



IN THE HIGH COURT OF KENYA

AT NAKURU

MURDER CASE NO.106 OF 2008

REPUBLIC.....PROSECUTOR

VERSES

CHARITY WANGECI MAINA.....1st ACCUSED

STEPHEN NDIRANGU MAINA.....2ND ACCUSED

RULING

The 1st accused person is the mother to the 2nd accused person. They are jointly charged that in the night of 17th and 18th October, 2008 at Kilimanjaro village, Shamata Location in Nyandarua they murdered Peter Ndemi Wamae, the deceased. The prosecution has closed its case after calling seven witnesses. The question to be determined at this stage is whether the evidence presented by the seven prosecution witnesses discloses a *prima facie* case against the accused persons. In other words, is the evidence on record such that the accused persons may be convicted if they elected not to call evidence in rebuttal"

The import of the evidence adduced is that the deceased was a tenant in one of the two rooms owned by the 1st accused person. He occupied the ground floor while the 2nd accused person occupied the upper floor. They were the only occupants of the grass thatched structure. On 18th October, 2008, the deceased person's father **P.W.1, Eliud Wamae Theuri (Theuri)** received a report from the 1st accused person that the deceased person has been found dead under the bed in his room. It is also in evidence that the 1st accused had in turn been told of the death of the deceased by **P.W.2, Zipporah Muthoni**

Mwangi (Zipporah). Zipporah on the other hand had received this information from a neighbour.

The 1st accused in the company of Zipporah went to the scene. At the scene they confirmed the deceased was dead and his naked body with head injuries lying under the bed. In the room they noted there was a chicken with feathers fully plucked. They also found on the grass thatched roof a blood stained *panga*. Zipporah advised the 1st accused to hide the *panga* in the fence so that it is not taken away.

The 1st accused subsequently went to call Theuri. Theuri confirmed that after seeing the body of the deceased, the 1st accused retrieved the *panga* from the fence. The matter was reported to the police, the body removed to the mortuary and investigations launched.

Apart from the *panga*, a pair of long trousers said to belong to the deceased were recovered from the 1st accused person's house by Theuri. The *panga* and the long trousers were submitted to the Government Chemist in Nairobi for analysis. At the closure of the prosecution case, no evidence was available as to the results of the analysis. The accused persons were arrested and charged.

I have set out the question for determination as being whether there is a *prima facie* case against the accused persons from this evidence. There is no direct evidence and this question must be answered from the circumstantial evidence. The circumstantial evidence sought to be relied on are:

- i) that the deceased occupied a room in a building owned by the 1st accused persons
- ii) that the 2nd accused person was the deceased person's immediate neighbour living on the upper floor while the deceased occupied the ground room
- iii) that a blood stained *panga* was retrieved by the 1st accused person from the fence
- iv) that the 2nd accused attempted to run away when the police went to the scene
- v) that a pair of jeans trousers was recovered from the 1st accused person's house

It is now settled that a conviction can be based on circumstantial evidence if that evidence irresistibly points to the accused person's guilt and if there are no co-existing factors that may weaken or destroy the inference of the accused person's guilt. See **Republic Vs. Kipkering Arap Koske & Another** (1949) 1 EACA 135 and **Simeon Musoke Vs. Republic** (1958) EA 715.

It is in evidence that the deceased was suspected in the village as a chicken thief. Indeed when his body was found under the bed, a chicken whose feathers had been plucked in readiness to be prepared as a meal was also found in the room. It was suspected that he may have been killed due to his involvement in stealing chickens. I have stated that there was no eye witness to the killing of the deceased. The first report, according to Zipporah was from a neighbour who informed her that the deceased was dead. It is not clear how this neighbour knew of the death of the deceased. Since the so called neighbour did not testify, this court did not have the benefit of that evidence, which remains a

hearsay.

It is also in evidence that the news of the deceased person's death was first broken to the 1st accused by the same Zipporah. Zipporah went to the 1st accused person's home which was about 2 miles from the house where the deceased was found. When the two reached the scene and found a blood stained *panga*, it is once again Zipporah, who advised the 1st accused person to hide it in the fence so that it was not taken away. Zipporah observed that when they found the *panga*, the 1st accused was surprised as she identified the *panga* as hers which had been stolen.

Although the room occupied by the deceased, in which his body was found belonged to the 1st accused person and although the 2nd accused person was the deceased person's neighbour, there is no evidence that any one of them was seen with the deceased prior to his death. As a matter of fact, the 1st accused lived 2 miles from the scene. There is no evidence that the chicken found in the room belonged to any of the accused persons. The running away of the 2nd accused person on seeing police officers, cannot, *per se* be evidence of guilt.

Similarly, the finding of a pair of jeans trousers in the 1st accused person's house is not sufficient evidence for, one, there was no special mark on the jeans to distinguish it from any other. Two, it is not explained how the trousers were found. Theuri simply stated that the trousers were found in the 1st accused person's house without saying where in the house. Yet it was the testimony of **P.W.6 Snr. Sgt Hesbon Maina Mwangi** that the pair of trousers were taken to the police station by the deceased's father (Theuri).

The blood stained *panga* was taken to the government analyst. No results were tendered in evidence to link the blood on it with the deceased and/or the accused persons. It should be obvious from the foregoing that the prosecution evidence presented at the closure of the prosecution case does not meet the threshold of *prima facie* case as enunciated in the famous case of **Ramanlal Trambaklal Bhatt Vs. Republic** (1957) EA 332.

Instead I find the conduct of the 1st accused person in consistent with that of a person who had committed murder. She did not appear to be aware of the deceased's death until she was alerted by Zipporah. It was infact the 1st accused person who went to Theuri's home to inform him of his son's death.

The circumstantial evidence does not, as presented, irresistibly point exclusively to the accused persons. They were not the only people who were predisposed to commit the crime.

For these reasons, it will serve no useful purpose to require the accused persons to defend themselves. They are acquitted and shall be set free forthwith unless lawfully held.

Dated, Delivered and Signed at Nakuru this 21st day of December, 2010.

W. OUKO

JUDGE



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