



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL CASE NO. 10 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSES**

**AWN.....1<sup>ST</sup> ACCUSED**

**MK.....2<sup>ND</sup> ACCUSED**

**GW.....3<sup>RD</sup> ACCUSED**

**MWK.....4<sup>TH</sup> ACCUSED**

**JUDGEMENT**

1. The accused persons are jointly charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that **on the 5<sup>th</sup> day of April 2018 at [particulars withheld] area in Saboti Location within Trans-Nzoia County murdered DAVID SIMIYU WANYAMA**.

2. The accused persons denied the charge and the matter went to full trial where the prosecution called several witnesses. At the end the accused were placed on their defences and they each gave sworn defence but none called any witness. The parties were as well ordered to file written submissions which they complied and the court has perused the same with the attendant authorities attached. Before looking into the merits or otherwise of this matter it shall be appropriate to summarise the evidence as presented during trial.

3. **PW1 KL** aged 13 years old testified that he used to stay with his grandparents. That on the material day the accused persons who were all armed came and attacked them. He said that he was standing next to the coffin and they attacked the deceased who was next to the coffin as well. They assailants were using timber, knives and metal bars.

4. The assailants as well attacked MN, EN and HN. He said that the second accused beat M her grandmother, the 1<sup>st</sup> accused assaulted H, the 4<sup>th</sup> accused assaulted E and the 3<sup>rd</sup> accused assaulted the deceased. All the accused eventually assaulted the deceased.

5. When cross examined he said that there were many people and he was standing next to a wall and he saw all that happened. He said that the 1<sup>st</sup> accused was his uncle and he hit the deceased with a metal bar and stabbed him using a knife. He said that the deceased was making the coffin with one Patrick who was not a family member.

6. **PW2 CN** testified that he was at the home on 5<sup>th</sup> April 2018 since his father had died. His uncle the deceased was making a coffin and was being assisted by someone else who was also a carpenter. The accused persons and others attacked the deceased using crude weapons namely rungas and pangas.

7. They asked the deceased why they were making the coffin and while he replied they proceeded to attack him simultaneously. The police later came and took photographs and the body taken to the mortuary.

8. When cross examined he said that the 1<sup>st</sup> accused was his brother and there was a dispute regarding the burial of their father.

9. **PW3 HN** testified that she knew PW1 who was his sister's child and PW2 was her brother. On the material day she was at her father's place preparing for his burial at around noon when they were attacked by the accused persons who numbered about 13. She said that she was assaulted by MK and GW. The deceased pleaded with them while raising his hands but he was hit by the 2<sup>nd</sup> accused and felt into the coffin.

