



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL CASE NO. 5 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

MIKA WATIMA.....1ST ACCUSED

MUSA WEKESA.....2ND ACCUSED

JUDGMENT.

The Accused MIKA WATIMA (Accused 1) and MUSA WEKESA WABUKE (Accused 2) are charged with offence of; Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are; On the 24th day of January 2018 in Cheptais Sub-County within Bungoma County jointly with others not before Court murdered BROWN WASIELA WANAMBISI.

The prosecution evidence is that Pw1 PM a student at [particulars withheld] Girls in Form 1 was a girlfriend of Accused 1 Mika Watima from September 2017 to December 2017 when their friendship ended. It is P who terminated the relationship. Stung by the decision, Accused 1 told P that he will not leave her and that if he found her with any boy, he will deal with him. Having left Accused P asked Accused 1 to give her back her photographs to which the Accused refused. P then became friends with deceased Brown Nasiela Wanambisi.

On 24.1.2018 she was sent by her mother to the market. While on the way to the market, the deceased called her on her phone and informed her he was sick. She proceeded to his house within the market and found him with one Job. After 40 minutes, the deceased escorted her to the road where they parted and deceased went to meet his friend Rashid while the witness went to her home. The next day she started going to the deceased's house but on the way she met his friend Rambo who informed her deceased had gone to Eldoret. She turned back and went home. Later she received information that deceased had died. She was arrested and taken to the police station where she recorded her statement. On being cross-examined by Olonyi for Accused 1, she stated that her and the deceased did not meet accused that day.

Pw2 Job Wanjala Simiyu testified that on 24.1.2018 Pw1 P visited the deceased. The deceased and P (Pw1) left together. He was informed by one David that there was a person knocked down on the road. He went there and found it was deceased. He took him on a boda boda to Sirisia Sub-County Hospital where he was referred to Bungoma and later to Moi Teaching & Referral Hospital where he died. On being cross-examined he confirmed deceased had injuries on the head and chin but he did not see accused 1 that night.

Pw4 Christopher Saenyi Namunala was called by Wycliff Winimasi who told him the deceased had been beaten. He went there and found he had been taken to Sirisia Hospital, where he was referred to Bungoma. He then went and reported the matter to police. Pw5 Maurice Wabomba Wetala the Assistant Chief received information that deceased who had earlier been alleged to have been assaulted had died. He was informed that the suspect was Musa Wabuke (Accused 2). He then arrested P (Pw1) who was the last person seen with the deceased and took her to police station. He also looked for Mika (Accused 1) who was also a suspect and took him to the Police.

Pw6 David Nyongesa Wafula a boda boda rider was riding his Motor cycle when he saw a person lying down across the road. He stopped and checked. He found it was deceased, who was known to him. He called Job and Rambo friends of the deceased and informed them.

Pw9 P.C. Johnson Wanjohi took over the file which had been compiled by Cpl. Okuku who passed on in April 2018. He produced the statement by the Investigating Officer.

Pw10 Dr. Harun Ombongi performed a Post Mortem on body of the deceased. His observation in external appearance was that he had bruises on face, depressed skull fracture on frontal region and bruises on left wrist joint. Upon opening the body he found the deceased had a depressed fracture on frontal region and skull was fractured at the parietal region. He formed opinion that cause of death was due to severe head injury, secondary to assault.

Accused 1 Mika Watima gave sworn evidence in his defence. Testified that he is employed by one Collins as a pool attendant. On 24.1.2018 he went to his place at work where he works upto 8p.m. when he went home. While at home at 10p.m. Police Officers came and

arrested him and took him to Chesikaki Police Station. The next day he was informed of the allegation of murder. He was detained by order of the court for 14 days and later charged with present offence. He testified he knew P (Pw1) who was his girlfriend but did not know the deceased. On cross-examination by Thuo for state he stated that although he used the road where deceased was found, when going home he did not see any person lying on the road.

Accused 2 Musa Wekesa testified that he is a car washer at Melong Market. On 24.1.2018 he worked at his place of work upto 6p.m. when he went home, had supper and slept. At 11.30p.m. Cpl. Okumu went to his home arrested him and took him to Police Station where he was placed in cells. The next day he was informed of the allegation of Murder which he denied. He denied knowing Accused 1 or P (Pw1) or the deceased.

Mr. Were for the accused filed written Submissions. He submitted that from the evidence adduced the prosecution did not establish the cause of death. He further submitted that the prosecution failed to place accused person at the scene of the alleged murder. He further submitted that none of the prosecution witnesses mentioned accused as the person who caused the death of deceased.

In a charge of Murder the Prosecution for it to succeed, must prove the ingredients of the offence. These are the fact and cause of death, the unlawful act or omission causing death, or actus reus the presence of malice aforethought or mens rea and finally that it is the accused who inflicted injuries from which the deceased died. Pw10 Dr. Ombongi testified that the deceased had bruises on the face depressed skull fracture at frontal region and bruises on the wrist. Internally the deceased had a skull fracture on frontal region, and massive sub-dural haematoma. According to him the cause of death was due to the severe head injury secondary to assault using a blunt object. The fact and cause of death was established by this witness.

The other ingredients the prosecution has to prove is that it is accused who caused the unlawful act or omission or inflicted the injuries on the deceased from which he died. This is the issue of positive identification of the accused as the person who inflicted the injuries. This can be done by the prosecution adducing direct evidence. This will be evidence which directly links a person to a crime that is based on eye-witness account, or personal knowledge or observation. The prosecution can also prove the fact by way of circumstantial evidence. This would be by proving fact or circumstances, from which an inference would be drawn that it is the accused who committed the offence.

Positive identification of an accused as the person who committed the offence is always an important issue in criminal law. This is so for two reasons, first criminal law attaches to a person and secondly objectives of punishment or sentencing is aimed at achieving particular objectives to an offender.

In this case none of the 10 witnesses called by the prosecution testified to having seen either Accused 1 or 2 singly or jointly assaulting the deceased. Indeed P (Pw1), Job (Pw2), Sammy Barasa (Pw3), Christopher Saenyi (Pw4) all said they did not know how the deceased died. They confirmed that they did not see Accused 1 or 2 on that material night. Pw5 Maurice Wabomba the Assistant Chief who arrested Accused 1 as a suspect did not state the basis for the arrest. Indeed he also arrested Pw1 P, for the reason that P was with the deceased that night and Accused 1 because he had threatened P that any man she will befriend after terminating their friendship, will be dealt. This alone without more cannot in my view be a basis for charging the accused with offence of Murder. An offence of Murder must be premised on cogent evidence, not suspicion however strong it is.

I have considered the whole evidence, I am persuaded that the prosecution has not established any evidence to connect the two accused with the death of the deceased. I therefore find the Accused 1 Mika Watima and Accused 2 Musa Wabuke not guilty of the offence of Murder and acquit them under Section 215 of the Penal Code. Accused 1 Mika Watima Accused 2 Musa Wabuke be set at liberty unless otherwise lawfully detained.

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

S.N. RIECHI

JUDGE