



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL CASE NO. 1 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

PAUL WANYONYI KUNDU.....ACCUSED

J U D G M E N T

1. The Accused was 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 2nd day of January 2012 at Kimase trading centre within Trans-Nzoia County murdered Antony Silali Boyi**. The accused denied the offence. The prosecution called several witnesses to establish its case whose evidence can be summarised as follows.
2. **PW1 Stephen Kimase Birech**, testified that he was at his place on 3rd January 2012 when he woke up and found that there was a dead body 30 metres from his house. He reported the matter to the AP Camp nearby as well as the Chief. They came. The neighbours came as well. The chief called the police who came and took photographs. It was later found that the body was that of Antony Boyi. He saw stabbed wounds on the body.
3. **PW2**, the star witness Gladys Nasambu Barasa testified that one Jackline Namalwa came to her house that evening. He was followed by the accused who was interested in seeing Jackline. They ate supper together as they discussed the issue of buying maize.
4. They later left and she had her children sleep as she went to her main house to sleep. She saw both of them standing. Later Jackline came back to the house. She allowed her to sleep. As she slept the deceased came and knocked the door and demanded to see Jackline. After a while she opened the door for her.
5. Jackline and the deceased left thereafter. About 10 minutes she heard people running outside her house and she heard the deceased screaming. She learned through PW1 the following morning that the deceased had died.
6. On cross-examination she said that she had seen the deceased that day and he appeared drunk. She admitted that chang'aa was sold in that area. Infact the deceased had come to her house earlier and had demanded to see Jackline.
7. **PW3 Martin Wanyonyi Mango** testified that on 2nd January 2012 he was taking dinner in his house at around 7.00 pm when the deceased came and knocked this door. He told him to go to the Aps Camp and get his son's phone which had gotten lost. The following morning he heard people screaming and he went to the scene and found that he had died.
8. **PW4 Dr Okumu Moses** from Kitale District Hospital produced the postmortem report on behalf of Dr Onyango who opined that the cause of death was internal hemorrhage hemothorax and abdomen.
9. **PW5 P.C Francis Michira** was the Investigating Officer. He recorded statements from the witnesses after receiving report from PW1. According to him the accused herein led them to the place where he had hid the knife. He produced the said knife. He found that there was a love double dealing between the deceased and the accused in respect to one Jackline. The same led to the fight which caused the deceased to be stabbed and died from the injuries.
10. When placed on his defence, the accused gave unsworn evidence denying the charge. He said that he went for a "chama meeting" on 2nd January 2012 at 2.00 pm where the deceased was. Afterwards he went with one Mama Wamalwa to the home of Gladys where they were joined by the deceased. He had his panga heading to work as he was a watchman at ADC.

11. After supper he left them with Jackline at Gladys's house. He went to his house which was 4 km away. The following day while doing his cobbling business he was arrested by police officers. He denied the weapons produced by the police.

Analysis and Determination

12. I have carefully read the proceedings herein together with the learned counsel's written submissions. It is true that this case is solely based on circumstantial evidence as there was no eye witness to the incident.

13. The evidence of PW2 clearly established that the deceased was in her house that evening when he came demanding to see Jackline. Earlier on, the accused was with Jackline and he left thereafter and that is why Jackline went back to PW2 to sleep.

14. As at the time of the deceased arrival the 2nd time, the accused appeared to have left the homestead of PW2. In fact Jackline and PW2 had gone to sleep. Although Jackline hesitated to have the door opened for the deceased, PW2 opened when she was persuaded by Jackline concerning maize business with the deceased.

15. This case against the accused will fail for two major reasons; first Jackline the prime suspect was not called to testify. She was the one last seen with the deceased at least from the evidence of PW2. No reason was advanced by the prosecution to why she did not even record any statements.

16. Secondly, there was no DNA carried out to confirm that the blood on the sword collected by the investigating officer from the accused indeed belonged to the deceased. Neither was any analysis taken in respect to the deceased clothes.

17. Further no confession was recorded by the police in respect to the admission by the accused that there was a love triangle between him and the deceased over Jackline. It would have been necessary to record such confession now that it was even admitted that he is the one who showed them where he had hidden the knife.

18. Needless to say, the police bungled the investigations. The two issues raised above should have at least pointed out whether the accused was culpable. For now based on the evidence on board, it would be difficult to establish that it was the accused who injured and killed the deceased.

19. As a matter of fact, although the deceased was a widower, there was nothing to suggest that he had any love relationship with the said Jackline. Neither was there any evidence to point out that Jackline had a love affair with the accused. Apparently both Jackline and the accused appeared to have had their families. Nonetheless the absence of Jackline was a weak link in this case.

20. Consequently, the case against the accused was not proved beyond reasonable doubt. The accused is hereby set free under the provisions of Section 215 of the Criminal Procedure Code unless lawfully held. The sureties if any are discharged.

Orders accordingly.

Delivered, signed and dated at Kitale this 26th day of March, 2019.

H.K. CHEMITEI

JUDGE

26/3/19

In the presence of:

Mr Omoria for the State

Wagale for Kiarie for Accused

Accused – Present

Court Assistant – Kirong

Judgment read in open court.