



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 7 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

DAVID WEKESA KAMUSINI ALIAS ONGARO.....1ST ACCUSED

RONALD WANYONYI KHABESI ALIAS RONNY.....2ND ACCUSED

DENNIS WANJALA BARASA ALIAS DENNO.....3RD ACCUSED

J U D G M E N T

The accused **DAVID WEKESA KAMUSINI alias ONGARO (accused 1)**, **RONALD WANYONYI KHABESI alias RONNY (accused 2)** **DENNIS WANJALA BARASA alias Denno (accused 3)** are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the offence are that **DAVID WEKESA KAMUSINI alias ONGARO (accused 1)**, **RONALD WANYONYI KHABESI alias RONNY (accused 2)** **DENNIS WANJALA BARASA alias Denno (accused 3)** on the 28th January 2020 at Kibisi Village in Kimilili Sub-County within Bungoma County jointly murdered **BARASA CHACHA alias ALI NINJA**.

The case for the prosecution is that on 28.1.2020 **PW2 Kassim Wanyonyi Fota** was at 8.p.m. on the Verandah of his house when he saw 4 people pass nearby. He recognized them as David (Accused 1) Ronny (accused 2) and Denno (accused 3). He noticed the 4th person was deceased. He did not get concerned. After a short time people came and informed him a person had been killed. Police came and took him to the police station where he recorded a statement. At 12.a. the police officers brought accused 1, David, Mama Chebet (PW1) and the next day they brought accused 3 Denno.

On cross examination by Muchi he stated he had known accused 1, 2, 3 for 4 years as they stay together.

PW4 Kennedy Wanyonyi Namasaka was with Kassim (PW1) outside on his verandah when he saw 4 people pass by. He recognized them as Ongaro (accused 1) Denno (accused 2) and the deceased. Shortly after a neighbor came and informed them that deceased had been killed. They went there and found the body had been removed. Police came and took him to the police station while there accused 1 and 2 were brought and later Mama Chebet was also brought. The following day accused 3 was brought. He recorded his statement and was released.

On cross examination by Muchi for accused he stated that he had known the 3 accused for 2 years and saw them pass at 8 p.m. as there was security light and they were about 10 meters away. He confirmed he did not see who killed the deceased.

PW5 Zebedee Wakoli testified that he was working on a tractor with accused 1, 2, 3. On 28.1.2020 at 11.30 p.m. he was in the house with Ongaro (accused 1) when police came. The police asked for Ongaro (accused 1). In the house were clothes which belonged to accused 1 which were in a basin. They took accused 1 to the police station. He had been the one who had entered the house earlier and accused 1 came later and went to sleep. He saw he had clothes which were blood-stained and his legs had blood stains. He identified the accused 1's long trouser.

In cross-examination he stated that the accused 1 was wearing that trouser that day and he is the one who opened the door for accused 1.

PW6 No. 231717 C.I Francis Mihia the Investigating Officer testified that on 28.1.2020 at 9.30 p.m. he received information from the assistant chief of Kimilili township of murder. He together with OCPD, OCS Kimilili Mr. Maiko and IP Kariuki and other officers went to the scene. They found deceased and blood stains all over the place and recovered a stick used in beating the deceased. He commenced investigations and arrested Kassim Wanyonyi alias Christopher and Kennedy Wanyama. Upon interrogated they mentioned 3 people, Ongaro (accused 1) Ronnie (accused 2) and Denno (accused 3). At 11 p.m. they went to where they were informed Ongaro (accused 1) stays. They entered the house and found 2 people one in the bed-room and another in the sitting room. They found Ongaro (accused 1) in

the sitting room and Zebedee Wakoli who was in the bed room. They observed and saw a long trouser outside the door which appeared to have blood stains. They observed accused 1 and saw he had blood stains on his legs and toes. They took the inventory of the items recovered and took the accused 1 and Zebedee Wakoli to the police station. He conducted further investigation and arrested Sarah Wamboi Mureithi alias Mama Chebet whom he established was earlier married to accused 1 and separated in 2019 when she started cohabiting with the deceased.

In total he arrested 6 suspects but released the 3 others as there was no evidence to connect them to the offence.

On being cross examined by Mechi for the accused he stated that he interrogated Sarah Wamboi who informed him that accused 1 had assaulted her and she reported to the OCS. He stated that Kennedy and Kassim had informed her that they saw deceased being removed.

PW7 Clair Nafula testified that she knew the deceased as the husband of Mama Chebet. On 28.1.2020 at 8.30 p.m. the deceased went to her house and bought changaa for Kshs 50 and 2 cigarettes. He poured the changaa in a jik container and left. She then saw 3 people come and go away with the deceased while beating him. She went back to the house and later received information that a person had been killed. She went there and saw it was deceased.

