



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 18 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

1. PHILIP ETYANG

2. MARTIN OJUMA

3. EZEKIEL EKIRAPA

4. SILAS GABRIEL NYONGESA.....ACCUSED

JUDGMENT

1. **Philip Etyang, Martin Ojuma, Ezekiel Ekirapa and Silas Gabriel Nyongesa** are charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

2. The particulars of the offence are that on the 22<sup>nd</sup> day of July 2018, at [particulars withheld] village, Teso North Sub County of Busia County, jointly with another not before court murdered **LAP**.

3. After the deceased was found murdered after she had been raped, the accused persons were arrested for she had complained that they had insulted her severally.

4. Each accused denied any involvement in the offence. They called Felix Ikarot who has since been convicted and sentenced for the offence after he entered plea bargaining. He exonerated the accused persons. He contended that he was alone.

5. The issues for determination are:

a) Whether the alleged insults are sufficient for inference of guilt to be made; and

b) Whether there was any other evidence against any of the accused persons.

6. The evidence that connect the accused persons to the murder of the deceased herein is what the deceased is alleged to have complained about them. One such a witness is Andrew Ipara Papa (PW2). He testified that when he went to see the deceased on 19<sup>th</sup> July 2018, she complained to him that somebody had attempted to break into her shop. She further informed him that she had seen Philip Etyang (accused 2) and Silas Nyongesa (accused 5) through a gap between the door and the frame and was assisted to do so by moonlight.

7. On identification when circumstances are not favourable, Lord Widgery in the case of **R. vs. Turnbull and Others [1976] 3 All ER 549** stated as follows:

**Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a**

**material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.**

If we take heed of the directions given by Lord Widgery on identification where circumstances are not favourable, we may attach no weight to the purported recognition for three reasons; the intensity of light was not testified to, the duration when she had the two under observation and the size of the gap.

8. Even if the prosecution had proved that these two accused persons were seen and identified by the deceased, it would be required that a nexus between the alleged attempted break-in and the subsequent death on 22<sup>nd</sup> July 2018 be proved. There was no such an attempt to do so.

9. Andrew Ipara Papa (PW2) further testified that on 20<sup>th</sup> July 2018, when he went to check on the deceased, she informed him that Martin Ojuma, Felix Ikarot, Philip Etyang and Silas Nyongesa had insulted her alleging that she was going to get old without a husband. He conceded during cross examination that these alleged insults could not amount to threats to kill.

10. I find that the insults complained of cannot be evidence against any accused person unless there is more. These will amount to molestation and no more.

11. It may prove difficult to act on what the deceased is alleged to have complained. It would appear that each witness gave his own interpretation to what she allegedly said. Peter Imokori Epaa (PW3) attributed his source of what the deceased allegedly complained against the accused persons to Andrew Ipara Papa (PW2). His evidence in court was that PW2 informed him that the deceased told him that the accused had threatened to show her for refusing to associate with them. In court, Andrew Ipara Papa (PW2) did not testify to that effect.

12. It would appear that except the first accused who pleaded guilty and who was placed at the scene by DNA results, the rest were arrested on suspicion. The Court of appeal in the case of **Sawe vs. Republic [2003] KLR 354** said:

**Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.**

13. In the instant case, I find that the prosecution case has not proved that any of the accused was involved in the murder of the deceased herein. I accordingly acquit each one them of the charge of murder and set him free unless if otherwise lawfully held.

**DELIVERED and SIGNED at BUSIA this 24<sup>th</sup> day of March, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**