



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NO. 27 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

IDD WEKESA SIBUTA

SIMON JUMA BIPOREACCUSED

MOHAMMED WANJALA SIBUTA

JUDGMENT

The accused **(1) IDD WEKESA (2) SIMON JUMA BIPORE (3) MOHAMMED WANJALA SIBUTA** were charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the offence were; On the 13th day of August 2016 at Lukaala village, Bisunu Location in Bungoma West Sub-County within Bungoma County murdered **JOCKTAN WANJALA WALUCHO**. **Particulars of the offence were;** On the 13th day of August 2016 at Lukaala village, Bisunu Location in Bungoma West Sub-county within Bungoma County murdered **ANN NASIPONDI WANJALA**.

The prosecution case is that Pw2 Dina Naliaka is the wife of Jocktan Wanjala Walucho the deceased in Count No. 1 and mother to Ann Nasipondi Wanjala the deceased in Count No. 2. On the night of 13.8.2016 the witness prepared supper and all went and slept. At 8p.m. she heard people shouting outside singing circumcision songs. He recognized the voice as that of Wafula. He also heard him say that when they enter they will beat up the father, mother and daughter. The people started hitting a door, window and were cutting down Iron sheets. The witness and Anna screamed. Some people entered the house and attacked Jocktan (deceased in Count 1). She then ran out through another door but left Anna inside the house. She ran and hid near the river till next day when she went and reported the matter to the chief and later police.

Pw3 SW the daughter of Ann Naspondi the deceased in Count 2 and grand-daughter of deceased in Count 1 was in the house asleep when people came making noise and hitting the door. They entered the house and Jocktan (deceased in Count 1) hit one of them with a jembe. Ann the deceased in Count 2 came and pleaded with them not to kill her father. She ran away but was killed. While inside she was able to identify them, Evans, Kitutu, Sinoko, IDD, Simon and Mohammed. She pointed out Accused 1 as IDD, Accused 2 as Simon and Accused 3 as Mohammed. She testified that she heard them before. She saw IDD hit Ann before she escaped.

Pw4 Joseph Mandu Soita the Senior Chief of Busuru Location was in the office on 12.8.2016 when Jocktan Wanjala Walucho (Deceased in Count 1) and his wife came to him. They reported that their neighbor Bramwel had circumcised his son AW and A had bled and was taken to Moi Teaching & Referral Hospital where he died. They had gone to console the family but were chased away on allegations that they caused the death of boy by witchcraft. He advised them to report to Sirisia Police Station. On 13.8.2016 at 9p.m. he received information that people had gone to the home of the deceased and attacked him. He went there and found the body of Jocktan. He recovered stones and Jembe at the scene. He observed that the window and door had been removed. He also was informed that Ann had been killed too. Police were informed and took the bodies to the mortuary. Upon his investigations he found that a meeting had been held at home of Bramwel Wafula attended by Bramwel Wafula, Edward Kundu Matino, Charles Magoruba, Edward Nangila, Collins Bulitia Wanjala, Andrew Juma Wafula and Michael Wanyonyi, where plans were made to attack deceased. On 13.8.2016 another meeting was held at home of Vincent Namasaka where the 3 accused attended and plans for attack of the deceased finalized.

Pw11 Senior Sgt. Moris Kawa then attached to Malakisi Police Station was on duty when he was informed of the incident of murder. He together with Chief and village elder visited the scene where they found deceased Jocktan next to the door of his house; with severe injuries on his body. They recorded a stone and jembe. They took body to the mortuary.

On 24.8.2016 Dr. Haron Ombongi performed Post Mortem on body of Ann Nasipondi. She had Cut wound on frontal part of head when

extended to skull, cut wounds on face and multiple injuries. Upon opening he found the skull had a fracture. He assessed cause of death to be due to severe head injury secondary to assault. Jocktan Walucho had compound fracture leading to massive bleeding. He assessed cause of death to be due to bleeding secondary to assault.

The accused gave sworn evidence. Accused 1 IDD Wekesa testified that though he knew the deceased, he did not know who killed him. He said he was arrested from a drinking place and taken to Malakisi police station. He denied during cross – examination of hearing any commotion during that night although his home is about 500 metres away.

Accused 2 Simon Juma Bipore testified that on material day on 13.8.2016 he was in Bungoma in his bicycle transport business when he heard some people had been killed allegation of being a witch. He was later arrested.

Accused Mohammed Wanjala testified that on 13.8.2016 he worked at his firm and later went to drink. He later learnt that a witch had been killed. On 21.9.2016 he was arrested at his home and taken to Malakisi police station and later charged with present offence.

Mr. Wattanga for all the accused filed written submission. He submitted that the investigating officer confirmed that the deceased were killed by a mob. He further submitted that the accused were all arrested at place of drinking and were among the 14 people who were arrested as suspects but others were released when they gave out money to police.

The accused were charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code which provides;

Section 203 penal code provides. 203: Any person who of malice afore thought causes death of another person by unlawful act or omission is guilty of murder.

204: Any person convicted of murder shall be sentenced to death.

