



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 3 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

1. CHRISPINUS OKUMU NAKHABI

2. SILAS JUMA NAKHABI

3. ELIA WANZALA MAJONI

4. PATRICK OWINO MUBWEKA

5. DANIEL WABWIRE STANGAACCUSED

JUDGMENT

1. Chrispinus Okumu Nakhabi, Silas Juma Nakhabi, Elia Wanzala Majoni, Patrick Owino Mubweka and Daniel Wabwire Stanga are charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

2. The particulars of the offence are that on the 12th day of January 2018, at Mundika sub location in Matayos sub County of Busia County, jointly murdered Robert Odunga Okumu.

3. On 12th January 2018 the body of Majoni, a paternal uncle of the deceased herein was removed from the mortuary for burial. Some mourners alleged that he had been bewitched by his brother, Francis Okumu Nakhabi. They therefore descended on his home and injured him. His son, the deceased herein, was killed in the process. It was contended that the accused persons were part of the mourners who committed the offence.

4. All the accused denied involvement in the offence.

5. The issues for determination are:

a. Whether any of the accused persons participated in beating the deceased; and

b. Whether the offence of murder was established.

6. The prosecution gave several versions of how the incident started prior to the killing of the deceased. According to the evidence of Francis Okumu Nakhabi (PW1) the attackers found him and his family taking lunch. After alighting from his motor vehicle armed with a club and a machete, Chrispinus Okumu (accused 1) placed the club down and proceeded where he was seated and cut him on the head and on the left leg. He lost consciousness.

7. Oliver Wandera Okumu (PW2) who testified that he was partaking lunch with his father (PW1) testified like his father but unlike his father who said two other people were in company of accused 1 and who did not alight, his evidence was that the first accused alighted with the other four people. He named them as Juma (accused 2), Patrick Owino (accused 5) Youth and a fifth person who was not known to him.

8. Though Moses Wesonga Okumu (PW4) in his evidence in chief said that it was Chrispinus Okumu (accused 1) who cut his father (PW1), he admitted that in his statement to the police, he recorded that it was Elia Wanzala (accused 3) who cut his father (PW1) and that two people

alighted from the vehicle.

9. During cross examination this witness testified that five people alighted from the vehicle which was being driven by accused1. In his evidence in chief he testified that the first accused was with Silas Juma, Owino and Youth. He was categorical that he did not see anybody else. He contradicted the other witnesses when he said that he saw Owino (accused 4) beat his father (PW1).

10. Okumu Daniel Wabwire (PW3) testified that accused one was in company of Silas Juma, Owino and Youth.

11. Another version was given in the evidence of Lawrence Owino Oundo (PW8). He testified that accused 1 went to the home of PW1 in company of Clement, Silas Juma (accused 2), and Patrick Owino (accused 5) and others whom he did not name. Chrispinus Okumu (accused 1) chased Francis Okumu (PW1) before cutting him on the head. When he fell down, boda-boda riders attacked him with stones and clubs.

12. Julius Wandera Wabwire (PW5) testified that Francis Okumu (PW1) was chased to his (PW5's) grandmother's home where his assailants caught up with him and that was where he was cut.

13. These are the witnesses whom am expected to rely on their evidence to make a finding as to how the deceased herein met his death. Other than these background evidence to the incident what did they testify in regards to the death of Robert Odunga Okumu?

14. Moses Wesonga Okumu (PW4) testified that after the deceased had run away, he saw Chrispinus (accused 1) and Elia (accused 3) take the direction the deceased had run to. Julius Wandera Wabwire (PW5) said he saw Daniel Wabwire (accused 6) chasing the deceased but did not see him beat him.

15. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283, (Madan, Miller and Potter JJA)** held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates makes it unsafe to accept his evidence.

In view of the many contradictions by these witnesses over the events that culminated in the death of the deceased, I will be very cautious in considering their evidence worth of believe. Either they deliberately misled the court or they were overwhelmed by the circumstances due to the big crowd that was involved.

16. Okumu Daniel Wabwire (PW3) is the only witness who testified that he saw the deceased being beaten by Chrispinus, Daniel Wabwire, Alecky, Freddie, Wandera and Evans. This was after they caught up with the deceased.

17. This witness testified that the people who alighted from the motor vehicle that was driven by accused 1 were four, accused 1 included. This was an area where the prosecution witnesses contradicted each other. There is therefore a possibility that his evidence may have been prompted by their family differences after considering the evidence of Julius Wandera Wabwire (PW5). He said that the deceased was chased by Dan and the crowd.

18. It is evidently clear that the deceased was a victim of mob injustice on accusations that his father (PW1) was the cause of the death of Majoni, his brother through witchcraft. There is however no concrete evidence that has pinned any of the accused persons to the offence. At best, the prosecution has succeeded to adduce evidence of suspicion. The Court of Appeal in the case of **Sawe vs. Republic [2003] KLR 354** said:

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

19. I therefore find that the prosecution has not proved the offence of murder against any of the accused. I acquit each one of them of the offence of murder contrary to section 204 of the Penal Code, and set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 16th day of December, 2020

KIARIE WAWERU KIARIE

JUDGE