



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NO. 24 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS.

MARTIN NYONGESA WAFULA.....ACCUSED

JUDGMENT

The accused MARTIN NYONGESA WAFULA is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence being that; On the 24th July 2017 at Lunao village, Mitua Location in Bungoma North Sub-County within Bungoma County murdered JACOB YESULIE SHIKUKU

Pw1 Petronila Namukuru is the wife of Geoffrey who is the brother of the deceased Jacob Yesulie Shikuku. She sells changaa at her home. On 27.7.2017 she was in her house with Jacob the deceased at 9p.m. when 4 people came; Martin (the accused) Peter and 2 girls. When the accused and his party arrived, a quarrel ensued between the deceased and accused. The accused, Peter and the 2 girls left the house saying they were going to a funeral. The deceased then left the house after about 30 minutes. Shortly after she heard one Morine shouting that “don’t beat him.” she went out only to find the deceased walking towards the house saying Martin had finished him. She observed deceased and saw he was bleeding. They put him on a Motor cycle and took him to Hospital. On the way the Motor cycle ran out of fuel and deceased died at Musengi Trading Centre.

Pw2 Wycliffe Nyongesa Sabuni a step-brother of the deceased was at the house of Petronila (Pw1) drinking changaa. At 9.00p.m. Martin, Peter and 2 girls who appeared drunk came. There was a slight commotion and Martin, Peter and the 2 girls went out. The deceased also left. After a short while he heard Morine shouting that deceased had been injured. He went out with Patricia and Geoffrey and found deceased had been stabbed on the chest. He was taken to Hospital but died on the way. On being cross-examined by Kundu for the accused he testified that the quarrel was between deceased, Peter and Martin, He testified that it is Morine who told him that it is Martin (accused) who stabbed deceased.

Pw4 Shakilla Juma was in his house when he heard screams from outside. He ran there and saw the accused slap the deceased. The deceased picked a stick and hit the accused. He then saw Winnie who was with accused being hit by another girl. That girl removed a knife and aimed to stab Winnie. Accused disarmed the girl of the knife which he then used to stab deceased. Deceased started crying and people dispersed. Accused then ran away. He screamed and people came to the scene. They took deceased to hospital but died on the way. He stated that he was able to see the accused stab deceased using the light from the moonlight.

Pw5 Peter Juma Nalianya was with the deceased at the home where changaa was being sold. While there drinking, the accused came with 2 girls. Accused bought changaa for Kshs.200. They drunk. Accused then started to go away with the 2 girls but deceased held one of the girls as he did not want her to go. The girl fell from a motorbike. Accused and deceased started fighting. Deceased picked a stick and hit the accused. Accused then took a knife from Mary one of the girls he was with and stabbed deceased. The deceased was taken to Hospital but died on the way. On being cross-examined by Kundu for the accused, he testified that he was with the 2 girls, accused, and his sister and he saw accused stab the deceased.

Pw6 Miriam Nelima Wekesa testified that on 24.7.2017 she, was with accused, Mary and Caro at a campaign rally where they were given Kshs.1,000/=. They decided to go and get change in a homestead where changaa was being sold. They bought changaa and drunk. She left but as she was leaving, she heard the accused say “you are beating Peter.” She then saw accused remove a knife and stab the deceased. Geoffrey who was with them tied the deceased with a sweater to stop bleeding. They put the deceased on accuseds Motorcycle but the rider was not accused. They took him to Hospital but died on the way. On being cross-examined by Kundu, she testified that she was with accused, Mary and Caro. She confirmed that before the stabbing, the accused quarreled with the deceased. She was able to see clearly as there was moonlight.

The accused on being put on his defence gave Sworn evidence. He testified that on 23.7.2017 he had gone to his place of work where he removes river sand from the river. He later went to a construction site where he slept. On 24.7.2017 his wife called him to go home. He did

not go. On 26.7.2017 she called again on 1.8.2017 he was arrested by Police officers who took him to Mukuyuni Police Station where he was informed of the present charges. He denied that on 24.7.2017 he was with Mary Jacob (deceased) or Wycliff, though he knew them.

Mr. Kundu for the accused filed written submission. He submitted that in this case the Prosecutor has to prove that the accused was at the scene of the murder, and that he is the one who stabbed deceased with result that he died from the injuries; finally the prosecution was to establish the existence of malice aforethought. Counsel submitted that while there is no dispute on the death of the deceased, several people were arrested as suspects including ones who testified as prosecution witnesses. He submitted that the prosecution witnesses did not place the accused at the scene of crime; no murder weapon was traced to the accused and consequently the prosecution failed to prove its case beyond reasonable doubt.

Pw3 Dr. Patrick Musita who performed a Post Mortem on the body of the deceased on external examination the deceased had abrasion injuries on lower leg, penetrating chest injury 4cm between the 7th and 8th rib extending to the diaphragm with left lung injured. From the examination he formed opinion that cause of death was bleeding as a result of the penetrating injury to the Chest. He therefore established the fact and cause of death of the deceased.