The ingredients of the offence of Murder which the prosecution must prove are;

In Republic **Vs. Joseph Ekai Lomogin** [2018] eKLR this court stated that in an offence of murder the prosecution must establish the three ingredients of the offence;

1. The killing or fact of death of the deceased;
2. existence of malice aforethought or *mens rea* and
3. The unlawful act or omission on the part of the accused the *actus reus*.
4. That it is the accused who inflicted the injury.

Death and cause of death was established by the evidence of Pw1 Dr. Haron Ombongi who testified that the deceased died as result of injuries on the head leading to the skull fracture by each.

The issue this court has shown determination is whether the accused either singly or jointly inflicted the injuries as the deceased in Count 1 and Count 2.

In Republic **Vs James Ogwang Alichu & Another** [2018] eKLR

The issue which has to be determined in this case is that of identification. It is particularly important because the death of the deceased occurred in the night. The courts have held, and rightly so, that in a case where the evidence for the prosecution rests on the identification of the assailant by whatever number of witnesses be it by way of identification of a stranger” or the recognition of a close relative or friend, the court must be careful to properly direct its mind to the condition prevailing at the time of the identification. The court must also consider the length of time for which the witness had the accused under his/her eye. The purpose of this careful consideration is to eliminate the possibility of error which is bound to happen even in cases where the person under observation is a close friend or relative. See *Joseph Ngumbao Nzaro – vs – Republic [1991]2KAR 212*

There were only two witnesses who were present during the attack who testified. Pw2 stated I recognized some voice of the accused and that of Wafula. Wafula singing some circumcision songs. I heard Wafula say as we get there we beat up the father, mother and daughter. Wafula is also known as Namutila. I have known Wafula for long, we live together. He is a nephew. Wafula did not explain why. I peeped and Anna and I wailed saying we have been invaded. They hit the door and window and were cutting Iron sheets. They then cut my husband. They started struggling with mzee at the window, some got inside and attacked mzee. When I saw this I ran through another door. I had seen Wafula and the boys whose names I do not know.

(Court asks witness to point at the boys).

(She was unable to point them out).

Upon cross – examination by Wattanga she said she said; It is true on 13th night we went to sleep. I cannot know exact time. The attack was at night. It was dark but not very dark. We heard noise while in the house. It was noise of many people. I recognized voice of Wafula

Wamutula. They sang circumcision songs in the house.

Pw3 SW In her evidence testified;

They hit the door. Babu hit one of them with a jembe my mother came out saying do not kill my father. She went near the kitchen and was hit. Mum ran towards the road. They hit her and killed her and one escaped. They killed my mum and returned and called my grandfather. I was able to identify the people. They were Evans, Kitutu, Sinoko, IDD, Simon and Mohammed. I see some of the people (points at some)

3rd accused is Mohammed

2nd accused is Simon

It is not in dispute that the witnesses knew the accused. Even the accused admits that they knew each other as they stay about 500 metres away. It is also clear from the evidence that the attack took place at night and it was dark. Pw2 testified that she would recognize the voice of Wafula who is also known as Namutula. She did not mention or testify that she recognized the voices of Accused 1 IDD and 2 Simon or Accused 3 Mohammed Wanjala. This witness therefore did not identify the accused as among the persons who attacked the deceased.

Pw2 SW a child aged 11 years testified that she saw IDD hit Anne before she escaped to the road. She in Cross – examination admits that there was no light in the house but there was moonlight outside. She further stated; I did not see them beating my mum. I saw them beat Babu. Babu was in the house. There were may attackers. I could not tell who beat my grandfather. I heard them sing circumcision songs. I could not tell the lyrics of the song.

I know the accused. The 2nd accused came and helped cut trees. He used to pass by greeting. He is not a neighbor. 1st Accused used to come. I saw 3rd Accused only once. The accused called grandfather uncle.

The accused put forward an alibi defence. Accused 1 stating that on the material day he was at his home the whole night; Accused 2 thought he was in Bungoma and Accused 3 was at his home. All the Accused state they were arrested later along with many other people as suspects.

The proof of accused as the persons who knew the deceased is a burden for the prosecution to discharge to the satisfaction of the court. In this case it is admitted the offence was committed at night and involved many people who attacked the homestead. The witnesses were in the house which did not have any form of light to assist in recognition and/or identification. The witness asserts that they saw the accused inflict injuries on the deceased under those circumstances cannot in any view be practical. The importance of identification in Criminal cases is that punishment is based on culpability.

In Evaluating the evidence of the witness and the conditions obtaining, I am not satisfied that conditions were such that she would make positive identification free from error.

In the result I am not satisfied that Accused 1 IDD Wekesa Sibuta and 2 Simon Juma Bipore and Accused 3 Mohammed Wanjala Sibuta were positively identified as the person or persons who inflicted the injuries on the 2 deceased in Count 1 and Count 2. I therefore find Accused 1 IDD Wekesa Sibuta Accused 2 Simon Juma Bipore and Accused 3 Mohammed Wanjala Sibuta not guilty of the offence of Murder and acquit each one of them under Section 215 of Criminal Procedure Code. Accused to be set at liberty unless otherwise lawfully detained.

Dated at Bungoma this 10th day of March, 2020.

S.N. RIECHI

JUDGE