



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA.**

**CRIMINAL CASE NO. 22 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENARD SOITA WAMBATI.....ACCUSED**

**JUDGMENT**

The Accused BENARD SOITA WAMBANI is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of offence being that; between the night of 1<sup>st</sup> August and the dawn of 2<sup>nd</sup> of August 2016 at [particulars withheld] village, Musakasa Sub-location within Bumula Sub-county in Bungoma County murdered JWW.

The evidence for the Prosecution is that on 1.8.2016 Pw1 SWW was with the deceased JWW when at 8p.m. they went to a home where there was a circumcision ceremony. While walking and on reaching near the home of Edamleri, they heard people breaking sticks, behind them. The people then shouted stop, and one of them threw a metal pipe which hit L. The witness was pushed and he fell down. The people attacked him and he escaped and hid near a fence. He then saw the deceased running away when he was chased by a person wearing a coat which had white box colours. The witness ran to the circumcision ceremony where he stayed upto 12a.m. when he saw accused come and tried to fight other people. He then went home. The next day, deceased's mother came and asked him of deceased's whereabouts. Later he received information that deceased had been found dead at Murumba.

Upon cross-examination by M/s Lunani for the accused, he testified that they were in a group of about 12 boys and that the group that attacked them were more than 3 and he only identified the accused. He testified that he did not see accused beat Joseph.

Pw4 LS a minor aged 16 years testified that on material day her B and B decided to go to a home where there was a circumcision ceremony. They were a group of 14 boys. On the way they were attacked by unknown people. He was hit on the head and ran away. They went to the home where the circumcision ceremony was being held but he noticed deceased was not among them. He later went home and next day received information that deceased had been killed.

Pw5 BM who was with L and B testified that while going to the circumcision ceremony they were attacked on the way. He was with the deceased before the attack. He did not know who attacked them as it was at night.

Pw6 BS testified that he was in the group with deceased who was behind them. He however did not see who attacked him. Pw9 Martin Nyongesa the Chief at Saboti Location on 2.8.2016 received information that there was a person lying in his Sub-location. He instructed Pw8 Charles Wafula Simiyu the Chairman of *Nyumba Kumi* who proceeded to the scene and confirmed the same. Pw8 on arrival at the scene found the deceased lying on a trench facing down. He had visible injuries on the face and hands. Police were informed and took away the body.

Pw11 DW who was also in the group of boys which included the deceased testified how they were attacked on the way by people he did not know. He however noticed that one of them was wearing a Jacket Exh. 2. The person again came at the ceremony and beat them. He decided to leave the place for home. The next day he was informed deceased had died. Pw12 No. [xxxx] Inspector Simon Mwangi the Investigating Officer received information of the murder from the Chief (Pw9). He visited the scene. At the scene he found the body of a young man who had injuries on the head. He was unknown to the villagers in that area. He took the body to Bungoma Mortuary. On 3.8.2016 the body was identified as that of the deceased. Later he received 2 suspects, the accused and another person. He recorded statement of the witnesses who said they identified accused by the clothes he wore. He caused accused to be charged with present offence. Upon cross-examination by Lunani for accused, he testified they recovered the coat from house of accused which was then identified by witnesses.

The accused gave sworn evidence. He testified that on 1.8.2016 at 8p.m. he went to the home of his neighbour where there was a circumcision ceremony. He arrived at 8p.m. and led in the singing of circumcision songs. He led the singing upto 3a.m. when he left and

went to his home where he slept. The next day they took the boy for circumcision and came back. He then received information that there was body of a person in a trench. He went there and found many people but did not identify the person. Police officers came and took away the body. He was later arrested by Nyumba Kumi officials and taken to the Assistant Chief and later to the police station. He was later taken to his home where a jacket and stick were recovered.

Dw2 IW in whose home the circumcision ceremony was held testified that accused was the lead singer and was at his home from 8p.m. to 3a.m. when he returned the ceremonial lamp to him. Accused came back at 6a.m. when his son was circumcised. He confirmed that the accused did not at any time leave the home from 8p.m. to 3a.m. that night.

M/s Lunani for the accused filed written submissions. Counsel submitted that there was no witness who testified that he saw accused beating the deceased. Counsel further submits that all the witnesses could not see the assailants. She further submitted that the accused has given account of where he was which is corroborated by the evidence of IW (Dw2) in whose home he was. She urged the court to find that prosecution has not established its case.

That the deceased JWW sustained injuries on the fateful night and died is not in dispute. Indeed the evidence of Dr. Harun Ombongi confirms that the deceased had deep cut wounds on leg, blood oozing from left ear and had head injury leading to a skull fracture. What is in issue is whether it is accused who inflicted the injuries.

Pw1 SW testified that the people who attacked them chased deceased and one of them was wearing the coat Exh.1. He saw that person again came to the ceremony and started beating people. He said he had known accused before and he was the one who came to the ceremony. In cross-examination by M/s Lunani he admitted that he did not see accused beating the deceased but only saw accused following deceased.

Pw4 LS in his evidence testified that their group of about 14 boys was attacked by people while on the way to the circumcision ceremony. The deceased was in his group, but after the attack he did not see him. He confirmed on cross-examination that he did not see the person who hit him nor know the attackers as it was dark.

Pw5 BM was in the group of the deceased and when they were attacked on the way to the home where the ceremony was held. He did not see who attacked them as it was dark. Pw6 BS who was also in the deceaseds' group testified he did not see who attacked them as it was dark.

From all these witnesses, it is clear that it was dark and they did not see who attacked them or the deceased. It is only Pw1 SW who testified that he saw a person wearing a jacket produced as Exh.1. The jacket was recovered from the house of accused. The accused testified that he was at the circumcision ceremony as a lead singer. This fact is admitted by all the prosecution witnesses and supported by Dw2 Isaac in whose home the ceremony was held. He has therefore accounted for his whereabouts from 8p.m. to 3a.m. He would not have been where the attack was being carried out. He was already at the home.

Considering all the evidence, I am satisfied that accused was not positively identified as the person who inflicted injury on the deceased on the fateful night. I therefore find the accused BSW Not guilty of the offence of murder contrary to Section 203 as read with Section 203 of the Penal Code and acquit him under Section 215 of the Criminal Procedure Code.

Accused be set at liberty unless otherwise lawfully detained.

**Dated at Bungoma this 27<sup>th</sup> day of October, 2020.**

**S.N. RIECHI**

**JUDGE.**