



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 14 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

1. JOSEPHAT BARASA OSIROM

2. VINCENT ETYANG EKAMURAN

3. FREDRICK OJUMAA OMUKAGA

4. ANDREW OMUKAGA BARASA.....ACCUSED

JUDGMENT

1. Josephat Barasa Osirom, Vincent Etyang Ekamuran, Fredrick Ojumaa Omukaga and Andrew Omukaga Barasa 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 31st day of July 2019, at Walatsi location in Nambale sub County of Busia County, jointly murdered Domiano Wamalwa.

3. The prosecution contends that the accused persons went and removed the deceased from his house at night and killed him over a land dispute.

4. The defence tendered by the accused persons is to the effect that the deceased was arrested with a stolen cow and killed by a mob.

5. The issues for determination are:

a. Whether any of the accused persons removed the deceased from his house as contended by the prosecution;

b. Whether any of the accused participated in the killing of the deceased; and

c. Whether the offence of murder was established.

6. Ali Wasike Obuya (PW2) testified that on 30th July 2019 at about 5 p.m. while he was going home, he overheard some three men who were plotting to kill the deceased herein that evening. He described the three as young men whom he knew by appearance. He identified them as the 1st, 2nd and 4th accused persons. He went and reported to the father of the deceased at about 6 p.m. He conceded that he did not report to any authority. The evidence of this witness is suspect for two reasons.

7. When he reported to the father of the deceased at 6 p.m., and he indicated he could not go and report for he was disabled and his wife was blind, I could have expected him (PW2) to report at least to the village elder, due to the seriousness of the threat. He testified that he was a close relative of the deceased. This was not done. We are therefore left wondering if any such plot was made.

8. Except for the 1st accused who is 32 years old, accused 2 and four cannot fit in the description of young men. If at all he heard some people plotting to kill the deceased, then one is left wondering if indeed he was able to identify the plotters.

9. The people this witness said were plotting to kill the deceased were walking 10 metres in front of him. He did not testify that any one of

them or all of them turned for him to be able to recognize them. He said he only knew them by appearance. I am not persuaded that he could recognize the people he purported to be 1st, 2nd and 4th accused persons.

10. Ordinarily, when people are plotting to commit an offence, they do not go shouting in public for all and sundry to hear. More intriguing aspect of his evidence is that they gave reasons for their proposed action as if they were addressing another third party. This is not what ordinarily happens in everyday life.

11. At this age of mobile communication, the expectation was that even if the father of the deceased had challenges of moving about, he could have called either his village elder or area assistant chief and report what he had been informed. His evidence was that the home of the village elder was about 400 metres and one mile to the home of the area assistant chief from his. From the evidence of Truphena Khayangi Obuya (PW3) we are made aware that the mother of the deceased had a mobile phone. It is therefore suspect why they did not call the village elder or the assistant chief while in possession of such crucial information.

12. Truphena Khayangi Obuya (PW3) is the widow of the deceased. She testified that when they were attacked and her husband taken away, she recognized Andrew Omukaka (accused 4) Josephat Barasa (accused 1), Ipoit Elvis and Otwane. In her evidence she said that when her husband opened the door, Andrew Omukaka (accused 4) went where she was and ordered her to lie down. He did this while directing his spotlight at her. Lord Widgery CJ in the celebrated case of **R. Vs. Turnbull and Others [1976] 3 All ER 549** stated as follows:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

If we assume that the deceased was removed from the house in the manner described by this witness, then certainly the circumstances were not favourable for any positive recognition.

13. The widow of the deceased (PW3) left her house to that of her father in-law to report the incident at about 5 a.m. This according to the estimation of her father in-law was about 3 miles (4.8 kilometers) away. This may take about one and half hours at an easy pace, this being an emergency, it could have taken her about one hour. We can still assume that she took about one and half hours to reach her father in-law's home. She could have arrived at about 6.30 a.m. or thereabouts. Her evidence was that while she was reporting to her father in-law is when a call came in to state reporting that Domiano had been killed.

14. Chrispinus Sidialo Makano (PW5) is the chief Walatsi location. His evidence is that by 8 a.m. the deceased was still alive. This was when pastor Job Wanyama called him and reported to him a suspect of stock theft had sought refuge in his home with members of public in hot pursuit. He requested him (chief) to move quickly and rescue him (the suspect). This contradicts the evidence as to the time the deceased herein was reported dead.

15. The evidence of this witness (PW5), indicates that the deceased was a suspected stock thief. This resonates with the defence of Josephat Barasa (accused 1). In his defence he contended that when he went out for a call of nature at about 4 a.m., he found his cow missing. He enlisted the help of his brother, Andrew Omukaga (accused 4). The two went to different markets.

16. When Josephat Barasa (accused 1) reached at Khulare, he found the deceased driving his cow which was tied with a rope. When he asked him where he was taking his cow, he ran away and left the cow. Members of public pursued him. As he was driving his cow home, he found the deceased having been killed by members of public.

17. The prosecution did not record a statement from pastor Job Wanyama. This was a very material witness. His communication to Chrispinus Sidialo Makano (PW5) tends to give credence to the defence. The Court of Appeal in the case of **Bukenya vs. Uganda [1972] EA 549**, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

In the instant case, I find that had pastor Job Wanyama been called to testify, his evidence would have been adverse to the prosecution case.

18. Vincent Etyang Ekamuran (accused 2) and Fredrick Ojumaa Omukaga (accused 3) tendered an alibi defence. The court of appeal in the case of **Kiarie vs. Republic [1984] KLR** held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt

that is not unreasonable.

In view of the weakness in the evidence of the prosecution that I have pointed out, and in view of its insufficiency, I find that the alibi defenses raised by the accused persons are plausible.

19. Andrew Omukaga (accused 4) gave an explanation as to how he found himself in the search party.

20. It would appear that the family of the deceased wanted to cover up for his actions by exploiting existing disputes. This cannot be condoned. Though mob injustice is equally condemned, it was incumbent on the prosecution to prove to the required standards that the accused persons were involved in the killing of the deceased. This has not been done.

21. The offence has not been proved against any of the accused persons. I accordingly acquit each one of them and set him free unless if otherwise lawfully held.

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

KIARIE WAWERU KIARIE

JUDGE