not form part of these proceedings. The same therefore remains hearsay evidence and it is not admissible. The fact that Fred Wanami did not testify makes all the information he had given the chief and the police of no evidential value whatsoever.

As matters stand now, there is not even an iota or scintilla of evidence against Accused 4, 5 and 6 to require them to be placed onto their defence. They cannot therefore be placed onto their defence. On Accused 1, accused 2 and accused 3, they were mentioned by PW2. According to this witness, when she heard the screams coming from her brother's homestead, she rushed there. She was informed by the deceased's children that the thugs had killed their father.

She therefore also started screaming. She said that it was at that point that a voice told her to "get lost" and she started running away. She said that one of them followed her and she therefore started running back to her father's homestead. She told the court that in that short spell of time, she was able to identify 3 voices. She said that the voices belong to accused 1, accused 2 and accused 3 – all who were her neighbours. She said that as she ran, she heard the sound of gunfire. She therefore hid in the maize plantation. She said that after sometime, she went back to the scene. She said that she saw accused 1 Douglas carrying a rungu and he had hung a black raincoat over his arm.

She said that when she went back to the scene, accused 1 who was their immediate neighbour came to assist them. He had changed his clothes. He was one of those who took the deceased to hospital. She said that she was later called to attend an identification parade at the police station. She picked out accused 1 with no difficulty. Before I go any further, I wish to state that this identification parade was superfluous. An identification parade is conducted when a witness says that she saw a suspect who she did not know before and he/she can recognize the said suspect if he/she saw him again. Identification parades are not meant to be conducted in cases where a witness says she knows the suspect. In this case, PW2 said she had known accused 1 for 3 years – why therefore was she being required to pick him out at an identification parade"

This was purely unnecessary. The identification parade conducted in respect of accused 1 was totally uncalled for. It does not add any evidential value to PW2's evidence. While on this, I wish to also mention that, it was admitted that accused 3 was one of those people who were used in the parade line up. PW2 did not pick him out as one of the suspects. She did not even request PW14 to ask accused 3 to speak so that she could confirm that it was indeed his voice which she had heard that night. As rightly submitted by Mr. Bungei for accused 3, if PW2 had heard accused 3 speak that night, and if she was sure he was one of the suspects, there is no reason as to why she did not pick him out at that parade.

I will note further that as rightly stated by Mr. Kidiavai for accused 1 and accused 2, PW2 did not tell the court which words were said by which accused person. How then is the court to determine whether indeed the witness heard the accused person's voices as she claimed" She only said specifically that she was told to "get lost". She did not attribute this statement to either A1, 2 or 3. When it comes to evidence of identification by wife, the court has to treat the same very cautiously.

The test of admitting evidence of voice identification was laid out in the case of Choge vs Republic 1985 KCR 4. where the court of Appeal held "Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused's person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it ……."

In our case, PW2 has not even said what was said and which of the suspects or accused persons said it. It is also noted that – in her own evidence, she just approached the homestead and when she started screaming. She was told to get lost and she started running back. At what point did she hear and recognize these voices" If she had heard them so clearly, why did she not say what each accused person had said" In my considered view, this is not a case where the identification by voice can be said to be fool proof.

There is no other evidence against accused 2 and accused 3. As far as accused 1 is concerned, PW2 said that she saw him holding a rungu and a black trench coat. When her statement to the police was read out to her, it stated that it was the person who was with accused 1 who had a black coat and a rungu. This put the veracity of PW2's evidence to great test. It is also noted, as rightly submitted by Mr. Kidiavai for accused 1 that PW2 did not take the earliest opportunity to make this report to the police. She made the allegations after accused 1, 2 and 3 had already in police cells.

It is also noted that she did not give this information to PW1 or other members of public who arrived at the scene immediately after the robbery or even thereafter – yet accused 1 and accused 2 were in that homestead mourning with the other members of public and condoling the family. If she was so sure about accused 1, 2 and 3's involvement, why did she not inform PW1 – or even the police officers who went to record the statements at the scene the very following day" What sister would allow her injured brother to be taken to hospital by one of his murderers"

PW2's evidence does not pass the test as far as creditworthiness, truthfulness and reliability is concerned. The same can at best be described as worthless and discredited. The court also notes that it is the evidence of one witness. In deciding on whether to rely on the evidence of this witness, I am guided by the case of Abdella bin Wendo & Another vs Republic 20 EACA 168 and all other subsequent cases which have cited the same with approval. It was held in the said case.

"Subject to certain well – known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct, pointing to the guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error."

In our present case, as analysed above, the evidence of PW2 is questionable and cannot be said to

be free from error. There is absolutely no other evidence whether direct or circumstantial to corroborate her evidence. I am well aware that at this case, the prosecution only needs to establish a prima facie case and not prove their case beyond reasonable doubt. The test however is whether any reasonable Judge or tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence. If the accused persons opted to call no evidence in this matter, I would still not have any basis on which to convict them.

Overall therefore, my finding is that the evidence on record cannot support a conviction against any of the accused persons in court. It is not sufficient to cause accused to be placed onto their defence. The prosecution has not discharged its onus of proof. If I were to put the accused persons onto their defence, I would effectively be shifting the burden of proof from the shoulders of the prosecution – where it rightly belongs –to those of the accused persons. The law does not allow me to do so. Accordingly, my finding is that there is no evidence on record to show that any of the accused persons committed the offence they are charged with. In the circumstances, I enter a finding of not guilty for all of them and acquit them accordingly under section 306(1) of the CPC.

They are set to liberty unless otherwise lawfully held.

WANJIRU KARANJA.

AG. JUDGE.

21/4/2005.

Delivered, signed and dated in open court at Kitale in presence of all accused, Mr. Bungei for accused 3 and 4 also holding brief for Mr. Kidiavai for accused 1 & 2 and Mr. Barongo for accused 5 & 6.

22/4/2005.

Coram – W. Karanja – J.

Mr. Mutuku for the state present.

CC – Ngitira.

Mr. Mutuku:- I apply that the Exhibits No. 1 – 9 and No. 16 be released to the DCIO, Kitale.

WANJIRU KARANJA.

AG. JUDGE.

Court:- the said exhibits be released to DCIO Kitale.

WANJIRU KARANJA.

AG. JUDGE.

22/4/2005.

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