Upon cross examination by Muchi for accused she stated she only knew accused 3 Dennis Wanjala who is her neighbor and doe sot know accused 1 Davis Wekesa alias Ongaro and accused 2 Ronald Wanyonyi. She stated she saw 3 people take away deceased but did not recognize them. She admitted in re-examination by M/s Mukhangu for the state that she mentioned the names of accused 1, 2,3 as the people who took the deceased to the nappier grass.

The accused upon being placed on his defence, accused gave sworn evidence.

Accused 1 David Wekesa Kamusini testified that he did not know the deceased. On 28.1.2020 he was going home walking along Lusaka road in Bungoma township where he found many people and followed them. They reached where they found a person had been killed. He observed the scene and found he did not know the person. He went home. He reached home and washed his clothes and slept. At 11 p.m. police came and ransacked the house. They took away his long trouser and arrested him. He denied that the long trouser had blood stains. He admitted he was a boyfriend of Mama Chebet and had at some point broke her hand when she was drunk.

On being cross-examined by the M/s Omondi for state, he stated that he was staying with Zebedayo (PW5) and that accused 1 entered the house first and Zebeded came in at 10 p.m. He denied that he killed deceased because deceased had married Mama Chebet his girlfriend.

Accused 2 Ronald Wanyonyi Khabesi alias Ronny testified that on 28.1.2020 he was at Kimilili when at 7.30 p.m. he went to a bar and ordered for soda. While taking soda three (3) police officers went to him and asked him to go outside. Once outside he was thrown into a vehicle and taken to Kimilili police station. The next day he recorded his statement. He denied ever passing through the home of Christopher to buy changaa.

Accused 3 Dennis Wanjala Barasa testified that on 28.1.2020 he left work at 5.30 p.m. and went to his house. He stayed there and slept up to the next day. At 7.30 a.m. he was going to work when he met the assistant chief. Who informed him that a person had been killed. He walked along with the assistant chief to the police station where he was arrested. At the police station he was asked about the murder and he recorded his statement.

Mr. Muchi for accused filed written submissions. He submitted that from the evidence of PW1 to PW8 who testified for the prosecution, it is evidence that the stand of proof in criminal cases had not been attained by the prosecution.

The accused are charged with offence of murder contrary to Section 203 of the Penal Code. Section 203 provides:

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

The ingredients of the offence of murder which the prosecution must prove beyond reasonable doubt are:

- a) The fact and cause of death***
- b) The unlawful act or omission that caused the death***
- c) That it is accused who occasion the unlawful act or omission or inflicted the injuries that caused the death***
- d) That the accused had the intention of causing death or malice aforethought.***

PW3 Dr. Achieyenza Sikuunzi who performed the post mortem on the body of the deceased testified that the body had open wounds on left side of the face, torn right ear, 1st tooth and 4 upper teeth missing, bruises on the chest. Upon opening he found deceased had a further of the skull and brain was swollen. He formed opinion that the cause of death was fracture leading to sub-dural haemorrhage secondary to blunt trauma. This witness therefore confirmed the fact of death and issued death certificate NO. 0780742. He also confirmed that the cause of death was due to blunt trauma leading to fracture of the skull.

Did the accused jointly or singly inflict the blunt force injuries that led to the fracture of the skull?

PW1 Sarah Wamboi testified that the deceased Barasa Chacha alias Ali Ninja was her boyfriend with whom she had stayed for one month.

On 27.1.2020 he gave her phone to deceased to go and charge but he did not come back. She then received information that he had been killed. She confirmed she knew accused 1 David Wekesa alias Ongaro who had been her man friend and had broken her arm.

PW2 Kassim Wanyonyi Fota testified that on 28.1.2020 at 8 p.m. he was at his verandah when he saw 4 people whom he recognized as David (accused 1) Ronny (accused 2) Dennis (accused 3) and the deceased pass on the road going towards Kibisi Baptist. Shortly later he saw a police land rover with police officers who informed him that a person had been killed. They took him to the police station where he recorded a statement. He did not see the person who killed the deceased.

PW 3 Kennedy Wanyonyi Namasaka was seated with PW2 Kassim Wanyonyi when he saw 4 people pass on the road. They were accused 1, 2, 3 and deceased. He did not get concerned. After a short time police officers came and arrested them. While at the police station accused 1, 2, 3 were brought to the police station. He recorded the statement and was released. He stated that he did not witness who killed the deceased.

