



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NUMBER 30 OF 2019

REPUBLIC..... PROSECUTOR

VERSUS

SAMWEL KIPSENJE MUNYAKA 1ST ACCUSED

SABASTIAN KWEMBOI.....2ND ACCUSED

J U D G M E N T

The accused **Samwel Kipsenje Munyaka** (accused 1) and **Sabastian Kwemboi** (accused 2) are charged with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the night of the 6th and 7th August 2019 at Kamosong primary school area, Chebukule location in Cheptais Sub-county within Bungoma County murdered **Hastings Samberia Morei**.

On 6.8.2019, **PW2 Ann Sanamu Kiboli** the aunt of the deceased **Hastings Samberia Morei** at 9 p.m. was at the funeral of one Kaye. The deceased was also at the funeral AS were accused 1 Samwel Kipsenje Munyaka and accused 2 Sabastian Kwemboi. While at the funeral, she saw accused 1 fighting with the deceased. They were separated by members of public. Deceased went to her and informed her that accused 1 was drunk. The deceased then left. After about 30 minutes accused 2 came to her and informed her deceased had been stabbed with a knife by accused 1. She ran there and found deceased had been stabbed using a kitchen knife and was dead. The knife was at the scene. Police who were informed came and took the body away.

PW3 Kiboi Fabia Morei the younger brother of the deceased was with the deceased at the funeral of Kaiya Joseph, where there was a disco matanga. The accused 1 and 2 were also present. At 11 p.m. the accused 1 started fighting with the deceased. The witness and one Micah separated them. The deceased then received a telephone call and left. After a short time he heard screams from the road. He ran there and found deceased had been stabbed.

PW5 Briton Kibet Chenginwa testified that while at the funeral the deceased asked him if they could go home. They started going to the road. On the way he remembered he had forgotten a key. He went back to pick it and left deceased proceeding with the journey home. After a short time he heard screams and ran there. He found deceased had been stabbed. On cross examination by Mr. Wekesa for the accused he testified that he did to see who killed the deceased.

PW6 Evans Mabani Kingwa was at the funeral when he saw accused 1 and deceased fighting. He went there and accused 1 alleged that deceased had hit him on the head. He separated them and later went home. He received information that deceased had been murdered. He testified that he did not know who killed the deceased.

PW7 FN. xxxx Copl Joseph Ruto attached to Chepkube police station visited the scene. At the scene he found the deceased lying down and next to him was a kitchen knife. They took the body to mortuary and took deceased's jacket, shirt and trouser which he handed over to the investigating officer. **PW10 PC John Maina** took over the investigation and received a knife, jacket, shirt, long trouser which were subjected to examination by Government analyst who confirms the blood stains on the items belonged to the deceased. He confirmed that there were no eye witnesses to the stabbing of the deceased.

The accused on being placed on defence elected to give sworn testimony. Accused 1 Samwel Kipsenje Munyala testified that on 6.8.2019 he was in Eldoret as he had left Chepkube on 5.8.2019. He confirmed he was at the funeral on that night. He testified that deceased who was also at the funeral assaulted him. They started fighting but were separated. Deceased then left and accused stayed for a while and left later. On 6.8.2019 he was arrested at Eldoret and he had no information that deceased had died.

Accused 2 Sabastian Kwemboi Kumso was at the funeral when he heard screams outside and went to the gate where he found many people including police officers. He met Brighton Kibet (PW2) who told him deceased had been killed by unknown people. He denied knowing accused 1 and that he and accused 1 fought with the deceased.

Mr. Wekesa counsel for the accused filled written submissions. He submitted that the prosecution case against accused is based on circumstantial evidence, for circumstantial evidence to lead to a conviction it must be.....pointing to the accused persons to the exclusion of any other person. He submitted that the prosecution failed to establish the three ingredients of the offence to the required standards as the evidence adduced was scanty lacks corroboration and therefore not sufficient to warrant a conviction. He referred this court to the decision in R –V Elizabeth Anyango Ojwang to support his submissions.

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

Section 203 provide...Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

It is clear from this definition that for an accused person to be convicted of murder, it must be proved that the accused persons caused the death of the deceased with malice aforethought by an unlawful act or omission. “ There are therefore three ingredients of the offence of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction.

- a) The death of the deceased and the cause of death.***
- b) The unlawful act which caused the death of the deceased.***
- c) It is accused who committed the unlawful act or omission.***
- d) That the accused persons had the malice aforethought.***

PW1 Dr. Wanambisi Caleb Wata who performed the post mortem on body of deceased found that deceased.....

External

- Stitched cut wound on left breast.
- Bruises on left hip joint.
- Blackening of the bruised area.

Internal:

- Blood in the chest
- Ruptured abdominal blood vessels.
- Swelling of abdomen
- Blood in the abdomen due to ruptured spleen.

From the examination he formed opinion that cause of death was due to severe bleeding as a result of ruptured spleen secondary to penetrative abdominal injury by a sharp object.

This witness confirmed that indeed deceased died and that the death was due to infliction of injury in the abdomen by a sharp object. The issue is who inflicted the sharp object injury on the deceased?

PW2 Ann Sanlamu Kiboi who was at the funeral testified how she saw accused 1 fighting with the deceased and were separated. **PW3 Kiboi Fabia** also testified how the accused 1 and deceased fought and were separated. This was the similar evidence of **PW4 Peter Kiboi** and **PW5 Brian Kibet Changinwa**. They all testified that after the accused 1 and deceased were separated, they later heard screams and went to the gate where they found deceased in a pool of blood having been stabbed. None of these witnesses saw who stabbed the deceased.

Accused 1 in his defence admits that they fought with the deceased at the funeral and were separated. The deceased then went away and accused 1 also went to his home. He denied that he stabbed the deceased as alleged. From the evidence submitted none of the witnesses testified as to having seen either accused 1 or accused 2 stab the deceased. It is common ground from the witnesses that the fight between accused 1 and deceased was at the home where the funeral was, but none of them sustained any visible injuries. The injuries inflicted on deceased were therefore after the fight, and outside the home.

As there was no eye witness to the offence the prosecution sought to rely on circumstantial evidence to prove that it is accused who murdered the deceased.

The only set of circumstantial adduced by the prosecution from which it seeks the court to find accused committed the offence is the accused 1 fought with deceased, were separated and later deceased was found stabbed. The prosecution therefore seeks to demonstrate that it is accused 1 who would have had a grudge and therefore motive to murder the deceased. While this may be true, it only manages to raise suspicion against accused 1. Suspicion alone however strong it is cannot be a basis for a conviction in a criminal trial.

I therefore find that the prosecution has not established an offence of murder contrary to section 203 of the Penal Code against accused 1 Samwel Kipsenje Munyaka and accused 2 Sabastian Kwemboi beyond reasonable doubt. I find accused 1 and 2 not guilty of the offence of murder contrary to section 203 of the Penal Code and acquit them under Section 215 C.P.C. Accused 1 Samwel Kipsenje Munyaka and Accused 2 Sabastian Kwemboi be set at liberty unless otherwise lawfully detained.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF SEPTEMBER, 2021.

S N RIECHI

JUDGE