



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NUMBER 18 OF 2019

REPUBLIC. PROSECUTOR

VERSUS

DENNIS BARASA MUKHWANA. ACCUSED

J U D G M E N T

The accused **Dennis Barasa Mukhwana** is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 2nd day of April, 2019 at Sirare Village, Sirare Location of Bungoma Central Sub-County within Bungoma County murdered **David Juma Wanjala**.

The case for the prosecution is that on 30th March, 2019, **PW 1 Aggrey Sinino Wanjala** a boda boda rider was from Nalondo Market going home when he saw deceased David Juma Wanjala walking ahead of him. He then saw accused standing at a corner of the road which was near accused's home. When the deceased reached where accused was, the witness heard accused ask deceased 'who are you'. The deceased also replied 'who are you'. They then started fighting and he saw accused hit the deceased with a piece of wood. Deceased fell down and accused ran away. He observed the deceased and saw he was bleeding. He screamed and went to his house and when he came back he found police had taken come and took deceased to hospital. He testified that he knows the accused as he is his uncle.

PW 2 Amos Wafula was with **Aggrey (PW 1)** when at 7.30 p.m. they were going home when he saw the accused hit the deceased with a piece of wood. He recognized the accused whose voice as he is a person know to him. He went to assist the deceased when accused also hit him with an iron bar. He saw the deceased had sustained injuries on the head.

PW 3 Naomi Nabukwangwa Wanjala the wife of the deceased was at her house when she heard screams from the road. She went there and found her husband the deceased lying down. She observed him and saw he had cuts on the head and eyes. They took him to Nalondo Hospital where he was treated and discharged. The next day he was taken to Bungoma Hospital where he was treated and discharged but became worse and admitted at same hospital where he died.

PW 6 No. 56734 PC Richard Kipkorir Towe received a report of assault. The deceased was brought to the police station to report but he was unable to speak. He was taken to hospital for treatment where he died while undergoing treatment.

The accused gave sworn evidence. In his defence he testified that the deceased is his uncle. On 2nd April, 2019 he did not meet with the deceased as he was involved in making bricks up to 5 p.m. when he went to his house and slept. The next day on 3rd April, 2019, he received information that deceased had been killed and people were saying he is the one who killed him. He was then arrested. In cross-examination he denied meeting the deceased on 30th March, 2019 and stated that he did not go to home of deceased.

Miss Natwaiti for the accused filed written submissions. Counsel submitted that the witnesses stated that they identified the accused by voice. The prosecution must establish that the voice was that of the accused, the witness is familiar with the voice and that there was no mistake in the identification. Counsel submitted that these conditions have not been established by the prosecution in this case.

Counsel further submitted that the accused in his defence raised an alibi defence stating that he was not at the scene of crime when it is alleged to have occurred. She submitted that it is the prosecution's burden to prove that the accused was at the scene of crime which they have failed to do so.

That deceased David Juma Wanjala died from injuries inflicted on him on 30th September, 2019 is not disputed. Even the accused who is a nephew to the deceased confirmed that he was informed the deceased had been killed. Indeed **PW 5 Dr. Wanambisi Caleb Waswa** who performed the post-mortem confirmed that deceased had a depressed skull fracture on back of head and had massive subdural haematoma under the brain. He formed opinion that cause of death was due to severe head injury.

The issue for determination is whether it is accused who inflicted the injury and whether he had the necessary malice aforethought.

The accused in his defence testified that he was not at the scene when the offence was committed and, therefore would not have committed the offence. He raised the defence of *alibi*. An accused who raises an *alibi* defence does not assume any burden of proof which always lies on the prosecution. The prosecution can displace the *alibi* defence by evidence to prove that the accused was at the scene of crime at the time the offence was committed.

In placing the accused at the scene of the offence the prosecution called **PW 1 Aggrey Sinino Wanjala**. He testified that he was going home at 7.00 p.m. when he heard accused ask deceased who was ahead of him “*who are you*” The deceased also replied “*who are you*” there was a fracas and accused hit the deceased with a piece of timber and deceased fell down. Accused ran away. He testified that he was able to recognize the voice of the accused.

PW 2 Amos Wafula was with **Simon (PW 2)** testified an almost similar terms stating that he was able to recognize accused by the voice. These are the two witnesses whose evidence the prosecution sought to prove that accused was at the scene, and he is the one who inflicted the injuries to the deceased. Voice identification of an accused person is receivable and admissible in evidence. Before acting on the evince, however, the court must be satisfied that

- a) The witness was familiar with the voice, of the accused previously.
- b) That the voice was that of the accused.
- c) The words or uttered by the accused from which he would recognize the voice are stated.
- d) That the conditions obtaining at the time the voice was made were free from possibility of mistake in testifying to what was said and who said it.

In **Choge Vs R (1985) I KLR** the Court of Appeal stated: -

“There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances carry as much weight as visual identification since it would be identification by recognition rather than first sight. In Rosemary Njeri Vs Republic [1977] Criminal Appeal No. 27 a victim of grievous harm testified that she heard the appellant say “break her legs”. The reception of the evidence was upheld by the High Court in the first appeal.”

In **Karani Vs Republic [1985] KLR 290**, the Court of Appeal held:-

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification.”

In assessing recognition by voice evidence, the court must be careful to ensure that the conditions for voice identification were free from error. In **Vuva Mwachumbi Vs Republic (2016) eKLR** the Court of Appeal stated:-

“Of course in testing voice recognition in addition to considering the length of time the witness has not known the person and circumstances of their acquaintance one has to consider the words heard by the witness in order to determine whether they were sufficient to enable him correctly recognize his voice.”

PW 1 Aggrey Sinino Wanjala testified that while waking behind the deceased he heard the voice of accused asking the deceased ‘*who are you*’ and the deceased replied ‘*who are you*’. He knows the voice of both deceased and accused. He then saw a fracas ensue between deceased and accused. The accused after hitting the deceased ran away. He testified that he knew accused as he was his neighbor. This is the same evidence of **PW 1 Amos Wafula** who was with **PW 1 Aggrey**.

From the evidence the accused was known to the witnesses as they were neighbours. They knew and would recognize his voice well. The witnesses stated the words uttered though it was at night, the conditions for voice recognition were free from possibility of mistake as the two witnesses each recognized the voice of the accused.

In the result, I find that the accused’s *alibi* defence has been displaced by the prosecution evidence which placed him at scene of the offence. I, therefore, find accused **Dennis Barasa Mukhwana** guilty of the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

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

.....

S N RIECHI

JUDGE

SENTENCING

25/11/2020

Before S N Riechi

Nyakibia for State in Bungoma

Wilkister – Court Assistant – In Bungoma Court

Natwati for accused - Bungoma

Nyakibia: Accused may be treated as first offender.

Natwati: the accused is remorseful for having committed the offence. The accused is a young man with family of 4 children aged 10, 7, 5 and 3 years respectively. They depend on the accused for survival. He has parents who are aged. Pray for leniency.

Court: The court has taken into account the fact that accused is first offender and what has been stated in mitigation. Accused is sentenced to **Twenty (20) years** imprisonment. Right of Appeal within 14 days.

Dated, signed this 25th day of November, 2020.

.....

S N RIECHI

JUDGE