10. The accused as well broke into the house of CN and set the coffin ablaze and left thereafter. The 1<sup>st</sup> accused took a stone and hit the deceased head while he was lying on the ground.
11. When cross examined he said that the 1<sup>st</sup> accused hit the deceased head using a panga. She said that there was no quarrel but they simply attacked him.
12. **PW4 PATRICK WAMETWA NALIANYA** testified that he was a carpenter and he was assisting the deceased on the material day to make the coffin. The accused persons came to the homestead and began assaulting the women who included H, Emily and Mary. They went to where they were and using metal bars they attacked the deceased despite his pleas by raising his hands. He fell to the ground and died.
13. He went on to state that G and M had paraffin and they poured on the coffin and set it ablaze. They also chased people from the compound.
14. When cross examined he said that he got to know them when he recorded his statements at the police station. He said that while the deceased was being attacked he did not do anything. That they simply attacked the deceased without talking to him.
15. **PW5 EN** testified that on the material day she was at her father's home preparing for his funeral. The accused person came and assaulted the deceased who was his uncle and was making a coffin. They also beat her up using sticks. The deceased had raised his hands. He was injured on the head and hands.
16. On cross examination she said that beside the relatives there were other people but it was the accused persons who came and attacked them.
17. **PW6 A.P.C FRANCIS SAGALA** from Kaburetwa police post testified that he received information from the area chief concerning the incident. He was advised by his senior to go to the scene where he found many people crying. There was a body lying on the ground and the family members told him about the 4 accused persons who had since taken off.
18. He then followed them and was told that they had gone to the farm of senator Ndiema. He was given their phone numbers by the area chief and he called them. They picked his call and he directed them to where he was and they came. The two told him they were fleeing for fear of their security. He arrested them and took them to police station at Kinyoro. He later handed the two namely accused 1 and 2 to the police who took them to the station.
19. **PW7 PC WILLIAM MAIYO** from Saboti Patrol Base testified that he was told of the incident and informed that the assailants had fled from the scene towards Kabason. He went with his friends towards Saboti /Kisawai road and he saw the two crossing the road. This were Gilbert and Mike. They told them that they were from Kaburetwa and he suspected them. He placed them in the vehicle and called his boss.
20. He joined PW6 who had by then arrested the rest. They did not go back to the scene as the members of the public were baying for their blood. They handed them over to the police from Kitale police station. The scene of crime officer came and took the photographs.
21. On cross examination he said that he arrested the two accused person as they were walking in a hurry and looked suspicious.
22. **PW 8 PROTUS WECHULI SIFUNA** the Chief Saboti Location testified that on 5<sup>th</sup> April 2018 he was called by one Beatrice and told of the incident at the home of CNM. He called pw6 as well as the assistant chief. He went to the scene where he found many people screaming and the deceased body lying on the ground. Beside the body was a coffin and a jerry can containing paint.
23. He was called by M who told him that he was involved in the incident and that he was with Andrew. He advised them to surrender to the police. Pw6 called him and notified him of their surrender. He said that the deceased was an in-law to the accused father. The dispute according to him was over the funeral.
24. When cross examined he said that the 2<sup>nd</sup> accused called him as he was fearing for his life and he advised him to surrender to the police. He was told that the deceased wanted the burial of their deceased father earlier while they had suggested the following week.
25. **PW9 HILARY NDUMBA** testified that the deceased CN was from his clan and he was called by the 2<sup>nd</sup> accused concerning the incident. He went to the deceased home and they were to agree on the burial date. He went back and was later called and informed of the incident herein. He was discouraged and he did not attend the funeral.
26. **PW10 MNW** said that the deceased was her brother and that he was in the homestead on the material day when they were attacked by the accused. They were armed with crude weapons including pangas, knives and metal bars. She was injured by accused 3 on her hand. They also attacked the deceased who was making the coffin and they thereafter took off. They also destroyed the house of their brother and ransacked everything.
27. **PW11 SABWMI WANJALA** a mental health expert from Kapenguria hospital produced the mental health status of all the accused persons. He found all of sound mind and were fit to stand trial.
28. **PW12 DR ALEX BARASA** from mount Elgon hospital produced the post mortem report of the deceased on behalf of Dr Sitote who performed it. It was concluded that the deceased cause of death was severe head injury.
29. **PW13 INSPECTOR FREDRICK SIMIYU SIRENGO** attached to the CID Kitale Crime Scene Section produced several photographs

which he took at the scene. The same depicts the homestead as well as the deceased body lying on the ground.

30. **PW14 CORP. JOSEPH OMONDI** carried out the investigations by recording statements from the witnesses and preferred charges against the accused persons.

31. As indicated above when placed on their defences each of the accused persons gave sworn evidence in their respective defence. Accused one **AWN** testified that he was the first born of the late NM whose funeral they were planning that day. All his children were present including W, the last born. He went on to state that since their aunt had died at Vogoli she was to be buried first and that some people from the family were to attend.

32. The said W said that the burial of their father should be moved forward as he was a prominent person. He was holding a jack plane, "randa", and he attempted to hit him and he dodged. He then hit the deceased on the head. He denied that it was him who hit the deceased using a panga.