The second ingredients of the offence of murder which the prosecution must prove, besides the unlawful act or omission is that it is the accused who committed the unlawful act or caused the injuries that lead to the death of deceased. The prosecution must lead evidence to positively identify the accused as the person who committed the offence. The accused in this case gave his defence in which he stated that he was not at the scene of the crime. He testified that at the time the offence was committed on 24.7.2017 he was at a construction site far from home. He therefore contends that he is not guilty as he could not be at two places at the same time.

In our Criminal Justice system the prosecution is under a duty to prove all the ingredients of the offence. The burden of proof of the guilt of the accused rests with the prosecution throughout the trial except where there are admission or the burden of proof is by law shifted to the accused. In *Charles Anjare Mwamusi -Vs- Republic CRA No.226 of 2002* the court of Appeal states; Quoted with proved *In Benard Odongo Okutu -Vs- Republic [2018] eKLR*.

109. On Issue 6, the appellant claims that his defence of alibi was not considered in his favour. On the Appellant's defence of alibi, the appellant complained that his defence of alibi was not considered by the trial magistrate. In the case of *Charles Anjare Mwamusi V. R CRA No. 226 of 2002* the Court of Appeal stated:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him 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 Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25.”

110. I thus take cognizance of the principle that by setting up an alibi defence, the accused does not assume the burden of proving the alibi- see *Ssentale vs. Uganda [1968] EA 36-*. The foregoing was restated in the case of *Wang'ombe vs. Republic [1976-80] 1 KLR 1683* where it was stated *“the prosecution always bears the burden of disproving the alibi and proving the appellant's guilt.”*

111. However, this defence should also be raised at the earliest opportune time as was held in the case of *R VS SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6EACA 145* that:

“ if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there's naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”

112. And in the case of *Victor Mwendwa Mulinge vs Republic*, the Court of Appeal rendered itself on the issue of alibi thus:-

*“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanjavs Republic*, this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought”*

Where an alibi defence has been raised by the accused, the prosecution can disapprove the same by leading evidence that places the accused at scene of crime. This can be done by eye witness evidence, electronic evidence for instance CCTV images, or mobile phone technology location, or by establishing the accused made mobile phone communication from that vicinity and therefore would not have been at the place he alleges he was, or by vehicle tracking technology.

In this case the Prosecution called Pw1 Petronila Namukuru (Pw1) who testified that accused, together with Peter and 2 girls came to her house where she was selling changaa on 24.7.2017. Accused started quarrelling with the deceased over one of the girls. Pw2 Wycliffe Nyongesa Sabuni testified that he was at the house of Pw1 and saw accused Peter and 2 girls come to the house. This is the same evidence given by Pw4 Shakilla Juma, Pw5 Peter Juma Pw6 Miriam Nelima Wekesa. Miriam (Pw6) testified that indeed they had been in the campaign where they were given Kshs.1000 and they went to look for change in the house of Pw1 Petronila who insisted they buy changaa first.

All these witnesses knew the accused well and their evidence that he was with them is in my view credible. The evidence of these witnesses place the accused at the scene where the offence occurred and therefore has displaced his alibi. The other ingredients that the prosecution must establish is whether it is accused who inflicted the injuries from which the deceased died. Pw4 Shakilla Juma testified that he heard screams and ran there. On arrival he saw the deceased pick a stone and hit the accused. The accused then took a knife from one the ladies called Winnie and went to where deceased was and stabbed him near the hip. Deceased started crying and then accused ran away. He was able to see the events using the light from the moonlight.

Pw6 Miriam Nelima testified that she heard screams and when she went there she saw the accused remove a knife and stab the deceased on the ribs. One Geoffrey who was with them tied the deceased with a sweater to stop bleeding. They put the deceased on accused's motorcycle using another rider to take the deceased to Hospital but died on the way. She was able to see what was happening using the moonlight.

Pw5 Peter Juma who was with the accused and deceased testified that the accused and deceased started fighting over a girl who was with the accused and the deceased. The deceased picked a stick and hit the accused. The accused got a knife from one of the girls and stabbed the deceased on the abdomen. He was able to observe and see what happened with the help of the moonlight. All these witnesses were with both the accused and deceased on the material night. They testified that there was a fight between the accused and deceased. They were outside and were able to see what happened by use of moonlight. The witnesses Pw4 Pw5 and Pw6 saw the accused stab the deceased on the material night. There was sufficient moonlight to enable them see what happened. They were consistent and credible witnesses. I am satisfied that it is accused who stabbed the deceased inflicting the injuries from which he died.

Upon considering all the evidence I am satisfied that the prosecution has proved the offence of Murder against the accused. I find accused Martin Nyongesa Wafula guilty of the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Dated at Bungoma this 29th day of October, 2020

S.N. RIECHI

JUDGE