



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 2 OF 2018

REPUBLIC .....PROSECUTOR

VERSUS

1. SEBASTIAN OTIENO OMONDI

2. VICTOR ONJALO ODHIAMBO

3. BONVENTURE JUMA MURUKA.....ACCUSED

JUDGMENT

1. **Sebastian Otieno Omondi, Victor Onjalo Odhiambo and Bonventure Juma Muruka** 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 7<sup>th</sup> day of December 2017, at Bulemia village, Bulemia sub location of **Busia** County, murdered **Benjamin Mayabi**.

3. The deceased was killed by an enraged mob. The accused persons were allegedly part of the mob.

4. In his defence, the first accused contended that the deceased was killed by a mob after he fled from an AP camp. The second accused pleaded an alibi while the third accused opted to keep mum.

5. The issues for determination are:

- a. Whether any of the accused was involved in the killing of the deceased;
- b. Whether the defence of alibi of the second accused was displaced; and
- c. Whether the offence of murder was established against any of the accused.

6. The undisputed facts of this case are that the deceased was killed by a mob that accused him of being involved in thefts. The incident was at about 7.30 p.m., and it took place near an A.P (administration police) camp.

7. Before we embark on an analysis of the evidence, it is important to first appreciate whether it was dark and if there was light what was the source and its intensity. According to the evidence of Jeremiah Ouma (PW2) the only source of light was a little moonlight. The prosecutor in court did not elicit from this witness on the intensity of what he called a little moonlight. The court could have been greatly assisted had he been asked to indicate from what distance he could have recognized a person. This was not done for this witness. What he called little moonlight was therefore very vague.

8. Ismael Musa (PW3) testified to have identified some people who were beating the deceased. He did not testify as to what assisted him to recognize the people he said he saw beating the deceased.

9. The prosecution did not discharge its duty as to what light enabled the witnesses to recognize the people they testified to have recognized while beating the deceased. In the case of **R vs. Turnbull [ 1976] 3 All ER 549** Lord Widgery CJ stated:

**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.

In the instant case, the evidence of PW2 & PW3 can pass the test of evidence of recognition as prescribed in the above case.

10. The evidence that linked the first accused to the killing of the deceased was that of Ismael Musa Ng'ayo (PW3). He said he saw him beating the deceased using a club. I have already addressed myself to the source of light and its adequacy. This witness testified that he was driving motor vehicle registration number KCH 128F Toyota DX commonly known as Nguruwe. He was however contradicted by a copy of records issued by NTSA (Defence exhibit 1). This document indicated that motor vehicle registration number KCH 128F was a Volkswagen station wagon. This calls the credibility of this witness in question. Can he be relied upon to tell the truth? I am afraid not. The Court of Appeal in **of Ndungu Kimanyi vs. Republic [1979] KLR 283**, (Madan, Miller and Potter JJA) held:

**The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.**

The defence that the first accused is not only plausible, but it is supported by the evidence on record.

11. Victor Onjalo Odhiambo (the second accused) pleaded an alibi. The court of Appeal in the case of **Kiarie vs. Republic [1984] KLR 739** held:

**An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.**

Jeremiah Ouma (PW2) however said that he saw him at the scene and that he was using a club to beat the deceased. Given the circumstances of this case, apart from lack of evidence to prove sufficiency of light, there was a huge crowd of unruly mob which could have made it difficult for him to identify anybody. From his evidence, one Freddie announced that any family members of the deceased were to be flushed out or killed. If true, this must have instilled a lot of fear in him and he cannot convince anybody that he was able to identify anybody. The alibi defence of the second accused was not displaced.

12. There was a single mention of the name Juma son of Nanzala. This was by the evidence of PW2. He was very categorical that this Juma was not the third accused.

13. From the foregoing analysis of the evidence on record, I find that the prosecution has failed to prove its case against any of the accused persons. I accordingly acquit each one of them of the offence of murder. Each is set at liberty unless if otherwise lawfully held.

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

**KIARIE WAWERU KIARIE**

**JUDGE**