



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL CASE NO. 4 OF 2019.

REPUBLIC.....PROSECUTOR

VERSUS

KENNEDY SIKUKU SIFUNA.....ACCUSED

JUDGMENT

The accused **KENNEDY SIKUKU SIFUNA** is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of offence are; On 9th March, 2016 in Siloba "B" village, Napara location, Bumula Sub-County murdered KIZITO KHAMALA JUMA.

The case for the Prosecution is that the deceased Kizito Khamala Juma was employed by Pw1 Kennedy Wabwire Wekesa as a boda boda rider for his motor cycle. On 9.3.2016 deceased called Kennedy Wabwire and informed him that he was sick and his motor cycle had a puncture. Kennedy went to where deceased was at Sigilia Market. He found deceased unwell as he was vomiting. He took him to Kimaiti Hospital where a nurse told him deceased had been there earlier and had been asked to go to Kocholia Hospital. He took deceased to his home and gave his family members Kshs.500/=.

Pw4 Chrispinus Wangala the elder brother of deceased informed by Kennedy Wabwire that deceased was unwell. When Kennedy brought deceased home, he spoke to the deceased who told him it is Kennedy Sifuna who had assaulted him. He observed that he had injuries on the head. They decided to take deceased to Mulago Hospital Uganda where he was admitted on 19.3.2016, he died while undergoing treatment.

Pw6 Dr. Harun Ombongi produced a Post Mortem report prepared by Dr. Raymond Damba. He observed that the deceased had a wound on the back of the head and Subdural haemorrhage on the left side. He formed opinion that cause of death was due to head injury due to trauma.

The accused Kennedy Sikuku Sifuna gave sworn evidence in his defence. He testified that he did not assault deceased. He testified that he did not know the prosecution witness who testified that he had been in Nairobi on the alleged dates as he was working with Tononoka Steel Mills. The accused called his mother Dw2 Catherine Sifuna who testified that on 9.3.2016 the accused was in Nairobi when the alleged offence was committed.

M/s Natwati for the accused filed written Submissions. Counsel submitted that the prosecution in this case must prove the 3 ingredients of the offence of Murder (1) an intention to cause death (2) the unlawful act or omission committed. Counsel submitted that there is no eye witness who saw the accused assaulting the deceased. Counsel submitted that the accused's defence was an alibi defence where he testified that he was not at the scene where the offence occurred as he was in Nairobi. Counsel submitted that the defence having raised an alibi defence, the burden always lies on the prosecution to displace the same by evidence placing the accused at the scene of crime.

For the prosecution to obtain a conviction in a charge of Murder It must by evidence prove.

- 1) *The fact and cause of death of the deceased.*
- 2) *The unlawful act or omission that caused the death of the deceased, or actus reus*
- 3) *There was existence of malice aforethought or mens rea*
- 4) *That it is accused who caused the unlawful act or omission or inflicted injuries that caused the death of the deceased.*

Pw6. Dr. Haron Ombongi produced the Post Mortem from filled by Dr. Raymond Damba who performed the Post-Mortem on body of deceased. The Post-Mortem showed that deceased had a wound on the back of head and internal haemorrhage on the left side. He concurred with the Medical report from Mulago Hospital that cause of death was due to multiple crush injuries due to blunt trauma. The fact and cause of death was therefore established by this witness.

The identification of the accused as the person who caused the unlawful act or omission or inflicted the injuries on the deceased that caused his death is an important ingredient the prosecution must prove. Prosecution can prove this by direct evidence, or proving circumstances from where the court will draw an inference that it is accused and no other who committed the offence.

In this case Pw1 Kennedy Wabwire Wekesa testified that the deceased who was his employee called him and informed him he was sick. He went there, and found him vomiting. He took him to the Kimaiti Clinic and later to his home where he left him. On 10.3.2016 he heard from boda boda riders that accused and deceased fought over KShs.200/=.

Pw2 Anne Nakhumicha the mother of the deceased heard screams and when he opened the door found deceased lying down with injuries. He was not able to speak. In cross-examination she stated that the deceased was assaulted at Kimaiti which was about 1Km away from her home at 5-6p.m. and he was brought home at 8.00p.m.

Pw4 Chrispinus Mwangala the brother of the deceased testified that when deceased was brought home at 8.00p.m. he spoke to the deceased who told him it is Kennedy Sifuna who had assaulted him. He knew Kennedy Sifuna as the person who washes boda boda motorcycles at Kimaiti. On cross-examination by Wekesa Counsel for the accused he confirmed he was not present when they fought. He stated that it is not true that the deceased told him it is accused who had assaulted him while at home but did so while in Mulago Hospital.

From the evidence of these witnesses, they were not present when the alleged fight at Kimaiti took place. Pw1 Kennedy testified that he only heard the deceased and accused fought from boda boda riders. These boda boda riders were not called as witnesses or even their identities disclosed.

The only evidence adduced to connect the accused with the offence is that of Chrispinus whose evidence is that the deceased told him that he was assaulted by the accused. In his evidence in chief this witness stated that deceased told him of the accused while at his home, where he had been taken by the employer (Pw1). However, Pw2 Ann Nakhumicha stated in her evidence that while the deceased was lying down at their home, he was not able to speak. On being cross-examined by Mr. Wekesa, Chrispinus changed his mind and said the deceased told him of the accused assaulting him while deceased was at Mulago Hospital. The Prosecution therefore was relying on the evidence of a dying declaration of the deceased to connect the accused with the commission of the offence. In **David Agwata Achira -Vs- Republic 2003 eKLR** the C. Appeal on evidence of dying declaration stated.

*“The law on dying declaration in Kenya was laid down in the case of **Pius Jasunga S/o Okumu -Vs- Republic [1954] 21 EACA** which was cited with approval in the case of **Okale -Vs- Republic [1965] KLR 543** where it was held at page 547 paragraph 5-10 thus.*

In every Criminal trial a conviction can only be based on the weight of actual evidence adduced and it is dangerous and in advisable for a trial Judge to put towards a theory not canvassed in evidence or in counsels speeches. A trial Judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction on a dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.”

In this case the alleged information to Chrispinus that it is accused who assaulted the deceased was alleged to have been made when the deceased was at his home. There is evidence however, from deceased's mother that he was unable to speak due to the injuries. Chrispinus (Pw4) while being cross-examined changed the story and said the deceased told him so while he was in Mulago Hospital, and not at home. This inconsistency by the witness to such an important piece of evidence leads this court to find it not credible. I echo the words of the C. Appeal that it will be very unsafe to base the conviction of the accused on this evidence without satisfactory corroboration.

In the result, I find the prosecution has failed to prove a charge of Murder against the accused. I therefore find the accused Kennedy Sikuku Situma NOT guilty of the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and acquit him under Section 215 Criminal Procedure Code. Accused Kennedy Sikuku Sifuna to be set at liberty unless otherwise lawfully detained.

Dated at Bungoma this 29th day of October, 2020.

S.N. RIECHI

JUDGE