PW5 Zebededayo Wakoli was in his house where he stayed with accused 1 David alias Ongaro. At 12. A.m. police officers came and found him present. They took accused 1's clothes which were in a basin with water. They arrested accused 1 and the witness and took them to the police station. He confirmed to police that the clothes in the basin belonged to accused 1 Ongaro and that the clothes and his legs had blood stain. He identified the clothes.

PW6 Chief Inspector Francis Mahia testified that he visited the scene and commenced investigations. He received information accused 1, 2, 3 were suspects. At 11 p.m. he together with others visited the house where accused 1 was staying, found him present with another person (PW5). At the house they found a trouser (exh.2) which looked like it had blood stains. He observed accused 1 and saw he had blood on his toes. They arrested him. He confirmed he did not take the trouser to Government analyst for DNA analysis and therefore did not know whose blood was on the blood stained trouser.

PW7 Clair Nafula testified that she knew the deceased as the husband of Mama Chebet (PW1). On 28.1.2020 the deceased bought changaa of Kshs 50 and 2 Cigarettes and left. She then saw 3 people walk away with the deceased. She did not recognize the 3 people, who she saw were beating the deceased. Later one Mary told her the deceased had been killed.

None of the prosecution witnesses Sarah (PW1) Kassim (PW2) Kennedy (PW4), Zebedeyo (PW5) testified as having seen the person who killed the deceased. Indeed Kassim (PW2), Kennedy (PW4) only testified that they saw accused 1, 2, 3 with the deceased on the material date and later were informed he had been killed.

PW7 Clair Nafula testified how the deceased bought changaa and cigarette from her and left with people she did not know.

As none of these witness testified that they saw accused 1, 2 or 3 inflict injuries, it is clear that the prosecution did not tender evidence of an eye witness to the murder.

Where there is no direct evidence to prove an offence against an accused person, the prosecution can prove by circumstantial evidence that it is accused and no other who committed the offence. In Abanga alias Onyango -Vs- Republic Criminal Appeal No. 32 of 1990 the court stated that; It is now settled when the case rests entirely on circumstantial evidence such evidence must satisfy these three tests.

1. The circumstances from which an inference of guilt is sought to be drawn must be cogent and firmly established.
2. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.
3. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.

In this case the prosecution sought to rely on two sets of circumstantial evidence, that the deceased was last seen with accused 1 and 2) that when PW 6 C.I Muhia arrested accused 1 David Wekesa alias Ongaro, his long trouser was blood stained and had dry blood on his legs.

PW6 Chief Inspector Mihia who testified that he recovered a blood stained trouser from accused 1. He confirmed that he did not take the same to the Government analyst to determine whether the blood stains on the trouser belonged to the deceased. At the close of his evidence there was nothing tendered to confirm that accused 1 alias Ongaro had trouser with blood stains which matched the DNA of the deceased. The trouser produced as exhibit was therefore of no probative value and his evidence on this one did not establish any fact, which can be relied on as circumstantial evidence.

On the issue of last seen with deceased, the prosecution called PW2 Kassim Wanyonyi and PW4 Kennedy Wanyonyi who testified that they were at the verandah when they saw accused 1, 2, 3 with the deceased while walking on the road. Shortly later police came and informed them that deceased had been killed and arrested then they both recorded statements and were released. They admitted that it was at 8 p.m. and that both the accused and deceased appeared drunk.

Where the doctrine of last seen with deceased is relied on by the prosecution, the fact of that the accused was last seen with deceased must be proved. In this case, there is evidence that it was at night. The period of observation was not given to enable the court to find that there was no error in identification of accused as the persons who were with the deceased. From the circumstances I am not satisfied that the identification of accused as the person last seen with deceased was free from error.

In the result I find that the circumstances relied on by the prosecution did not point to the accused as the persons who murdered the deceased and no one else. I find the prosecution has not proved the charge of murder against accused 1, 2, 3 beyond reasonable doubt.

I therefore find David Wekesa Kamusini alias Ongaro (accused 1), Ronald Wanyonyi Khabesi alias Ronny (accused 2) and Dennis Wanjala Barasa alias Denno (accused 3) not guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and acquit each one of them under Section 215 C.P.C. I direct that David Wekesa Kamusini alias Ongaro (accused 1), Ronald Wanyonyi Khabesi alias Ronny (accused 2) and Dennis Wanjala Barasa alias Denno (accused 3) be set at liberty unless otherwise lawfully detained.

DATED AT BUNGOMA THIS 31ST DAY OF MARCH, 2022

S.N RIECHI

JUDGE