33. When cross examined, he said that they did not refuse the deceased to make the coffin but they wanted the burial date to be moved forward.

34. The 2<sup>nd</sup> accused **MK** testified that he heard of the death of his father through GW. He went and found people who were mourning at home. He was given tea and decided to rest till the following day when he was to go and see the body at Kiminini mortuary. There was a discussion about postponing the burial to allow the burial of their aunt first.

35. He said that there was a land dispute between the brothers and they agreed to discuss after the funeral. On the material day however he saw W take a jack plane and hit Andrew but missed him and instead hit the deceased. He wanted to assist but took off because of fear. He called the area chief who promised to call the police. He met Andrew who was also running away. He met the 3<sup>rd</sup> and the 4<sup>th</sup> accused and all were arrested by the police. He said that the dispute was about the land and not their father.

36. On cross examination he said that the dispute was about the burial and the chairman of the clan had permitted the deceased to make the coffin. He said that W hit the deceased once with the jack plane and the deceased as well hit himself on the coffin.

37. The 3<sup>rd</sup> accused **GW** said that his grandfather died on 2<sup>nd</sup> April 2018 and he informed the 2<sup>nd</sup> accused. There was also another funeral of their aunt and she was to be buried first before their father. He said that while in his house he heard some screams from his grandfather's house and people saying "shika huyo".

38. He saw the 1<sup>st</sup> and the 2<sup>nd</sup> accused running away and they decided to follow them and there were many other people running behind them. They found the police vehicle from Saboti and they informed them that they were following their parents. They were told to board the vehicle for their own safety.

39. He denied being at the scene when the deceased was killed. He said on cross examination that when the deceased was killed he was at his mother's house.

40. The 4<sup>th</sup> accused **MWK** testified that they received a call concerning the passing on of their grandfather and he went to his home after 3 days. He was given tea and as he continued he heard some noise and he saw accused 1 and 2 running away and were being chased by his aunt H, C and others. They were heading towards the road that goes to Saboti.

41. He decided with accused 3 to follow them and they called them and they were later picked by a police vehicle. They were not released by the police because of their safety. He denied being at the scene and he did not know what transpired.

### **ANALYSIS AND DETERMINATION**

42. The parties did file their written submissions as stated earlier. The prosecution submitted that it had proved its case beyond any shadow of doubt and that the accused persons ought to be convicted based on the evidence presented. The learned state counsel submitted that the accused had a common intent which they executed successfully. The intention was to stop the deceased from making the coffin for the interment of his brother in law.

43. The counsels for the accused have submitted on their part that the state failed to link the accused persons with the death of the deceased. That the witnesses failed to name the assailants to the police and that they were generally arrested because of suspicion.

44. The court must prove that there was malice aforethought on the side of the accused persons which they successfully executed. The Penal Code under Section 203 states as follows;

***"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder"***.

45. This is the substantive ingredient which ought to be satisfied for the offence of murder to be proved. It must be shown that the accused action caused the deceased death, and that the same was unlawful and was carried out maliciously. The cause of the deceased death as found by the pathologist was severe head injury which caused excessive bleeding.

46. The prosecution witnesses especially PW1, 1,2,3, 4 and 5 stated that they were at the scene preparing for the funeral of their deceased

father. All the witnesses agree that the accused persons were at the scene as well. The deceased and his carpenter friend pw4 were busy working on the coffin.

47. The other issue that was admitted by the parties was that there was another funeral arrangements involving their aunt who had died and was living in Vogoli. It had been suggested that she should be buried first before their deceased father.

48. Did the accused persons attack the deceased? The general thread of evidence by the prosecution witnesses indicated so. The incident took place around noon and thus the visibility was good. Secondly there were many people within the homestead including the witnesses.

