



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NUMBER 14 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

EMM.....1ST ACCUSED

PATRICK FUNGUTUTI.....2ND ACCUSED

J U D G M E N T

The accused **EMM** (1st Accused) and **Patrick Fungututi Khaemba** (2nd Accused) are charged with offence of Murder. The particulars of the offence are that on 21st day of June, 2015 at about 4.00 p.m. at Milo village in Sitikho location in Bungoma East Sub-County within Bungoma County murdered **Robin Wamutete**.

The prosecution's case is that on 21st June, 2015 **PW 1 PNW** a girl aged 17 years was sent by her mother to go and withdraw money from Mpesa shop. On reaching there she found the shop closed. She then met the deceased who was her boyfriend for months and started walking together. They met **1st Accused EM** and **2nd Accused Patrick Fungututi** who emerged and quarreled with them as they thought they were school children misbehaving on the road. She then parted with the deceased who started going towards his home and **2nd accused** followed him on cross-examination she stated that **1st accused** is her grandfather and he had told them to go home.

PW 2 Bernard Wamutete Tela was at his home when he received information that his brother the deceased had fallen on the road. He went to the scene where he found the deceased dead. He had no visible injuries. He found the Chief, police officers were informed and came and took the body to the mortuary.

PW 3 Fredrick Wanyonyi Wamutete the brother of the deceased was informed by the mother that the deceased had been found dead. He went there and confirmed the deceased had died. **PW 4 John Masinde Muyekho** received similarly information and went to the scene and found the deceased lying on the road with no visible injuries. **PW 5, Julius Masibo** who was the Chief received information at 5 p.m., that there was a person lying dead on the road. He went there and confirmed that it was the deceased who was a boyfriend to the daughter of M. He observed the scene and did not see any sign of struggle, nor did the deceased have any visible injuries.

PW 6 Dr. Edward Vilembwa produced a post-mortem report on the body of the deceased performed by Dr. Brian Enwalu. The findings were that the deceased had bruises on anterior nasal; part bruises on the knee and swelling on upper limbs. Upon operating the body he noticed that there was bleeding inside the brain. He formed opinion that cause of death was cerebral haemotomia due to severe head injury.

Upon being placed on their defence the accused gave sworn evidence in their defence. **1st Accused EMM** testified that on 21st June 2015 he was on his farm with **2nd accused** when he saw 2 children on the road. They were holding each other inappropriately. He told the boy and girl to concentrate on their schooling. They left. He left his farm at 5 p.m. where he was informed that a boy was lying on the road about 2 km from where he was. He did not know the person and reported the matter to the clan elder. He noticed that the deceased was the boy who was with the girl earlier. After 5 days he was arrested.

2nd Accused Patrick Fungututi was with **1st Accused** on his farm at 3.30 p.m. they saw a boy and girl on the junction. They advised them to concentrate on their studies. It started raining and the girl went towards her home. On 22nd June, 2015 he learnt that the boy he had met had died. On 25th June, 2015 he was arrested and charged with present offence.

Mr. Kombwayo for **1st accused** filed written submission. He submitted that the prosecution relied on the evidence of **PW 1** who was the girlfriend of the deceased. None of the witnesses saw the accused assault the deceased and therefore the prosecution was lying on circumstantial evidence. He submits that from the evidence the prosecution did not prove that it is the accused who committed the offence and should, therefore, be acquitted.

Mr. Kundu for **2nd accused Patrick Fungututi** submitted that there is no evidence that **2nd accused** bet up the deceased when he met him with PW 1. The prosecution, therefore, failed to prove its case beyond reasonable doubt.

The accused are charged with the offence of murder contrary to Section 203 of the Penal Code. The elements of the offence of Murder whether the prosecutor must prove are: -

- a) **The fact and cause of death of deceased.**
- b) **The unlawful act or omission that caused the death.**
- c) **That it is accused who committed the unlawful act or omission.**
- d) **That the accused had the requisite malice aforesaid.**

PW 1 PNW testified that she was with the deceased when **1st accused** and **2nd accused** rebuked them for inappropriate behavior. She decided to go home and deceased also left for his home. She saw **2nd accused Patrick Fungututi** following him. Later she heard deceased had died. She did not see **2nd accused** assault the deceased. **PW 2 Bernard Namutete** the brother of the deceased was informed that deceased was lying down on the road. He went there and found him dead. **PW 3 Fredrick Wanyonyi** also went to the scene upon receiving information that deceased had been found lying down, so did **PW 4 John Masinde** and **PW 5 Julius Masibo**. None of these prosecution witnesses testified having seen either **1st accused** or **2nd accused** inflict injuries on the deceased. There is, therefore no direct evidence to connect the **1st accused** and **2nd accused** to the death of the deceased.

The prosecution relied on the evidence of PW 1 P who testified that she saw **2nd Accused Patrick Fungututi** follow the deceased when deceased decided to go home. The prosecution, therefore, relied on circumstantial evidence by showing that the accuseds' were the last persons seen with the deceased live; that they had earlier threatened deceased and that the motive was to make the deceased discontinue his friendship with PW 1 P.

Where the prosecution seeks to rely on circumstantial evidence, the burden rests upon it to prove those circumstances the court will upon considering them make an inference that it is accused and no other who committed the offence in.

“As we have already pointed out, the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of the innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

The evidence relied on by the prosecution to show circumstances from which the occur should found and inference that it is accused who committed the offence is that of PW 1 P who said that he saw **2nd accused** follow the deceased. There is evidence, however that the accused received information about the body being found where they were away from the scene. Indeed, accuseds testified that after their advice to deceased and P, the boy left for his home and P also left for his home.

The proved circumstances taken cumulatively do not form a chain which is so complete or when taken cumulatively lend this court to make an inference that it is accused who murdered the deceased. I, therefore, find that the prosecution has failed to prove its case against **1st accused** and **2nd accused**. I, therefore, find **1st accused EMM** and **2nd Accused Patrick Fungututi** not guilty of the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and **Acquit 1st Accused and 2nd Accused** accordingly under Section 215 of the Criminal Procedure Code. Accused be set at liberty unless otherwise lawfully detained.

Dated, signed and delivered at Bungoma this 25th day of November, 2020.

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S N RIECHI

JUDGE