



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NO. 12 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JOSHUA WABWOBA MUMALI.....ACCUSED

JUDGMENT

The accused **JOSHUA WABWOBA MUMALI** is charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the offence are that **JOSHUA WABWOBA MUMALI** on the 27th day of March 2018 in Kibingei location of Kimilili sub-county within Bungoma County murdered **TIMONTHY WEKESA**

The prosecution case is that PW1 Alice Wekesa is the wife of the deceased Timothy Wekesa. On 27.3.2018 at 5 p.m. she was with the deceased in the house, with 3 children. They then heard a group of people screaming from the upper part of their home coming to thier house. She went out to check leaving the deceased behind. She then saw the accused with other people. The accused then pointed at her and said “we want to finish this woman.” The people who were with the accused and who were armed with various weapons, attacked her; and she fell down. She saw that Mohamed Wendiaga hit her with iron rod, David Waswa cut her on the head Wycliffe Simiyu cut her on the mouth, Bilha Akasa hit her with stone, Kai hit her on the back and Werunga kicked her. She noticed that the people who were assaulting her were from the clan. All this time the deceased had hid. As the beating intensified she became unconscious and only found herself in hospital when she learnt that her husband the deceased had died. On being cross-examined by Wamalwa for the accused, she denied that she knew Micah Kokai or even injuring him. She however admitted to there being a land dispute which was being handled by accused. She confirmed that she did not see accused lead the group to her husband the deceased.

PW2 Josam Murungo Musa was informed by Beatrice Wafula that deceased had been killed and PW1 Alice injured. He went to Kimilili police station where he reported the matter. He accompanied police officers to the scene where by they found Alice (PW1) unconscious and deceased dead. They took Alice to hospital. PW3 Zebedee Wayumba heard Beatrice Wakulo tell another person that his aunt will be killed. He heard screams and people running towards the home. He called the chief and clan Chairman the accused and informed him. He did not go to the scene. He confirmed he was the clan vice-chairman and had handled a land dispute between Violet Kakai and the family of the deceased. Violet is the sister of the deceased.

PW5 Dr. Edward Wafula performed a post mortem on the body of the deceased on 5.4.2018. He found the deceased had multiple cut wounds which were 10 in number on the head and deep cut wound on the right wrist joint. On opening the body, he found there was no fracture of the skull. He formed opinion that cause of death was due to bleeding secondary to cut wounds.

PW6 No. 49015 Corporal Wilson Bunyasi the investigating officer was directed to take over investigations by the OCS. He recorded statement of Alice (PW1) who was admitted at Dreamland Hospital, and other witnesses including Abraham. From the investigations it is accused who instructed people to assault the deceased and his wife. He then arrested him and caused him to be charged with present offence.

At the close of the prosecution case, accused was put on his defence. He gave sworn evidence stating that on 27.3.2018 he was at home with a mason who were building his house. While there he received a telephone call that Timonthy (deceased) and his wife (PW1) were being killed. He went to the scene where he received information that deceased was being beaten as he had injured the private parts of another boy. He called the assistant chief and waited until police came and took away the body of deceased. He testified that he knows PW1 Alice Wekesa and heard her evidence in court but stated that it was all lies and that they have a grudge stemming from a dispute over land. He denied telling people to kill the deceased.

The accused called his witness DW2 Morris Nyongesa who is deceased’s brother. He testified that accused is their clan chairman. PW1 is the wife of his brother the deceased. The siblings had an issue over land which they reported to the accused as clan chairman to arbitrate but

he referred them to the chief. He however testified that he was not present when deceased was killed. DW3 Violet Nekesa Munialo, and DW4 Jane Nabwire testified as to the dispute over land which was referred to the accused as clan chairman to arbitrate.

DW5 Micah Wandiaika testified how on 24.3.2018, the deceased and his wife PW1 Alice Nekesa assaulted him on his private parts. Alex Okama a neighbor came and one Joseph gave him money to go to hospital. He went to Bungoma hospital where he was admitted. He confirmed that on date when deceased was killed he was admitted at the hospital.

Mr. Wamalwa Simiyu for accused filed written submissions. Counsel submitted that the prosecution must prove all the elements of offence of murder beyond reasonable doubt. He submitted that the fact and cause of death is not disputed. He submitted that there was no eye witness who testified as seeing the accused kill the deceased. He submitted that the evidence of PW1 that it is accused who ordered her to be killed together with the deceased was contradicted in cross-examination when she stated that she did not see accused order people to kill the deceased. He submitted that the evidence of witnesses show that accused was not at the scene and was only called by PW3 Zebedee Wayumbe Munyodo to the scene.

Pw5 Dr. Edward Wafula performed a post mortem of the body of the deceased found that the deceased had multiple cut wounds 10 in number on the skull, deep cut wound on right wrist joint. He formed opinion that a cause of death was due to bleeding secondary from cut wounds.

Did the accused inflict these injuries on the deceased from which he died?

PW1 Alice Wekesa the wife of the deceased testified how people went to her home screaming led by the accused who was the clan chairman. She testified that on seeing the mob she fled and left deceased behind. The mob attacked her with David Waswa on the lead. Biliha Akusa hitting her with a stone and Nyongesa kicked her. Kai Mangeni hit her on the back and legs while Beatrice and others also joining the fray. She became unconscious and only came to and found herself in hospital. She received information that deceased had been killed. On being cross examined by Wamalwa for the accused, she stated that she did not see accused lead the mob to attack the deceased.

PW2 Josam Marango Mosa was informed that the deceased had been killed and PW1 Alice his wife attacked. He went to the home and found deceased already dead and PW1 Alice the wife with injuries. He took her to hospital.

PW3 Zebedee Wanyumba received information and passed it on to accused who was the clan chairman. He knew of existence of a land dispute between the deceased and his sister which had led to the assault of Micah the son of the sister who was admitted in hospital.

The accused defence is that he is the clan chairman and received information that deceased was being beaten. He called the assistant chief and gave him the information.

None of the prosecution witnesses testified as to whether they saw accused inflicting injury on the deceased. PW1 the only eye witness testified as to how she was assaulted by the people she named. The charge in court is not about her assault but the death of the deceased. Indeed, she admit in her evidence that she did not see accused lead a mob to where the deceased was. While there is evidence that deceased was assaulted and sustained injuries from which he died, I do not find any sufficient evidence adduced to show that it is accused either alone or with others who killed him.

Considering all the evidence I find that the prosecution have not proved a charge of murder against the accused beyond reasonable doubt.

I therefore find the accused Joshua Wabwoba Mumali not guilty of the offence of murder contrary to section 203 as read with Section 204 of the Penal Code and acquit him under Section 215 Criminal Procedure Code. Accused Joshua Wabwoba Mumali to be set at liberty unless otherwise lawfully detained.

Dated and delivered at Bungoma this 26th day of May, 2021

S.N RIECHI

JUDGE