49. It appears that the accused began first by attacking pw3, 5 and 10 the sisters to their deceased father and grandfather. They then proceeded to attack the deceased. Pw1 although a minor saw the accused persons armed with crude weapons including rungas, sticks, metal and wooden bars and pangas.

50. Efforts by the deceased to calm them was fruitless despite raising his hands. PW 2 said that he was next to the coffin as well just like pw1 and was able to see the assailants clearly. He even saw the type of weapons they carried.

51. When cross examined he said that pw1 had a panga and he hit the deceased on the head and cut him with a panga.

52. This court based on the sum total of the evidence presented easily concludes that all the accused persons in one way participated in assaulting the deceased. They thereafter left the scene while the members of the public were pursuing them.

53. Their defence was in my view ridiculous and holds no water. It was a sham in the sense that they claimed to have taken off as they feared for their lives. Why were they running away if they had not committed any offence?

54. The surrendering to the police was just a mere coincidence. The members of the public were in hot pursuit and baying for their blood. Had they been innocent as they claim and had W been the cause of the deceased injuries as they claim then they should have remained at the scene.

55. The fact that no weapon was recovered does not exonerate them from the offence. The pangas, metal bars or wooden bars used against the deceased may not have been recovered but the witnesses were unanimous that they saw the accused use them to assault the deceased. There may have been some discrepancy on what weapon each of the accused was carrying but they generally carried various weapons stated above which the net effect were used to assault the deceased.

56. The allegations that W hit the deceased as he missed accused one does not hold any water. None of the witnesses associated W with the incident. It appears that the accused are now roping in W who is alleged to be their last born brother because of their differences over land.

57. It is instructive also to note that the accused assaulted their sisters and they sustained some injuries although there were no medical documents produced. They caused mayhem in the compound which led to the death of their uncle.

58. There was also the jerry can which was used to carry kerosene which the accused attempted to burn the coffin. The photographs produced indicates some burns on the lining used for the coffin.

59. In the premises, there was a common intention by the accused. The common intention was well explained in the case of **REX V. TABULA YENKA S/O KIRYA & 3 OTHERS (1943) 10 EACA 51** where the Court of Appeal stated that;

***“To constitute a common intention to prosecute an unlawful purpose ...it is not necessary that there should be any concerted agreement between the accused prior to the attack on the so called thief (or perceived offender). Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault.”***

60. The accused persons knew that their action was meant to harm the deceased. They failed to disassociate themselves from their action and the assault on the deceased. By the time they left the scene the deceased had been fatally wounded and even went to the extent of setting ablaze the coffin the deceased was making.

61. Their intention it appears was to stop the burial of their deceased father and grandfather on that day or earlier and before their aunt in Vogoli was buried. Although there may have been an issue of land between them and their brother W, the same did not feature. Even if there was a family misunderstanding there is no evidence to suggest that and in any event it was not a licence to attack the deceased.

62. There was no reason for the deceased to have met his death. It was senseless and completely unnecessary. The most that should have happened was for the accused to have stopped the deceased from working on the coffin. It appears further that there was a consensus by the clan chairman and elders that the burial of their father ought to be postponed.

63. The type of weapons used by the accused was meant to inflict maximum injuries to the deceased which it did as confirmed by the pathologist. The none recovery of the said weapons for purposes of this matter is irrelevant.

64. The argument by the accused that it was not possible to identify the assailants as there were many people is not plausible. As found above the incident took place in broad daylight and their running away from the scene was an indication of guilt on their part.

65. For the above reasons the accused persons jointly and severally are found guilty of the Murder of the deceased herein under Section 203

of the Penal Code.

**Dated, Signed and Delivered at Kitale this 27<sup>th</sup> day of October 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**27/10/2020**

**In the presence of:-**

**Mr Omooria for State**

**Ms Munialo for accused 1 & 2**

**Ms Arunga for Accused 3&4**

**Accused 1-4 – All present**

**Court Assistant – Kirong**

**Judgement read in open court.**